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' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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Issues Presented

1. Have plaintiffs demonstrated a strong likelihood of success in their claim that defendants Gratz, Connerly, and the Michigan Civil Rights Initiative Committee (the "Citizen Defendants") violated Section 2 of the Voting Rights Act?

a. Is the alleged racially-targeted fraud of the moving defendants a "practice" or "procedure" imposed by a State or political subdivision sufficient to constitute a violation of Section 2 of the Voting Rights Act?

b. Have plaintiffs demonstrated a strong likelihood that the Citizen Defendants denied or abridged plaintiffs' right to vote on account of race?

c. Have plaintiffs demonstrated a strong likelihood that the Citizen Defendants engaged in widespread practices of fraud?

d. Have plaintiffs demonstrated a strong likelihood that the Citizen Defendants' alleged practices of fraud were racially-targeted?

2. Would a finding that the Voting Rights Act reaches speech made during political campaigns render that Act violative of the First Amendment? If so, would the Voting Rights Act also reach plaintiffs' own misstatements of fact?

3. Have plaintiffs demonstrated that they will suffer irreparable injury in the absence of a preliminary injunction?

4. Would the issuance of a preliminary injunction cause substantial harm to others and/or serve the public interest given the scheduled vote on a proposed constitutional amendment for this November's general election in Michigan?

Leading Authorities

U.S. Const., amend. I

28 CFR 51.7

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

Buckley v. American Constitutional Law Foundation, Inc., 525 U.S. 182 (1999)

Morse v. Republican Party of Virginia, 517 U.S. 186 (1996)

Larouche v. Fowler, 77 F. Supp. 2d 80 (D.D.C. 1999) (three-judge court)

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The Citizen Defendants submit this memorandum of law in opposition to plaintiffs' motion for a preliminary injunction.

Factual Background

The Michigan Civil Rights Initiative Committee ballot question committee (the "Committee") was formed to promote an amendment to the Michigan Constitution that would prohibit discrimination or preferences on the basis of race or sex by state government (the "Proposed Amendment"). Jennifer Gratz is the Executive Director of the Committee. Ward Connerly is an advisor and supporter of the Committee. He fully supports the Proposed Amendment, but he has no formal role in the Committee. More importantly, for purposes of this motion, Mr. Connerly had nothing to do with the hiring or training of petition circulators. Statement of Jennifer Gratz ("Gratz St.") ¶¶ 2-3.

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. In July 2004, the Committee began the process of asking the citizens of Michigan to place the Proposed Amendment on the ballot for 2006. Gratz St. ¶ 4.

A. The Committee's Role In Procuring Signatures

The Committee had two basic methods of trying to procure signatures. First, it asked volunteers to go around and collect signatures. Second, it retained a professional petition drive organizer to assist it. Gratz St. ¶ 8.

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 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 like that. Gratz St. ¶ 9.

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 all kinds of propositions. The Committee's personnel lacked that experience, and did not tell NSM how to do its job. Gratz discussed the general purposes of the Proposed Amendment with the lead officers or employees of NSM. She learned from *them* that the best and most effective way to obtain signatures is simply to ask people to review and sign the petition. Together, the Committee and NSM developed a training program for the circulators that was based upon this strategy. Gratz St. ¶¶ 10-11; Statement of Alan Lindsay ("Lindsay St.") ¶ 2; Statement of Heidi Verougstraete ("Verougstraete St.") ¶¶ 2-3, 6.

Gratz met all of the individuals at NSM who trained circulators and witnessed training sessions at NSM. She never witnessed any trainer tell circulators that they should tell potential signers that the Proposed Amendment was for affirmative action, or that it would assist people to get into college. 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 and sex. But again, the primary objective of the training that Gratz witnessed was to impress upon the

circulators that they should not engage in discussions with potential signers, but simply ask them if they would sign it. Gratz St. ¶ 12; Verougstraete St. ¶¶ 5-6; Lindsay St. ¶ 5.

The paid circulators all signed a contract with NSM. The contract with plaintiffs' witness Lavon Marshall (Plaintiffs' Exhibit 15) is typical of all of the contracts that circulators had with NSM. Each of those contracts made the circulator an independent contractor of NSM. Lindsay St. ¶ 7 & Ex. A; Verougstraete St. ¶ 4.

On rare occasion, Gratz would be asked by people whether the Proposed Amendment was for or against "affirmative action." On those occasions, she would tell them that she did not consider it to be anti-affirmative action, but that opponents of the measure would. Gratz St. ¶ 13.

Signatures were collected from July 2004 until early January 2005. As signatures were collected, representatives of NSM would check to determine the validity of the signatures (*i.e.*, whether they had been collected consistent with Michigan law). In many instances, NSM struck signatures from the petitions. It did the same thing in a second review during the final few weeks before the petitions were filed on January 6, 2005, and, in this final review, it also checked to see if anyone had signed twice. The Committee submitted petitions on January 6, 2005 that had a total in excess of 508,000 signatures that had not been struck ahead of time. Based on a sample of 500 signatures, the Secretary of State of Michigan determined that 90% of the signatures (or more than 457,200) 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 139,000 valid signatures. Gratz St. ¶ 13; Lindsay St. ¶ 10; Verougstraete St. ¶ 10.

B. Plaintiffs' Evidence

The Citizen Defendants' separate motion *in limine* identifies the serious flaws in plaintiffs' evidence rendering them inadmissible. This flawed evidence includes (1) various unsworn or hearsay statements (Plaintiffs' Exhibits ("Pls' Exs.") 2, 4, 12, 15, 19, and 21), (2) testimony by signers of a petition that do not show that they signed a petition related to the Proposed Amendment (Pls' Exs. 7-10), and (3) a report by a state agency that announced its opposition to the Proposed Amendment some two years prior to beginning the investigation that led to its biased report (Pls' Ex. 1). But even ignoring all of these problems in admissibility, ignoring plaintiffs' misrepresentation of their own evidence,[1] and ignoring all of the problems in plaintiffs' legal theory (discussed both in the Citizen Defendants' motion for judgment on the pleadings and *infra*) the evidence comes woefully short of proving a strong likelihood that plaintiffs would succeed in this case.

1. No Evidence Of Fraud. -- Plaintiffs' primary assertion of fraud is that petition circulators told potential signers that the petition favored affirmative action. As discussed in detail in the Citizen Defendants' brief supporting its motion for judgment on the pleadings, such assertions, even if they were made and directed by the Committee, are protected by the First Amendment. *See* Doc. No. 21, Memorandum of Law In Support of Motion for Judgment On the Pleadings Pursuant to Rule 12(c) ("Citizen Defs' 12(c) Memo.") at 20-26. Indeed, much of plaintiffs' evidence does not even suggest that anything was said about affirmative action at all.

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[1] *Compare, e.g.*, Plaintiffs' Memorandum of Law ("Pls' Memo.") 7 (Lupe Ramos-Montigny "persuaded her friends to sign") *with* Pls' Ex. 7 at 41 (Ramos-Montigny testifying that her friends did not sign the petition). *See also* n.3, *infra*; Gratz St. ¶ 5.

In her presentation of hearsay evidence, Donna Stern, the treasurer of lead plaintiff Operation King's Dream ("OKD"), states that OKD's own investigators -- hardly unbiased in this matter -- found only one person from various cities "who had signed the petition knowing that it was opposed to affirmative action." Pls' Ex. 2 ¶ 11. This, of course, says nothing about what anyone said. Interviewees may not have "known" that the Proposed Amendment was opposed to affirmative action because they had read it and did not believe that it was. Political petitions are not securities in which "full disclosure" -- much less, full disclosure as defined by one's opposition -- is required.[2]

2. No Evidence Of Any Harm To Any Plaintiff. -- Even if one indulges the assumption that an assertion that the Proposed Amendment was "for affirmative action" could be the basis of a fraud claim, it is remarkable that *not one individual plaintiff* provides evidence that (s)he was a minority duped into signing the petition. (Evidence is provided for only two plaintiffs, Samantha Canty and Martha Cuneo. Neither identifies her race, and Cuneo does not even testify that she signed a petition for the Proposed Amendment. Pls' Ex. 8 at 58-63 (Cuneo signed a petition represented to be "for affirmative action" and "about the Ann Arbor case") and Ex. 11 (Canty)). Similarly, none of the organizational plaintiffs provide even an argument as to how it has been harmed. (The Macomb County NAACP is listed as a plaintiff on the summons

[2] Similarly, although June Scroggins claims she was a circulator who "mistakenly led signers to believe that the MCRI petition was a civil rights petition for affirmative action." Pls' Ex. 19, ¶ 13, the only things she claims that she said to potential signers was to ask them if they would sign the petition "to help kids get into the college of their choice" or to "help stop discrimination." *Id.* ¶ 9 (first). (There are two paragraphs numbered "9" in Ms. Scroggins declaration.) It is unclear what was "false" about these questions. *See also* Pls' Ex. 20 ¶ 8 (Yvonne Moore claims she was a petition circulator who told people that it would "help kids get into college").

in this case, but not in the complaint.)

3. No Evidence Of The Numbers Who Were Allegedly Defrauded. -- In addition to providing evidence from a few people who claim they were somehow tricked into signing some petition, plaintiffs provide evidence from a number of alleged circulators. The circulators do not say how many times they made representations to people, or how many times people read the petition itself and paid no attention to what the circulators were saying. That is, the circulators do not (because they cannot) provide any evidence of how many people actually heard or listened to, much less relied upon, what they were saying. This, of course, is of some consequence given how many extra valid signatures the Secretary of State found (139,000). Moreover, even if one indulges the assumption that *every single* person who signed a petition circulated by one of plaintiffs' witnesses was defrauded, the numbers are still quite low. There were more than 1,000 circulators trained by NSM (Lindsay St. ¶ 6), and plaintiffs provide testimony from just a handful. And many of plaintiffs' circulator witnesses provide no evidence at all as to how many signatures they collected, and, of course, they would have no knowledge of how many had been found invalid. *See, e.g.*, Pls' Exs. 12 (between about 3000-4000), 13 (no estimate of number), 14 (more than 1000), 15 (150), 16 (500-700), 17-19 (no estimate of number) and 20 (20 petitions, no estimate of number).

To make up for this complete lack of evidence, plaintiffs assert that (1) 125,000 black citizens signed a petition for the Proposed Amendment, and (2) "[t]here are very few black citizens who oppose affirmative action." Pls' Memo. 13; *id.* at 25 (126,000). (They also assert that black support "was essential to securing support from white voters" because of the "disproportionate authority of black people on questions of civil rights and voting rights," Pls'

Memo. 2; *id.* at 13. It is absurd to suggest that white voters would not sign a petition unless they received a report of the demographic breakdown of support for the Proposed Amendment.) The first "fact" is simply fabricated out of thin air; plaintiffs provide evidence from OKD's own treasurer, who claims to have an unidentified database of 300,000 petition signers (without explaining how it was obtained or created) and personal knowledge of the demographic composition of individual zip codes within Detroit. Pls' Ex. 2 ¶ 8; *see* Gratz St. ¶ 21.[3] The second "fact" is a racist presumption about black views and is irrelevant even if it were true because it wrongly assumes that there is a generally understood definition of "affirmative action," and that the petition eradicates all forms of it. *See generally* Citizen Defs' 12(c) Memo. at 20-26. In fact, most blacks oppose that which the Proposed Amendment *would* eliminate: race and sex preferences. *See* Washington Post/Kaiser/Harvard Racial Attitudes Survey, available at http://www.washingtonpost.com/wp-srv/nation/sidebars/polls/race071101.htm (Question No. 50: 86% of African Americans surveyed oppose using race or ethnicity as a factor when deciding who is hired, promoted, or admitted to college). Finally, plaintiffs' argument assumes that people would not sign a petition unless they supported the underlying objective of the law that the petition seeks to enact, but this is not true either. *Meyer v. Grant*, 486 U.S. 414, 421 (1988)

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[3] This apparently accounts for approximately 75,000 of plaintiffs' 125,000. Pls' Ex. 2 ¶ 6 (15% of statistical sample came from Detroit). It is unclear how they derive the other 50,000. OKD's treasurer claims that another 9% or so of the statistical sample (or about 45,000 of the total) came from cities whose populations are from 60-99% black, *id.* ¶¶ 5-6, but this says very little about the race of those who signed the petition, who may or may not reflect the demographics of the area. Plaintiffs' memorandum avoids this problem by, once again, misrepresenting their own evidence. *Compare* Pls' Memo. 12 (breakdown of signatures by zip code in all cities with majority black populations showed that they were from exclusively black areas) *with* Pls' Ex. 2 ¶ 8 (only knows about zip codes for Detroit).

("Although a petition circulator may not have to persuade potential signatories that a particular proposal should prevail to capture their signatures, he or she will at least have to persuade them that the matter is one deserving of the public scrutiny and debate that would attend its consideration by the whole electorate"); Verougstraete St. ¶ 8.

4. No Proof Of Racially-Targeted Fraud. -- Plaintiffs also provide no evidence (other than the conclusory allegations of the Michigan Civil Rights Commission, which provides no distinct evidence of its own for this conclusion) that the so-called fraudulent scheme was targeted at any one group.

To the contrary, whatever evidence of fraud plaintiffs provide shows no racial targeting. *See* Pls' Memo. 13 (describing "numerous other" white individuals who allegedly were deceived into signing the petition). Nor is there any evidence that anyone was told to deceive only black and/or minority citizens, or only make references to affirmative action in urban areas. To the contrary, the only "evidence" on this score is the unsworn statement of Lavon Marshall, who states that "the supervisors wanted us to circulate the petition in the suburbs but I did not do that." Pls' Ex. 15 ¶ 10.

5. No Evidence Of Fraud Perpetrated By Any Defendant. -- Finally, plaintiffs' motion for a preliminary injunction provides no evidence that any of the alleged wrongs was perpetrated by any of the *defendants*. Plaintiffs have not sued an issue or a cause; they have sued defendants. But they have provided no evidence about Ward Connerly, and their "evidence" on Jennifer Gratz is from one unsworn statement asserting that she hired Lavon Marshall -- and nothing else. (Once again, they misrepresent this evidence in their memorandum. *Compare* Pls' Memo. 10 (Marshall "received . . . instructions from Jennifer Gratz") *with* Pls' Ex. 15.).

As for the Committee, plaintiffs have no competent evidence that *anyone* associated with it was responsible for anything about which they complain. To avoid this problem, plaintiffs liberally spread the letters M-C-R-I throughout their papers, sometimes meaning the Committee, sometimes meaning the Proposed Amendment, and sometimes meaning some admixture of the two. But its witnesses cannot competently state that any person to whom they spoke had some connection with *the Committee*, much less that the Committee had control over their conduct in such a way that it would be liable for their conduct under the legal principle of *respondeat superior*. As shown above, the Committee did not have such control over NSM, much less petition circulators.

Finally, plaintiffs' own evidence demonstrates that much of what they complain about did not emanate from *any* supervisors of *any* organization. Lavon Marshall's unsworn statement says only that "[t]he supervisors were vague about what the petition was for." She then told people that the petition was "for affirmative action." Pls' Ex. 15 ¶¶ 7-8. Christi Sanders was told that the petition would "stop segregation" and "stop colleges from choosing people who they can let in by race." Pls' Ex. 17 ¶ 7. She apparently led signers to believe that the petition was "a civil rights petition for affirmative action." Pls' Ex. 17 ¶ 4 (which follows ¶ 12). Lerwonia Summers' unsworn statement does not say anything at all about what she was told about the petition; she told all of four people that the petition was "not against affirmative action," and none of them apparently signed a petition. Pls' Ex. 19 ¶¶ 7-8. Yvonne Moore also states nothing about what she was told; she decided on her own to promote the petition by asserting that it would "help kids get into college." Pls' Ex. 20. Exie Chester states that an unidentified white man told her that "it was against discrimination and preferences." Pls' Ex. 12 ¶ 6. She decided to tell people that the

petition would "help blacks get into college" after speaking with "some other petitioners." *Id.* ¶¶ 9-10.

Argument

It is black letter law that a preliminary injunction is an "extraordinary remedy," *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000), and it is hard to think of a case that better illustrates that truism. Plaintiffs want to halt the democratic process guaranteed to the people of Michigan by its state constitution. *State ex. rel. Montana Citizens for the Preservation of Citizens' Rights v. Waltermire*, 729 P.2d 1283, 1285 (Mont. 1986) ("we should decline to interfere with this right of constitutional change by initiative unless it appears to be absolutely essential"). To succeed, they must demonstrate that such an extraordinary remedy is appropriate after considering the following factors: whether they 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. *Id.* at 736.

As shown in the Citizen Defendants' motion for judgment on the pleadings and below, plaintiffs' underlying legal theories are meritless. Further, their factual contentions do not support those legal theories, and all of the equities favor allowing Michigan voters to participate in the democratic process that plaintiffs so ardently wish to prevent.

I. PLAINTIFFS HAVE NOT DEMONSTRATED A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS

The Citizen Defendants memorandum in support of their motion for judgment on the pleadings demonstrates that the plaintiffs' complaint against the Citizen Defendants must be dismissed because (1) the Citizen Defendants are not "States" whose conduct can violate Section 2 of the Voting Rights Act (the "Act"), (2) plaintiffs have not alleged the denial of their right to vote on account of race, (3) the complaint fails to allege the elements of fraud or to state fraud with particularity, (4) the Citizen Defendants have legislative immunity, and (5) plaintiffs' interpretation of the Act would render it unconstitutional because, *inter alia*, it would violate the First Amendment rights of the Citizen Defendants. The Citizen Defendants will not repeat these arguments here, but simply respond to the few points raised in plaintiffs' legal argument and add certain arguments based upon plaintiffs' absence of proof. Both the lack of legal merit and the absence of factual support demonstrate that plaintiffs cannot show a strong likelihood of success on the merits.

A. Plaintiffs Have No Claim Under Section 2 Of The Act

There has never been any case holding *any* private entity other than a major political party liable under *any* provision of the Voting Rights Act. Plaintiffs' bid to make this the first such case uses the following argument: (1) the Voting Rights Act covers all government acts which affect the voting process in any way, and (2) the Voting Rights Act covers some private entities, so therefore (3) the Voting Rights Act must also cover all acts of private associations which affect the voting process in any way.

This argument is legal alchemy. Plaintiffs take a few Section 5 cases (*Allen v. State Bd. of Elections*, 393 U.S. 544 (1969) and *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996)), shake in some old Fifteenth Amendment cases (*Smith v. Allright*, 321 U.S. 649 (1944) and *Terry v. Adams*, 345 U.S. 461 (1953)), and try to create the gold of a Section 2 violation. It is alchemy because these cases have limitations that plaintiffs ignore.

1. Plaintiffs' Cases Demonstrate That The Act's Reach To The Conduct Of Private Parties Is Very Limited. -- Plaintiffs' discussion of *Allen* is typical of their method. Citing a non-existent page, they assert that *Allen* stands for the proposition that Congress added certain text in Section 2(b) to insure that the Act was an all-inclusive ban of all discriminatory practices that might effectively deny citizens their right to vote. Pls' Memo. 16 (citing "*Allen*, 393 U.S. at 656"). But Section 2(b) did not even exist at the time that *Allen* was decided, Pub. L. 97-205 (1982) (adding Section 2(b)), and the Court in *Allen* only stated that the Act "was aimed at the subtle, as well as the obvious, *state regulations* which have the effect of denying citizens their right to vote because of their race." *Allen*, 393 U.S. at 565 (emphasis added). *See also id.* at 566 (describing legislative history of Section 2 to support the proposition that "Congress intended to reach any state enactment which altered *the election law* of a covered state in even a minor way" under Section 5) (emphasis added). In *Whitley v. Williams*, the specific consolidated case in *Allen* upon which plaintiffs rely, the Court held that *state* amendments changing the time for filing a petition as an independent candidate, adding to the number of signatures needed to qualify as an independent candidate, and adding to the requirements that an elector must meet in providing a valid signature were changes that needed to be precleared under Section 5. *Id.* at 570 (changes might undermine the effectiveness of voters who wish to elect independent

candidates).[4]

In contrast to *Allen*, the Court's holding in *Morse v. Republican Party* -- the only case that plaintiffs cite in which any private entity is deemed subject to the Act -- is quite narrow. Indeed, there is nothing *but* a holding in *Morse*; as lower courts have noted, there is no rationale for that holding because the Court was splintered. *See Larouche v. Fowler*, 77 F. Supp. 2d 80, 84-85 (D.D.C. 1999) (3-judge court) (*Morse* did not have a "narrowest" rationale under *Marks v. United States*, 430 U.S. 188 (1977) and thus "lower courts are left without clear instruction"). The opinions of both Justice Stevens and the Justice Breyer (whose combined adherents constituted the majority) were narrow and cautious, and did not go further than decide the case before the Court -- to wit, that a fee to attend a party's nominating convention had to be precleared under Section 5. As noted previously by the Citizen Defendants, Justice Stevens' opinion emphasized the special treatment received by the major parties under Virginia law. Citizen Defs' 12(c) Memo. at 7-8. It also emphasized the Attorney General's regulation narrowly interpreting what conduct of a political party could "affect voting." *Morse*, 517 U.S. at 227 (Stevens, J.) (citing 28 CFR sect. 51.7, excluding changes by political parties in recruiting new members, conducting political campaigns, and drafting party platforms as changes that would not be subject to preclearance). Justice Breyer's opinion emphasized that the Court need go no further than

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[4] So, too, when plaintiffs assert that Section 2 applies to procedures by which propositions secure access to the ballot, every single one of their authorities speaks of *state* enactments that limit the right to vote on such propositions. *E.g.*, Pls' Memo. 21 (citing 28 CFR 51.17(a), a regulation stating that changes made *by the jurisdiction* to procedures related to referenda and initiatives are subject to preclearance), and 21-22 (citing *Armstrong v. Allain*, 893 F. Supp. 1320 (S.D. Miss. 1994), which held that a Mississippi statute requiring a 60% majority for school bond referenda did not violate Section 2).

address the party's fee for its convention given the serious First Amendment questions raised by extending the Act to political parties. *Id.* at 239 ("We go no further in this case because . . . First Amendment questions about the extent to which the Federal Government, through preclearance procedures, can regulate the workings of a political party convention, are difficult ones").[5]

Thus, the lesson from *Morse* is that a few activities of major political parties relating to nominations -- when they are selecting standard-bearers for the party among candidates -- may be subject to the Act. Despite plaintiffs' repeated use of the phrase "private association" in its memorandum, major political parties are the only private entities ever held subject to the Act, and no case has held even those entities subject to the Act for anything but the equivalent of holding an election.[6] Extending the Act to private entities has grave and serious consequences

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[5] Justice Breyer's opinion also emphasized the legislative history of the Act, and the concerns Congress had about the means by which political parties in the South used racially-exclusive nomination methods. *Id.* at 235-36 (opinion of Breyer, J.). In contrast, as plaintiffs readily concede, there was no history of using "racially-targeted fraud" to obtain access for initiatives. Pls' Memo. 21 ("Because the referendum process had fallen into general disuse by 1965, . . . there was little Congressional consideration of referendums under the Act").

[6] That is also the lesson to be drawn from plaintiffs' Fifteenth Amendment cases, the so-called "white primary" cases. *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)); *Federspiel v. Ohio Republican Party State Central Comm.*, 867 F. Supp. 617, 622 (S.D. Ohio 1994) (state's authorization of party's Central Committee to resolve internal disputes and choose between competing slates of party officers did not make the party's decision "state action"); *id.* at 625 (*Terry v. Adams* distinguished because the Jaybird primary there effected total disenfranchisement of the African American population because of its dominance within the state; "Hamilton County Republicans still face a tough challenge from the

(continued...)

for the First Amendment rights of those entities. *See also, e.g.*, *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 192 (1999) ("the First Amendment requires vigilance in making those judgments [in assessing restrictions on the petitioning process], to guard against undue hindrances to political conversations and the exchange of ideas"). Private entities do innumerable things that affect voting, campaigning being only the most obvious. If every "practice" of a campaign that affects the choices that appears on a State's ballot -- presumably, any and all practices of a candidate's organization during primary season -- is subject to the disparate impact analysis of Section 2, courts will be forever reviewing those practices; the chilling effect will be palpable. *Larouche v. Fowler*, 77 F. Supp. 2d at 89 (Democratic Party's refusal to permit Larouche to run for its presidential nomination did not have to be precleared under Section 5).

2. No Denial Or Abridgement Of The Right To Vote Because Of Race. -- Both *Morse* and *Allen* were Section 5 cases, and the only issue in each case was whether the practice was subject to the preclearance requirement of Section 5; there was no issue about whether the practices actually discriminated in any way. *Allen*, 393 U.S. at 555 n.19 ("the only question is whether the new legislation must be submitted for approval"); *Morse*, 517 U.S. at 216, 234-35 (question of whether discrimination occurred is for Attorney General or District Court). (Plaintiffs again misrepresent in suggesting that the Court in *Morse* "sustained" a substantive challenge to the $35 fee. Pls' Memo. 20.) Here, plaintiffs sue under Section 2, and thus must demonstrate that the practices (1) denied or abridged plaintiffs' right to vote and (2) did so

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[6](...continued)
Democrats before being elected. Therefore the Republican Primary does not automatically dictate who will eventually win the election").

because of race. Their claim that the alleged fraud affects the identity of a substantive issue to be held in an election is insufficient to show a Section 2 violation because no one's right *to vote* for or against the proposition is any more difficult to exercise (to the contrary, it is easier) or less effective. *E.g.*, *Gerena-Valentin v. Koch*, 523 F. Supp. 176, 177 (S.D.N.Y. 1981) ("The failure to provide bilingual petitions does not by itself deprive the Hispanic community of their right to vote"). Plaintiffs rewrite Section 2 in suggesting that any discriminatory conduct that "shape[s] the choices that will appear on the ballot" (Pls' Memo. 25) violates it; the conduct must deny or abridge someone's right to vote. "The Voting Rights Act is not an all-purpose antidiscrimination statute." *Presley v. Etowah County Comm'n*, 502 U.S. 491, 509 (1992).[7]

Moreover, as discussed *supra* (*see* Factual Background, Part B(4), B(5)), plaintiffs have not shown that any so-called fraud was "racially-targeted" or that it was perpetrated by defendants. In a Section 2 case, it is plaintiffs' burden to show a denial or abridgement of the right to vote based upon race. *Voinovich v. Quilater*, 507 U.S. 146, 155-56 (1993); *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 480 (1997); *Armstrong v. Allain*, 893 F. Supp. 1320, 1329 (S.D. Miss. 1994) (cited at Pls' Memo. 21-22) (plaintiffs' expert testimony did not meet their burden in challenge under Section 2 to Mississippi statute requiring 60% approval for school bond referenda). That is, they must show either that members of a race were treated differently, or that the result disproportionately impacts one race. Plaintiffs have failed to prove

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[7] *Presley* identified four factual contexts for changes generally subject to Section 5 preclearance: (1) changes in the manner of voting, (2) changes in candidacy requirements and qualifications, (3) changes in the composition of the electorate, and (4) changes affecting the creation or abolition of an elective office. Each of those, the Court held, "has a direct relation to voting and the election process." *Presley*, 502 U.S. at 502-03.

a strong likelihood of success that they can show either one. They have said little about how whites or other races were approached, and what they have said suggests that there was no difference between races in that regard. Nor can they show that a disproportionately large percentage of blacks have had their right to vote affected (not least because they cannot show that *anyone's* right to vote has been affected), or that blacks are uniquely vulnerable to alleged misrepresentations. Finally, plaintiffs do not show that the Citizen Defendants are responsible for the conduct about which they complain.

3. No Standing Under Article III. -- As shown above (Factual Background, B(2)), no individual plaintiff has submitted any proof about how they have been denied the right to vote on the basis of race, and the organizational plaintiffs have demonstrated no injury at all. Accordingly, they not only failed to demonstrate a violation of Section 2, they have no standing under Article III of the Constitution. *Georgia State Conference of NAACP Branches v. Cox*, 183 F.3d 1259, 1264 (11th Cir. 1999) (plaintiffs who challenged campaign finance laws as favoring the wealthy because of certain exemptions from contribution limits did not allege an Article III injury; "*Terry* and the other ballot access cases only recognize that each voter is entitled to a single, equal vote. As no one has been denied the right to vote or access to the ballot, [plaintiffs] have failed to allege any legally cognizable injury in fact").

4. No Entitlement To Injunctive Relief. -- Even if plaintiffs could demonstrate a violation of the Act, that would hardly be sufficient to entitle them to the relief they seek: an order precluding the Proposed Amendment from being placed on the ballot. Rather, they would have to show that eliminating the number of "invalid" signatures would give the Proposed Amendment fewer than needed to be placed on the ballot. *Montero v. Meyer*, 696 F. Supp. 540,

549 (D. Colo. 1988) (Voting Rights Act would not prohibit initiative from appearing on ballot unless eliminating signatures on petitions circulated in "bilingual counties" would leave petition with fewer than needed to be certified under state law), *rev'd*, 861 F.2d 603 (10th Cir. 1988). Again, plaintiffs have offered nothing but racist (and erroneous) theories about how *all* blacks oppose "affirmative action" and sheer speculation as to the numbers of those who allegedly were "defrauded" into signing the petition based upon those racist assumptions. *See* Factual Background, *supra*, B(3).

B. Plaintiffs' Theory Of The Act Would Violate The Citizen Defendants' First Amendment Rights

The Citizen Defendants' memorandum in support of their motion for a judgment on the pleadings demonstrates that the application of the Act to the alleged facts here would violate the Citizen Defendants' First Amendment rights, and would put federal courts in the precarious position of reviewing various "racially-targeted" or "ethnically-targeted" statements throughout the course of political campaigns. Consider some of the statements that plaintiffs themselves have made during this lawsuit, *e.g.*, that the purpose of the Proposed Amendment is to eliminate affirmative action, or that the Proposed Amendment would "overrule" *Grutter v. Bollinger*, 539 U.S. 306 (2003). Complaint ¶¶ 31-32. *See also* Gratz St. Ex. B. The former statement already has been held to be "false and misleading" in a very similar context (*see Lungren v. Superior Court*, 48 Cal. App. 4th 435, 442, 55 Cal. Rptr. 2d 690, 694 (Ct. App. 1996) ("any statement to the effect that Proposition 209 repeals affirmative action programs would be overinclusive and hence `false and misleading.' (Elec. Code § 9092).")), and the latter is obviously untrue.

(*Grutter* held only that a system of using race for admissions at the University of Michigan Law School did not violate the Fourteenth Amendment, Title VI, or 42 U.S.C. § 1981. Those holdings could not be overruled by the Proposed Amendment.)[8]

Politics infuses this case, and language of politics is designed to persuade. Plaintiffs' overstatements are typical; they are concerned that they cannot achieve their political goals by political means, so they are attempting to achieve them through hyperbole and litigation (and litigation and more litigation). This is not unusual in America, but plaintiffs' theory of the Act is, and its threat to civil liberties cannot be denied. We urge this Court to push back this threat and decline plaintiffs' invitation to descend into the miasma of political claims.

II. THE OTHER FACTORS IN DETERMINING THE PROPRIETY OF INJUNCTIVE RELIEF ALL MILITATE AGAINST THE RELIEF PLAINTIFFS SEEK

The other factors in considering the propriety of a preliminary injunction all point against granting one here. Plaintiffs have not shown irreparable harm because they still have an opportunity to vote in November. They can defeat the measure, and achieve the same result that an injunction would give them, if they can convince their fellow citizens of the rightness of their

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[8] The affidavit of John Irving ("Irving Aff.") shows misbehavior that goes beyond mere hyperbole. It shows that he was apparently called by an opponent of the Proposed Amendment, and told that he had signed a petition *favoring* affirmative action. Since Mr. Irving generally opposes affirmative action, he gave permission to have his name removed from the petition. Irving Aff. ¶ 3. Without his knowledge, a "phone affidavit" was submitted before the State Board of Canvassers in his name asking that his name be removed from the petition supporting the Proposed Amendment. *See* Gratz St. Ex. C; Irving Aff. ¶ 4 (first). When Mr. Irving learned that he had actually signed a petition opposing preferential treatment on the basis of race and sex, which was exactly what he intended to do, he concluded that his "statement to the . . . caller was taken out of context and used to represent the opposite of my feelings." Irving Aff. ¶ 4 (second).

cause. *Friendship Material, Inc. v. Michigan Brick, Inc.*, 679 F.2d 100, 103 (6th Cir. 1982) ("equity has traditionally required such irreparable harm before an interlocutory injunction may be issued"). On the other hand, precluding the citizens of Michigan from voting on the Proposed Amendment would cause them substantial harm and would be against the public interest. It would deny those citizens the right that the Michigan Constitution specifically gives them to amend the Constitution, and it would encroach upon the United States Constitution's guarantee of a Republican form of government. U.S. Const. Art. IV, § 4. That form permits the people of the states (including Michigan) the right to self-governance, and federal courts should not lightly interfere with that right.

Conclusion

For the foregoing reasons, plaintiffs' motion for a preliminary injunction should be denied.

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Certificate of Service

I hereby certify that on August 10, 2006, I electronically filed the foregoing brief in opposition to plaintiffs' motion for a preliminary injunction with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

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