

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN**

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DUANE MALETSKI, )  
 SHARON LOPEZ, )  
 FRANCES M. ZICK, )  
 and all others similarly situated, )  
 OBAMA FOR AMERICA, and )  
 DEMOCRATIC NATIONAL COMMITTEE )  
 )  
 PLAINTIFFS )  
 )  
 v. )  
 )  
 MACOMB COUNTY REPUBLICAN )  
 PARTY, )  
 MICHIGAN REPUBLICAN PARTY, )  
 REPUBLICAN NATIONAL COMMITTEE, )  
 and JOHN DOES #1-100, )  
 )  
 DEFENDANTS. )

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Case No. 08-cv-13982  
**Hon. David M. Lawson**  
**CLASS ACTION**  
**Expedited Consideration Requested**

**MOTION FOR PRELIMINARY INJUNCTION AND DECLATORY RELIEF**

In order to avoid irreparable harm during the 2008 General Election, and for the reasons stated in the accompanying Memorandum in Support of Motion for Preliminary Injunction and Declaratory Relief, Plaintiffs respectfully request that the Court issue an order prohibiting the Defendants, their respective agents, servants, employees, attorneys, successors, and all persons acting in concert with each or any of them, from challenging Michigan voters on the basis of the presence of particular property on a listing of foreclosure proceedings. Plaintiffs further request an order declaring that the presence of a particular property on a listing of foreclosure proceedings is not a reasonable basis on which to lodge a challenge to a voter's registration and a systematic plan to challenge such voters at the polls violates federal law. Plaintiffs also

respectfully request the Court's expedited consideration, so that the relief will be in time to protect their right to vote and avoid irreparable harm.

Pursuant to L.R. 7.1(a), counsel certify that they conferred with counsel for Defendant Michigan Republican Party and have determined that the relief sought in the motion will be opposed.

Dated: September 25, 2008

Respectfully submitted,

/s/James R. Bruinsma

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### **STATEMENT OF ISSUES**

Whether Defendant Republicans’ “lose your home, lose your vote” foreclosure-based challenge scheme likely violates Plaintiffs’ right to vote as protected under 42 U.S.C. § 1983 and § 1985(3), and whether an impairment of that vote outweighs Defendant Republicans’ interest in foreclosure-based challenges.

## INTRODUCTION

Duane Maletski, Sharon Lopez, Frances M. Zick, Obama for America, and the Democratic National Committee (hereinafter “Plaintiffs”), by counsel, hereby move for a preliminary injunction to enjoin the Defendant Macomb County Republican Party, Michigan Republican Party, Republican National Committee, and John Does #1-100 (hereinafter “Defendant Republicans”) from implementing a mass challenge to the eligibility of voters who reside at properties that have appeared on lists of foreclosed properties. Plaintiffs also seek corresponding declaratory relief. As discussed below, this “lose your home, lose your vote” scheme – to intimidate voters from going to the polls and to harass them at the polls – infringes on the fundamental right to vote of Plaintiffs and others similarly situated.

Republican officials’ “lose your home, lose your vote” scheme is simply a new version of an old tactic: In a process called “caging,” Republicans have repeatedly tried to have voters removed from voter registration rolls in Democratic areas on the basis of nothing more than a returned postcard. Since a 1986 consent decree barred Defendant Republican National Committee from repeating the tactic, state party officials have pressed on with the tactic while trying to avoid RNC fingerprints – most notably in the last presidential election, when the Ohio Republican Party tried to strip 35,000 people of their vote in the days leading up to the election and had to be enjoined by a federal district court and the Sixth Circuit.

Now Defendant Republicans have announced to the press that they will use public lists of foreclosed homes (rather than returned postcards) to support mass challenges of voters in an attempt to strip them from the voter rolls. This is nothing more than a bold-faced attempt to stop those who are not inclined to vote for them from exercising the franchise. Like the Republican

tactics in prior years, the “lose your home, lose your vote” program violates the U.S. Constitution and federal law.

It is essential that this Court intervene. Defendant Republicans’ statements have already caused mass confusion, leaving voters believing they may have lost the right to vote and fearing that they will be subjected to questioning at the polls because of their financial situation. Moreover, the “lose your home, lose your vote” program is predicated on making mass, baseless challenges to voters on the electoral process at the last minute – on Election Day, at the polls. Absent action by the Court prior to Election Day to prohibit Defendant Republicans from undertaking their “lose your home, lose your vote” scheme, it will be all but impossible to remedy the damage to Plaintiffs and to the electoral process that is occurring now and that will occur. Voters’ concern has spread beyond Michigan, across the nation. Ex. 17, Ian Urbina, *As Homes Are Lost, Fears that Votes Will Be, Too*, New York Times (Sept. 25, 2008).

If indeed the Defendant Republicans no longer intend to challenge voters in this way and concede that foreclosure lists provide no reasonable basis to challenge a voter’s eligibility, it should be a simple matter to issue a declaratory judgment that will give voters the assurance that they need to go to the polls without fear and to enter a brief, stipulated injunction that ensures that this Court can take rapid action, if needed, on Election Day. But if Defendants cannot accede to such terms, then it is critical that the Court take action to protect the most fundamental right for those who are suffering today from the home mortgage crisis. Finally, in the event that the Court believes a more detailed record is needed concerning Defendant Republicans’ plans to suppress the vote, Plaintiffs respectfully request that, if the Court declines to issue declaratory and injunctive relief at this stage, the Court authorize Plaintiffs to conduct expedited discovery to

ensure that Defendants Republicans' plans to challenge voters on or before Election Day or otherwise to suppress the vote are subject to full review in advance of Election Day.

## FACTS

### I. HISTORY OF VOTER SUPPRESSION EFFORTS

This year's "lose your home, lose your vote" effort builds on a long history of Republican Party efforts to suppress the vote. The practice known as "caging," goes back at least 50 years. Teresa James, *Caging Democracy: a 50-Year History of Partisan Challenges to Minority Voters*, at 12-16 (Sept. 2007) (detailing the history of known caging efforts since the RNC's initiated "Operation Eagle Eye" following a 1958 Arizona election);<sup>1</sup> Chandler Davidson, *et al.*, *Vote Caging as a Republican Ballot Security Technique*, 34 Wm. Mitchell L. Rev. 533, 543-62 (2008). In its traditional form, vote caging is the use of returned mail (generally a single postcard) to create a list for a mass challenge of the eligibility of voters.

While often called "election integrity" or "ballot security" efforts, these benign names belie caging's true purpose: suppressing the vote. The goal of caging – and, in particular, of *announcing* plans for mass voter challenges – is to prevent communities of people whom Republicans do not believe are going to vote for them from voting. Davidson, *Vote Caging*, 34 Wm. Mitchell L. Rev. at 539-42. The targeted class is often African-American and other minority voters, but here, Republicans have targeted those hit hardest by the home mortgage crisis.

Courts have taken action to stop caging and similar unlawful Republican tactics since at least the 1980s. In 1981, the RNC in conjunction with the New Jersey Republican Party sent a mass mailing to homes in African-American and Hispanic neighborhoods, seeking to purge tens

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<sup>1</sup> See [http://www.projectvote.org/fileadmin/ProjectVote/Publications/Caging\\_Democracy\\_Report.pdf](http://www.projectvote.org/fileadmin/ProjectVote/Publications/Caging_Democracy_Report.pdf).

of thousands of voters from the rolls. The DNC filed suit and forced the RNC to enter into a consent decree prohibiting the use of such “ballot security” efforts targeted at minority neighborhoods. *See* Ex. 6, Consent Order, *Democratic Nat’l Comm. v. Republican Nat’l Comm.*, No. 81-3876 (D.N.J. entered Nov. 1, 1982).<sup>2</sup> Despite the consent decree, the RNC continued in its unlawful voter suppression efforts in Louisiana in 1986, where internal Party memoranda acknowledged a goal of reducing turnout in Democratic (principally African-American) strongholds. Thomas B. Edsall, “‘Ballot Security’ Effects Calculated – GOP Aide Said Louisiana Effort ‘Could Keep the Black Vote Down,’” *Washington Post*, Oct. 25, 1986 (quoting memo from regional RNC political director that “this program will eliminate at least 60-80,000 folks from the rolls . . . If it’s a close race . . . this could keep the black vote down considerably”). Once again, the DNC brought the RNC to court, and the RNC was forced to enter into an expanded consent decree prohibiting caging efforts of any kind, absent prior express authorization by the Court. Settlement Stipulation and Order of Dismissal, *DNC v. RNC*, No. 86-3972 (D.N.J. entered July 27, 1987).

While the RNC remains subject to that consent decree, caging activities continue. In 2004, the Ohio Republican Party sought to strip some 35,000 Ohioans in Democratic areas of the state of their right to vote in rapid-fire election eve “hearings” that were scheduled, in some parts of the state, for only 15 seconds per voter. The national party chair showed up to announce the program. The courts again stepped in, enjoining the Republican caging program and ensuring that Ohio voters had the opportunity to go to the polls and have their ballots counted. *Miller v. Blackwell*, 348 F. Supp. 2d 916 (S.D. Ohio 2004), *stay denied*, 388 F.3d 546 (6th Cir. 2004).

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<sup>2</sup> Other state Republican parties have similarly been sued and forced into consent decrees that prohibit caging and similar “ballot security” measures. Ex. 7, Consent Order, *United States v. North Carolina Republican Party*, No. 91-161-Civ-5F (E.D.N.C. entered Feb. 27, 1992) (“NCRP Consent Order”).

Michigan is not immune from these tactics. *See, e.g.*, Ex. 8, Patricia Montemurri, “Tensions in Michigan – Tempers Boil Amid Partisan Challenges at Detroit Polls,” Detroit Free Press (Nov. 3, 2004). Although it was never determined whether aggressive Republican challengers in 2004 were caging, Michigan State Representative John Papageorge admitted that to succeed in the state, Republicans would need to “suppress the vote” in Detroit. Ex. 9, Kathleen Gray, Remark Sets off Election Fervor, Detroit Free Press (Oct. 13, 2004). Republican challengers in the Detroit area showed every sign that they were engaged in such suppression.

## II. THE “LOSE YOUR HOME, LOSE YOUR VOTE” SCHEME

Today, in attacking foreclosure victims, the local, state, and national Republicans have taken caging to a new low. The chairperson of the Republican Party in Macomb County intends for Republicans to challenge the right to vote of Michigan residents whose houses have been the subject of foreclosure notices. James Carabelli, quoted in the Michigan Messenger, said “[w]e will have a list of foreclosed homes and will make sure people aren’t voting from those addresses.” Ex. 10, Eartha Jane Melzer, *Lose Your House, Lose Your Vote*, Michigan Messenger (Sept. 10, 2008). The Michigan Messenger reporter has sworn under oath that her quotation is accurate.

There can be no doubt that such a scheme is directed at voters whom Republicans believe are unlikely to vote for them. If this point were not self-evident, it is established by examination of the location of foreclosed homes whose residents are likely to be most affected by this scheme. As shown in the declaration of Dr. Fred Conrad, who compared a list of foreclosed homes in Macomb County with the voting record of the precincts where those homes are located, foreclosures disproportionately occur in precincts that have voted Democratic in past elections. Of the foreclosures for which Dr. Conrad had corresponding election data, 62.5% occurred in precincts that were more Democratic than the county as a whole in the 2004 Presidential

election, and 56.4% occurred in precincts where a majority (more than 50%) of the votes cast were for the Democratic candidate. Ex. 16 (Conrad Decl.) ¶ 3. Using the results from the 2006 Gubernatorial election, the pattern is even more striking: Sixty percent of the foreclosures occurred in precincts that voted more Democratic than the county as a whole, and 69.1% occurred in precincts where a majority of the votes cast were for the Democrat. *Id.* Furthermore, the foreclosure rate is highly statistically correlated with the partisanship of a precinct – more foreclosures occur in precincts where more people voted for the Democratic candidate. *Id.* Democratic precincts (under both definitions in both elections) had between 22% and 42% more foreclosures on average than other precincts. *Id.* Finally, there is a statistically significant correlation between the percentage of votes cast for the Democratic candidate and the number of foreclosures in a given precinct. *Id.* ¶ 6.b. In other words, as the percentage of votes cast for the Democratic candidate increases, so does the number of foreclosures. *Id.* Defendant Republicans’ targeting of foreclosed homes is thus nothing more than an attempt to target voters who are likely to vote Democratic.

The “lose your home, lose your vote” scheme being perpetrated by the Macomb County Republicans is part of a broader state and nationwide campaign by the Republican Party to suppress the vote. The Michigan Republican Party, working with the national Republican party, intends to engage in a coordinated “election integrity” program designed to stop people from voting. Ex. 10 (*Lose Your House, Lose Your Vote*); Ex. 5 (Melzer Decl.) ¶ 3. The Republican Party chair for Genesee County confirmed that this effort of challenging voters on Election Day is being coordinated with the McCain campaign. Ex. 10 (*Lose Your House, Lose Your Vote*). A press report indicates that the Republican Party in Franklin County, Ohio, where the state and national Republican parties’ 2004 “caging” operation was shut down by a federal court, has not

ruled out foreclosure-based challenges. Ex. 11, Robert Vitale, *Foreclosed-on Voters Using Old Addresses Could Snag Election*, Columbus Dispatch (July 6, 2008). In Florida, the RNC sent a piece of mail to Democratic voters, saying that they have been registered as a Republican and causing uncertainty among recipients about the status of their registration. The mailing had a “Do not forward” instruction – just as traditional “caging” mailings do. Ex. 12, Steve Bousquet, “Democrats, Florida Elections Officials Criticize GOP Mailing,” St. Petersburg Times (Sept. 16, 2008).

Since announcement of the “lose your home, lose your vote” scheme and the resulting public outcry, Republicans have been backpedaling furiously, though with inconsistent and confused remarks that, rather than assuaging concerns, appear to have heightened them. Ex. 4 (Sabaugh Decl.) ¶ 2. Even while denying that they are going to undertake this scheme, Ex. 13, Kathleen Gray & Amber Hunt, *GOP Won’t Use Foreclosure List To Block Voters*, Detroit Free Press (Sept. 12, 2008), Republican operatives have admitted that they intend to engage in traditional caging (using returned mail to make *en masse* challenges to voters before or at the polls), Ex. 14, Eartha Jane Melzer, *Republicans Recant Plans To Foreclose Voters But Admit Other Strategies*, Michigan Messenger (Sept. 11, 2008) – the very unlawful activity which the Defendant RNC and its agents are forbidden to undertake under a preexisting consent decree and which was the subject of the Ohio injunction in 2004.

Moreover, in the face of threats of libel, the newspaper that first reported the “lose your home, lose your vote” scheme has stood by its story. Ex. 15, Jefferson Morley, *Messenger Rejects GOP Plea for Retraction*, Michigan Messenger (Sept. 12, 2008). And Ms. Melzer, who reported it, has sworn under oath that it is accurate. Ex. 5 (Melzer Decl.) ¶ 3.

### III. HARM TO VOTERS AND THE ELECTORAL PROCESS

As discussed in the declarations submitted by Plaintiffs, the harm to plaintiffs and others similarly situated is immediate and irreparable. Plaintiffs fear that their right to vote will be taken away or that they will be subjected to burdens on Election Day not shared by other voters and without any rational basis, including being subjected to public questioning arising out of their foreclosures and being forced to wait inordinate amounts of time to vote. *See* Ex. 1 (Maletski Decl.) ¶¶ 15-16; Ex. 2 (Lopez Decl.) ¶¶ 13-15; Ex. 3 (Zick Decl.) ¶ 15. In addition, as explained by the clerk of Macomb County, there has been widespread public confusion and concern since announcement of the “lose your home, lose your vote” scheme, leaving people uncertain about whether they still have the right to vote and whether they should show up at the polls on Election Day. Ex. 4 (Sabaugh Decl.) ¶¶ 2-3. It is precisely this type of pre-Election Day media hype that has been a cornerstone of Republican party vote suppression efforts in the past – a person who doesn’t go to the polls is one who does not even need to be challenged. James, *Caging Democracy* at 10-11. In addition, as the clerk explains, if allowed to occur, the Defendant Republicans’ mass challenges under the “lose your home, lose your vote” scheme will result in long lines on Election Day, likely discouraging voters and causing them not to vote. Ex. 4 (Sabaugh Decl.) ¶ 7.

### ARGUMENT

When considering a motion for preliminary injunction, a district court must balance four factors: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of the injunction. *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 542 (6th Cir. 2007). The four considerations are “factors to be

balanced, not prerequisites that must be met.” *Jones v. City of Monroe, MI*, 341 F.3d 474, 476 (6th Cir. 2003). Plaintiffs satisfy this test for preliminary injunctive relief.

**I. PLAINTIFFS HAVE A STRONG CASE ON THE MERITS.**

Plaintiffs have a strong likelihood of success on the merits. On Plaintiffs’ Section 1983 claim, Defendants have not and cannot assert a state interest that is strong enough to allow them to burden the Plaintiffs’ fundamental right to vote with mass challenges at the polls based on listings of foreclosed properties. And Plaintiffs’ claim under Section 1985(3) succeeds for two reasons: Defendants have conspired to burden that fundamental right solely because they believe Plaintiffs are not likely to support their candidates, and Defendants have conspired to intimidate eligible voters from exercising the franchise.

**A. Plaintiffs Are Likely to Succeed on Their Section 1983 Claim.**

**1. “Lose Your Home, Lose Your Vote” Impermissibly Burdens Plaintiffs’ Constitutional Right.**

“The right to vote freely for the candidate of one’s choice is of the essence of a democratic society and any restrictions on that right strike at the heart of representative government.” *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). That is because the right to vote is “preservative of all rights.” *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (“Other rights, even the most basic, are illusory if the right to vote is undermined.”). For this reason, the Supreme Court has made clear that “any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.” *Reynolds*, 377 U.S. at 561-62.

By creating a scare among voters about whether foreclosure strips them of the right to vote and threatening mass challenges at the polls on that basis, Defendants have debased the democratic process. *See Harper v. Virginia Bd. of Elections*, 383 U.S. 662, 666 (1966)

(recognizing that Equal Protection Clause is violated whenever the law “makes the affluence of the voter or payment of any fee an electoral standard”); *Edwards v. California*, 314 U.S. 160, 184 (1941) (Jackson, J., concurring) (“[A] man’s mere property status, without more, cannot be used by a state to test, qualify, or limit his rights as a citizen of the United States.”). Defendant Republicans’ scheme impinges on the exercise of this fundamental right in a number of ways.

First, Defendant Republicans’ announcement has already interfered with the right to vote. Just by publicizing their plan – particularly through independent media they could later seek to discredit – Defendant Republicans have sown mass confusion about foreclosure victims’ eligibility, clearly designed to deter those voters from going to the polls. As the Clerk of Macomb County has explained, the Defendant Republicans’ announcement, and their subsequent recanting, revisions, and extensions, have led to significant confusion and concerns among voters, leaving them uncertain about whether it is even worth it to show up to the polls on Election Day. *See* Ex. 4 (Sabaugh Decl.) ¶ 2. Absent a declaration by this Court, there is a significant chance that some voters will not go to the polls out of the belief that they have lost the right to vote or out of fear that they will be subjected to public questioning arising out of their foreclosure and the economic details of their lives. *See* Ex. 4 (Sabaugh Decl.) ¶¶ 2-3. Voters who heard the plans feared that their right to vote may have been stripped from them. *See* Ex. 4 (Sabaugh Decl.) ¶ 2; Ex. 1 (Maletski Decl.) ¶¶ 15-16; Ex. 2 (Lopez Decl.) ¶¶ 13-15; Ex. 3 (Zick Decl.) ¶ 15. The numerous calls to the Clerk’s office demonstrate that the suppression plan has succeeded – and the Clerk is concerned that absent an order from the Court, she will be powerless to stop them. Ex. 4 (Sabaugh Decl.) ¶¶ 2-3, 6.

Second, on Election Day itself, the foreclosure-based, mass challenge program will burden the right to vote. As in their past caging efforts and consistent with their threats, absent

an order from this Court, challengers trained and directed by the Defendant Republicans will be able to challenge Plaintiffs and other voters' residency, threaten to have them pulled out of line, and press already harried election officials to question them, causing those voters to be detained at the polls for an undetermined length of time. Defendants' scheme will lead to long lines at the polls, diversion of the resources of electoral officials, and possibly public humiliation of individual voters. Ex. 4 (Sabaugh Decl.) ¶ 7. For eligible voters whose addresses have appeared in foreclosure proceedings for any reason, the cost of a ballot is the willingness to risk being subject to questions that arise solely from the financial status of the property at which they reside. Election practices that threaten to humiliate and discourage voters can constitute constitutional violations. *United States v. Charleston County*, 316 F. Supp. 2d 268, 286 n.23 (D.S.C. 2003) (treating "public and hostile questioning" that "upset and humiliated" select voters as part of pattern of constitutional violations); *Harris v. Graddick*, 593 F. Supp. 128, 131 (D. Ala. 1984) (same); cf. *Lightourn v. Garza*, 928 F. Supp. 711, 714 (W.D. Tex. 1996) (finding ADA violation where practice "often results in embarrassment and sometimes humiliation for blind voters and results in discouraging them from exercising the franchise"), *rev'd on other grounds*, 118 F.3d 421 (5th Cir. 1997), *vac'd without op.*, 127 F.3d 33 (5th Cir. 1997).

The Defendant Republicans' plan will also subject those residing at addresses that have appeared on foreclosure lists to inordinate delays. Responding to a challenge is more time consuming than simply casting a ballot, and under Michigan law, a "challenged person shall stand to one side until after unchallenged voters have had an opportunity to vote, when his case shall be taken up." Mich. Comp. Laws § 168.728. And once a challenge is taken up, even the most meritless challenges cause additional delay as pollworkers are required to document the activity. *See* Mich. Comp. Laws § 168.727. The Macomb County clerk is concerned that "if

there are long lines due to inappropriate challenges, ... many voters will become discouraged and leave without voting.” Ex. 4 (Sabaugh Decl.) ¶ 7. This burden infringes on the right to vote. *See, e.g., Ury v. Santee*, 303 F. Supp. 119, 126 (N.D. Ill. 1969) (finding constitutional defect where inadequate voting facilities caused long lines, because “United States citizens do have a right guaranteed by the Constitution to a reasonable opportunity to vote in local elections, that is, ... to be able to vote within a reasonable time”); *Summit County Democratic Central & Exec. Comm. v. Blackwell*, 388 F.3d 547, 552 (6th Cir. 2004) (Ryan, J., concurring) (recognizing that “inordinate delay” at polls could constitute unconstitutional burden).

There is no question that these tactics burden the right to vote. And where fundamental rights are at stake, courts in the Sixth Circuit have been exacting: The Constitution is violated whenever a person is “deterred, even if imperceptibly, from exercising those rights in the future.” *Miller*, 348 F. Supp. 2d at 921-922 (quoting *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg’l Transit Auth.*, 163 F.3d 341, 363 (6th Cir. 1998)) (invalidating Republican voter caging efforts in Ohio in 2004). Defendants’ scheme to depress turnout – and worse, harass those who are not deterred – clearly impinges on this right.

**2. There is No Rational Basis, Much Less a Compelling Interest Narrowly Tailored, to Support the Defendant Republicans’ “Lose Your Home, Lose Your Vote” Scheme.**

The Defendant Republicans do not even arguably justify the harms they are imposing on voters. Burdens on the right to vote are analyzed on a sliding scale – the more severe the burden, the greater the justification required to support it. *Anderson v. Celebrezze*, 460 U.S. 780, 788 (U.S. 1983); *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978) (“When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interest and is closely tailored to effectuate only those interests.”). Where, as here, there is no rational basis at all to support the burden on the right to

vote, the action or regulation that causes that burden cannot stand. *Crawford v. Marion County Election Board*, 128 S. Ct. 1610, 1616 (2008) (Stevens, J., joined by Roberts, C.J., and Kennedy, J.) (“even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications”); *see also City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) (invalidating local ordinance because it had no rational basis).

Because the “lose your home, lose your vote” scheme is targeted at voters who are likely to vote Democratic, it must be analyzed under the strictest scrutiny – a test that Defendant Republicans cannot meet. As Dr. Conrad’s analysis shows, there is a significant correlation between precincts that tend to vote Democratic and those in which large numbers of foreclosures occur, and precincts that tend to vote Democratic have, on average, a much higher number of foreclosures. Ex. 16 (Conrad Decl) ¶¶ 3, 6. Thus, targeting foreclosed homes is the equivalent of targeting a population that tends to vote strongly Democratic.<sup>3</sup> Such partisan-based burdens on the right to vote are contrary to basic tenets of democracy and can only be upheld if they advance a compelling interest and are as narrowly tailored as possible. *See Anderson*, 460 U.S. at 801-06.

But even if the Court were to conclude that the “lose your home, lose your vote” scheme *were not* targeted at Democratic voters, but simply imposed a non-discriminatory burden on the right to vote, it would nonetheless have to enjoin the Defendants here because there is no legitimate interest at all in allowing such a scheme to proceed. Compared to the threat that the Defendant Republicans’ mass challenge scheme will deter voters from voting, subject them to long delays and harassment at the polls, or both, the societal interest in allowing challenges

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<sup>3</sup> Indeed, the partisan impact of the Defendant Republicans’ “lose your home, lose your vote” scheme is understated here because, on Election Day, Defendant Republicans can simply choose not to challenge voters in heavily Republican precincts, meaning that all of the foreclosure-based challenges will occur in heavily Democratic precincts. This additional partisan targeting is consistent with Defendant Republicans’ prior caging activities and its aggressive challenges focused on the Detroit area in 2004. Ex. 8 (*Tempers Boil*).

based on a foreclosure list is precisely zero. The presence of a property on a foreclosure list says nothing about the entitlement to vote of those who are registered voters at that property. Some voters who are registered to vote from an address will be renters, with not even the slightest connection to the foreclosure notice. But even if the voter is the owner of property subject to a foreclosure notice, the notice says *nothing* about the voter's eligibility: Michigan law requires notices to run for four consecutive weeks before a home can be subjected to a foreclosure sale, and even after such a sale, under Michigan law a resident is entitled to stay in the home for up to a year in the hope that it may be possible for them to resolve their financial difficulties, *see Mich. Comp. Laws §§ 600.3240(7)-(12), 600.3232, 600.3236* – and *even then*, a voter who moves within 60 days of an election is entitled to vote from his or her old precinct, *see Mich. Comp. Laws § 168.507a(1) & (2)*. Even a spokesman for the Michigan Republican Party has conceded as much; according to the Detroit Free Press, party spokesman Bill Nowling said “What does a name on a foreclosure list tell us? Nothing . . . . We go into the polling place with the qualified voter file and that is all.” Ex. 13 (*GOP Won't Use Foreclosure List To Block Voters*).<sup>4</sup>

The existence of a foreclosure notice is not evidence of a voter's ineligibility to vote or to vote from a particular location. With *nothing* to justify the foreclosure-based challenges, the “character and magnitude” of the injury to the Plaintiffs' rights far outweighs the interest advanced by permitting the scheme to go forward. *Anderson*, 460 U.S. at 789; *see also Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 920-21 (6th Cir. 1998).

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<sup>4</sup> Mr. Nowling's statement is itself inconsistent with the comments of another Republican official who indicated that Michigan Republicans also intend to engage in caging, which requires them to have both the voter file and a list of addresses to be attacked following the caging effort.

**3. Defendant Republicans Are State Actors Because They Are Specifically Empowered by State Law, and Their Exercise of that Power Is Intimately Intertwined with Administration of a Quintessential Public Function: The Conduct of a General Election.**

Defendant Republicans cannot attempt to excuse their voter suppression tactics by arguing that they are not state actors and thus not bound to comply with the First and Fourteenth Amendment. The law is clear that, when they are levying challenges to prevent voters from exercising a fundamental right pursuant to authority granted to them by state law, they are state actors for purposes of the Fourteenth Amendment.

Under Section 1983, private entities and individuals are subject to suit when “there is a sufficiently close nexus between the State and the challenged action of the private entity so that the action of the latter may be fairly treated as that of the State itself.” *Hernandez v. Thomas*, No. 92-CV-173, 1993 U.S. Dist. LEXIS 21285, at \*7 (W.D. Mich. Aug. 19, 1993); *see also Adams v. Vandemark*, 855 F.2d 312, 314 (6th Cir. 1988) (quoting *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982) (holding that private individuals are state actors whenever they act “under color of state law” such that “the alleged infringement of federal rights [is] ‘fairly attributable to the State.’”)). A private person or entity’s acts are attributable to the State, for example, in cases where that person or entity assumes a public function, *e.g. Marsh v. Alabama*, 326 U.S. 501 (1946) or acts in concert with public authorities, *e.g. Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 941 (1982). The Supreme Court has long recognized that when an election-related practice gives significant authority to political parties, those entities are converted to state actors. *Smith v. Allwright*, 321 U.S. 649, 663-64 (1944) (concluding that party-operated primary in a single party state constituted state action).

In this case, there can be little dispute that the challengers whom the Republican Defendants will send to the polls are state actors. The Michigan election code makes specific

provision for partisan challengers, making them part of the election process. By law, a political party is specifically authorized to designate up to two challengers for each polling place on Election Day. Mich. Comp. Laws § 168.730(1). At any given time, one of those individuals has the authority to make challenges. Mich. Comp. Laws § 168.730(3). Michigan law specifically requires local election officials to provide space for these partisan challengers so that they can observe the voting. Mich. Comp. Laws § 168.733(1).

Michigan law allows a challenger to challenge the right to vote of a person whom he has “good reason to believe” is not eligible to vote in the precinct. Guidance from the Michigan Department of State Bureau of Elections, states that a proper challenge is one “based on information obtained by the challenger through a reliable source or means.” *The Appointment, Rights and Duties of Election Challengers and Poll Watchers* at 6 (Sept. 2003). Conversely, an improper challenge is one which is not based on such reliably sourced information. But neither state law nor the Bureau of Elections’ guidance provide direction about rejecting an “improper” challenge or about a procedure to be followed by the elections inspector to determine whether a challenge is “proper” or “improper.” Ex. 4 (Sabaugh Decl.) ¶ 6 (explaining that she is not aware of any authority that would allow election inspectors to deny challenges out-of-hand based on foreclosure lists). Therefore, the elections inspector is unlikely to reject a challenge, even one based on such unreliable information as that derived from foreclosure lists, or even to learn that a foreclosure list is the purported source for the challenge. As explained by the Clerk of Macomb County, although foreclosure lists are not a reliable source for challenges, poll workers are unlikely to reject challenges out-of-hand and are not trained to handle mass challenges such as those under the Defendant Republicans’ “lose your home, lose your vote” scheme. Ex. 4 (Sabaugh Decl.) ¶ 7.

The effect of a decision by a partisan challenger triggers a statutory process. When a challenge is made and there are several persons in line, the challenged voter is taken out of line by an election inspector to permit other voters to continue to vote. Mich. Comp. Laws § 168.728. Instead of questioning the challenger, the inspector, having taken the voter aside, is directed to administer an oath to the voter requiring him to truthfully answer all questions put to him regarding his qualifications. Mich. Comp. Laws § 168.729.

Thus, under Michigan law, the partisan challengers have enormous ability to interfere with the electoral process, just as Defendant Republicans did in the Detroit area in 2004. That power is granted to them by the state, relates to the quintessential public function (administration of voting in a general election), and is intertwined with the functions of government election officials. By delegating authority to partisan challengers to challenge eligible voters, thus triggering an elaborate state process, the Michigan statutes make partisan challengers into state actors. “No activity is more indelibly a public function than the holding of a political election: ‘While the Constitution protects private rights of association and advocacy with regard to the election of public officials, Supreme Court cases make it clear that the conduct of the elections themselves is an exclusively public function.’” *Tiryak v. Jordan*, 472 F. Supp. 822, 824 (E.D. Pa. 1979) (quoting *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978)) (parentheses omitted). Thus, challengers empowered by the state and intimately involved in the electoral process are state actors. *Tiryak*, 472 F. Supp. at 824 (recognizing that election observers are state actors). Where such challengers are involved in a scheme to intimidate or otherwise suppress the vote that is “made possible only because [the challengers] are clothed with the authority of state law,” such activities violate the Constitution and can be remedied by Section 1983. *Id.* at 825.

**B. Plaintiffs Have a Strong Claim Under Section 1985(3).**

Even if the statutory challengers are *not* considered state actors, Plaintiffs still have a likelihood of success for their claims under the two prongs of Section 1985(3). First, the statute's Equal Protection provision provides a cause of action for the Defendant Republicans' viewpoint-motivated conspiracy to deprive the Plaintiffs of their right to vote. Second, the statute's Support and Advocacy provision provides a cause of action for the Defendants' conspiring to intimidate Plaintiffs from exercising that constitutional right.

**1. Defendants' Conduct Violates the Equal Protection Provision of Section 1985(3).**

There can be no dispute that the "lose your home, lose your vote" scheme was designed to prevent voters whom Republicans believe are not likely to support their candidates from voting. The activity thus falls within the scope of Section 1985(3)'s Equal Protection provision, which provides a cause of action against anyone who "conspire[s] ... for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws." 42 U.S.C. § 1985(3). That the county, state, and national Republicans have conspired is established below. That they did it in order to deprive the foreclosure victims of the equal protection of the laws and deprive them of their rights should not be in serious question. *See Conklin v. Lovely*, 834 F.2d 543, 548-49 (6th Cir. 1987) (requiring plaintiffs to show conspiracy for the purpose of depriving class of equal protection of the laws, an act in furtherance of the conspiracy, and the deprivation of a right).

As shown above, in discussion of the Section 1983 claim, the foreclosure-based challenges impose an impermissible burden on voting that is wholly unrelated to a person's eligibility to vote. The injury, like any deprivation of the right to vote, is of constitutional dimensions. In addition, the plan is clearly targeted at voters whom Defendants believe will not

support their candidates. The evidence shows that targeting foreclosure victims was indeed an effective means to carry out the Defendant Republicans' partisan animus: As the Declaration of Professor Conrad demonstrates, precincts that have voted Democratic in past elections have statistically significantly higher numbers of foreclosures (between 22% and 42% higher on average, depending on the election), and the number of foreclosures tends to increase as the percentage of votes cast for the Democratic candidate increases. Ex. 16 (Conrad Decl.) ¶¶ 3, 6. Further, more than 60% of the foreclosures occurred in precincts that voted more Democratic than the county as a whole. *Id.* ¶ 3. Indeed, assuming that Defendant Republicans have no animus against foreclosure victims themselves, there is only one inference to be drawn from their tactic: They want to challenge voters who will not support their candidates.

It is well-established in this circuit that viewpoint-motivated efforts to deprive eligible citizens of a constitutional right fall within the purview of Section 1985(3). Thus, in *Cameron v. Brock*, 473 F.2d 608 (6th Cir. 1973), the supporter of a candidate for sheriff brought suit under § 1985(3) after the supporter was arrested for distributing pamphlets critical of the incumbent sheriff. The Sixth Circuit affirmed the jury verdict in favor of the supporter, holding that “§ 1985(3)'s protection reaches clearly defined classes, such as supporters of a political candidate.” *Id.* at 610. In *Glasson v. Louisville*, 518 F.2d 899 (6th Cir. 1975), similarly, the Sixth Circuit held in favor of protesters whose signs criticizing President Nixon had been destroyed by police officers, because “[a] more invidious classification than that between persons who support government officials and their policies and those who are critical of them is difficult to imagine.” *Id.* at 912; *see also Conklin*, 834 F.2d at 549; *Keating v. Carey*, 706 F.2d 377, 379, 387 (2d Cir. 1983) (holding that Republicans are “a protected class under the statute” and that § 1985(3) aims “to prohibit political discrimination in general”); *Means v. Wilson*, 522

F.2d 833, 838 (8th Cir. 1975); *see also, e.g., Anderson*, 460 U.S. at 793 ( explaining that “[i]t is especially difficult” to justify a burden on “political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status.”); *Bullock v. Carter*, 405 U.S. 134, 144 (1972) (explaining that it would “ignore reality were [the Court] not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status.”).

In targeting voters whom they believe are unlikely to vote for Republican candidates, Defendant Republicans have targeted Michigan residents on the basis of their views. The conspiracy to deprive them of their vote is thus actionable under Section 1985(3)’s Equal Protection Provision.

**2. Defendants’ Conduct Separately Violates Section 1985(3)’s Support and Advocacy Provision.**

Section 1985(3)’s Support and Advocacy provision provides an entirely separate basis on which Plaintiffs will succeed on the merits. *See Federer v. Gephardt*, 363 F.3d 754, 760 & n.5 (8th Cir. 2004) (recognizing that Support and Advocacy provision does not require class-based discrimination). Defendants’ strategy impermissibly attempts to intimidate voters from exercising their right to vote; their announcements have warned voters who have appeared on foreclosure lists that if they turn out on Election Day, they will be subjected to a challenge. Michigan law permits challenged voters to be asked to stand aside while unchallenged voters pass through before the challenge is resolved, drawing out their voting process beyond the delays that anyone else will face. Mich. Comp. Stat. § 168.728. Voters have already making clear that these activities discourage them from casting a ballot. Ex. 1 (Maletski Decl.) ¶¶ 15-16; Ex. 2 (Lopez Decl.) ¶¶ 13-15; Ex. 3 (Zick Decl.) ¶ 15; Ex. 4 (Sabaugh Decl.) ¶ 2. It is all based on Defendant Republicans’ false propaganda that appearance on a foreclosure list has any

relationship to voter eligibility. The activity violates the Support and Advocacy provision, which provides a cause of action against those who “conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner.” 42 U.S.C. § 1985(3).

Case law on Section 1985(3)’s intimidation provision is slim, but district courts within the Sixth Circuit have recognized that attempts to suppress turnout through misinformation campaigns are actionable. *See Miller*, 348 F. Supp. 2d at 918 (granting injunction, in case brought under Section 1983, when “the timing and manner in which Defendants intend to send notice may discourage Plaintiff Voters from exercising that fundamental right by leading them to believe they are not eligible to vote”). More to the point, parallel *criminal* voter intimidation statutes are interpreted to cover any kind of improper efforts to interfere with voter turnout, not just threats of physical violence. *See, e.g., United States v. Tobin*, No. 04-CR-216-01-SM, 2005 WL 3199672 (D.N.H. Nov. 30, 2005) (interpreting 18 U.S.C. § 241, which criminalizes efforts “to injury, oppress, threaten, or intimidate” voters, covers jamming of voter transportation phone bank); *United States v. Haynes*, No. 91-5979, 1992 WL 296782 (6th Cir. 1992) (upholding § 241 conviction for failure to submit registration forms collected from voters); *United States v. Townsley*, 843 F. 2d 1070 (8th Cir. 1988) (destruction of ballots). Indeed, the United States Department of Justice interprets the voter intimidation statutes to cover vote-suppression schemes based on providing misinformation to the public. *See, e.g., U.S. Department of Justice, Federal Prosecution of Election Offenses at 61* (7th ed. 2007) (concluding that “providing false information to the public – or a particular segment of the public – regarding the qualifications to vote” is no less intimidation than more physical forms are); Ex. 7 (NCRP Consent Decree) (entering consent decree on voter-intimidation claim based on caging practices designed to

suppress minority turnout). Thus, threatening that voters who show up will be forced to answer questions about their eligibility to vote based on nothing more than a foreclosure notice similarly violates the prohibition against voter intimidation in Section 1985(3).

### **3. There Is Ample Evidence of Conspiracy.**

If Plaintiffs can show a likelihood of success on either provision of Section 1985(3), they will have no difficulty establishing the necessary conspiracy. The statute clearly governs private actors, with no state action requirement. *Griffin v. Breckenridge*, 403 U.S. 88, 101 (1971). And the evidence of coordination between the Macomb County and Michigan Republican parties is clear: After the initial news report just implicated the county party, the *state* party responded with a denial. *See* Ex. 13 (*GOP Won't Use Foreclosure List To Block Voters*). Press accounts report that the Michigan Republican Party, working with the national Republican party, intends to engage in a coordinated "election integrity" program designed to stop people from voting. Ex. 10 (*Lose Your House, Lose Your Vote*). The Republican Party chair for Genesee County confirmed that this effort of challenging voters on Election Day is being coordinated with the McCain campaign. *Id.* Moreover, even apart from this reporting and the national party's long history of working with state parties on this cynical tactic, there is evidence of a nationwide strategy: In Ohio, the chair of the Franklin County GOP has admitted that they have not ruled out the foreclosure-based challenge process, Ex. 11 (*Foreclosed-on Voters*), and in Florida, an RNC mailing with do-not-forward instructions is spreading misinformation about voter registrations, *see* Ex. 12 (*Democrats, Florida Elections Officials*). Plaintiffs will have little difficulty establishing a conspiracy to suppress the vote in multiple ways, including through the "lose your home, lose your vote" scheme. Creating plans to obtain the foreclosure lists and announcing the actions to be taken are all the overt action required. *See Hooks v. Hooks*, 771

F.2d 935, 943-44 (6th Cir. 1985) (rejecting suggestion that express agreement and knowledge of all the details of the plan are necessary for civil conspiracy).

## II. THE EQUITIES STRONGLY FAVOR PLAINTIFFS.

### A. Plaintiffs Will Be Irreparably Harmed and There Is No Possible Equity to Support the “Lose Your Home, Lose Your Vote” Scheme.

Plaintiffs in this case seek to protect their right to vote, a right that ranks among the most fundamental in our society. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969); *Reynolds*, 377 U.S. at 562; *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *Wesberry v. Sanders*, 376 U.S. at 17. As a matter of law, impairment of that right is irreparable harm. *See, e.g., Overstreet v. Lexington-Fayette Urban County Gov’t*, 305 F.3d 566, 578 (6th Cir. 2002) (recognizing that impairment of constitutional right would be irreparable); *Touchston v. McDermott*, 234 F.3d 1133, 1158-59 & n.4 (11th Cir. 2000) (concluding that violation of right to vote constitutes irreparable harm); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986) (“The registration applicants in this case would certainly suffer irreparable harm if their right to vote were impinged upon.”); *Boustani v. Blackwell*, 460 F. Supp. 2d 822, 827 (N.D. Ohio 2006) (“The loss of the protected right to vote ‘for even minimal periods of time, constitutes irreparable injury.’”) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality op.)).

Absent a clear declaration that appearance on a foreclosure list does not constitute “good reason” to believe that the voter is ineligible to vote, thousands of Michigan voters may be deterred from exercising this basic and critical right. Some will believe they have lost their right or will not go to the polls out of fear that they will have to submit to intrusive questioning at the behest of a partisan challenger arising out of their personal finances. Some – particularly those for whom every hour represents wages that could be put toward their housing needs – will be

unable to wait after the challengers force them to stand aside. Others will fall victim to pollworkers who, without detailed knowledge of Michigan foreclosure law and despite officials' best efforts, improperly uphold a challenge under partisan pressure. Under Sixth Circuit precedent, the harms both to those who *do* show up and those who are *deterred* from showing up are irreparable. *United Food & Comm. Workers Union, Local 1099*, 163 F.3d at 363 (citing “the fear that, if these rights are not jealously safeguarded, persons will be deterred, even if imperceptibly, from exercising those rights in the future”) (internal quotations omitted). The Macomb County clerk confirms this: If the Defendant Republicans go forward with their plan, *the clerk has announced to voters that she will be unable to stop them*. Ex. 4 (Sabaugh Decl.) ¶ 6.

In contrast, the failure to grant an injunction could present no conceivable harm to the Defendant Republicans: They would be forced to rely on *appropriate evidence* before challenging voters' eligibility. Consistent with Michigan law and absent some additional ruling, Defendants could still challenge voters for whom there is a “good reason” to believe they are ineligible. They just would not be able to rely on foreclosure lists, which are completely irrelevant, to do so. And there is no possible equity to support Defendant Republicans' scheme. They freely concede that challenging voters based on foreclosure lists has no basis in law and advances no legitimate interest. Moreover, allowing Defendant Republicans to engage in mass, baseless challenges will simply clog the polls on Election Day, harming not simply Plaintiffs, but all voters, as well as diverting resources of election officials and interfering with the administration of the election. The balance of harms weighs strongly in favor of an injunction.

**B. This Case Is Ripe for Adjudication.**

Defendant Republicans cannot render this case non-justiciable by recanting the statements they have made or simply saying – without being subject to an enforceable decree – that they no longer plan to implement the “lose your home, lose your vote” scheme. This case

presents a ripe controversy because it arises in a concrete factual context. *Warshak v. United States*, 532 F.3d 521, 525 (6th Cir. 2008) (en banc). Defendant Republicans have announced a plan that is clear and well defined, with several concrete steps, all public: gather foreclosure lists, assemble challenge sheets, go to the polls on Election Day, and challenge voters on those lists to prevent them from voting. Under Sixth Circuit precedent, a claim can be sufficiently ripe for resolution when the factual contours of the case are clear in advance – especially in election cases. *See Kardules v. City of Columbus*, 95 F.3d 1335, 1343-44 (6th Cir. 1995).<sup>5</sup> This case is thus fit for judicial resolution.

That Defendant Republicans have responded to public pressure by denying that they will implement their plan neither alleviates the harm they are already causing nor makes it unlikely that voters will be faced with baseless challenges – and all the attendant harms – on Election Day. First, Defendant Republicans have already achieved one of their objectives by sowing fear and concern among Michigan residents. That harm can only be remedied by a declaration from this Court made known to the people of the state of Michigan that such conduct cannot occur. Second, the rights of foreclosure victims to vote cannot be gambled on the mere hope that the Republicans’ casual denials of the newspaper story are reliable. The newspaper reporter who first reported the Republicans’ plans has sworn under oath regarding their conversation. Ex. 5 (Melzer Decl.) ¶ 3. Moreover, the history of the Republican Party’s unlawful caging operations

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<sup>5</sup> In *Kardules*, 95 F.3d at 1344-47, at issue was harm to the right to vote that would have been caused by the feared financial consequences of the merger of two Ohio villages. *Id.* at 1339 (noting that applicable water and sewer contracts required a rate increase in the event of village merger). When the plaintiffs filed suit, nearly nine months before the November election, a merger commission was *attempting to agree* on conditions of merger. If the commission could not reach agreement within 75 days of being formed, no merger vote would have been on the ballot at all. *Id.* at 1340. And, of course, it was not at all clear that a majority of both villages would have approved the merger, even if it made its way onto the ballot. *Id.* Nevertheless, the court held squarely that the claim was ripe for adjudication because none of those events would have changed in a pertinent way the dispute’s contours.

– including repeatedly engaging in such conduct even though the national RNC is prohibited from doing so – is so prevalent that mere denials in the face of public pressure provide little assurance. Many of those efforts have been halted only with judicial intervention. *See Miller*, 348 F. Supp. 2d at 919-20; Order, *DNC v. RNC*, CA No. 81-3876 (D.N.J., entered Nov. 1, 2004). Thus, Defendants are likely to engage in the threatened conduct, on the basis of their current threats and past similar conduct. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (“Past wrongs [are] evidence bearing on ‘whether there is a real and immediate threat of repeated injury.’”).<sup>6</sup>

Third, even if the Court were uncertain about whether the Defendant Republicans are likely to engage in their unlawful plan, there is a real and significant threat to Plaintiffs and others similarly situated that they will not be able to vindicate their rights. Empty promises by Defendant Republicans today will be of little value on Election Day if Defendant Republicans are not subject to a court order and thus can simply change their mind and engage in the same tactics that they always have. The ability of this or any other Court fashioning a remedy on Election Day is simply too limited to fail to consider Plaintiffs’ challenge now. Indeed, election cases are the classic cases in which the hardship or impossibility of providing an adequate remedy to an infringement of a fundamental right compels early adjudication. *See Babbitt v. UFW Nat’l Union*, 442 U.S. 289, 301 n.12 (1979) (“Challengers to election procedures often

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<sup>6</sup> Defendant Republicans also cannot argue that their denials have mooted the case. “It is well settled that a defendant’s voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. If it did, the courts would be compelled to leave the defendant free to return to his old ways.” *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (internal citations and quotations marked omitted); *Jones v. City of Lakeland*, 224 F.3d 518, 529 (6th Cir. 2000) (en banc). A party claiming that its change of behavior has mooted a case bears a “heavy burden” of making it “absolutely clear” that the challenged conduct “cannot be reasonably expected to recur.” *Ammex, Inc. v. Cox*, 351 F.3d 697, 704-05 (6th Cir. 2003) (internal quotations omitted). Defendant Republicans cannot meet that burden here.

have been left without a remedy in regard to the most immediate election because the election is too far underway or actually consummated prior to judgment.”); *Fla. State Conf. of the NAACP v. Browning*, 522 F.3d 1153, 1164 (11th Cir. 2008) (“The hardship to would-be voters is that if we require them to wait until after their applications have been rejected to challenge Subsection 6, there may not be enough time to reach a decision on the merits before the actual election.”). Nothing in Article III prevents this Court from doing what is essential to protecting the rights of Plaintiffs and others in the State – imposing a court order that prohibits Defendant Republicans from undertaking their unlawful scheme.

**C. Both Declaratory and Injunctive Relief Are Needed Here.**

Plaintiffs believe that this case can be resolved and public confidence restored in a simple manner – through a declaration from this Court that the foreclosure lists cannot provide a basis for challenging voters at the polls and an injunction (to which Defendant Republicans should be willing to stipulate if indeed they have no plans to implement the “lose your home, lose your vote” scheme) that prohibits use of such foreclosure lists as a basis for challenging voter eligibility. Such an order would address both the public confusion that is already occurring and the threat to voters on Election Day.

Declaratory relief is critical to address the public confusion that Defendants have fostered.<sup>7</sup> The Court has “unique and substantial discretion” to issue declaratory relief based on the facts of each case. *Wilton v. Seven Falls Co.*, 515 U. S. 277, 286 (1995). The Court is to consider whether, under the totality of the circumstances, there is “sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). Declaratory relief is particularly proper when the

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<sup>7</sup> Declaratory relief may be available even when injunctive relief is not. *Steffel v. Thompson*, 415 U.S. 452, 469 (1974).

there is a “public interest in having the legality of the practices settled.” *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953).

This case presents sufficient immediacy and reality to warrant declaratory relief for multiple reasons. First, the announcement of the “lose your home, lose your vote” strategy has had an immediate and material effect on the exercise of the fundamental right of the Individual Plaintiffs and the members of the proposed class to vote. As set forth in the declarations of the Individual Plaintiffs and the Macomb County Clerk, a real question has been raised in the minds of the Individual Plaintiffs and members of the proposed class whether they remain eligible to vote given their foreclosure proceedings. Many may elect not to go to the polls on the erroneous belief that they have lost the right to vote.

Second, even for those voters who understand that they maintain the right to vote despite foreclosure proceedings, the announcement of the “lose your home/lose your vote” strategy has a chilling effect on their exercise of the right to vote. The Individual Plaintiffs and members of the proposed class have been advised that they may be singled out, stigmatized, and delayed on Election Day in a public forum when they attempt to exercise their right to vote.

Third, it is undisputed that the “lose your home/lose your vote” strategy as publicized throughout Michigan is not even a potentially lawful basis upon which to challenge voters. Even Defendants now concede that the plan provides no good reason to challenge a voter at the polls.

Finally, nothing in the recent retractions obviates the harm on Election Day in the manner that declaratory relief would. The Individual Plaintiffs and members of the proposed class cannot resolve Defendants’ conflicting accounts with Ms. Melzer’s sworn testimony. Ex. 5 (Melzer Decl.) ¶ 3. And, given the public announcement by the Macomb County Clerk that she is powerless to prevent the “lose your home, lose your vote” strategy, class members cannot simply

rely on public officials to protect voters' rights under the law. In light of the confusion that has already been created, there remains a substantial public interest in clarifying the rights of voters before they go to the polls. A declaratory judgment would provide the Individual Plaintiffs and members of the proposed class with a clear and reliable statement that their right to vote is secure, regardless of the conflicting reports that have been publicized.

An injunction here is also critical. As noted above, resolving disputes about Defendant Republicans' challenges on Election Day will be difficult at best, especially if Defendant Republicans engage in a mass effort, as threatened. Election cases thus require early adjudication to ensure the smooth operation of the election and to make certain that no voter is deterred from going to the polls by an unconstitutional scheme. An injunction will prevent Defendant Republicans from engaging in their unlawful scheme, and, if Defendant Republicans violate the injunction on Election Day, this Court can be prepared to take swift action.

Finally, if the Court believes a further record is required (Plaintiffs do not believe this is necessary), the proper course would be to order expedited discovery into the Defendant Republicans' "election integrity" efforts. Although Plaintiffs believe that it is essential to restore public confidence as soon as possible through an authoritative declaration by this Court and that the current record is sufficient for entry of such a declaration and an injunction, an order authorizing expedited discovery into the Defendant Republicans' planned tactics would be an appropriate action in the event that Defendant Republicans refuse to stipulate to an order that would prevent them from engaging in the "lose your home, lose your vote" scheme.

### **CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request that their Motion for a Preliminary Injunction be granted, and the Court issue an order prohibiting the Defendants, their respective agents, servants, employees, attorneys, successors, and all persons acting in concert

with each or any of them, from challenging Michigan voters on the basis of the presence of particular property on a listing of foreclosure proceedings. Plaintiffs further request an order declaring that the presence of a particular property on a listing of foreclosure proceedings is not a reasonable basis on which to lodge a challenge to a voter's registration and a systematic plan to challenge such voters at the polls violates federal law.

Dated: September 25, 2008

Respectfully submitted,

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