UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

OPERATION KING'S DREAM, *et al.,*	:	
Plaintiffs,	:	Civ. No. 06-12773
v.	:	HON. ARTHUR J. TARNOW
WARD CONNERLY, *et al.,*	:	HON. R. STEPHEN WHALEN
Defendants.	:	

THE CITIZEN DEFENDANTS' MOTION IN LIMINE TO EXCLUDE PORTIONS OF PLAINTIFFS' EVIDENCE ON THEIR MOTION FOR A PRELIMINARY INJUNCTION

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Pursuant to Federal Rules of Evidence 402, 403, 602, 603, 702-704, and 801-807, defendants Jennifer Gratz, Ward Connerly, and the Michigan Civil Rights Initiative Committee ballot question committee (collectively "the Citizen Defendants") move to exclude portions of the exhibits plaintiffs submitted in support of their motion for a preliminary injunction. (Pursuant to Local Rule 7.1(a), the Citizen Defendants spoke to counsel for plaintiffs, and plaintiffs do not consent to this motion.) The portions of the exhibits that the Citizen Defendants move to exclude and the grounds therefore are set forth in the accompanying Memorandum of Law.

WHEREFORE, the Citizen Defendants respectfully request that the Court grant their motion.

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Dated: August 10, 2006

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THE CITIZEN DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION IN LIMINE TO EXCLUDE PORTIONS OF PLAINTIFFS' EVIDENCE ON THEIR MOTION FOR A PRELIMINARY INJUNCTION

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Issues

I

WHETHER THE RULES OF EVIDENCE SHOULD BE APPLIED TO THE EVIDENCE PLAINTIFFS SUBMIT IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION.

II

WHETHER THE REPORT OF THE MICHIGAN CIVIL RIGHTS COMMISSION SHOULD BE EXCLUDED AS HEARSAY.

III

WHETHER THE BULK OF PLAINTIFFS' OTHER EXHIBITS, OR CONTENTS THEREOF, SHOULD BE EXCLUDED PURSUANT TO THE FEDERAL RULES OF EVIDENCE.

Leading Authorities

Federal Rules of Evidence 402, 403, 602, 603, 702-704, 801-807

Beech Aircraft Corp. v. Rainey, 488 U.S. 153 (1988)

Miller v. Caterpillar Tractor Co., 697 F.2d 141 (6th Cir. 1983)

Insect-O-Lite Co. v. Hagemeyer, 226 F.2d 580 (6th Cir. 1955)

Background

In their motion for a preliminary injunction, plaintiffs seek to have this Court order a proposed amendment to the Michigan Constitution eliminating sex and race preferences ("the Proposed Amendment") off the November, 2006, ballot in the State of Michigan. Their proffered evidence in support of this request consists, in the main, of the Report of the Michigan Civil Rights Commission and some of the evidence – consisting of selected transcripts of testimony at hearings held by the Commission and various signed statements – on which the Commission based its conclusions.

In its report, the Michigan Civil Rights Commission (MCRC) concluded that "[t]he weight of the evidence received in the form of sworn testimony and affidavits offered by aggrieved citizens from across the state, paints a disturbing picture of deception and misrepresentation," and that "[t]here is substantial credible testimony that . . . . efforts [of the Michigan Civil Rights Initiative Committee ballot question committee ("the Committee")] to change the Constitution of the State of Michigan rest on a foundation of fraud and misrepresentation." Plaintiffs' Brief in Support of their Motion for a Preliminary Injunction and Exhibit 1 thereto (Exhibit 1) at 12. MCRC continued:

> The instances of misrepresentation regarding the content of the MCRI ballot language are not random or isolated. These acts occurred across the state, in multiple locations in the same communities, and over long periods of time
>
> The impact of the acts of misrepresentation is substantial. It appears that the acts documented in this report represent a highly coordinated, systematic strategy involving many circulators and, most importantly, thousands of voters.

Id.

Some of the evidence MCRC referred to in its report is submitted by plaintiffs in support of their motion for a preliminary injunction. In the evidence plaintiffs submit, a number of persons claim, or appear to claim, that they signed a petition to put the Proposed Amendment on the ballot because the circulator told them that the initiative was "for civil rights," or "for affirmative action," and that they would not have signed the petition had they understood the true nature of the initiative. Also, some witnesses and declarants claim that they circulated the petition and while doing so told potential signers that the initiative was "for civil rights" or "for affirmative action."

Argument

As shown below, the bulk of plaintiffs' evidence would be inadmissible at trial as violating various Federal Rules of Evidence. This unreliable and inadmissible evidence should not be considered on plaintiffs' motion for a preliminary injunction.

I. THE FEDERAL RULES OF EVIDENCE SHOULD APPLY ON PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION.

The Sixth Circuit has indicated that the Federal Rules of Evidence should be applied to a plaintiff's evidence in support of a motion for a preliminary injunction. *Insect-O-Lite Co. v. Hagemeyer,* 226 F.2d 580, 581 (6th Cir. 1955) (upholding the denial of a preliminary injunction: "While there was evidence which if believed might have justified a conclusion of unfair competition causing irreparable injury, this evidence was unsupported except by affidavits which the court correctly excluded as hearsay."). *See also Midwest Guaranty Bank v. Guaranty Bank,* 270 F.Supp.2d 900, 917 (E.D. Mich. 2003) (declining, in an extensive discussion, to exclude plaintiffs' declarations supporting

their motion for a preliminary injunction, on the ground that they did not violate Federal Rules of Evidence against hearsay); *Nixon v. Kent County, Mich.,* 790 F. Supp. 738, 745 (W.D. Mich. 1992) (disregarding plaintiffs' affidavits in support of their motion for a preliminary injunction as "clear hearsay").

In addition, "[t]he Sixth Circuit warns that courts should exercise great caution and careful deliberation in reviewing a motion for a preliminary injunction because 'there is no power . . . . more dangerous in a doubtful case than the issuing of an injunction.'" *Id.* at 738 (quoting *Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union,* 471 F.2d 872, 876 (6th Cir.1972)) (internal quotation marks omitted). This case is (at best) doubtful, only injunctive relief is sought, and the preliminary injunction plaintiffs request, if granted, would have the effect of removing the Michigan Civil Rights Initiative from the November 2006 ballot. Not only would granting plaintiffs' motion thus reverse, rather than preserve, the relative positions of the parties, but the Court should decline to bring about such a momentous result based on evidence that would be inadmissible on the merits. *See* 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE: FEDERAL PRACTICE AND PROCEDURE § 2950 (2d ed. 1995 & Supp. 2000) (noting that when the district court consolidates a motion for a preliminary injunction with a trial on the merits, "in general the evidentiary rules applicable to trial should govern during a consolidated hearing," because the hearing "really is a trial on the merits").

II. THE REPORT OF THE MICHIGAN CIVIL RIGHTS COMMISSION SHOULD BE EXCLUDED AS HEARSAY, AND BECAUSE IT IS BIASED, UNTRUSTWORTHY, AND UNFAIRLY PREJUDICIAL.

The MCRC's unsworn report is an out-of-court statement offered for the truth of the matters asserted therein, and is thus hearsay. Fed. R. Evid. 801(c). The Federal Rules of Evidence include the following hearsay exceptions:

> [r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . in civil actions . . . . factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Fed. R. Evid. 803(8)(C). While MCRC has the legal authority to investigate and report on allegations of discrimination under the Michigan Constitution, Article 5 § 29 (1963), it has abused its authority, and its hearsay report should not be admitted under the exception in Rule 803(8)(C), because it is biased, untrustworthy, and unfairly prejudicial.

A. MCRC's Report Is Untrustworthy.

For a public report to be admissible, it must be trustworthy. Fed. R. Evid. 803(8)(C). The Court "has the discretion, and indeed the obligation, to exclude an entire report or portions thereof – whether narrow 'factual' statements or broader 'conclusions' – that [it] determines to be untrustworthy." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 167 (1988). With respect to the standard for trustworthiness, the Sixth Circuit has stated:

> "As with any exception to the rule against hearsay, Rule 803(8)(C) is to be applied in a commonsense manner, subject to the district court's sound exercise of discretion in determining whether the hearsay document

> offered in evidence has sufficient independent indicia of reliability to justify its admission."

Miller v. Caterpillar Tractor Co., 697 F.2d 141, 144 (6th Cir. 1983) (quoting *City of New York v. Pullman Incorporation,* 662 F.2d 910, 914 (2nd Cir.1981)). Also, "[t]o determine whether a report is trustworthy, the Advisory Committee suggests four factors to consider: (1) the timeliness of the investigation, (2) the special skill or experience of the investigators, (3) whether the agency held a hearing, and (4) possible motivational problems." *Bank of Lexington & Trust Co. v. Vining-Sparks Secur., Inc.*, 959 F.2d 606, 616 (6th Cir. 1992). As shown below, under each of these factors, particularly the fourth, the MCRC report should be excluded.

The Advisory Committee's list of factors, furthermore, "is not exclusive; any circumstance which may affect the trustworthiness of the underlying information, and thus, the trustworthiness of the findings, must be considered when ruling upon the admissibility of factual findings under this rule." *In re Complaint of Paducah Towing Co.*, 692 F.2d 412, 420 (6th Cir. 1982). For example, the report must survive the "safeguards built into other portions of the federal Rules, such as those dealing with relevance and prejudice." *Beech Aircraft Corp.*, 488 U.S. at 167-168.

1. *The MCRC Performed an Untimely "Investigation" Based on Stale "Information."*

According to MCRC, it did not become aware of any allegations concerning the circulation of petitions, which was completed before January 6, 2005, until the fall and winter of 2005. Exhibit 1 at 4. MCRC held its first hearing on the allegations on January 11, 2006. *Id.* at 5. By the time MCRC completed its hearings, in May of 2006,

individuals who testified had been asked to recall details from brief conversations that happened at least one year, and sometimes almost two years, earlier. *Id.* at 10. This delay casts significant doubt on the reliability of MCRC's report.

2. *The MCRC Investigators Lacked Special Skill or Experience.*

The second factor to be considered in determining whether a report is trustworthy is the "special skill or experience of the investigators." *Bank of Lexington & Trust Co.*, 959 F.2d at 616. The necessary qualifications are parallel to those required to satisfy the standards for expert testimony under Fed. R. Evid. 702-704. *See, e.g., Miller,* 697 F.2d at 143 (upholding the exclusion of a report under Rule 803(8)(c) in part because its author was not an expert); *see also Matthews v. Ashland Chemical, Inc.,* 770 F.2d 1303, 1309-1310 (5th Cir. 1985) ("In reviewing the application of these factors by trial courts, an appellate court should not rely merely on the title of the official or official body making the report, but must look to additional considerations that indicate the special skill or expertise of the official or official body who made that report.").

All eight members of MCRC are political appointees. Mich. Const. Art. 5, § 29 (1963). Despite the Commission's name, there is no indication in the record that any member of it had any special skill or experience in recognizing or investigating violations of Section 2 of the Voting Rights Act, or any kind of election fraud, or was especially knowledgeable about the history of affirmative action. For this reason, the conclusion of the report that misrepresentations occurred because some circulators allegedly told some potential signers that the initiative was "for affirmative action" is particularly untrustworthy.

3. *MCRC's Investigation was One-Sided.*

The third factor regarding whether a report is trustworthy is whether the investigators held an adversarial hearing, or more generally, whether or not the process by which they gathered evidence was evenhanded. *See Baker v. Elcona Homes Corp.,* 588 F.2d 551, 558 (6th Cir. 1978) (upholding the admission of a report under Rule 803(8)(C) in part because "[t]here is no indication that [the investigator] neglected any one source [of information] or impermissibly preferred one over another."). While MCRC asserts in its report that "[e]very effort was made to obtain testimony from [the Committee] including the issuance of a valid, lawful, narrowly tailored Order to produce relevant information," the one-sidedness of the actual hearings speaks for itself. Exhibit 1 at 11. Indeed, quite apart from the Committee, no evidence from supporters of the initiative (with a lone exception), or those who may have considered that a circulator represented the initiative to them accurately and honestly, was before the Commission. *Id.* at 10. However it came about, MCRC based its conclusions, at best, on only one side of the story, and thus those conclusions cannot be other than untrustworthy.

Light is cast on one likely cause of this one-sidedness (and also of the irrelevance, detailed below, of much of the testimony MCRC heard) by the experiences of the lone supporter of the initiative who testified at the hearings, William B. Allen, a professor at Michigan State University who has chaired the U.S. Civil Rights Commission. Professor Allen, who attends Union Missionary Baptist Church, the congregation of which is almost all black, witnessed a recruiting pitch to that congregation by Ms. Monica Smith of the Coalition to Defend Affirmative Action & Integration, and Fight for Equality by

Any Means Necessary (BAMN). Ms. Smith spoke for about fifteen minutes to urge members of the congregation to testify before MCRC. She told them that it did not matter whether they had signed the petition for the proposed constitutional amendment, or could remember having signed it, as long as they thought that they *might* have signed it. Statement of William B. Allen, dated August 7, 2006 (Allen St.) at ¶ 1, 4.

4. *MCRC was Blatantly Biased.*

The final factor is "possible motivational problems." *Bank of Lexington & Trust Co.*, 959 F.2d at 616. Here, the bias of MCRC is beyond question.

On January 11, 2004, two years before it began its investigation, MCRC released a resolution and stated that it had taken "a necessary stance against [the Committee's] ballot initiative and its dire consequences."[1] In the resolution, the Commission declared:

> Whereas, the Michigan Civil Rights Initiative is not an initiative that is sponsored or advocated and is, in fact, opposed by the Michigan Civil Rights Commission; and Whereas, the Michigan Civil Rights Initiative represents an attempt to *mislead Michigan voters* regarding the issue of discrimination by state entities; and Whereas, the Michigan Civil Rights Initiative is inconsistent with the Constitutional mandate of the Michigan Civil Rights Commission and the mission of the Department of Civil Rights . . . be it resolved that the Michigan Civil Rights Commission *vigorously opposes* the Michigan Civil Rights Initiative designed to eliminate and undermine the basic principles of equal treatment under the law as set forth in the Michigan Constitution.

Id. (emphasis added).

[1]http://www.callsam.com/bernstein_lawyers_in_the_news/supporting_equal_opportunity_for_all.html. A copy of the MCRC press release quoting this resolution accompanies this memorandum as an Appendix.

MCRC could not have been more blatant about its institutional and political bias against MCRI. Indeed, its statement that the initiative "represented an attempt to mislead Michigan voters" is a suspicious foreshadowing of the conclusions it would generate over two years later. No one reading the report, moreover, could gain the impression that its "vigorously opposed" authors were unbiased or impartial. This is seen not only in MCRC's tendentious use of a truncated and superseded definition of "affirmative action," Exhibit 1 at 1, explained in the Citizen Defendants' Memorandum of Law in Support of their Motion for Judgment on the Pleadings at 23-24 & n.6, but in the virtually complete one-sidedness of the evidence it relied on. And as detailed in the next section, MCRC's bias is also evident in the poor quality of much of the evidence it uncritically accepted.[2]

B. MCRC's Report Should Also Be Excluded Under Rule 403.

Rule 403 provides a back-stop which all excepted hearsay must overcome in order to be considered admissible. *Beech Aircraft Corp.*, 488 U.S. at 167-168 ("[S]afeguards built into other portions of the Federal Rules, such as those dealing with relevance and prejudice, provide the court with additional means of scrutinizing and, where appropriate, excluding evaluative reports or portions of them."). Rule 403 provides for the exclusion of otherwise admissible evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by

[2] Also, though Professor Allen testified about the church recruiting pitch at the MCRC hearing in Lansing, MCRC does not even mention that testimony in its report. Allen St. at ¶ 5. Although Professor Allen was the first witness to arrive and sign in, he was ignored for hours until he expressed his astonishment at the way he was treated. *Id.* at ¶ 6.

considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.

The low probative value of this untrustworthy report is greatly outweighed by the danger of unfair prejudice. Because they are made by a constitutionally authorized commission, MCRC's denunciations have a spurious air of official authority. And because, as MCRC admitted, it "cannot make an educated analysis of who is actually at the root of the fraud that has occurred," Exhibit 1 at 6, its "findings" have little if any probative value to outweigh their prejudicial impact. The report is also needlessly cumulative. Almost all of the other evidence plaintiffs submit in support of their motion for a preliminary injunction is evidence that MCRC considered. The Court can and should evaluate this evidence directly, without the filter of MCRC's conclusions about it. True, MCRC refers in the report to evidence that plaintiffs do not submit, but the very fact that plaintiffs did not see fit to include that evidence speaks volumes about its reliability, and about the reliability of any conclusion based on it.

C. Even If The Report Were Determined Admissible, Portions Of It Should Be Redacted As Hearsay.

The United States Supreme Court has determined that Rule 803(8)(C) allows for the "admission of reports containing opinions and conclusions, as well as facts." *Miller v. Field,* 35 F.3d 1088, 1088 (citing *Beech Aircraft Corp.*, 488 U.S. at 169-70). If "the conclusion is based on a factual investigation and satisfies the rule's trustworthiness

requirement, it should be admissible along with other portions of the report." *Id.*[3] The public records exception, however, extends only to opinions of the agency or public office itself, not to statements of witnesses quoted or summarized within a report. *See, e.g., Miller v. Field,* 35 F.3d 1088, 1091-92 (6th Cir.1994) ("While a court may presume that a preparer of a report, under a duty to relate information, will perform the task required and formulate justified conclusions . . . . no such presumption arises when the preparer relies on potentially untrustworthy hearsay evidence from another individual under no duty to provide unbiased information.") Thus, the hearsay quotations or summaries of testimony or written statements, and the hearsay restatements of the opinions or conclusions of witnesses or declarants, with which the MCRC report is replete, either should be redacted or should not be considered for their truth. The

[3] Obviously, however, legal conclusions should be inadmissible under the same logic that disallows an expert from testifying about the law. *Hines v. Brandon Steel Decks, Inc.*, 886 F.2d 299, 302 (11th Cir. 1989) ("Rule 803(8)(C) does not provide for the admissibility of the legal conclusions contained within an otherwise admissible public report"); Fed. R. Evid. 704(b); *see also Woods v. Lecureux*, 110 F.3d 1215, 1220 (6th Cir. 1997) (noting that expert testimony consisting of legal conclusions is inadmissible). To discern whether a conclusion in a report is legal or factual, the Eleventh Circuit recommends the following analysis: "Would the conclusion, if made by the district court, be subject to the clearly erroneous standard of review on appeal? If so, then the conclusion is factual; if not, then the conclusion is legal. In addition, for those conclusions which are a mixed question of law and fact, a potential framework for analysis would be to ask whether the investigator made a finding of the 'ultimate facts' underlying the legal conclusion." *Hines*, 886 F.2d at 303. Here, MCRC's conclusion that "fraud" took place, Exhibit 1 at 12, is at least partially a legal conclusion. As shown in the Citizen Defendants' Memorandum of Law in Support of their Motion for Judgment on the Pleadings at 15-16, 20-26, the assertions attributed to various petition circulators about "affirmative action" cannot be the basis for a claim of fraud (and, indeed, are protected by the First Amendment), because they are not definite statements of fact.

substance of such summaries, quotations, or restatements are not statements of MCRC, and do not fall under the Rule 803(8)(C) exception.

III. THE BULK OF PLAINTIFFS' REMAINING EVIDENCE IS INADMISSIBLE.

For numerous reasons, all but a small part of the remaining evidence plaintiffs submit is inadmissible under the Federal Rules of Evidence.

Exhibit 2: Exhibit 2 is the declaration of Donna Stern, consisting of a vague and confusing account of an "investigation" that plaintiff Operation King's Dream (OKD) allegedly performed into the knowledge and opinions of petition signers. This exhibit as a whole should be excluded, because its crucial portions are either hearsay or otherwise inadmissible. First, the race of any of the signers allegedly contacted can only be inferred (to the extent it can be inferred at all) from the hearsay claim that the signers contacted were from "cities whose populations are from 60 to 99 percent black, according to the most recent census," or the claim that "many" were from "virtually all black" zip codes in Detroit. ¶¶ 5, 8. Even if the "census" referred to is the U.S. Census and qualifies under the public records exception, a foundation is lacking for the declarant's opinion about how its findings apply to particular cities, and she merely asserts that, rather than explains how, she "personally knew" certain zip codes in Detroit "to be virtually all black." ¶ 8. (In any event, that signers contacted were from cities that were "from 60 to 99 percent" black is, without more, very little if any indication that this percentage was reproduced in the group of signers.) Second, the final, most crucial paragraph – *viz.,* "[i]n total, the investigators reported to me that they found one person from those cities who had signed the petition knowing that it was opposed to affirmative

action" – consists of hearsay within hearsay, not admissible under any exception. ¶ 11; Fed. R. Evid. 801-807. Absent this paragraph, the declaration is devoid of probative value.

Exhibit 4: This exhibit is a letter from Michigan Circuit Court Judge Robert L Ziolkowski to Shanta Driver of BAMN, in which he states that he signed a petition for the Proposed Amendment based on "false" "representations" by a circulator. It is unclear from the letter exactly what those representations were. This letter should be excluded as unsworn. Fed. R. Evid. 603. Even if the letter as a whole is not excluded, the vague hearsay in its last sentence – "[w]hen I confronted her about the misrepresentations, she said that was what she was told to say when she was hired to circulate the petition" – should be.

Exhibit 6: This is the statement of Heidi Osgood, in which she claims to have observed a circulator gaining signatures to put the Proposed Amendment on the ballot. Two portions of this statement should be excluded on grounds of lack of personal knowledge. First, the declarant states, "As a reporter for the Michigan Citizen and as a former host of a talk show in Detroit, I knew she [the circulator] was lying [when she allegedly told people that the initiative would "protect affirmative action"]. The declarant lacks the requisite credentials to render an expert opinion, and gives insufficient foundation for a lay opinion, about whether the initiative is for or against "affirmative action," much less what was in the mind of the circulator. Fed. R. Evid. 602, 701, 702. More importantly, the declarant's claim that "I observed [the circulator] obtain signatures by means of this lie" was not based on her personal knowledge. The declarant does not

state how she knew the motives, or knowledge, of the persons signing the petition. She does not even state that they signed it without reading it.

Exhibit 7: This exhibit consists of the transcript of selected testimony before MCRC by three persons who claimed that they signed or were approached about a petition. The entire exhibit should be excluded as irrelevant, because evidence is lacking that the petition they signed or were approached about was the petition relating to the Proposed Amendment. Fed. R. Evid. 402. Indeed, one of these witnesses, Harry Campbell, did not read the petition he signed, which he never identified as the petition for the Proposed Amendment, and indicated that he signed it approximately four or five months before testifying. Pp. 12-15. Since he testified on May 22, 2006, the likelihood is that he signed whatever petition he did sign sometime in January or February of 2006, long after the petition for the Proposed Amendment had been filed. Similarly, Lupe Ramos-Montigny never read the petition she signed, and she did not identify it as the petition for the Proposed Amendment. Pp. 40-42. And Theodus Bates never testified that he signed any petition, nor does he testify that the petition he was approached about and read was the one for the Proposed Amendment. Pp. 16-19.

Exhibit 8: This exhibit consists of more transcripts of testimony from persons who claimed that they signed or were approached about a petition. The testimony of eight of them, Ruthie Stevenson, Bernita King, Turqois Wise-King, Ken Gray, Kelvin Jackson, Mark Bryant, Lawrence Fears, and Martha Cuneo, should be excluded as irrelevant, since evidence is lacking that the petition they testified about was the one for the Proposed Amendment. Also, Ruthie Stevenson's reading of another person's

affidavit into the record should be excluded as hearsay. Pp. 9-10. And plaintiff Martha Cuneo testified outside of her personal knowledge when she stated, "I can't understand how so many people could have signed this petition in error without some kind of encouragement such as I was given." P. 60.

Exhibit 9: This exhibit consists of more transcripts of testimony from persons who claimed they signed or were approached about a petition. As with Exhibit 7 (and most of Exhibit 8), Exhibit 9 should be excluded in its entirety on grounds of relevance, because evidence is lacking that the petitions in question related to the Proposed Amendment. None but one of these witnesses even alleged the date on which he or she signed a petition, and none identified it as a petition to eliminate race and sex preferences, or gave any other indication that the petition in question was the one about the Proposed Amendment. Furthermore, no foundation is discernible for Willie Hill's opinion that he was lied to by a circulator who told him that the petition was in support of affirmative action, nor for Marion Lee's opinion that the petition she read was designed to deceive. Pp. 53, 84. Finally, the latter witness's hearsay accounts of what alleged petition signers told her over the telephone should be excluded. Pp. 84-86.

Exhibit 10: This exhibit consists of more transcripts of testimony before MCRC. For various reasons, much of it should be excluded. The testimony of Tiffany Jones is irrelevant. The substance of her testimony was merely that at the Student Activities Center at Central Michigan University, where an event was being held by the Organization for Black Unity in the fall of 2004, a circulator of a petition approached her

and stated that the petition was "for civil rights." The witness refused to sign the petition, which she did not identify as the petition for the Proposed Amendment. Pp. 8-10.

The first page and last several pages of the testimony of the Reverend Nathaniel Smith are missing from the exhibit, so there is a lack of evidence that his testimony was sworn. In essence, this witness stated that he circulated a petition that he never identified as the petition for the Proposed Amendment, after persons working for the company that hired him told him that the initiative was pro-civil rights. Not only is his testimony thus irrelevant, but he lacked a basis in his personal knowledge for his statements about the motives of petition signers and that "half the circulators were told a lie." Pp. 44-45.

The testimony of Shirley Schwartz (the final pages of which, like those of the Reverend Smith, are missing) is also irrelevant. She merely testified that in the spring of an unidentified year, while at an outdoor function on University of Michigan campus, she observed a woman asking people to sign a petition "for affirmative action." Pp. 58-59. She did not testify that she read the petition, and she did not identify it as the petition for the Proposed Amendment. Also, her opinion that all of the people in a "half hour long" line waiting to sign the petition were "misled" lacks foundation. P. 59; Fed. R. Evid. 701.

The testimony of Jevon Cochran, an organizer for plaintiff OKD, consists of hearsay accounts of persons he spoke to on the telephone. Pp. 61-65. Likewise, the testimony of Joyce Schon, an organizer for BAMN and an investigator for plaintiff OKD, consists entirely of hearsay, pp. 64-70, and a political speech containing opinions about matters outside of her personal knowledge, including her opinion that "the . . . . circulators" targeted minority voters "to politically cover the scam" engendered by the

Proposed Amendment's allegedly deceptive language, pp. 70-72. Finally, Dario Medrano's testimony should be excluded as irrelevant, because it is entirely unclear that the petition he observed people signing was the petition for the Proposed Amendment. Pp. 73-76.

Exhibit 12: This is the declaration of Exie Chester, in which she describes being hired to circulate and circulating a petition. This statement is unsworn.

Exhibit 13: This is the declaration of Dana Clowney, who claims that he circulated the petition for the Proposed Amendment. His incompetent statement imputing motives to signers in ¶ 3 ("I obtained signatures on this petition from black citizens in Detroit by telling them that it would support affirmative action and that it would assist black students to get into college") should be excluded.

Exhibit 14: This is the declaration of Joseph Henry Reed, who claims that he circulated the petition for the Proposed Amendment. The declarant's statement in ¶ 4 that he was given "instructions" by "the MCRI" should be excluded as incompetent. The declarant does not explain how he had personal knowledge that the persons who hired him were affiliated with the Committee.

Exhibit 15: This is the declaration of Lavon Marshall, who claims that he circulated the petition for the Proposed Amendment. This statement should be excluded as unsworn. Even if it is considered, his incompetent statement imputing motives to signers in ¶ 17 ("I then misled several hundred people into signing") should be excluded.

Exhibit 16: This is the declaration of Elitha Marie Shumpert, who claims that she circulated the petition for the Proposed Amendment. She claims that her

"supervisors" told her that the initiative was "not against affirmative action." ¶ 11. In ¶ 18 she states, "I was lied to about the real purpose of this petition and in turn misled hundreds of others into signing . . . ." The latter paragraph should be excluded, because the declarant gives no foundation for her opinion that the initiative was against affirmative action, nor for her opinions about the motives of either her "supervisors" or those who signed the petition.

Exhibit 17: This is the declaration of Christi Lynn Sanders, who claims that she circulated the petition for the Proposed Amendment. The incompetent statement in ¶ 5 (on p. 2) that "[t]he petition language is purposely misleading" should be excluded.

Exhibit 18: This is the declaration of June Scroggins, who claims that she circulated the petition for the Proposed Amendment. The incompetent statement in ¶ 14 that "[t]he petition language is purposely misleading" should be excluded.

Exhibit 19: This is the declaration of Lerwonia Summers, who claims that she circulated the petition for the Proposed Amendment. This statement should be excluded as unsworn.

Exhibit 21: This is the affidavit of Heather Miller, who recounts her conversations with two alleged circulators of the petition for the Proposed Amendment. This exhibit should be excluded, because everything of substance in it is inadmissible hearsay.

Conclusion

By presenting evidence that was before the MCRC, and very little else, plaintiffs are asking this Court simply to adopt the show-trial evidentiary standards that the MCRC

depended on to reach its foreordained, politically motivated "findings." For the reasons stated above, neither those findings nor the inadmissible evidence purportedly in support of them should be considered.

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Dated: August 10, 2006

Certificate of Service

I hereby certify that on August 10, 2006, I electronically filed the foregoing motion in limine to exclude portions of plaintiffs' evidence on their motion for a preliminary injunction, with the memorandum of law in support thereof, with the Clerk of the Court using the CM/ECF system, which sent a Notice of Electronic Filing to the following persons:

George B. Washington (attorney for plaintiffs)

Heather S. Meingast (attorney for defendants Terry Lynn Land, *et al.)*

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