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. 2:08-cv-13982-DML-MKM

Honorable David M. Lawson
District Judge

Honorable Mona K. Majzoub
Magistrate Judge

BRIEF OF REPUBLICAN NATIONAL COMMITTEE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND DECLARATORY RELIEF

JAMES R. BRUINSMA (P48531)
Attorney for Individual Plaintiffs
Myers Nelson Dillon & Shierk, PLLC
125 Ottawa Ave., N.W. Suite 270
Grand Rapids, MI 49503; (616) 233-9640
jbruinsma@mnds-pllc.com

MARY ELLEN GUREWITZ (P25724)
Attorney for Obama for America and
Democratic National Committee
Sachs Waldman, P.C.
1000 Farmer St.
Detroit, MI 48226-2899; (313) 965-3464
megurewitz@sachswaldman.com

ROBERT F. BAUER
General Counsel for Obama for America
607 Fourteenth St., N.W.
Washington, D.C. 20005; (202) 638-6600

GARY P. GORDON (P26290)
W. ALAN WILK (P54059)
JASON T. HANSELMAN (P61813)
DENNIS M. HAFFEY (P26378)
Attorneys for the Republican National Committee
DYKEMA GOSSETT PLLC
201 Townsend Street, Suite 900
Lansing, MI 48933; (517) 374-9181
ggordon@dykema.com
awilk@dykema.com
jhanselman@dykema.com
dhaffey@dykema.com

ERIC E. DOSTER (P41482)
RICHARD C. KRAUS (P27553)
Attorneys for the Michigan Republican Party
FOSTER, SWIFT, COLLINS & SMITH PC
313 S. Washington Square
Lansing, MI 49833-2193; (517) 371-8100
edoster@fosterswift.com
rkraus@fosterswift.com

DYKEMA GOSSETT·A PROFESSIONAL LIMITED LIABILITY COMPANY· CAPITOL VIEW 201 TOWNSEND STREET SUITE 900·LANSING, MICHIGAN 48933

JOSEPH E. SANDLER
General Counsel for Democratic National Committee
Sandler, Reiff & Young, P.C.
300 M St., SE Suite 1102
Washington, D.C. 20003; (202) 479-1111

JOHN D. PIRICH (P23204)
ANDREA L. HANSEN (P47358)
Attorneys for Macomb County Republican Party
Honigman Miller Schwartz & Cohn LLP
222 North Washington Square Suite 400
Lansing MI 48933-1800
517-484-8282
jpirich@honigman.com
ahansen@honigman.com

DYKEMA GOSSETT·A PROFESSIONAL LIMITED LIABILITY COMPANY· CAPITOL VIEW 201 TOWNSEND STREET SUITE 900·LANSING, MICHIGAN 48933

DYKEMA GOSSETT·A PROFESSIONAL LIMITED LIABILITY COMPANY· CAPITOL VIEW 201 TOWNSEND STREET SUITE 900·LANSING, MICHIGAN 48933

TABLE OF CONTENTS

TABLE OF AUTHORITIES v
STATEMENT OF ISSUE PRESENTED xi
CONTROLLING OR MOST APPROPRIATE AUTHORITY FOR RELIEF SOUGHT xii
CASES xii
STATUTES xii
I. INTRODUCTION 1
II. MATERIAL PROCEEDINGS AND FACTS 2
A. The RNC 2
B. Poll Challengers 3
C. DNC Political Strategy 4
D. The Alleged Weblog Quote 4
E. The Weblog Makes a Partial Retraction 5
F. Carabelli Denies Statement And Files Libel Lawsuit. 5
III. STANDARD OF REVIEW 7
IV. ARGUMENT 8
A. Plaintiffs Have Failed To Show Likelihood Of Success On The Merits. 8
i. Plaintiffs Present No Evidence Against The RNC. 8
ii. Plaintiffs Lack Standing. 9
iii. This Case Is Not Ripe 10
iv. This Case Is Moot. 11
v. Plaintiffs' Section 1983 Claim Fails As A Matter Of Law. 11
a. The RNC Does Not Act Under Color of Law. 12
b. Plaintiffs Have Not Proven That Constitutional Rights Have Been Deprived 13
vi. Plaintiffs' Section 1985 Claim Fails As A Matter Of Law. 13
a. If A Support Or Advocacy Claim Exists, Plaintiffs' Proofs Fail. 14
b. Plaintiffs Failed to Demonstrate Class-Based Animus. 15
c. Plaintiffs Failed To Demonstrate A Conspiracy 17
vii. Declaratory Relief Is Not Appropriate. 20

B. Plaintiffs Cannot Demonstrate Irreparable Injury.....21
C. Defendants Will Suffer Injury If An Unwarranted Injunction Is Issued.....23
D. The Public Interest Would Be Harmed By An Injunction.....25
CONCLUSION.....27

DYKEMA GOSSETT·A PROFESSIONAL LIMITED LIABILITY COMPANY· CAPITOL VIEW 201 TOWNSEND STREET SUITE 900·LANSING, MICHIGAN 48933

DYKEMA GOSSETT·A PROFESSIONAL LIMITED LIABILITY COMPANY· CAPITOL VIEW 201 TOWNSEND STREET SUITE 900·LANSING, MICHIGAN 48933

TABLE OF AUTHORITIES

Page(s)

CASES

Adult Video Ass'n v. United States Dep't of Justice,
71 F.3d 563 (6th Cir. 1995) 10

Aetna Life Ins. Co. v. Haworth,
300 U.S. 227 (1937) 25

Amoco Production Company v. Village of Gambell,
480 U.S. 531 (1987) 23

Barren v. Harrington,
152 F.3d 1193, 1194 (9th Cir. 1998) 13

Beck v. Prupis,
529 U.S. 494 (2000) 20

Bell Atl. Corp. v. Twombly,
127 S. Ct. 1955 (2007) ..... xii, 18, 19

Blanchette v. Connecticut Gen. Ins. Corps.,
419 U.S. 102 (1974) 11

Bogaert v. Terri Lynn Land,
Nos. 08-2130, 08-2131, 08-2140, 2008 WL 4489263 (6th Cir. October 8, 2008) 11

Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n,
531 U.S. 288 (2001) 12

Brooks v. American Broad. Cos., Inc.,
932 F.2d 495 (6th Cir. 1991) 18

Brown v. Bartholomew Consol. School Corp.,
442 F.3d 588 (7th Cir. 2006) 11

Burford v. Sun Oil Co.,
319 U.S. 315 (1943) 20

Cameron v. Brock,
473 F.2d 608 (6th Cir. 1973) 16

Coffy v. Multi-County Narcotics Bureau,
600 F.2d 570 (6th Cir. 1979) 12

Collyer v. Darling,
98 F.3d 211 (6th Cir. 1996) 18

Davis v. Caruso,
No. 07-11740, slip op. (E.D. Mich. March 28, 2008).....8

Dekoven v. Bell,
140 F. Supp. 2d 748 (E.D. Mich. 2001).....17, 18

Detroit Newspaper Publishers Association v. Detroit Typographical Union No. 18, International Typographical Union,
471 F.2d 872 (6th Cir. 1972) 24

E.E.O.C. v. Wooster Brush Co. Employees Relief Ass'n,
727 F.2d 566 (6th Cir. 1984) 26

Farber v. City of Paterson,
440 F.3d 131 (3d Cir. 2006).....16

Federer v. Gephardt,
363 F.3d 754 (8th Cir. 2004) 14, 15

Friendship Materials, Inc. v. Michigan Brick, Inc.,
679 F.2d 100 (6th Cir. 1982) 21

Gill v. Farm Bureau Life Ins., Co.,
906 F.2d 1265 (8th Cir. 1990) 15

Glasson v. Louisville,
518 F.2d 899 (6th Cir. 1975) 16

Golden v. Zwickler,
394 U.S. 103 (1969).....10

Gonzales v. National Bd. Of Med. Exam'rs,
225 F.3d 620 (6th Cir. 2000) 7

Griffin v. Breckenridge,
403 U.S. 88 (1971)..... xii, 16

DYKEMA GOSSETT·A PROFESSIONAL LIMITED LIABILITY COMPANY· CAPITOL VIEW 201 TOWNSEND STREET SUITE 900·LANSING, MICHIGAN 48933

Jackson v. Metro. Edison Co.,
419 U.S. 345 (1974).....13

Jackson v. Michigan State Democratic Party,
593 F. Supp. 1033 (E.D. Mich. 1984).....15

Jaco v. Bloechle,
739 F.2d 239 (6th Cir. 1984) 18

Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).....13

Kardules v. City of Columbus,
95 F.3d 1335 (6th Cir. 1995) 10, 11

Keating v. Carey,
706 F.2d 377 (2d Cir. 1983).....16

Leary v. Daeschner,
228 F.3d 729 (6th Cir. 2000) 7

Lugar v. Edmonson Oil Co.,
457 U.S. 922 (1982).....13

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992)..... xii, 9

Marsh v. Alabama,
326 U.S. 501 (1946).....12

Memphis, Tennessee Area Local, American Postal Workers Union, AFL-CIO v. City of Memphis,
361 F.3d 898 (6th Cir. 2004) 12

Metrobanc, 666 F. Supp. at 984.....21

Michigan State AFL-CIO v. Miller,
103 F.3d 1240 (6th Cir. 1997) 7

Miyazawa v. Cincinnati,
45 F.3d 126 (6th Cir. 1995) ..... xii, 9

Monell v. Dep't of Social Services,
436 U.S. 658 (1978)..... xii, 13

DYKEMA GOSSETT·A PROFESSIONAL LIMITED LIABILITY COMPANY· CAPITOL VIEW 201 TOWNSEND STREET SUITE 900·LANSING, MICHIGAN 48933

Neveux v. Webcraft Technologies,
921 F. Supp. 1568 (E.D. Mich. 1996).....21

North Carolina v. Rice,
404 U.S. 244 (1971).....11, 25

NRA v. Magaw,
132 F.3d 272 (6th Cir. 1997) 10

O'Hara v. Mattix,
255 F. Supp. 540 (W.D. Mich. 1966) 20

O'Shea v. Littleton,
414 U.S. 488 (1974).....9

Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm'n,
812 F.2d 288 (6th Cir. 1987) 21, 22

Omaha Prop. & Cas. Ins. Co. v. Johnson,
923 F.2d 446 (6th Cir 1991) 21

Overseas Motors, Inc. v. Import Motors Ltd., Inc.,
375 F. Supp. 499 (E.D. Mich. 1974).....19

Overstreet v. Lexington-Fayette Urban County Gov't,
305 F.3d 566 (6th Cir. 2002) 7, 27

Paradise Distributors, 906 F. Supp. at 622 21

Paw Paw Wine Distributors v Seagram,
603 F. Supp. 398 (W.D. Mich. 1985) 21

Rizzo v. Goode,
423 U.S. 362 (1976).....13

Salehpour v. Univ. of Tennessee,
159 F.3d 199, 206 (6th Cir. 1998) 13

San Francisco Real Estate Investors v. Real Estate Investment Trust,
692 F.2d 814, 818 (1st Cir. 1982).....22

Scottsdale Ins. Co. v. Roumph,
211 F.3d 964 (6th Cir. 2000) 21

DYKEMA GOSSETT·A PROFESSIONAL LIMITED LIABILITY COMPANY· CAPITOL VIEW 201 TOWNSEND STREET SUITE 900·LANSING, MICHIGAN 48933

Smith v. Allwright,
321 U.S. 649 (1944).....13

Summit County Democratic Central and Executive Committee v. Blackwell,
388 F.3d 547 (6th Cir. 2004).....26

Taylor v. Michigan Dep't. of Corrs.,
69 F.3d 76 (6th Cir. 1995).....13

Thomas v. U.S.,
523 U.S. 296 (1998).....10

Tiryak v. Jordan,
472 F. Supp 822 (E.D. Pa. 1979).....12

United Brotherhood of Carpenters, etc. v. Scott,
463 U.S. 825 (1983)..... xii, 15, 16, 17

United States v. Articles of Drug . . . . Promise Toothpaste For Sensitive Teeth,
No. 83 C 6129, 1986 WL 5185 (N.D. Ill. April 25, 1986).....24

United States v. SCRAP,
412 U.S. 669 (1973).....25

United States v. W.T. Grant Co.,
345 U.S. 629 (1953).....22

RULES

Local Rule 7.1(a).....8

CONSTITUTIONAL PROVISIONS

U.S. Const. art. III, § 2..... xii, 9, 25

STATUTES

42 U.S.C. §1983..... passim

DYKEMA GOSSETT·A PROFESSIONAL LIMITED LIABILITY COMPANY· CAPITOL VIEW 201 TOWNSEND STREET SUITE 900·LANSING, MICHIGAN 48933

42 U.S.C. § 1985 ..... xii, 14, 17

42 U.S.C. § 1985(3) ..... passim

Michigan Compiled Laws § 168.730 4

Michigan Election Law 3, 22

OTHER AUTHORITIES

Detroit Free Press 19

House Bill 6477 20

Professor Wright's Federal Practice and Procedure 24

The Columbus Dispatch 5

DYKEMA GOSSETT·A PROFESSIONAL LIMITED LIABILITY COMPANY· CAPITOL VIEW 201 TOWNSEND STREET SUITE 900·LANSING, MICHIGAN 48933

DYKEMA GOSSETT·A PROFESSIONAL LIMITED LIABILITY COMPANY· CAPITOL VIEW 201 TOWNSEND STREET SUITE 900·LANSING, MICHIGAN 48933

STATEMENT OF ISSUE PRESENTED

Plaintiffs seek a preliminary injunction without evidence that the RNC plans to undertake any action that would deprive Plaintiffs' Constitutional rights, that the RNC conspired to undertake such a deprivation, that the deprivation alleged has a class-based animus, or that the RNC is a state actor. The RNC does not have poll challengers, has never possessed foreclosure lists, and has no information concerning any alleged plan to use foreclosures lists for poll challenges. Should this Court enjoin the RNC where the RNC will not use foreclosure lists for poll challenges and where Plaintiffs otherwise have not shown a likelihood of success on the merits under 42 U.S.C. §1983 and §1985?

CONTROLLING OR MOST APPROPRIATE AUTHORITY FOR RELIEF SOUGHT

CASES

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)

Miyazawa v. Cincinnati, 45 F.3d 126, 127 (6th Cir. 1995)

United Brotherhood of Carpenters, etc. v. Scott, 463 U.S. 825 (1983)

Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1964 (2007)

Monell v. Dep't of Social Services, 436 U.S. 658 (1978)

Griffin v. Breckenridge, 403 U.S. 88, 102 (1971)

STATUTES

U.S. Const. art III, § 2

42 U.S.C. § 1983

42 U.S.C. § 1985

DYKEMA GOSSETT·A PROFESSIONAL LIMITED LIABILITY COMPANY· CAPITOL VIEW 201 TOWNSEND STREET SUITE 900·LANSING, MICHIGAN 48933

DYKEMA GOSSETT·A PROFESSIONAL LIMITED LIABILITY COMPANY· CAPITOL VIEW 201 TOWNSEND STREET SUITE 900·LANSING, MICHIGAN 48933

I. INTRODUCTION

Plaintiffs in this "case" seek, purely for political gain, to parade that they obtained an injunction, when what they seek to enjoin is something no defendant plans or threatens, and all disavow as improper—use of foreclosure lists to challenge Michigan voters. This Court should reject Plaintiffs' academic exercise.

Plaintiffs' "support" should be put in 2 piles: (1) proving use of foreclosure lists would be improper (which no party disputes), and (2) proving the alleged plan of Defendants. There is nothing in the second pile, certainly not as to the Republican National Committee (the "RNC"). The second pile should be the entire focus of this proceeding, since no one contests the first pile.

Plaintiffs have no evidence linking the RNC to the alleged conspiracy, and not even a viable allegation. See the RNC's Motion To Dismiss. The RNC does not have poll challengers, does not make poll challenges, has no plan to use foreclosures lists for challenges, has no such foreclosure lists and does not know if any exist, does not coordinate with the other Defendants about poll challenges, and has no information concerning any alleged plan by any Defendant to use foreclosures lists for poll challenges. The RNC is named purely for political effect.

Now is the time for evidence, not allegations about unnamed "Republican operatives" and "former GOP operatives," or inadmissible "media reports" or articles, or past incidents some more than 20 years old not involving foreclosure lists, or ambiguous references to Ohio and Florida, or general accusations about past "caging" or prior litigation decades ago in other jurisdictions involving past campaigns unrelated to foreclosure lists.

Plaintiffs' sole "evidence" relating to foreclosure lists in Michigan is a single report in a blog that has been denied repeatedly (at the time and now in a sworn affidavit) by the alleged

DYKEMA GOSSETT·A PROFESSIONAL LIMITED LIABILITY COMPANY· CAPITOL VIEW 201 TOWNSEND STREET SUITE 900·LANSING, MICHIGAN 48933

speaker, who is not alleged to be an agent of or authorized by the RNC, with Plaintiffs admitting that all Defendants deny any involvement in the "scheme" that Plaintiffs allege.

By classic bootstrapping, Plaintiffs have widened the publicity of what would otherwise be an innocuous blog report, to speculate that, as a result, there now may be concern among voters (unnamed and unquantified) that their presence on a (non-existent) foreclosure list may result in them being challenged by someone. Plaintiffs do not produce the alleged foreclosure list that contains the name of any plaintiff or any other voter, probably because no list exists.

Plaintiffs' do not satisfy their heavy burden of proof. Plaintiffs' motion should be denied, and the case dismissed. The RNC's Motion To Dismiss should be adjudicated first, since Plaintiffs' pleadings are insufficient on their face, and otherwise the RNC is being required to defend itself at an evidentiary hearing that essentially is the trial on the merits given the imminent Election Day. To proceed with a hearing seeking injunctive and declaratory relief under these circumstances, with inadequate pleadings and no advance disclosure of any evidence linking the RNC to the alleged scheme, is a fundamental denial of due process.

II. MATERIAL PROCEEDINGS AND FACTS

A. The RNC

The RNC provides national leadership for the Republican Party of the United States. (Declaration of Chris McNulty, ¶2, attached as Exhibit A.) It is responsible for developing and promoting the Republican political platform, fundraising, and strategy. *Id.* It also is responsible for organizing and running the Republican National Convention. *Id.* The RNC is not involved with any "ballot security" or "election integrity" programs and does not contemplate, discuss, or coordinate any such program with state or local Republican parties. *Id.* at ¶¶11, 15-17 and 21-22.

DYKEMA GOSSETT·A PROFESSIONAL LIMITED LIABILITY COMPANY· CAPITOL VIEW 201 TOWNSEND STREET SUITE 900·LANSING, MICHIGAN 48933

The RNC does not have poll challengers, does not make poll challenges, has no plan to use foreclosures lists for challenges, has no such foreclosure lists and does not know if any exist, does not coordinate with the other Defendants about challenges, and has no information concerning any alleged plan by any Defendant to use foreclosures lists for challenges. *Id.* at ¶¶7, 12, and 21.

The RNC does not know to whom Plaintiffs refer in their Complaint by unnamed "Republican operatives" and unnamed "former GOP operatives." The past litigation to which Plaintiffs refer was in other jurisdictions, in one case more than 25 years ago and another more than 15 years ago, is not representative of the current RNC, involved past campaigns, was unrelated to foreclosure lists, and did not result in any finding of any wrongdoing by the RNC.[1] *Id.*

The sole person to whom plaintiffs attribute the single blog comment on which Plaintiffs rely is not alleged to be an employee, agent or otherwise authorized to speak for the RNC.

B. Poll Challengers

The Michigan Election Law provides that, at an election, a political party or an incorporated organization or organized committee of citizens interested in the adoption or defeat of a ballot question being voted for or upon at the election, or interested in preserving the purity

[1] Plaintiffs' inflammatory descriptions of past litigation are belied by their own exhibits, in which the consent decrees provide that no court found wrongdoing. "[W]ithout any finding by this Court of, and without any admission of, liability or wrongdoing by them or by any other person or entity…do not constitute any finding or admission of liability or wrongdoing by any defendant…." (Plaintiffs' Exhibit 6 pp. 1, 3.) "The decree shall not be construed as an admission by the defendants of any of the allegations in the complaint. Nor shall the decree be construed as an admission of any wrongdoing or liability by any of the defendants." (Plaintiffs' Exhibit 7 p. 2.) Rather than the RNC controlling state or county committees, "It is expressly understood and agreed that the RNC and the RSC have no present right of control over other state party committees, county committees, or other national, state or local political organizations of the same party, and their agents, servants and employees." (Plaintiffs' Exhibit 6 p. 2.)

DYKEMA GOSSETT·A PROFESSIONAL LIMITED LIABILITY COMPANY· CAPITOL VIEW 201 TOWNSEND STREET SUITE 900·LANSING, MICHIGAN 48933

of elections and in guarding against the abuse of the elective franchise, may designate challengers as provided in this act. Michigan Compiled Laws § 168.730. The RNC is not a group entitled to have poll challengers and, therefore, has no poll challengers. The RNC does not coordinate with the MRP with regard to their poll challengers.

C. DNC Political Strategy

Plaintiff Democratic National Committee outlined its political strategy in its Field Manual, instructing its operatives to "use minority intimidation as an organizing tool," and suggested "if no signs of intimidation techniques have emerged yet, launch a 'pre-emptive strike.'" (See Excerpt from DNC's "Field Manual" from www.democrats.org attached as Exhibit B). The preemptive strike suggests to "place stories [in "specialty press"] in which minority leadership expresses concern about the threat of intimidation tactics." The DNC is to "plan and completely prepare for possible legal action well in advance of election day." Here, Plaintiffs are following that "pre-emptive" strategy to create a "case" where none exists.

D. The Alleged Weblog Quote

On September 9, 2008, a blogger from the website www.michiganmessenger.com had a discussion with Macomb County Republican Party (the "Macomb Party") chairman James Carabelli. The blogger claims that, during the conversation, she asked Carabelli whether the Macomb Party planned to use lists of people with foreclosed homes to block people from voting. The blog quotes Carabelli as saying "[w]e will have a list of foreclosed homes and will make sure people aren't voting from those addresses." Complaint ¶34. Carabelli denies the statement. (See Carabelli Defamation Complaint, attached herein as Exhibit C.)

Plaintiffs offer no evidence that the Macomb Party possesses a list of foreclosed homes, or that such a list even exists, or discussed such a list with the Michigan Party or the RNC, or

that those Defendants had even contemplated using foreclosure lists. Plaintiff's "evidence" on alleged use of foreclosure lists in Michigan consists entirely of this quote from a weblog.

Plaintiffs do not allege that Carabelli is an employee, agent or otherwise authorized to speak on behalf of the RNC. Carabelli has no affiliation with the RNC. (McNulty Declaration ¶¶5-7.)

E. The Weblog Makes a Partial Retraction

On September 20, 2008, www.michiganmessenger.com issued a partial retraction of the blog post related to whether Republicans planned to challenge voters based upon a foreclosure lists. The Michigan Messenger acknowledged that it misstated an Ohio GOP official's comments in a posting that said Republicans in Michigan & Ohio were planning to challenge homeowners on foreclosure lists to keep them from voting.

A statement posted on the website entitled "Messenger clarifies Ohio official's remark" admitted that Franklin County GOP Chairman Doug Preisse's comments to the Dispatch "did not specifically address the issue of foreclosed homeowners." It turns out that, although the original website posting quoted Preisse as having "told The Columbus Dispatch that he has not ruled out challenging voters before the election due to foreclosure-related address issues," Preisse actually said that he "didn't rule out challenges before Nov. 4," adding that "his party wants 'clean, accurate voter lists.'" The website revised its posting on September 20, 2008 to correct the error, with the blog post now explaining that Preisse "said he has not ruled out challenging voters before the election." In other words, the website manipulated the Franklin County Party Chair's interview by combining separate parts of the interview to make it appear that the GOP Chair said something about foreclosures when he did not.

F. Carabelli Denies Statement And Files Libel Lawsuit.

DYKEMA GOSSETT·A PROFESSIONAL LIMITED LIABILITY COMPANY· CAPITOL VIEW 201 TOWNSEND STREET SUITE 900·LANSING, MICHIGAN 48933

DYKEMA GOSSETT·A PROFESSIONAL LIMITED LIABILITY COMPANY· CAPITOL VIEW 201 TOWNSEND STREET SUITE 900·LANSING, MICHIGAN 48933

Plaintiffs admit that all Defendants deny the alleged scheme exists. (See Complaint ¶51). The sole statement on which Plaintiffs base their claims has been denied by Carabelli and all parties. On October 1, 2008, James Carabelli, to whom the weblog attributes the sole statement which Plaintiffs rely, filed a lawsuit against the Michigan Messenger website and the weblog author in Macomb County Circuit Court, alleging libel based on publication of the false statement. (*See* Carabelli Defamation Complaint.)

To support his Defamation Complaint, Carabelli signed a sworn affidavit stating the true facts surrounding the quote attributed to him. (*See* Affidavit of James Carabelli, attached as Exhibit 1 to Macomb County Republican Party's Motion to Dismiss.) The Carabelli Affidavit explains that, on September 9, 2008, a blogger called and asked him to describe the most important issues facing Macomb County and its voters. *Id*. at ¶11. Carabelli responded: "Home foreclosures and the unemployment rate here in Macomb County." *Id*. In his affidavit, Carabelli explained that, during a different part of the interview, the blogger separately asked about poll challenges, to which Carabelli responded that "poll challenging is done to make sure state electoral procedures are followed." *Id.* at ¶14.

Carabelli's Affidavit states that "there was no connection during the interview between home foreclosures and poll challenging." Nonetheless, the blogger rewrote and falsely linked Carabelli's concerns about the number of foreclosures with the later unrelated question-and-answer regarding poll challenges, to state in her blog that Carabelli said "'[w]e will have a list of foreclosed homes and will make sure people aren't voting from those addresses.'" *Id.* at ¶16. In response to that article, Carabelli swore:

> I do not have nor have I ever thought to acquire a list of homes in which homeowners suffered a foreclosure; nor am I aware of any Republican Party committee in Michigan to do so. I have never

> spoken to any person affiliated or representing a Republican Party committee as to the use of a list of foreclosed homes to challenge a person's right to vote.

Id. at ¶17.

III. STANDARD OF REVIEW

A court is to consider four factors in addressing a motion for a preliminary injunction: "(1) whether the movant has shown a strong likelihood of success on the merits; (2) whether the movant will suffer irreparable harm if the injunction is not issued; (3) whether the issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuing the injunctions." *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 573 (6th Cir. 2002) (citing *Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir. 2000)).

"Although no one factor is controlling, a finding that there is simply no likelihood of success on the merits is usually fatal." *Gonzales v. National Bd. Of Med. Exam'rs*, 225 F.3d 620, 625 (6th Cir. 2000); *see also, Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1249 (6th Cir. 1997) ("A preliminary injunction issued where there is simply no likelihood of success on the merits must be reversed."). The extraordinary remedy of a preliminary injunction bears a heavy evidentiary burden:

> **Plaintiffs bear the burden of demonstrating their entitlement to a preliminary injunction, and their burden is a heavy one.** "A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 573 (6th Cir. 2002). **"[T]he proof required for the plaintiff to obtain a preliminary injunction is much more stringent than the proof required to survive a summary judgment motion."** *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000). Thus, plaintiffs may not merely point to genuine issues of material fact which exist, but must affirmatively demonstrate their entitlement to injunctive relief.

DYKEMA GOSSETT·A PROFESSIONAL LIMITED LIABILITY COMPANY· CAPITOL VIEW 201 TOWNSEND STREET SUITE 900·LANSING, MICHIGAN 48933

Davis v. Caruso, No. 07-11740, slip op. at *2 (E.D. Mich. March 28, 2008) (emphasis added). Plaintiff can establish none of these four elements.

IV. ARGUMENT

A. Plaintiffs Have Failed To Show Likelihood Of Success On The Merits.

Plaintiffs' case is entirely speculative. There is no evidence that a foreclosure list exists, that the voter plaintiffs are on the list, that the RNC or any Defendant has the list, that the RNC or any defendant plans to use it to make challenges, that the RNC has challengers or makes any challenges, that the RNC communicated with other Defendants about using a foreclosure list to make challenges, etc. (McNulty Declaration ¶¶7, 12, 15-18, and 21-22.) Plaintiff s have no right to any judicial relief.

i. Plaintiffs Present No Evidence Against The RNC.

Plaintiffs present no evidence the RNC is involved in any scheme to use foreclosure lists to challenge Michigan voters.[2] Plaintiffs finesse the absence of evidence by group references to "Defendants" in the plural and statements in the plural, *e.g.* "Defendant Republicans' statements" (Plaintiffs' Brief at 2), and "Defendant Republicans have announced to the press that they will use public lists of foreclosed homes (rather than returned postcards) to support mass challenges of voters in an attempt to strip them from the voter roles" (*Id.*). Plaintiffs know their statements are false and unprovable; when not proven, they should be sanctioned.

Plaintiffs do not even make sufficient allegations to state a claim against the RNC, for reasons stated in the RNC's Motion To Dismiss. The RNC should be dismissed.

[2] Perhaps Plaintiffs' awareness that they have no evidence against the RNC explains why they violated Local Rule 7.1(a) by not calling RNC's counsel in advance to explain the nature of the motion and seek concurrence. Plaintiffs' Motion p. 2 admits that they only conferred with counsel for Defendant Michigan Republican Party.

DYKEMA GOSSETT·A PROFESSIONAL LIMITED LIABILITY COMPANY· CAPITOL VIEW 201 TOWNSEND STREET SUITE 900·LANSING, MICHIGAN 48933

DYKEMA GOSSETT·A PROFESSIONAL LIMITED LIABILITY COMPANY· CAPITOL VIEW 201 TOWNSEND STREET SUITE 900·LANSING, MICHIGAN 48933

ii. Plaintiffs Lack Standing.

Article III of the Constitution limits federal judicial jurisdiction to actual "cases" and "controversies." U.S. Const. art. III, § 2; *see also O'Shea v. Littleton*, 414 U.S. 488, 493-94 (1974). Absent an actual case or controversy, a plaintiff lacks standing.

As determined by a three part test for standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). First, the plaintiff suffered 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.'" *Id.* at 560. Second, there is causation - 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." *Id*. Third, it must be "likely" not "speculative" that the injury will be "redressed by a favorable decision." *Id*. at 561. Plaintiffs bear the burden of demonstrating these elements. A voter alleging standing due to a potential deprivation of voting rights must prove that the threat of injury is real or immediate and **not hypothetical**. *Miyazawa v. Cincinnati*, 45 F.3d 126, 127 (6th Cir. 1995).

Plaintiffs speculate that people (unnamed and unquantified) with foreclosed homes will be scared to vote. Speculation is not evidence. Ironically, the Plaintiffs are the ones fomenting the alleged fear. Plaintiffs argue that "Defendant Republicans' announcement has already interfered with the right to vote" Plaintiffs Brief at 10. None of the Defendants made any such "announcement." Defendants have refuted the alleged "plan" at every turn and the Macomb Party Chair has sued the Michigan Messenger blog for libel. Defendants have made their message clear—there is no plan to use foreclosure lists for challenges.

Plaintiffs speculate with no evidence that "Defendants' scheme will lead to long lines at the polls, diversion of the resources of electoral officials, and possibly public humiliation of

DYKEMA GOSSETT·A PROFESSIONAL LIMITED LIABILITY COMPANY· CAPITOL VIEW 201 TOWNSEND STREET SUITE 900·LANSING, MICHIGAN 48933

individual voters." Plaintiffs Brief at 10. Plaintiffs' speculation is not a concrete or particularized injury necessary for standing of the individual voter Plaintiffs. Plaintiffs Obama for America and DNC identify no evidence proving any harm caused to them by the RNC, as the RNC has no challengers, much less ones who will use non-existent foreclosure lists for challenges. (*See* McNulty Declaration ¶¶18, 21, and 22.) Plaintiffs lack standing, and are, therefore, unlikely to succeed on the merits.

iii. This Case Is Not Ripe.

Under the case or controversy requirement, courts must abstain from deciding cases that are not ripe for review. *See Adult Video Ass'n v. United States Dep't of Justice*, 71 F.3d 563, 567 (6th Cir. 1995). Courts may not hear claims based on "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Thomas v. U.S.*, 523 U.S. 296, 300 (1998) (internal citations omitted). "Ripeness separates those matters that are premature because the injury is speculative and may never occur from those that are appropriate for the court's review." *NRA v. Magaw*, 132 F.3d 272, 280 (6th Cir. 1997). A case seeking declaratory and injunctive relief is deemed ripe "only if the probability of the future event occurring is substantial and of 'sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" *NRA*, 132 F.3d at 284 (quoting *Golden v. Zwickler*, 394 U.S. 103, 108 (1969)).

Plaintiffs cite *Kardules v. City of Columbus*, 95 F.3d 1335 (6th Cir. 1995), to argue that an uncertain future issue is ripe in the context of an election. In that case, however, a commission had been formed and was taking affirmative steps toward the action the plaintiffs sought to block. It was, in fact, precisely the inevitability of imminent action that empowered the court to act. Citing *Blanchette v. Connecticut Gen. Ins. Corps.*, 419 U.S. 102 (1974), the court explained "[w]here the inevitability of the operation of a statute against certain individuals

DYKEMA GOSSETT·A PROFESSIONAL LIMITED LIABILITY COMPANY· CAPITOL VIEW 201 TOWNSEND STREET SUITE 900·LANSING, MICHIGAN 48933

is patent, it is irrelevant to the existence of a justifiable controversy that there will be a time delay before the disputed provisions will come into effect." Unlike *Kardules*, where the question was "when, not if" the defendants would take undesirable action, all Defendants in this case have repeatedly explained that they never discussed the use of foreclosure lists for challenges, do not have and have never seen a foreclosure list, and do not plan to use a foreclosure list for challenges. There is no element of **inevitability** and, specifically, with regard to the RNC, there is not even a **possibility** of future action because the RNC does not have poll challengers. (McNulty Declaration ¶¶17 and 22.) Plaintiffs present no evidence, just speculation about improbable future events. The case is not ripe.

iv. This Case Is Moot.

Plaintiffs have no evidence that Defendants plan to use foreclosure lists to challenge voters. Plaintiffs admit that all Defendants (now supported by affidavits) have repeatedly denied plans to use foreclosure lists. The RNC does not have poll challengers. (McNulty Declaration ¶¶17 and 22.) Given the absence of proof of a plan, this case is moot. *See Brown v. Bartholomew Consol. School Corp.*, 442 F.3d 588, 596 (7th Cir. 2006) ("A case becomes moot when a court's decision can no longer affect the rights of litigants in the case before them and simply would be 'an opinion advising what the law would be upon a hypothetical set of facts.'" (quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971))); see also *Bogaert v. Terri Lynn Land*, Nos. 08-2130, 08-2131, 08-2140, 2008 WL 4489263 at *2 (6th Cir. October 8, 2008) (rejecting a contention that a candidate theoretically could suffer adverse action until the time ballots are tabulated and certified, the Sixth Circuit explained that "[w]hat may be possible in theory does not conform to the realities of the situation before us").

v. Plaintiffs' Section 1983 Claim Fails As A Matter Of Law.

DYKEMA GOSSETT·A PROFESSIONAL LIMITED LIABILITY COMPANY· CAPITOL VIEW 201 TOWNSEND STREET SUITE 900·LANSING, MICHIGAN 48933

Section 1983 requires that the RNC: (1) acted under color of law; and (2) its action deprived Plaintiffs of a right protected by the Constitution and laws of the United States. *Coffy v. Multi-County Narcotics Bureau*, 600 F.2d 570, 576 (6th Cir. 1979). They are absent here.

a. The RNC Does Not Act Under Color of Law.

In this case, there is no state action. For private conduct to be state action, there must be "such a close nexus between the State and the challenged action" that the behavior "may be fairly treated as that of the State itself." *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (citation omitted). The RNC analyzes in its Motion to Dismiss the three distinct tests used to determine when the actions of a private individual amount to state action: (1) the public function test; (2) the state compulsion test; and (3) the governmental nexus test. *Memphis, Tennessee Area Local, American Postal Workers Union, AFL-CIO v. City of Memphis*, 361 F.3d 898 (6th Cir. 2004). The RNC is not a state actor under any of the tests adopted by the Sixth Circuit.

Plaintiffs contend that "the law is clear" that those levying challenges transforms private citizens into state actors, but cite only a District Court case from Pennsylvania to support that proposition. *Tiryak v. Jordan*, 472 F. Supp 822 (E.D. Pa. 1979) (holding that a poll worker empowered by state statute to physically evict voters from polling places acted under color of state law). The RNC has no poll "watchers." (McNulty Declaration ¶¶12, 17, and 21-22.)

Plaintiffs proceed to cite inapposite cases in which private parties assumed a public function. *See Marsh v. Alabama*, 326 U.S. 501 (1946) (finding that a company that undertakes all facets of operating a company town makes that company a state actor); *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982) (holding that state action occurs when a private company and government entity jointly undertake a seizure of disputed property); and *Smith v. Allwright*, 321

U.S. 649 (1944) (determining that where a primary election was conducted entirely by a political party, that political party could be construed as a state actor). In each of these cases, the alleged state actors took such substantial government action that the private party and the state were indistinguishable.

Contrast the instant case, where the RNC has no poll challengers. Because Plaintiffs' theory is that having poll watchers is state action, RNC is not a state actor, because the RNC has no poll challengers. Even for parties who have challengers, the fact that poll challengers are authorized by state law does not convert their action into state action. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350 (1974).

b. Plaintiffs Have Not Proven That Constitutional Rights Have Been Deprived.

In addition to state action, § 1983 requires that action deprived a constitutional right. See Monell v. Dep't of Social Services, 436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S. 362 (1976). "A person 'subjects' another to deprivation of a constitutional right, within the meaning of section 1983, if he does an affirmative act, participates in another's affirmative acts or omits to perform an act which he is legally required to do that causes the deprivation." Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978). "A plaintiff must … show that an individual was personally involved in the deprivation of his civil rights." Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998); see also Salehpour v. Univ. of Tennessee, 159 F.3d 199, 206 (6th Cir. 1998). Plaintiffs present no evidence that RNC conduct deprived Plaintiffs of constitutional rights. See, e.g., Monell, 436 U.S. at 691-92; Taylor v. Michigan Dep't. of Corrs., 69 F.3d 76 (6th Cir. 1995) (finding that plaintiff must prove that state actors participated, condoned, encouraged, or knowingly acquiesced in alleged misconduct).

vi. Plaintiffs' Section 1985 Claim Fails As A Matter Of Law.

DYKEMA GOSSETT·A PROFESSIONAL LIMITED LIABILITY COMPANY· CAPITOL VIEW 201 TOWNSEND STREET SUITE 900·LANSING, MICHIGAN 48933

DYKEMA GOSSETT·A PROFESSIONAL LIMITED LIABILITY COMPANY· CAPITOL VIEW 201 TOWNSEND STREET SUITE 900·LANSING, MICHIGAN 48933

Plaintiffs cannot prove a Section 1985 claim, for a host of reasons. RNC does not have poll challengers, and makes no challenges. (McNulty Declaration ¶¶10, 12, 17, and 21-22.) Plaintiffs have no evidence of a conspiracy or action in furtherance of it. Voters whose homes have been foreclosed are not a protected class, and Plaintiffs have no evidence of RNC activity motivated by a "class based animus" or to deprive voting rights. Even if a foreclosure list exists, and Defendants had it, and a challenger used the list for challenges, none of which is true, the challenge still could not deprive the right to vote, as long as the voter resides within that precinct, because lawful voters are permitted to vote after confirming their residency.

Plaintiffs allege violations of two clauses of Section 1985: (1) the "support or advocacy" clause; and (2) depriving a class of voters of equal protection. (Plaintiffs Complaint ¶60). Sixth Circuit precedent does not support a separate support and advocacy claim. Plaintiffs cite *Federer v. Gephardt*, 363 F.3d 754, 760 (8th Cir. 2004), which appears to be the only case to adopt a separate "support or advocacy" claim.[3] Even if such a cause of action exists, the distinction between the two types of Section 1985(3) claims Plaintiffs allege is important:

- a "support or advocacy" claim requires a state actor, but no class-based animus.
- an equal protection claim requires a class-based animus, but no state actor.

Because Plaintiffs cannot demonstrate either a state actor or a class-based animus, Plaintiffs' claim fails.

a. If A Support Or Advocacy Claim Exists, Plaintiffs' Proofs Fail.

[3] Plaintiffs cite several cases, manuals, and consent decrees that are unrelated to Section 1985(3) or the underlying cause of action, none of which proves Plaintiffs' allegations and appear to have been included to demonstrate that voter intimidation is bad. See Plaintiffs Brief at 21. All parties agree that voter intimidation is bad. Plaintiffs have no evidence the RNC is planning to participate in voter intimidation using foreclosure lists or otherwise.

DYKEMA GOSSETT·A PROFESSIONAL LIMITED LIABILITY COMPANY· CAPITOL VIEW 201 TOWNSEND STREET SUITE 900·LANSING, MICHIGAN 48933

The Sixth Circuit has not recognized a claim based on § 1983's "support or advocacy" provision, whereby a violation for federal elections need not show class-based animus. Only one Circuit appears to have recognized such a claim, in *Federer*. The Eastern District of Michigan has held that class-based animus **is needed** for a § 1985(3) claim involving a federal election. *Jackson v. Michigan State Democratic Party*, 593 F. Supp. 1033, 1046-47 (E.D. Mich. 1984) (holding that plaintiffs' claims fail because they "failed to show any invidiously discriminatory animus underlying defendants' actions" which would demonstrate "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action").

Even a support and advocacy claim requires state action. *Federer* at 760 (even though the defendant was a United States Congressman, the alleged constitutional violations were not undertaken in his role as a government official, and therefore did not constitute state action). *See also Gill v. Farm Bureau Life Ins., Co.*, 906 F.2d 1265, 1270 (8th Cir. 1990) (finding that a claim under the support and advocacy provision of § 1985(3) is not be actionable absent state action). *See also Carpenters*, 463 U.S. at 830 ("an alleged conspiracy to infringe First Amendment rights is not a violation of § 1985(3) unless it is proved that the State is involved in the conspiracy or that the aim of the conspiracy is to influence the activity of the State.")

In short, Plaintiffs' claim fails even if class-based animus was not required. Plaintiffs must prove state action, and cannot, as previously discussed.

b. Plaintiffs Failed to Demonstrate Class-Based Animus.

Aside from the "support or advocacy" provision, Section 1985(3) requires a class based animus, which Plaintiffs have not shown. *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971) ("[t]he language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously

DYKEMA GOSSETT·A PROFESSIONAL LIMITED LIABILITY COMPANY· CAPITOL VIEW 201 TOWNSEND STREET SUITE 900·LANSING, MICHIGAN 48933

discriminatory animus behind the conspirators' action."). *United Brotherhood of Carpenters and Joiners of America, Local 610, AFL-CIO, et al. v. Scott,* 463 U.S. 825 (1983), held that "the class must exist independently of the defendants' actions; that is, it cannot be defined simply as the group of victims of the tortious action." The Court in *Griffin* cautioned against transforming the statute into a general federal tort law: "[t]hat the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others." *Griffin* at 101.

Plaintiffs present no evidence of class-based animus and would require a "general federal tort law" for their claim to survive here. Plaintiffs argue that supporters of a particular politician constitute the type of class required for a Section 1985(3) action, citing *Cameron v. Brock*, 473 F.2d 608 (6th Cir. 1973); *Glasson v. Louisville*, 518 F.2d 899 (6th Cir. 1975); *Keating v. Carey*, 706 F.2d 377 (2d Cir. 1983). The Court in *Cameron* explicitly restricts Section 1985(3) to clearly defined classes, to ensure that "[t]his interpretation does not transform the statute into the 'general federal tort law' feared by the *Griffin* Court." *Cameron* at 610.

In rejecting the *Keating* Court's decision that the Republican party is a "class" under Section 1983, the Third Circuit in *Farber v. City of Paterson*, 440 F.3d 131, 135 (3d Cir. 2006), explained that there are two distinct aspects to the "class-based invidiously discriminatory animus" for a § 1985(3) claim—form and function. A plaintiff must prove both that the conspiracy was motivated by discriminatory animus against an identifiable class, and that the discrimination against the identifiable class was invidious. *Id.* The Court rejected the plaintiffs' assertion that a union and local government conspired against "supporter[s] of the former administration" because alleged discriminatory animus based on their status as registered Republicans does not trigger § 1985(3) protection. *Id.* The Court rejected such politically-based

DYKEMA GOSSETT·A PROFESSIONAL LIMITED LIABILITY COMPANY· CAPITOL VIEW 201 TOWNSEND STREET SUITE 900·LANSING, MICHIGAN 48933

classes, stating that "unlike discrimination against a class on the basis of race, sex, or mental retardation, discrimination on the basis of political affiliation is not, as a matter of law, discrimination so invidious such that § 1985(3) would apply." *Id.*

Similarly, in *Carpenters*, the Supreme Court declined to extend Section 1985's private actions to politically-based classes, rejecting the statutory breadth proposed here:

> To accede to that view would go far toward making the federal courts, by virtue of § 1985(3), the monitors of campaign tactics in both state and federal elections, a role that the courts should not be quick to assume. If respondents' submission were accepted, the proscription of § 1985(3) would arguably reach the claim that a political party has interfered with the freedom of speech of another political party by encouraging the heckling of its rival's speakers and the disruption of the rival's meetings.

Id. at 836. The Court held that Section 1983 was not intended to extend to conspiracies motivated by based on economic views, status, or activities. *Id.* at 837.

Similarly, in the instant case, neither economically-based nor politically-based animus exists, has been proven, or would be sufficient.

c. Plaintiffs Failed To Demonstrate A Conspiracy.

Plaintiffs have failed to prove a conspiracy as required by 42 U.S.C. § 1985(3). For conspiracy claims under 42 U.S.C. § 1983 and 1985(3), "[v]ague and conclusory allegations of conspiracy unsupported by material facts" are not sufficient. *Dekoven v. Bell*, 140 F. Supp. 2d 748, 758 (E.D. Mich. 2001). Instead, specific facts are required, "showing the existence of the conspiracy." *Id.* (Citing *Collyer v. Darling*, 98 F.3d 211, 233 (6th Cir. 1996)); *Brooks v. American Broad. Cos., Inc.*, 932 F.2d 495 (6th Cir. 1991); *Jaco v. Bloechle*, 739 F.2d 239, 245 (6th Cir. 1984)).

DYKEMA GOSSETT·A PROFESSIONAL LIMITED LIABILITY COMPANY· CAPITOL VIEW 201 TOWNSEND STREET SUITE 900·LANSING, MICHIGAN 48933

Plaintiffs do not even adequately allege, much less present evidence proving, conspiracy. See the RNC's Motion To Dismiss, reciting the Complaint's bald conclusion of "in concert with" (¶2) unsupported by a single specific, just the speculation that they "appear to have plotted" (*Id.* at ¶30), which does not suffice under *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964 (2007), where the plaintiffs sought to allege a conspiratorial agreement between defendants:

> "[Stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made….an allegation of parallel conduct and a bare assertion of conspiracy will not suffice." *Id*. at 1965-1966.
>
> "[Parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unspecified point in time does not supply facts adequate to show illegality." *Id*. at 1966.
>
> "The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2)." *Id*. at 1966.
>
> "An allegation of parallel conduct is thus like a naked assertion of conspiracy in a § 1 complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of 'entitle[ment] to relief.'" *Id.* at 1966.
>
> "[T]he complaint leaves no doubt that plaintiffs rest their § 1 claim on descriptions of parallel conduct and not on any independent allegation of actual agreement…." *Id*. at 1970.
>
> "[T]he pleadings mentioned no specific time, place, or person involved in the alleged conspiracies." *Id.* at 1970 n.10.

Here, Plaintiffs' allegations are insufficient, and their evidence non-existent. Plaintiffs argue that "creating plans to obtain the foreclosure lists and announcing the actions to be taken are all the overt action required," but fail to present any evidence that any party, and certainly not the RNC, created such plans or announced such actions. Plaintiffs' have no evidence of the requisite "specific time, place, or person involved in the alleged conspiracies." *Id.*

DYKEMA GOSSETT·A PROFESSIONAL LIMITED LIABILITY COMPANY· CAPITOL VIEW 201 TOWNSEND STREET SUITE 900·LANSING, MICHIGAN 48933

Plaintiffs argue, but present no evidence, that "[Defendants] announcements have warned voters who have appeared on foreclosure lists that if they turn out on Election Day, they will be subject to a challenge," and falsely accuse the plural "Defendants" of "false propaganda." (Plaintiffs' Brief at 20, 21.) Plaintiffs' present no evidence that the RNC or any Defendant made such plural "announcements" or "propaganda." To the contrary, Defendants have denied the existence of a foreclosure challenge list at every opportunity, repeatedly and publicly. (McNulty Declaration ¶¶21-22.)

Plaintiffs admit that the Michigan Party's spokesman told the Detroit Free Press: "What does a name on a foreclosure list tell us? Nothing… we go into the polling place with the qualified voter file and that is all." (Plaintiffs' Brief at 14.) Plaintiffs concocted a plan to make Republican poll challengers appear to be preying on the downtrodden, planted a story in a specialty blog attributing that plan to all Republicans nationwide, and now attempt to use Defendants' denial of that plan as a basis for a lawsuit and even as grounds for injunction.

All Defendants have explained repeatedly that they have no foreclosure list, that a voter's presence on a foreclosure list is not an adequate basis for a challenge, and none of the Defendants ever have had any plan to use such lists as a basis for challenges. (McNulty Declaration ¶¶10, 12, and 21.) The RNC does not have poll challengers and has never discussed the creation or use of foreclosure lists for any purpose, publicly or otherwise, until forced to address the issue in the context of this lawsuit. *Id.*

There is no evidence of conspiracy. Speculation is insufficient. *See Overseas Motors, Inc. v. Import Motors Ltd., Inc.*, 375 F. Supp. 499, 534 (E.D. Mich. 1974) ("[w]hile it must be conceded that the defendants could easily have communicated, the bare physical possibility of agreement [for purposes of a conspiracy] has no affirmative probative value.").

DYKEMA GOSSETT·A PROFESSIONAL LIMITED LIABILITY COMPANY· CAPITOL VIEW 201 TOWNSEND STREET SUITE 900·LANSING, MICHIGAN 48933

Finally, conspiracy requires an overt act. *See generally Beck v. Prupis*, 529 U.S. 494, 502-504 (2000) (internal citations omitted); *O'Hara v. Mattix*, 255 F. Supp. 540, 542 (W.D. Mich. 1966) ("[a] conspiracy alone does not give a cause of action under [§ 1985(3)] without overt acts in furtherance of the conspiracy."). In this case, Plaintiffs have merely speculated about **possible**, **future** acts that **could be taken** on election day. Plaintiffs have failed to prove any conspiracy or any specific acts to advance the alleged conspiracy.

vii. Declaratory Relief Is Not Appropriate.

There is no need or basis for declaratory relief. Even if Plaintiffs somehow stated a claim, the Court still should decline to exercise its discretion on whether to grant declaratory relief. Since Defendants deny any involvement in the alleged scheme, the parameters of what constitutes a proper voting challenge is not contested, and will not be subjected to the vigorous advocacy process that would explore and define proper parameters. Those parameters should be debated and determined by the Michigan Legislature, where the issue is being addressed. House Bill 6477 was introduced by Michigan State Representative Robert Dean (D) on September 18, 2008, to prohibit using foreclosure lists as the sole basis of challenges. The legislation rapidly was reported out of the Committee on Ethics and Education and is pending approval by the Michigan Legislature. The Court should permit state government to address this question of state law.[4]

In assessing whether to exercise its discretion, a district court considers five specific factors. *Scottsdale Ins. Co. v. Roumph*, 211 F.3d 964, 965, 968 (6th Cir. 2000) (quoting *Omaha Prop. & Cas. Ins. Co. v. Johnson*, 923 F.2d 446, 447-448 (6th Cir. 1991):

[4] This Court should abstain from deciding questions of state law bearing on policy issues of substantial public import, whose importance transcends the case at bar. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

> (1) whether the judgment would settle the controversy; (2) whether the declaratory judgment action would serve a useful purpose in clarifying the legal relations at issue; (3) whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race of res judicata"; (4) whether the use of a declaratory action would increase the friction between our federal and state courts and improperly encroach on state jurisdiction; and (5) whether there is an alternative remedy that is better or more effective.

The Court should decline to exercise its discretion here. No controversy exists on whether foreclosure lists may be used. Judgment would not satisfy a controversy. The requested declaratory relief would be used merely for political purposes. The appropriate remedy is to take no action and allow the Legislature and Michigan Election Law's mechanisms to operate.

B. Plaintiffs Cannot Demonstrate Irreparable Injury.

Relief must be denied when, as here, irreparable injury to plaintiffs is not proven. "[T]he absence of irreparable injury must end the Court's inquiry." *Metrobanc*, 666 F. Supp. at 984; *see also, Paw Paw Wine Distributors v Seagram*, 603 F. Supp. 398 (W.D. Mich. 1985); *Paradise Distributors*, 906 F. Supp. at 622; *Neveux v. Webcraft Technologies*, 921 F. Supp. 1568, 1571 (E.D. Mich. 1996) ("a Plaintiffs must *always* demonstrate some irreparable injury before a preliminary injunction may issue.") (emphasis in original); *Friendship Materials, Inc. v. Michigan Brick, Inc.*, 679 F.2d 100, 104 (6th Cir. 1982).

In evaluating the alleged harm facing the plaintiffs, the Court must evaluate three factors: "(1) the substantiality of the injury alleged, (2) the likelihood of its occurrence, and (3) the adequacy of the proof provided." *Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm'n*, 812 F.2d 288, 290 (6th Cir. 1987). As discussed supra, Plaintiffs cannot satisfy any of the factors set forth in *Celebrezze* because there is no evidence that action by the RNC in connection with foreclosure lists will cause any injury to any Plaintiff.

DYKEMA GOSSETT·A PROFESSIONAL LIMITED LIABILITY COMPANY· CAPITOL VIEW 201 TOWNSEND STREET SUITE 900·LANSING, MICHIGAN 48933

DYKEMA GOSSETT·A PROFESSIONAL LIMITED LIABILITY COMPANY· CAPITOL VIEW 201 TOWNSEND STREET SUITE 900·LANSING, MICHIGAN 48933

For an injunction to issue, Plaintiffs cannot merely speculate about some circumstance that may cause injury if several variables perfectly line-up in the future, but must instead prove with evidence a concrete, particularized irreparable harm to their interests. To do so, the court must find "that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953).

Assurances of cessation of conduct "may affect the ability to obtain injunctive relief, as by impacting the ability to show substantial and irreparable injury." In this case, Plaintiffs' claimed injury is unsupported by evidence, is speculative, and unlikely. No Defendant possesses a foreclosure list, no Plaintiff is named on the (non-existent) foreclosure list, and no Defendant plans to use a foreclosure list to make challenges. (*See* McNulty Declaration.) Defendants have vigorously and publicly denied their use of foreclosure lists for challenges. Any harm caused by increased publicity related to foreclosure lists was caused by Plaintiffs and, therefore, cannot constitute irreparable harm. *San Francisco Real Estate Investors v. Real Estate Investment Trust*, 692 F.2d 814, 818 (1st Cir. 1982) (self-inflicted harm does not satisfy the irreparable harm criterion needed for a preliminary injunction).

Even if the Macomb Party used foreclosure lists, the voter Plaintiffs still could vote. Poll challengers merely make challenges to election officials. The three voter Plaintiffs can easily alleviate their unfounded and speculative concern about even facing a challenge, by getting absentee ballots. Even if present on Election Day, as long as election officials confirm a voter's identity, they will be allowed to vote normally. The challenge process contemplates an opportunity for poll challengers to make a challenge to election officials based upon a reasonable basis that a person is not eligible to vote. The election officials consider the evidence presented

DYKEMA GOSSETT·A PROFESSIONAL LIMITED LIABILITY COMPANY· CAPITOL VIEW 201 TOWNSEND STREET SUITE 900·LANSING, MICHIGAN 48933

and determine the challenge's validity. If, on Election Day, some rogue challenger attempts to challenge a voter based upon criteria other than the criteria established under the Michigan Election Law, election officials, particularly Macomb County Clerk Carmella Sabaugh, would not sustain that challenge. Plaintiffs rely on election officials and the Michigan Secretary of State to stop that challenger's actions. In fact, the Michigan Secretary of State already has publicly stated that foreclosure lists are not an adequate basis for challenges. Numerous adequate remedies exist and are more appropriate under the circumstances **if** inappropriate challenges occur on election day.

With regard to Plaintiffs Obama and DNC, they present no evidence of what particularized injury they would suffer. Plaintiffs have failed to demonstrate irreparable harm will result by any action taken by the RNC.

The evidence offered as to the RNC is non-existent and wholly inadequate for the extreme relief requested. There is no evidence that harm will befall the Plaintiffs even if Plaintiffs' hypothetical scenario were true, which it is not, regarding the RNC's use of foreclosure lists. As such, this Court should not resort to the extreme remedy of enjoining the RNC from taking action that it has no plans to take.

C. Defendants Will Suffer Injury If An Unwarranted Injunction Is Issued.

Assuming all the remaining injunctive relief factors have been met, an injunction should only issue if the harm to the Plaintiffs from failure to grant an injunction exceeds the harm to the Defendants from granting it. *Amoco Production Company v. Village of Gambell*, 480 U.S. 531, 545-546 (1987). The Plaintiffs have not demonstrated that any injury will occur to them without an injunction, but the Defendants would be harmed.

DYKEMA GOSSETT·A PROFESSIONAL LIMITED LIABILITY COMPANY· CAPITOL VIEW 201 TOWNSEND STREET SUITE 900·LANSING, MICHIGAN 48933

The harm to the Defendants, and the RNC particularly, will be tangible, vast and far-reaching, and will consist at least of public relations injury to the RNC, as Plaintiffs publicly parade, locally and nationally, that they got a Court injunction against the RNC against preying on the unfortunates subject to home foreclosures. *See United States v. Articles of Drug . . . . Promise Toothpaste For Sensitive Teeth*, No. 83 C 6129, 1986 WL 5185 (N.D. Ill. April 25, 1986) (finding that a stay of judgment was appropriate to avoid irreparable public relations harm). That Plaintiffs will suffer no harm must be compared to the real and significant injury that will be felt by Defendants, including the RNC. (McNulty Declaration ¶23.)

This case typifies why caution is paramount in addressing injunctions, according to the Sixth Circuit Court in *Detroit Newspaper Publishers Association v. Detroit Typographical Union No. 18, International Typographical Union*, 471 F.2d 872 (6th Cir. 1972), quoting Professor Wright's Federal Practice and Procedure:

> "The classic principles governing availability of injunctions were summarized by Justice Baldwin, sitting at circuit, in 1830: '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; it is the strong arm of equity, that never ought to be extended unless to cases of great injury, where courts of law cannot afford an adequate or commensurate remedy in damages. The right must be clear, the injury impending or threatened, so as to be averted only by the protecting preventive process of injunction: but that will not be awarded in doubtful cases, or new ones, not coming within well established principles; for if it issues erroneously, an irreparable injury is inflicted, for which there can be no redress, it being the act of a court, not of the party who prays for it. It will be refused till the courts are satisfied that the case before them is of a right about to be destroyed, irreparably injured, or great and lasting injury about to be done by an illegal act; in such a case the court owes it to its suitors and its own principles, to administer the only remedy which the law allows to prevent the commission of such act.'

Id. at 876.

DYKEMA GOSSETT·A PROFESSIONAL LIMITED LIABILITY COMPANY· CAPITOL VIEW 201 TOWNSEND STREET SUITE 900·LANSING, MICHIGAN 48933

In this case, Plaintiffs face no "great injury," certainly no injury so impending that it may be averted only through injunction. An injunction here puts the Court not in the neutral position of arbiter averting harm, but instead in the position of causing harm against persons who otherwise would not have suffered injury, and taking sides to influence an election. Here, where Plaintiffs bring this case to make political mileage from the result, *i.e.* to damage the RNC's reputation and fundraising efforts by mudslinging that proclaims a Court injunction against something the RNC is not doing.

D. The Public Interest Would Be Harmed By An Injunction.

The public interest will be harmed to the extent this Court issues an "obey the law" injunction to enjoin action that the RNC does not plan to take. Enjoining hypothetical actions and giving advisory opinions are not in the public interest nor the role of the judiciary.

Exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy. As the Supreme Court noted in *North Carolina v. Rice*, 404 U.S. 244, 246 (1971), a federal court has neither the power to render advisory opinions nor "to decide questions that cannot affect the rights of litigants in the case before them." Its judgments must resolve "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 state of facts." *Id*. (Quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937)).

As the Court noted in *United States v. SCRAP*, 412 U.S. 669, 688-689 (1973), "pleadings must be something more than an ingenious academic exercise in the conceivable. A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action." This Court must not endorse what can only be categorized as an academic exercise in

DYKEMA GOSSETT·A PROFESSIONAL LIMITED LIABILITY COMPANY· CAPITOL VIEW 201 TOWNSEND STREET SUITE 900·LANSING, MICHIGAN 48933

the conceivable by granting an injunction based upon a hypothetical set of facts that all Defendants disavow. The public interest would be disserved by this Court enjoining an activity that never was planned and is never going to happen.

An injunction based upon a hypothetical harm would portray poll challenges unfairly in a bad light, stifling their right and ability to perform the statutorily created challenge process, designed to protect the integrity of the election process by detecting fraud in the polling place. The origins of poll challengers come from a seedy time in American politics in which unscrupulous individuals literally stuffed ballot boxes in favor of their candidate. There is 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).

In *Blackwell*, the Sixth Circuit considered a County Democratic Party's request to enjoin all poll challengers in Ohio, making arguments similar to those offered here that poll challengers violated constitutional rights by blocking and intimidating voters. The Court explained that "the plaintiffs do not appear likely to succeed on the necessary primary finding that the presence of challengers burdens the right to vote. Challengers may only initiate an inquiry process by precinct judges, judges who are of the majority party of the precinct." *Id.* Similarly, in Michigan, poll challengers may only initiate an inquiry by election officials and, therefore, their actions cannot have the effect of blocking voters. Conversely, however, impeding challengers from performing their statutory rights undermines the integrity of the election by permitting the type of fraud bi-partisan poll challengers are to prevent.

Plaintiffs seek an injunction that only can be categorized as an injunction that Defendants "obey the law," which is not an appropriate use of the Court's injunction powers, since here is no

evidence that Defendants violated the law. See *E.E.O.C. v. Wooster Brush Co. Employees Relief Ass'n*, 727 F.2d 566 (6th Cir. 1984) (criticizing an "obeying the law injunction."). Here, Plaintiffs seek to compel the RNC to obey a law that the RNC never planned to disobey.

CONCLUSION

Plaintiffs have failed to present evidence satisfying the factors necessary for injunctive or declaratory relief. "A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet*, 305 F.3d at 773. Plaintiffs' motion should be denied.

Respectfully submitted,

DYKEMA GOSSETT PLLC

By: */s/ Gary P. Gordon*

Gary P. Gordon (P26290)
Dennis M. Haffey (P26378)
W. Alan Wilk (P54059)
Jason T. Hanselman (P61813)
Attorneys for Republican National Committee
Capitol View
201 Townsend Street, Suite 900
Lansing, MI 48933
(517) 374-9100
ggordon@dykema.com
dhaffey@dykema.com
awilk@dykema.com
jhanselman@dykema.com

Date: October 10, 2008

DYKEMA GOSSETT · A PROFESSIONAL LIMITED LIABILITY COMPANY · CAPITOL VIEW 201 TOWNSEND STREET SUITE 900 · LANSING, MICHIGAN 48933

CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2008, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to counsel of record. I hereby certify that I have mailed by United States Postal Service the same to any non-ECF participants.

By: */s/ Gary P. Gordon*

Gary P. Gordon (P26290)
W. Alan Wilk (P54059)
Jason T. Hanselman (P61813)
Dennis M. Haffey (P26378)
Attorneys for the Republican National Committee
DYKEMA GOSSETT PLLC
201 Townsend Street, Suite 900
Lansing, MI 48933; (517) 374-9181
ggordon@dykema.com
dhaffey@dykema.com
awilk@dykema.com
jhanselman@dykema.com

LAN01\193627.6
ID\JTHA

DYKEMA GOSSETT·A PROFESSIONAL LIMITED LIABILITY COMPANY· CAPITOL VIEW 201 TOWNSEND STREET SUITE 900·LANSING, MICHIGAN 48933