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Republican Committee of Lancaster County

and David M. Dumeyer, in his official capacity

as Chairman of the Republican Committee of

Lancaster County

MILLIE MAX,

Plaintiff

v.

REPUBLICAN COMMITTEE OF
LANCASTER COUNTY, and DAVID M.
DUMEYER, in his official capacity as
Chairman of the Republican Committee of
Lancaster County,

Defendants

: IN THE UNITED STATES DISTRICT COURT
: EASTERN DISTRICT OF PENNSYLVANIA

:
: No. 07-4488

:
: Jury Trial Demanded

:
: Assigned To:
: Judge James T. Giles

**DEFENDANTS' REPLY BRIEF IN SUPPORT
OF DEFENDANTS' MOTION TO DISMISS**

I. INTRODUCTION

According to the arguments in her Brief, in Max's view of the world, Dumeyer and the RCLC became "state actors," and engaged in "state action," when they exercised (1) their First Amendment right of speech by informing Max that it was inappropriate for a committeewoman to actively oppose the party's endorsed candidates, and (2) their First Amendment right of association by asking Max to consider resigning from the party if she believed she was morally obligated to actively oppose the party's endorsed candidates. Max argues in her Brief that the element which brings Dumeyer's and the RCLC's speech within the scope of "state action" for purposes of a cause of action under 42 U.S.C. §1983 is that

it was intended to alter and influence the outcome of the primary election which would, in turn, determine who would appear on the general ballot.

The required nexus, according to Max, is found in the conjunction between Dumeyer's and the RCLC's speech and the primary election. As incredible as the proposition sounds, because Dumeyer's and the RCLC's speech was intended to alter the outcome of the primary election it, therefore, constitutes "state action" and exposes Dumeyer and the RCLC to a claim for damages under the Civil Rights Act. See Max Brief at 13, 14 and 15 ("A political party seeking to suppress the political speech of others for the intended purpose of altering and distorting the results of a primary election contest has directly implicated itself into the exercise of the Commonwealth's sovereign authority to determine who shall appear on the Commonwealth's general election ballot and has, therefore, directly implicated itself as a state actor subject to the provisions of the Civil Rights Act.").

Max's argument, shocking in its audacity, is wholly contrary to established United States Supreme Court precedent and, if accepted, would eviscerate political parties' rights of speech and association protected under the First Amendment. Dumeyer and the RCLC respectfully submit that Max's Complaint lacks any factual or legal basis and must be dismissed with prejudice.

II. COUNTER-ARGUMENT

A. Max's Interpretation of the Supreme Court's Decisions in *Allwright* and *Terry* is without Merit.

In her Brief, presumably relying upon the Supreme Court's decisions in *Smith v. Allwright*, 321 U.S. 649 (1944) and *Terry v. Adams*, 345 U.S. 461 (1953), Max makes the fallacious argument that, "If a political party is not allowed to exclude African-Americans

from meaningful participation in primary elections under the Equal Protection Clause - then on the same analysis, political parties may not similarly suppress and exclude unwanted political speech from primary elections under the First Amendment.”^{1,2} Max Brief at 4, 13 and 15. Max’s argument does not find any support in either *Allwright* and *Terry*.

Neither *Allwright* and *Terry* are remotely analogous to the case at bar. In both *Allwright* and *Terry*, the State of Texas had delegated to the Democratic Party its authority to determine the qualifications of persons who could vote in the primary election.³ In turn, the Democratic Party, exercising the authority delegated to it by the state, determined that only whites would be permitted to vote in the primary election. The Supreme Court held in *Allwright* and *Terry* that the exclusion of African-Americans based upon their race by the Democratic Party, pursuant to the authority delegated to it by the state, constituted state action sufficient to state a claim under the Civil Rights Act. In this case, however, the RCLC did not promulgate a rule imposing limitations on anyone’s qualifications, or impairing anyone’s ability to vote in the primary election, and certainly not in violation of the rights of

¹The RCLC and Dumeyer are confident that the Court will recognize Max’s baseless insinuation on page 3 of her Brief about defense counsel’s “duty of candor” to the Court exactly for what it is: a continuation of Max’s attack-style of advocacy. The utter lack of any merit to Max’s position is best reflected in Max’s refusal to even address, let alone distinguish, the extensive Supreme Court precedent cited by the RCLC and Dumeyer in their Memorandum of Law (except in a footnote offering a poor excuse for not even making the attempt. See fn. 1 in Max Brief at 3.) and Max’s reliance upon a mischaracterization of a statement by Justice Stevens in his dissent in the Supreme Court’s 7-to-2 decision in *Jones*. See Max Brief at 11, citing Justice Stevens’ dissent.

²Although Max does not expressly cite these cases in support of the proposition, *Allwright* and *Terry* are the only cases with the holding alluded to by Max.

³Notably, the proscription against African-Americans voting in the Texas primary was originally contained in a statute enacted by the Texas legislature. See *Allwright*, 321 U.S., at 658.

a protected class under the Fifteenth Amendment as in *Allwright and Terry*.⁴ Rather, the speech which is the subject of Max's Complaint did not have any bearing on the conduct of the primary election itself. To the contrary, as reflected in Max's Complaint, Dumeyer's and the RCLC's speech was solely related to the party's support of its endorsed candidates. This is clearly an internal matter of the RCLC and does not involve any state action whatsoever.

Exercising the state's delegated power to establish rules regarding the qualifications of those persons who are permitted to exercise their constitutional right to vote in a primary election is wholly different from a political party exercising its First Amendment rights of association and speech as reflected in its choice of endorsed candidates. In the former case, as the Supreme Court held in *Allwright and Terry*, a party's mis-use of the delegated state power by preventing African-Americans from exercising their constitutional right to vote constitutes state action for purposes of a cause of action under the Civil Rights Act. In the later case, however, the Supreme Court has consistently held a political party is properly acting within the scope of its First Amendment rights of association and speech when it decides with whom it will associate (which also includes the right to exclude) and what message it wants to communicate. See *California Democratic Party v. Jones*, 530 U.S. 567, 120 S.Ct. 2402 (2000) (strongly affirming the right of freedom of association for political parties in holding that California's "blanket primary" was an unconstitutional infringement of political parties' rights of association and speech); *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 109 S.Ct. 1013 (1989) (holding that

⁴Max was not prevented from participating in the primary election in any fashion or supporting her preferred candidates. Max was only asked that she not actively oppose the RCLC's endorsed candidates while at the same time serving as a RCLC committeewoman.

California's ban on party endorsements of candidates in primary elections and restrictions on internal governance of the party violate political party's rights of speech and association under the First Amendment); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 107 S. Ct. 544 (1986) (holding that Connecticut statute restricting primary voting to party members violated political party's right to freedom of association; thus, party could open its primary to independent voters); *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564 (1983) (holding that Ohio statute requiring early filing by independent candidates to be on the general election ballot violated independent voters' freedoms of choice and association); *Democratic Party of U.S. v. Wisconsin, ex rel LaFollette*, 450 U.S. 107, 101 S.Ct. 1010 (1981) (holding that Wisconsin could conduct "open primary" but could not require delegates to the Democratic National Convention to vote in accordance with the primary results, as this would unconstitutionally intrude into the freedom of association of the party members); see also *McMenamin v. Philadelphia County Democratic Committee*, 405 F. Supp. 998, 1000-01 (E.D. of Pa. 1975) and *Valenti v. Pennsylvania Democratic State Committee*, 844 F. Supp. 1015 (M.D. Pa. 1994) (holding that the decision by Pennsylvania Democratic State Committee to prohibit candidates for statewide offices from distributing literature written by a third-party independent of the candidate's campaign at endorsement meeting was not state action needed to state a claim under Section 1983).⁵

⁵In her Brief, Max states that "Valenti clearly indicates that had the party's suppression of First Amendment speech occurred during the primary election rather than at a party endorsement meeting state action would have been implicated." Max Brief at 14. The District Court made no such suggestion. To the contrary, in response to this argument, the District Court stated, "We reject plaintiff's position." *Valenti*, 844 F.Supp., at 1019.

In *LaRouche v. Fowler*, 152 F.3d 974 (D.C. Cir. 1998), the United States Court of

Appeals for the District of Columbia Circuit observed:

But even if a political party could be considered a state actor, it is at the same time clothed with strong First Amendment protections against intrusion by the state. FN27. This is not simply a matter of dividing the universe of potential party activities into their public (state) and private (First Amendment-protected) spheres. The Court's cases have made clear that the very actions at issue here--the Party's decisions about who can be nominated as delegates and even about who can be considered a Democrat--are themselves clothed in First Amendment protection. Indeed, those cases suggest that if the State of Louisiana had tried to assist LaRouche by attempting to enforce the results of its primary (which yielded him one delegate) against the DNC, it would have been met with the bar of the First Amendment.

FN27. See *Eu*, 489 U.S. at 224 ("It is well settled that partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments."); *Tashjian*, 479 U.S. at 214 ("The freedom of association protected by the First and Fourteenth Amendments includes partisan political organizations."); *La Follette*, 450 U.S. at 121 ("The National Democratic Party and its adherents enjoy a constitutionally protected right of political association.") (quoting *Cousins*, 419 U.S. at 487); see also *Faulkner County*, 49 F.3d at 1295 ("The Supreme Court has located political parties roughly midway between conventional public and private institutions, attributing to parties elements of both."); cf. *Polk County v. Dodson*, 454 U.S. 312, 321, 325, 70 L. Ed. 2d 509, 102 S. Ct. 445 (1981) (holding that "it is the constitutional obligation of the State to respect the professional independence" of public defenders, even though some actions of public defenders may be under color of state law).

LaRouche at 152 F.3d at 992.

Max repeatedly asserts in her Brief, without citation to any authority, that, "It is well established that political parties are state actors in primary elections." Max Brief at p. 1, 2, 3, 10-11, 12 and 14. Max argues that because the RCLC is subject to regulation by the Commonwealth in the conduct of primary elections, any and all actions taken by it in connection with a primary election constitute "state action" for purposes of a cause of action under Section 1983. Max's position is a gross misrepresentation of the Supreme Court's decisions in *Allwright* and *Terry*. Justice Scalia, in *Jones*, made clear the limited scope of the holdings in *Allwright* and *Terry*. See *Jones*, 530 U.S., at 573. Moreover, as the District Court in *Valenti* astutely observed:

The Court finds plaintiff's argument which attempts to "bootstrap" and transform actions relating solely to the internal activity of a political party into activity which constitutes state action to be unpersuasive. Simply stated, the plaintiffs' argument, carried to its logical extension, would transform any action of a political party involving internal affairs into state action."

Valenti, 844 F.Supp., at 1019-20.

The unsupportable linkage Max attempts to make between Dumeyer's and the RCLC's speech and the alleged impact upon the primary election so as to create "state action" is best found in the following astounding statements in Max's Brief:

A political party seeking to suppress the political speech of others for the intended purpose of altering and distorting the results of a primary election contest has directly implicated itself into the exercise of the Commonwealth's sovereign authority to determine who shall appear on the Commonwealth's general election ballot and has, therefore, directly implicated itself as a state actor subject to the provisions of the Civil Rights Act.

Max Brief at 14-15.

Defendants are attempting to regulate and suppress Plaintiff's political speech which may change votes, which in turn, may alter and directly implicate who shall appear on the general election ballot which is the specific delegation of sovereign authority that the Commonwealth has delegated to primary election voters.

Max Brief at 15.

On the same analysis that a political is a state actor forbidden to exclude African-Americans from primary elections ... a political party is a state actor forbidden to exclude political speech intended to directly alter the votes cast by primary election voters and the First Amendment.

Max Brief at 13 (emphasis added).

Max's argument is shocking in its audacity. According to Max, a political party is forbidden to use its rights of association and speech protected under the First Amendment in an effort to alter votes cast by primary election voters. Max's own words reveal the total absurdity, in the deepest sense of the word, of her argument. Neither the RCLC or Dumeyer took any action to suppress or chill Max's freedom of speech. Max is free to exercise her right to engage in political speech, simply not while holding herself out as a RCLC committee woman opposing the RCLC's endorsed candidates. The RCLC enjoys the constitutional right to determine who will represent the party and who will speak for the party. After an extensive vetting process and action by a majority of the RCLC, the RCLC endorsed particular individuals as the persons who best represent the message and values of the RCLC through the endorsement process. In opposing the RCLC endorsed candidates, Max neither represented nor spoke for the RCLC. The RCLC acted well within its

constitutional rights when Dumeyer informed Max that if she intended to continue her opposition to the RCLC endorsed candidates, she should consider resigning from the party.

The hubris evidenced by Max's position cannot be overstated. Max could not be more clear than when she states, "Plaintiff is free to exercise and enjoy the benefits derived from the respect and trust others have in Plaintiff *for any means she so desires, with or without Defendants' permission*. Plaintiff's status as an elected Republican committee woman from a voting district does not subordinate her First Amendment rights to Defendants' own First Amendment rights." Max Brief at 26-27. (Emphasis added.) If Max's position represented an accurate statement of the law (which it does not), a partisan political party would exist only in theory. Instead, there would only be individuals, each claiming the unfettered right to associate with and speak on behalf of a party whose decisions the individual actively opposed. What a strange world indeed. Fortunately, Max's specious arguments run wholly contrary to decades of Supreme Court precedent.

B. In Her Brief, Max Improperly References Alleged Matters Outside The Allegations In Her Complaint.

In ruling on a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the United States Court of Appeals for the Third Circuit has held that the only facts which can be considered are those alleged in the complaint. See *Biesenbach v. Guenther*, 588 F.2d 400, 402 (3rd Cir. 1978) ("On a 12(b)(6) motion to dismiss, the district court must limit its consideration to the facts alleged in the complaint."). Plaintiff has alleged new facts in her Brief opposing Defendants' Motion to Dismiss. See Max Brief, at 6-7 and 20-21 (referencing alleged

conversations with a Ms. Cook and alleged events in connection with the 2007 general election in East Hempfield Township, Lancaster County). Max recognizes that these alleged facts are not in her Complaint, when she states, "In light of these additional facts..." Max Brief at 21. Besides being an obvious political shot and wholly irrelevant to the matter at bar, these alleged facts were not pleaded in Plaintiff's Complaint. Under *Biesenbach*, Dumeyer and the RCLC respectfully submit these alleged facts must be disregarded by the Court when ruling on Defendants' Motion to Dismiss.⁶

III. CONCLUSION

Max's Complaint lacks any factual or legal basis. To hold that Dumeyer's and the RCLC's speech constitutes state action would violate their rights of speech and association secured by the First Amendment. Dumeyer and the RCLC respectfully submit that Max's Complaint must be dismissed with prejudice.

Respectfully submitted,

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Date: 12/7/07

By: 

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⁶ This point is further expounded and clarified by *U.S. v. Schiffer*, 798 F. Supp. 1128, 1130, n.1 (E.D. Pa. 1992). In *Schiffer*, the court observed "[d]efendant refers to many additional facts in his Motion to Dismiss[.] Because we are limited on a Rule 12(b)(6) motion to the facts alleged in the complaint, we cannot consider these additional facts in our decision." *Id.* The court also observed that while Rule 56 motions are available under Rule 12, because the additional facts were not properly presented by affidavit or other proper means, a Rule 56 disposition was unavailable. *Id.* Similarly, since Max made no attempt to present these alleged facts in a proper fashion, e.g., by way of affidavit, they should be disregarded by the Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am this day serving the foregoing document upon the persons and in the manner indicated below.

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