IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OPERATION KING'S DREAM, *et al.*,	:	
Plaintiffs-Appellants,	:	Appeal No. 06-2144
v.	:	
WARD CONNERLY, JENNIFER GRATZ, MICHIGAN CIVIL RIGHTS INITIATIVE, TERRY LYNN LAND, *et al.*	:	
Defendants-Appellants.	:	
	:	
	:	

OPPOSITION OF DEFENDANTS-APPELLEES CONNERLY, GRATZ, AND MICHIGAN CIVIL RIGHTS INITIATIVE COMMITTEE TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION PENDING APPEAL

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Defendants-appellants Ward Connerly, Jennifer Gratz, and Michigan Civil Rights Initiative Committee (the "Committee"), pursuant to Circuit Rule 27, submit this opposition to plaintiffs' motion ("Mot.") for a preliminary injunction pending appeal.

RELEVANT HISTORY

Under Michigan law, a proposed constitutional amendment can be placed on the ballot by the collection of a sufficient number of signatures on petitions asking that the state do so. Mich. Const. art. 12, § 2. The proposed amendment to the Michigan Constitution (the "Proposed Amendment") at issue in this case states as follows:

ARTICLE 1, SECTION 25: Civil Rights.

> (1) The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting.
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> (2) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
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> (3) For the purposes of this section "state" includes, but is not necessarily limited to, the state itself, any city, county, any public college, university, or community college, school district, or other political subdivision or governmental instrumentality of or within the State of Michigan not included in sub-section 1.
>
> (4) This section does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state.
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> (5) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex that are reasonably necessary to the normal operation of public employment, public education, or public contracting.
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> (6) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of Michigan's anti-discrimination law.

> (7) This section shall be self-executing. If any part or parts of this section are found to be in conflict with the United States Constitution or federal law, the section shall be implemented to the maximum extent that the United States Constitution and federal law permit. Any provision held invalid shall be severable from the remaining portions of this section.
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> (8) This section applies only to action taken after the effective date of this section.
>
> (9) This section does not invalidate any court order or consent decree that is in force as of the effective date of this section.

See Ex. A, hereto. (Unless otherwise indicated, all exhibit references are to the exhibits to this opposition brief.)

In January 2004, the Michigan Civil Rights Commission ("MCRC") passed a resolution opposing the Proposed Amendment. *Inter alia*, that resolution stated that "whereas, the [Proposed Amendment] represents an attempt to mislead Michigan voters regarding the issue of discrimination by state entities . . . the Michigan Civil Rights Commission vigorously opposes the [Proposed Amendment] designed to eliminate and undermine the basic principles of equal treatment under the law as set forth in the Michigan Constitution." In the press release announcing the resolution, the Chair of the Commission stated that the Proposed Amendment "is a shameful attempt to confuse and manipulate unsuspecting Michigan voters. [It] is to civil rights what an ax is to a tree. Don't let these extremists tear down our state's great tradition of enabling and protecting diversity." Ex. B; *see* http://www.callsam.com/ bernstein_lawyers_in_the_news/supporting_equal_ opportunity_for_all.html; Ex. D at 198-200.

A month earlier, the Board of State Canvassers had approved the form of the petition. The opponents of the Proposed Amendment, led by the Coalition To Defendant Affirmative Action & Integration, and Fight for Equality by Any Means Necessary ("BAMN"), filed an action in Michigan state court seeking mandamus and declaratory relief. The circuit court rejected

BAMN's argument that the petition's summaries of the Proposed Amendment were misleading or violated statutory requirements, but did hold that the petition failed to conform with a Michigan statute (MCL 168.482(3)) requiring the petition to state that it would alter an existing provision of the constitution. *Coalition To Defendant Affirmative Action & Integration, and Fight for Equality by Any Means Necessary (BAMN) v. Bd. of State Canvassers*, 262 Mich. App. 395, 400-01, 686 N.W.2d 287, 290 (Ct. App. 2004) (hereinafter "*BAMN v. Bd. of Canvassers*"). The Court of Appeals reversed the circuit court's holding that the petition violated MCL 168.482(3), but agreed with the circuit court that the summaries on the petition were accurate and not misleading. *Id.* at 406 ("we find that there is simply no merit to plaintiffs' contention that the language is propaganda or misleading. The summaries that plaintiffs find objectionable do not introduce any information that is not found in the language of the proposed amendment").

The Court of Appeals ruled on June 11, 2004. At that time, it was impracticable to gather the needed signatures for the 2004 election ballot. *See* MCL 168.471 (petitions must be filed at least 120 days before the election). Accordingly, from July 6, 2004 to January 6. 2005, petitions for the Proposed Amendment were distributed and signatures gathered for placement on the ballot in 2006. (Under Michigan law, signatures dated more than 180 days before being filed are presumptively void. MCL 168.472a.) The petitions were filed on January 6, 2005. Ex. A; Ex. C (Gratz Statement) ¶ 14.

The Committee is a ballot question committee that had been formed to support the Proposed Amendment.[1] It had two basic methods of trying to procure signatures. First, it asked

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[1] Michigan's campaign finance law defines a "ballot question committee" as a "committee" acting in support or opposition to a ballot question (but that does not try to influence the election of candidates). MCL 169.202(3). *See also* MCL 169.203(4) (defining "committee" as a "person" (continued...)

volunteers to go around and collect signatures. Second, it retained a professional petition drive organizer to assist it. Ex. C (Gratz St.) ¶ 8; Ex. D at 266-67 (Gratz Test.).

In July 2004, the Committee asked people who had previously expressed interest in helping if they would circulate petitions. If they answered affirmatively, the Committee sent them petitions with a few basic written guidelines about gathering signatures and the general purpose of the Proposed Amendment. The Committee did not supervise these people in any meaningful way, and, indeed, it would have had no way of doing so. The Committee certainly did *not* tell them that the Proposed Amendment was for affirmative action, getting minority applicants into colleges, or anything along those lines. Ex. C (Gratz St.) ¶ 9; Ex. D at 267 (Gratz Test.).

The paid effort was led by a company called National Signature Management ("NSM"), which the Committee retained as an independent contractor. The lead officers or employees in that company had significant experience in collecting signatures for petitions on many kinds of propositions. The Committee's personnel lacked that experience, and did not tell NSM how to do its job. The trainers told the circulators that the Proposed Amendment was designed to require state universities and agencies to treat people equally without regard to race or sex. Ex. C (Gratz St.) ¶ 12; Ex. E (Verougstraete St.) ¶¶ 5-6; Ex. F (Lindsay St.) ¶ 5; Ex. D at 245, 251-52 (Verougstraete Test.) and 266 (Gratz Test.).

The paid circulators all signed a contract with NSM, which made them independent contractors of NSM. Ex. E (Verougstraete St.) ¶ 4.; Ex. F (Lindsay St.) ¶ 7; Ex. G. There were

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[1](...continued)
that tries to influence the actions of voters); MCL 169.211(1) (defining "person" as, *inter alia*, a "group of persons acting jointly").

more than 600 paid circulators who handed in petitions, as well as an unknown number of volunteers. Ex. D at 248-49 (Verougstraete Test.) and 267 (Gratz Test.)

As petition circulators tried to collect signatures, those opposing the Proposed Amendment urged people not to sign. BAMN handed out "Decline To Sign" fliers that stated (among other things):

> * "This petition would resegregate the University of Michigan and other colleges & universities throughout the state"
>
> * "This petition would *outlaw all affirmative action* for women and minorities in Michigan."
>
> * The petition's "aim is to overturn the laws and the programs that the Civil Rights Movement of the 1950's and 1960's secured in Michigan."
>
> * "This is a racist initiative."
>
> * "Jennifer Gratz [is] the racist who sued the University of Michigan undergraduate school against its affirmative action policy."
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> * "The purpose of the anti-affirmative action initiative is to drive minority students out of U of M and other colleges and universities in Michigan."
>
> * "The affirmative action program that Jennifer Gratz forced the University of Michigan to abandon included socioeconomic affirmative action."
> (Ex. H, emphasis in original)

The Committee submitted petitions on January 6, 2005 that had a total in excess of 508,000 signatures. The Secretary's staff eliminated approximately 2200 signatures for various defects, and took a sample of 500 signatures for analysis from the rest. Ex. I. BAMN and Operation King's Dream ("OKD"), an offshoot of BAMN, filed challenges to many of the signatures from that sample on April 18, 2005. *Michigan Civil Rights Initiative v. Bd. of State Canvassers*, 268 Mich. App. 506, 512, 708 N.W.2d 139, 142 (Ct. App. 2005). Among other things, they claimed that the signatures were procured through fraud, that the petition language

was deceptive, and that the petition drive was funded by improperly-reported out-of-state interests.

The staff issued its report on July 13, 2005. *Id.* Of the 130 challenges raised by the opponents for failure to comply with state law, the staff rejected more than 2/3 (88); it determined that 90% of the signatures in the sample (and, accordingly, more than 455,300 of the total) were valid. Since 317,757 valid signatures were needed for the Proposed Amendment to be placed on the ballot in 2006, there was an excess of more than 137,500 valid signatures based on traditional measures of validity. All of the remaining challenges were based upon purported "misrepresentations" by circulators to signers about the nature of the Proposed Amendment. The staff noted that there were only thirteen signatures from the sample challenged for this reason based upon personal statements of the signer or circulator. It also noted that, in order to reach the threshold to disqualify the petition, the Board of State Canvassers would have to find "improper" signatures based upon statements executed by people who claim that they spoke to the "defrauded" signer on the phone, and also assume that *every* signature procured by a circulator for whom any *one* signature was challenged were also invalid. Ex. I.

The Board of State Canvassers held a hearing on July 19, 2005 to discuss the challenges. BAMN, OKD, and the Committee all made presentations at the hearing. After the hearing, a board member moved that the Board conduct an investigation into the allegations of fraud, but that motion failed to pass. A second motion to certify the petition also failed to pass. Consequently, the Committee filed a complaint for mandamus and sought a directive from the Court of Appeals to the Board to certify the petition for placement on the November 2006 ballot. OKD intervened and sought an order instructing the Board that it could investigate whether the Committee obtained signatures by fraud. The Court of Appeals concluded that the Board's

authority was limited to determining whether the petition's form complied with statutory requirements and whether there were sufficient signatures to warrant certification, and that it had no authority to investigate the manner by which the signatures were procured. *Michigan Civil Rights Initiative*, 268 Mich. App. at 516-17. The Court added that an investigation into the underlying conversations that led to people signing the petition would "undermine[] the constitutional provision that reserves for the people of the state of Michigan the power to propose laws through ballot initiative." *Id.* at 520.

BAMN and Operation King's Dream moved for reconsideration. The Court of Appeals denied that motion in an order dated December 7, 2005, explaining that its previous order "simply reaffirms the people's Constitutional right to vote [to amend the Michigan Constitution]." Several third party intervenors were fined $ 500 each "for filing a motion grossly lacking in requirements of propriety." Ex. J.

In January 2006, the MCRC began an "investigation" into the fraud -- two years after its resolution and press release attacking the Proposed Amendment and its supporters. *See* discussion *supra* at 2. In June 2006, it issued a report, in which it claimed that there was widespread fraud involved in the procurement of the signatures on the petition for the Proposed Amendment, but did not attribute that fraud to the Committee. Mot. Ex. 3 at 6. The Michigan Supreme Court earlier had denied BAMN's and OKD's request for leave to appeal, *Michigan Civil Rights Initiative v. Bd. of State Canvassers*, 474 Mich. 1099, 711 N.W.2d 81 (1986), but those parties asked for reconsideration based upon the MCRC's report. The Court denied that motion on July 13, 2006. *Michigan Civil Rights Initiative v. Bd. of State Canvassers*, 2006 WL 1966737 (July 13, 2006). Justice Markman issued an opinion concurring in the result, stating:

> Assuming the accuracy of everything set forth in the [M]CRC

> report, the signers of these petitions did not sign the oral representations made to them by circulators; rather they signed petitions that contained the actual language of the [Proposed Amendment]. This Court does not sit in review of the hundreds of thousands of individual conversations that may have occurred between petition circulators and signers. . .

PROCEDURAL BACKGROUND

Prior to the Michigan Supreme Court's decision denying the motion for reconsideration, OKD and others filed the instant action, claiming that the Committee, Gratz, and Connerly (the "Citizen Defendants") "engaged in a systematic campaign of racially-targeted fraud during their effort to secure signatures for their proposed Constitutional amendment," Complaint ¶ 10, which violated Section 2 of the Voting Rights Act (the "Act"). Specifically, the complaint alleges that petition circulators claimed that the Proposed Amendment was "for" or "in favor of" affirmative action, whereas the proposed amendment was (according to the complaint) actually designed to end all affirmative action. Complaint ¶¶ 20-22, 32. The State Defendants (Terry Lynn Land, *et al.*) and the Citizen Defendants moved to dismiss on various grounds, and plaintiffs moved for a preliminary injunction.

The Citizen Defendants also moved *in limine* to strike much of the paper evidence plaintiffs introduced on their preliminary injunction motion, including the MCRC report on the ground that, because the MCRC itself was biased, the report was inadmissible hearsay falling outside the exception of FRE 803(8)(C). *See* discussion at 2, *supra*. The Court held an evidentiary hearing on the motion for a preliminary injunction on August 17, 2006. During that hearing, on the basis of *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988), it admitted the

MCRC report.[2] It had oral argument on all of the outstanding motions other than the motion *in limine* the next day, August 18, 2006.

The Court below denied plaintiffs' motion for a preliminary injunction, and granted both sets of defendants' motion to dismiss. Based upon its assessment that the term "affirmative action" had a fixed meaning (Mot. Ex. 1 ("Op.") 4 n.1), that the purpose of the Proposed Amendment was to ban "affirmative action," that voters should have been apprised of that fact (*id.*), and that the Citizen Defendants "disguised" the Proposed Amendment with the terms "preference" and "discrimination" (*id.* at 21), the Court concluded the Citizen Defendants were "aware of and encouraged" a widespread pattern of fraud in which circulators told potential signers that the Proposed Amendment was "in favor of" affirmative action (*id.* at 1, 21). Nonetheless, the Court denied plaintiffs' motion for a preliminary injunction because they had not demonstrated that the fraud was "racially-targeted" in intent or effect, that there was no established "inequality of access," and, accordingly, there was no violation of the Act. *Id.* at 29-30. The Court also found that even if all of the "disputed Black votes" [sic] were stricken, there would still be an adequate number of "votes" to require certification of the petition under state law. *Id.* at 30.

LEGAL ARGUMENT

THE MOTION FOR A PRELIMINARY INJUNCTION SHOULD BE DENIED

A motion seeking an injunction pending appeal must normally be made first to the district

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[2] According to the Court, *Beech Aircraft* held that "just because . . . a public agency reaches a conclusion, that does not make it inadmissible." Ex. D at 204. There is no such holding in *Beech Aircraft*, and trustworthiness under FRE 803(8)(C) was not an issue there. The Citizen Defendants intend to file a conditional cross-appeal challenging the admission of this obviously-biased report.

court. Fed. R. App. P. 8(a)(1)(C). It may be made to an appellate court only upon a showing that moving first in the district court would be impracticable or when the district court has "failed to afford the relief requested." Fed. R. App. P. 8(a)(2)(A). A motion in the district court seeking preliminary injunction pending *trial* does not meet the requirements of the rule. *Chemical Working Group v. Dep't of the Army*, 101 F.3d 1360, 1361-62 (10th Cir. 1996). Plaintiffs did not move for a preliminary injunction pending appeal in the district court and have not shown why it would be impracticable to do so, and, accordingly, they have not met the requirements of Rule 8(a). *Baker v. Adams Cty./Ohio Valley School Bd.*, 310 F.3d 927, 931 (6th Cir. 2002).

In evaluating whether an injunction is warranted, the Court considers and balances four traditional factors: whether movants have demonstrated a *strong* likelihood of success on the merits, whether they would otherwise suffer an irreparable injury, whether the issuance of a preliminary injunction would cause substantial harm to others, and whether the public interest would be served by the issuance of an injunction. *Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir. 2000). *Charter Township of Muskegon v. City of Muskegon*, 303 F.3d 755, 759 (6th Cir. 2002) (four factor test used on motion for preliminary injunction pending appeal); *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd.*, 2002 WL 1806831, *1 (W.D. Mich. July 16, 2002).[3]

Preliminary injunctions are extraordinary remedies (*Leary*, 228 F.3d at 739); enjoining state elections are even more so, and courts have expressed a natural reluctance to interfere with such elections. *Southwest Voter Registration Education Project v. Shelley*, 344 F.3d 914, 918

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[3] Two of plaintiffs' five cases on the propriety of injunctive relief (Mot. ¶ 59) come from the Second Circuit, which only requires a showing of likelihood of success and irreparable harm. *E.g.*, *Bridgeport Coalition for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 274 (2d Cir. 1994).

(9th Cir. 2003) (en banc) (affirming refusal to enjoin upcoming gubernatorial recall and initiative election on ground that punch-card balloting violated Section 2 of the Act; "a federal court cannot lightly interfere with or enjoin a state election . . . The decision to enjoin an impending election is so serious that the Supreme Court has allowed elections to go forward even in the face of an undisputed constitutional violation"); *id.* at 919 ("our law recognizes that election cases are different from ordinary injunction cases . . . Interference with impending elections is extraordinary . . . "); *Chisom v. Roemer*, 853 F.2d 1186, 1189 (1988) (refusing to enjoin judicial election on ground that multimember district for electing judges violated Section 2; "`intervention by the federal courts in state elections has always been a serious business,' *Oden v. Brittain*, 396 U.S. 1210 (1969) (Black, J., opinion in chambers), not to be lightly engaged in"); *Ajax Gaming Ventures v. Brown*, 2006 WL 2302192, *2 (D.R.I. Aug. 8, 2006) ("Enjoining an election is one of the most drastic powers of equity within the arsenal of a federal district court . . . prudence requires enormous discretion in its exercise"); *Dillard v. Crenshaw Cty.*, 640 F. Supp. 1347, 1362 (M.D. Ala. 1986) (Mot. ¶¶ 59-60, 63) (although at-large elections for county commissioner likely violated Section 2, court denies motion for a preliminary injunction requiring new plans for elections or postponing election until new plans are created).

The lower court's determination that plaintiffs are not entitled to a preliminary injunction is reviewed under an abuse of discretion standard.

A. MOVANTS ARE UNLIKELY TO SUCCEED ON THE MERITS

The opinion of the district court is one of a kind. It is the *only* opinion ever holding that statements by private persons can violate Section 2 of the Act, the *only* opinion ever holding that *any* conduct related to an initiative petition can violate Section 2 of the Act, and the *only* opinion ever holding that a "fraud" claim can be based upon representations about any hot-button and

amorphous political phrase such as "affirmative action." As shown below, there is plenty of case law holding just the opposite, and, the district court's finding of a "widespread pattern of fraud" is a product of its own biases.

Despite the district court's willingness to create new law, it still denied plaintiffs' motion for a preliminary injunction, and dismissed their case, because they had no evidence that the alleged widespread pattern of fraud was *discriminatory* in either intent or results. Plaintiffs do nothing to suggest how they will show that the district court abused its discretion in reaching this determination. To the contrary, they assert only that a voter practice is not immune from liability simply because whites are also victimized by it. Mot. ¶¶ 53-54. This is true, but quite beside the point. It is plaintiffs' burden to show that the "practice" had a disparate result (as practices such as literacy tests, *see* Mot. ¶ 54 n.8, surely did); at a minimum, they needed to show that a statistically significant higher percentage of approached blacks were deceived than approached whites, or, perhaps, that the ratio of "deceived" black signers to all black signers is significantly higher than the ratio of "deceived" white signers to all white signers. And, of course, such disparate impact alone would not be sufficient to demonstrate a Section 2 violation. *E.g.*, *Johnson v. Governor of Florida*, 405 F.3d 1214, 1228 (11th Cir. 2005) ("Section 2 does not prohibit all voting restrictions that may have a racially disproportionate effect"); *id.* n.26 (totality of circumstances test requires "courts [to] consider a non-exhaustive list of objective factors" detailed in a 1982 Senate Report); *Smith v. Salt River Project Agricultural Improvement and Power Dist.*, 109 F.3d 586, 594 n.6, 595, 596 n.8 (9th Cir. 1997). Plaintiffs did not even show disparate impact, and cannot hope to meet their burden simply by *not putting on evidence* of how non-minorities were approached, much less (as they did) with evidence that they were approached in the same way as minorities.

Nor do plaintiffs do anything to show that the district court abused its discretion in concluding that even if all of the "disputed Black" signatures were stricken from the petition, there would still be an adequate number of votes to require certification.[4] More importantly, plaintiffs have done nothing to identify the number of signatures, by signers of any race, that should be stricken (other than, presumably, the signatures of its handful of witnesses and those who signed the petition of its two circulator witnesses, all of which would amount to about 1,000). There were more than 137,500 *excess* signatures on the Proposed Amendment (*i.e.*, more than the minimum needed to qualify for the ballot). Thus, even if a violation of the Act had been found, plaintiffs still had not demonstrated their entitlement to the relief they sought. The court below did not abuse its discretion in so concluding.

Finally, in order to show a likelihood of success on the merits of their appeal, plaintiffs would have to show that this Court could not affirm the judgment of the court below on any number of grounds that the court below rejected. In fact, any number of conclusions by the district court were contrary to the weight of authority, including the entire basis for its conclusion that there was a widespread pattern of fraud for which the Citizen Defendants were responsible. We briefly address three such issues.

1. Fraud And The First Amendment. -- The court below concluded that the Citizen Defendants "and its circulators engaged in a pattern of voter fraud by deceiving voters into

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[4] The number of "disputed Black" signatures was a creature of plaintiffs' imagination in two ways. First, they submitted a chart created by OKD's own treasurer, purporting to identify how many people in majority-black cities signed the petition. Mot. ¶ 38 & Ex. 4. Then, assuming all of those people were actually black, they asserted that no blacks knowingly would have signed a petition that was "against affirmative action." The court explicitly (and correctly) rejected this second argument, Op. 30, leaving plaintiffs with nothing at all to identify how many "disputed Black" signatures there were.

believing that the petition supported affirmative action" because (1) the "conduct of the circulators went beyond mere `puffery' and was in fact fraudulent because it objectively misrepresented the purpose of the petition," and (2) the Citizen Defendants "were aware of and encouraged such deception by disguising their proposal as a ban on `preferences' and `discrimination,' without ever fulfilling their responsibility to forthrightly clarify what these terms were supposed to mean." Op. 21. The underlying assumptions or findings were that (1) the phrase "affirmative action" has "a commonly understood definition" (Op. 4 n.1), (2) the Citizen Defendants' use of the actual language of the Proposed Amendment (precluding "discrimination" and "preferences" based upon race and sex) disguised its true meaning, and (3) the Citizen Defendants had some duty to disclose akin to that imposed upon those selling securities or used cars. These propositions are wrong as a matter of law, as is the district court's finding of a "pattern of voter fraud."

The court below provided no citation or evidence to suggest that the phrase "affirmative action" has so fixed and definitive a meaning that a statement that the Proposed Amendment was "for" affirmative action was a provable fact that could be deemed fraudulent. Every court and commentator that ever has considered the issue has reached the contrary conclusion. *See Coalition for Econ. Equity v. Wilson*, 122 F.3d 692, 700 (9th Cir. 1997) ("the term `affirmative action' is an `amorphous, value laden term,' `rarely defined . . . so as to form a common base for intelligent discourse'") (quoting *Lungren v. Superior Court*, 48 Cal. App. 4th 435, 442, 55 Cal. Rptr. 2d 690, 694 (Ct. App. 1996)); *Lungren*, 48 Cal. App. 4th at 442-43 (Attorney General acted properly in omitting the term "affirmative action" from description of Proposition 209; "we cannot fault the Attorney General for refraining from the use of such an amorphous, value-laden

term in the ballot title and ballot label").[5] In fact, the phrase is frequently used to mean vigorous efforts to root out disparate treatment and gratuitous qualifications that have disparate impact. *See* Exec. Ord 10,925, § 301(1) (1961) (requiring contractors to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin"); *Bazemore v. Friday*, 478 U.S. 385, 408-09 (1986) (state agency that maintained segregated clubs for disseminating information on agriculture and home economics met Department of Agriculture regulation calling for "affirmative action" to overcome the effects of its prior discrimination when it removed all racial barriers to membership); *Sussman v. Tanoue*, 39 F. Supp. 2d 13, 23-24 (D.D.C. 1999) (concluding that "FDIC's affirmative action does not use quotas or lead to preferential treatment"); *Parents Involved in Community Schools v. Seattle School District No. 1*, 149 Wash. 2d 660, 677, 72 P.2d 151, 160 (2003) (identifying the "difference between `preference programs' and other types of affirmative action measures"). By eliminating race and sex preferences, and forcing state agencies to reassess their qualifications and to use non-discriminatory means of searching for the best candidates, the Proposed Amendment will improve the quality of "affirmative action"

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[5] *See also, e.g.*, John Valery White, *What Is Affirmative Action?*, 78 Tul. L. Rev. 2117, 2117 (2004) ("There is no rigorous definition of affirmative action"); *id.* at 2168-69 ("The academic literature offers no better understanding of what affirmative action is. Indeed, very little effort is made to define affirmative action, and no serious conceptual definition appears in the literature in recent years"); Deborah C. Malamud, *Values, Symbols And Facts In The Affirmative Action Debate*, 95 Mich. L. Rev. 1668, 1692-94 (1997) (noting various theories in which, *inter alia*, disparate impact analysis of job requirements or the use of statistics generally to smoke out discrimination would be "affirmative action"; and others in which the conscious use of race as a hiring criteria would *not* be "affirmative action"); W. Brevard Hand, *Affirmative Action: La Mort De La Republique? A Second Cry From The Wilderness*, 48 Ala. L. Rev. 799, 800 & n.2 (1997) (senior district judge in Alabama breaks down the phrase into its component words, and concludes that "affirmative action" means "assertive behavior"; "No one can deny that some form of affirmative action, or assertive behavior, has been around since what scientists now call the Big Bang").

overall. It *does* favor "affirmative action," and it is certainly permissible for people to think so.

Indeed, one could argue that the district court's own *ipse dixit* claim that the purpose of the Proposed Amendment is to "ban affirmative action" (Op. 4 n.1) was far more misleading than anything it attributed to the Citizen Defendants. *Lungren*, 48 Cal. App. 4th at 442 (because "affirmative action" encompasses programs that do not involve racial or gender preferences, "any statement to the effect that Proposition 209 repeals affirmative action programs would be overinclusive and hence `false and misleading.' (Elec. Code § 9092)."). *See also supra* at 5 (describing statements of opponents).[6]

Second, the proposition that the Citizen Defendants "disguised" their proposal as a ban on "preferences" and "discrimination" (and thus they were "aware of" and "encouraged" the circulators' statements about "affirmative action") raises two obvious problems. The first is "issue preclusion" and the full faith and credit statute (28 U.S.C. § 1738). The Michigan Court of Appeals rejected BAMN's argument that a summary on the petition itself, describing the Proposed Amendment as one "to prohibit . . . state entities from discriminating or granting preferential treatment based on race, sex . . . ," was misleading. *BAMN v. Bd. of Canvassers*, 262 Mich. App. at 399, 406 ("we find that there is simply no merit to plaintiffs' contention that the [summary] language is propaganda or misleading"). (Curiously, the district court's long description of the state proceedings omits this holding.) There are several plaintiffs here who

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[6] The court below relied only upon the ballot summary language chosen by the state to support this conclusion. *See* Op. 4 n.1; Op. 8 n.5. In fact, the ballot language demonstrates just the opposite. Op. 8 n.5 ("to ban affirmative action programs *that give preferential treatment* . . . ") (emphasis added). If the purpose of the amendment were to ban *all* affirmative action, the italicized phrase would be unnecessary. *State v. Webb*, 324 Or. 380, 387-88, 927 P.2d 79, 83 (1996). In any event, the very notion that proponents of a constitutional amendment can only describe it in terms approved by the state is so foreign to the First Amendment and our tradition that it does not warrant discussion.

also were plaintiffs in state court, and others are in privity with *BAMN*. *See, e.g.*, http://www.bamn.com/operation-kings-dream.asp (OKD is "a civil rights campaign launched by Michigan BAMN"). *Dillard v. Crenshaw Cty.*, 640 F. Supp. at 1364 n.8. More substantively, the court below essentially concluded that if the Citizen Defendants used the words of the Proposed Amendment (*i.e.*, that it would prohibit "preferences" and "discrimination" based upon race and sex) without describing them further, it constituted aiding and abetting fraud. Again, this proposition is wholly new, without any support in the law, and utterly inconsistent with the First Amendment. Indeed, in order to satisfy the court below, the Citizen Defendants would have had to describe the Proposed Amendment in terms that the *Lungren* court had declared were "false and misleading."

The speech at issue here is political speech to change government policy, and is at the very core of the First Amendment. There is no "full disclosure" requirement for political speech, much less one that requires political advocates to describe their proposals using only their opponents' words. Indeed, it is questionable whether *any* speech in that context (even concerning provable facts) could be regulated. *E.g.*, *State ex rel. Public Disclosure Comm'n v. 119 Vote No! Comm.*, 135 Wash. 2d 618, 632, 957 P.2d 691, 699 (1998) (law prohibiting false political speech made with actual malice violated the First Amendment). *See also id.*, 957 P.2d at 695 (quoting *Thomas v. Collins*, 323 U.S. 516 (1945) (opinion of Jackson, J.)):

> The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind . . . In this field *every person* must be his own watchman for truth because the forefathers did not trust any government to separate the true from the false for us.

See also O'Connor v. Superior Ct., 177 Cal. App. 3d 1013, 1019, 223 Cal. Rptr. 357, 361 (Ct. App. 1986) (refusing to extend California law on unfair business practices to statements made in

political campaign):

> In the context of political campaigns, almost any political speech might be viewed by an opposing candidate as `unfair' or `misleading.' Courts should not and, practically speaking, cannot be in the business of determining the fairness and unfairness of statements made in a political campaign. These matters should be left to the criticism of the public and press to assure a free and unfettered interchange of debate on public issues.

Federal judges cannot, through the Act or any other statute, police campaign speech. Phrases like "affirmative action" have not been copyrighted, and (for example) an advocate of a gay marriage proposal cannot be accused of fraud if he argues that his proposition is "defending marriage" or supporting "traditional values." Nor are federal courts in a position to analyze the "truth" of statements about John Kerry's or George Bush's military service records. In a democracy where free speech is valued, those questions are for the people.

2. Section 2 Does Not Reach The Conduct Of The Citizen Defendants. -- Section 2 prohibits actions taken by "States" and "political subdivisions," and the Citizen Defendants are neither. *Cf. Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 192 n.11 (1999) ("Nothing in this opinion should be read to suggest that initiative-petition circulators are agents of the State. Although circulators are subject to state regulation and are accountable to the State for compliance with legitimate controls . . . circulators act on behalf of themselves or the proponents of ballot initiatives"); *Ranjel v. City of Lansing*, 417 F.2d 321, 323 (6th Cir. 1969) ("The only purpose in naming the City as a partner [with petition circulators] was to establish state action inasmuch as private acts of discrimination are not unconstitutional"). The acts of private political campaigns are not subject to Section 2's proscriptions. *E.g.*, *Welch v. McKenzie*, 765 F.2d 1311, 1316 (5th Cir. 1985) (fraud committed against black voters did not violate the Act because "the fraudulent acts causing the deprivation were committed by [white candidate]

and his supporters, not by the county registrar . . . Because Section 2 only affords redress for voting practices `imposed or applied by any State or political subdivision,' [white candidate's] chicanery is not a Voting Rights Act infringement"); *Coleman v. Bd. of Educ. of the City of Mount Vernon*, 990 F. Supp. 221, 232 (S.D.N.Y. 1997) (letter that "warned voters to protect their property values by supporting white . . . candidates to the School Board" and phone calls "warn[ing] that if minority candidates were elected, they would undermine the quality of public education . . . and would cause a decline in property values" did not state a claim under Section 2 because "[t]hey were not implemented by any official actor with responsibility for conducting the elections"). *See also Montero v. Meyer*, 861 F.2d 603, 609-10 (10th Cir. 1988) (no violation of Section 203(c) of the Act, 42 U.S.C. § 1973aa-1a(c), requiring materials related to the electoral process to be written in the language of prevalent minorities; although state actors performed ministerial functions in approving petitions for circulation, Colorado law reserved the right to circulate a petition for the people and those who did so were not state actors); *Delgado v. Smith*, 861 F.2d 1489, 1495-96 (11th Cir. 1988) (where Florida constitution expressly reserves to the people the right to amend the constitution by initiative, the ministerial duties of state officials did not bring the distribution of petitions within Section 203(c).)

The court below relied primarily upon the "white primary" cases in reaching the conclusion that the Citizen Defendants were "States" for purposes of Section 2. Op. 26-28. But these cases have been limited to their facts, and have never been stretched to find a group of private citizens seeking political change liable under the Constitution or the Act. *California Democratic Party v. Jones*, 530 U.S. 567, 573 (2000) ("These cases [*Smith v. Allright*, 321 U.S. 649 (1944) and *Terry v. Adams*, 345 U.S. 461 (1953)] held only that, when a State prescribes an election process that gives a *special role* to *political parties*, it `endorses, adopts and enforces the

discrimination against Negroes that the parties (or, in the case of the Jaybird Democratic Association, organizations that are `part and parcel' of the parties . . .) bring into the process") (emphasis added); *Banchy v. Republican Party of Hamilton County*, 898 F.2d 1192, 1193, 1196 (6th Cir. 1990) (although Ohio law requires political parties to elect an "Executive Committee," it does not specify how, and Republican Party's system of electing ward chairmen by precinct executives in which some precinct executive plaintiffs were "denied the opportunity to participate in the circulation and signing of petitions for the selection of ward chairman" was not state action; distinguishing *Smith v. Allright* and *Terry v. Adams* because they "`merely hold that conducting an election is a governmental function and constitutes state action, no matter who actually conducts the election'") (quoting *California Republican Party v. Mercier*, 652 F. Supp. 928, 934 (C.D. Cal. 1986)); *Torres v. New York State Bd. of Elections*, 2006 WL 2505627, *17 (2d Cir. Aug. 30, 2006) ("Of *central importance* to the Court's finding of state action [in *Terry*], and hence constitutional protection, was the fact that the `only election that has counted in this Texas county for more than fifty years has been that held by the Jaybirds from which Negroes were excluded. The Democratic primary and the general election have become no more than perfunctory ratifiers of the choice that has already been made in Jaybird elections . . . '") (quoting *Terry*, 345 U.S. at 469) (emphasis added). The court below concluded that the Citizen Defendants "acted as part of the state's political machinery for choosing which issues would be placed on the state's general election ballot," Op. 27, but that cannot be sufficient to constitute state action. Voters act "as part of the state's political machinery for choosing" public policy and their representatives in government, and do so pursuant to considerable state oversight, but no one would contend that voters (or groups of voters) are state actors.

If Section 2 applies to private petitioners, then the acts of private parties distributing

petitions in areas not reflective of statewide demographics would violate Section 2, since (under the theory of the Court below) such a "skewed" distribution is a "political process" that would not be "equally open to participation" by members of a protected class. Since Section 2 covers some acts that unintentionally have disparate results, virtually *every* petition would be subject to a challenge under Section 2.

3. No One's Right To Vote Has Been Abridged Or Denied. -- A Section 2 violation can be found only when someone's right to vote has been abridged or denied. Since initiative petitions can only *expand* the choices one has on the ballot, no one's right to vote can be abridged or denied by successful petition drives.

Curiously, the court below did not reach this issue, cryptically ruling that this argument "speaks to whether or not the defendants violated the Act, but has no bearing on whether or not the Act applies in the first instance." Op. 24 n.8. But whether the Citizen Defendants "violated the Act" by their alleged conduct is exactly the point of a Rule 12(b)(6) motion. Plaintiffs cannot show a strong likelihood that they have been denied access to a process that has resulted in an abridgement or denial of their ability to vote.

B. NO IRREPARABLE HARM

Plaintiffs' only harm is that they will have to vote against the Proposed Amendment, and convince others to vote against it, in order to defeat it. That is a harm that is inherent in a democracy. Although the court below did not specifically use the phrase "irreparable harm" in its analysis, its "preliminary injunction" discussion did "note[] that voters who were induced by fraud into signing the petition still have an opportunity to participate in the political process by voting against the proposal in the general election." Op. 33. That finding is obviously true and not an abuse of discretion. Indeed, this is what distinguishes this case from the various

preliminary injunction cases cited by plaintiff. Mot. ¶ 59. In those cases, it was an *upcoming election* that would dilute or deny plaintiffs the right to vote because of some state procedure, like the use of at-large elections, not a past event.[7]

Plaintiffs claimed that there was racially-targeted fraud almost one year before filing this action. *See* discussion *supra* at 5-8. It is only when their efforts in the state courts proved unsuccessful that they first filed suit in federal court, only months before the deadline for printing ballots. *Dillard v. Crenshaw Cty.*, 640 F. Supp. at 1362 (refusing to enjoin at-large elections for June 1986, even where they likely would violate Section 2, because "plaintiffs did not even seek preliminary injunctive relief until February 1986").

Finally, if the Proposed Amendment passes, plaintiffs can always seek some kind of post-election remedy. *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 173, 183 (1985) (holding that change in election date for School District trustees should have been precleared under Section 5, and remanding to district court for further proceedings, even though preliminary injunction had been denied and the election had taken place); *Backus v. Spears*, 677 F.2d 397, 398 (4th Cir. 1982) (district court's refusal to grant preliminary injunction requiring candidate's name to be placed on the ballot affirmed because "post-election relief, including setting aside the election results, might be warranted if the plaintiffs were to prevail on the merits"); *Ajax Gaming Ventures*, 2006 WL 2302192 at *3 (no irreparable harm shown by proposal's opponents because "[e]ven if the measure passes . . . , it must pass through the judicial gauntlet . . . "); *Goosby v. Town Bd. of the Town of Hempstead*, 981 F. Supp. 751, 763 (E.D.N.Y. 1997) (although at-large

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[7] Plaintiffs are also wrong in claiming that the courts are "unanimous" (Mot. ¶ 60) in holding that an impending violation will always constitute "irreparable harm." *Chisom v. Roemer*, 853 F.2d at 1188-89 (rejecting that proposition); *Goosby v. Town Bd. of the Town of Hempstead*, 981 F. Supp. 751, 763 (E.D.N.Y. 1997).

system of electing town board violated Section 2, court denies motion for a preliminary injunction to enjoin upcoming election because a special election could be held later to remedy the violation).

C. HARM TO OTHERS AND THE PUBLIC INTEREST

The other factors in considering the propriety of a preliminary injunction (upon which the court below made no findings) favor denying the motion. The Citizen Defendants are proponents of a ballot initiative that they have worked hard to place on the ballot. *Southwest Voter Registration Project*, 344 F.3d at 919 (costs associated with enjoining election include fact that candidates "have raised funds under current campaign contribution laws and expended them in reliance on the election's taking place . . . "). Precluding the people of the state from voting on their proposal would cause the Citizen Defendants irreparable harm for which no form of relief could possibly compensate them.

Finally, the public interest favors democracy, and allowing the people of Michigan to govern themselves pursuant to their Constitution. *Id.* ("Potential voters have given their attention to the candidates' messages and prepared themselves to vote"); *Chisom v. Roemer*, 853 F.2d at 1189 (even assuming likelihood of success and irreparable injury, trial court abused its discretion in enjoining election for violation of Section 2 because injunction was not in best interest of citizens of Louisiana); *Ajax Gaming Ventures*, 2006 WL 2302192 at *3 (debate "on the merits of having or not having casino gambling in Rhode Island" will be beneficial even if proposed amendment does not survive subsequent judicial review; "public policy must be said to favor the democratic electoral process over the iron fist of judicial intervention in a state election"); *Dillard v. Crenshaw Cty.*, 640 F. Supp. at 1362 (refusing to order five counties to implement new election plans before next election despite finding that current system likely violated Section 2).

Conclusion

For the foregoing reasons, the motion for a preliminary injunction pending appeal should be denied.

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Certificate of Service

I hereby certify that on September 7, 2006, I served the foregoing opposition to plaintiffs-appellants' motion for a preliminary injunction pending appeal by overnight mail, with a courtesy copy going by an attachment to an electronic mail or by fax, to the following persons:

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_____
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EXHIBITS

Ex.	Source In Record	Additional Description
A	Doc. No. 27 (Exhibit A to Statement of Jennifer Gratz Dated August 10, 2006 in Opposition to Motion for Preliminary Injunction)	Petition for the proposed amendment to the Michigan Constitution
B	Doc. No. 26 (Attachment to Citizen Defendants' Motion In Limine)	Press Release announcing resolution of Michigan Civil Rights Committee ("MCRC") and MCRC Resolution
C	Doc. No. 27 (Statement of Jennifer Gratz Dated August 10, 2006 in Opposition to Motion for Preliminary Injunction)	
D	Doc. No. 45 (Transcript of Hearing on August 17, 2006 on Plaintiffs' Motion for a Preliminary Injunction)	Excerpts of Transcript
E	Doc. No. 27 (Statement of Heidi Verougstraete Dated August 9, 2006 in Opposition to Motion for Preliminary Injunction)	
F	Doc. No. 27 (Statement of Alan Lindsay Dated August 9, 2006 in Opposition to Motion for Preliminary Injunction)	
G	Doc. No. 27 (Exhibit A to Statement of Alan Lindsay Dated August 9, 2006 in Opposition to Motion for Preliminary Injunction)	Independent Contractor Agreement between National Signature Management and Lavon Marshall
H	Doc. No. 27 (Exhibit B to Statement of Jennifer Gratz Dated August 10, 2006 in Opposition to Motion for Preliminary Injunction) Preliminary Injunction Hearing on August 17, 2006, Defendants' Ex. 3	"Decline To Sign" handout
I	Preliminary Injunction Hearing on August 17, 2006, State Ex. 1	Staff Report of Michigan Secretary of State on challenges to petition

J	Referred to in the opinion of the court below at 7	December 2005 opinion of the Michigan Court of Appeals denying a motion to reconsider