

**COURT OF COMMON PLEAS  
HAMILTON COUNTY, OHIO**

Central Committee of the Hamilton  
County Republican Party,

Plaintiff,

v.

Michael E. Dalton,

Defendant.

CASE NO. \_\_\_\_\_

**DEFENDANT’S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF’S  
MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY  
INJUNCTION**

Defendant requests that this Court deny plaintiff’s Motion for Temporary Restraining Order and Preliminary Injunction for the reasons set forth below.

**BACKGROUND**

Michael Dalton created a web page to express his displeasure against the Republican Party in Hamilton County. In choosing a domain name for his website, he picked a name that reflected the subject of his site – hamiltoncountyrepublicanparty.com.<sup>1</sup> The website is strongly critical toward Republicans, and no reasonable viewer of the page would mistake it for an official Hamilton County Republican Party site. In response to this lawsuit, Dalton made it even more obvious that the site is not affiliated with the Republicans by adding a prominent disclaimer to the top of the web page. *See* Affidavit attached to this memorandum. Dalton

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<sup>1</sup> Dalton also registered the related domain names hamiltoncountyrepublicanparty.net, hamiltoncountyrepublicanparty.info, hamiltoncountyrepublicanparty.us, hamiltoncountyrepublicans.org, and hamiltoncountyrepublicans.com. All the domain names registered by Dalton are directed to the same webpage.

makes no money from the website, and uses it solely as a forum to express his personal political views. *Id.*

The Hamilton County Republican Party now seeks a temporary restraining order and preliminary injunction against Dalton's further use of his website. Plaintiff's motion should be denied for several related reasons. First, a restraining order preventing Dalton from continuing to maintain his political website would constitute a prior restraint on speech that would offend core First Amendment principles. Second, plaintiff seeks relief against political speech under the state common law of trademark, when the relevant law covers only speech made in the course of a defendant's "business, vocation, or occupation." Third, although plaintiff relies heavily on federal court decisions to show that trademark law would apply here, it fails to cite the Sixth Circuit decision that is most directly on point, *Taubman v. WebFeats*, 319 F.3d 770, 774 (6th Cir. 2003). *Taubman* establishes that trademark law is not implicated when a website is devoted to criticizing the holder of a trademark and is not reasonably likely to confuse anyone. Fourth, plaintiff fails to satisfy any of the factors necessary to obtain a temporary restraining order or preliminary injunction. Finally, the injunction sought by the plaintiff in this case is overly broad and is not narrowly tailored to preserve Dalton's First Amendment rights.

## **ARGUMENT**

### **A. The Requested Temporary Restraining Order Would Infringe Dalton's Free Speech Right to Describe the Subject of His Criticism**

Dalton's speech is indisputably protected by the First Amendment. Plaintiff's trademark claims seek government action by a court, which is subject to First Amendment scrutiny.

*Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418 (1971). Where a defendant is engaged in noncommercial speech, mere application of trademark law may violate the First Amendment. *L.L. Bean v. Drake Publishers*, 811 F.2d 26, 32-33 (1st Cir. 1987). Even when

trademarks have been used in a commercial context, courts still construe the trademark laws narrowly to avoid impingement on First Amendment rights. *E.g.*, *Cliffs Notes v. Bantam Doubleday*, 886 F.2d 490, 494 (2d Cir. 1989). When an action is brought against plainly noncommercial uses of trademarks for political commentary, courts have not hesitated to afford full First Amendment protection against the trademark holder's claim, either by holding that First Amendment principles bar application of the statute, or by holding that a state law is unconstitutional on its face or as applied in the particular case.<sup>2</sup> Dalton's website is just the sort of political commentary that courts assiduously protect. Dalton's criticisms would be pointless if he had to omit the name of the Hamilton County Republican Party, yet the injunction sought by the plaintiffs would altogether forbid Dalton's use of the marks.

Furthermore, it is not just the website generally, but Dalton's use of plaintiff's trademark in his domain name, that constitutes protected speech. The Sixth Circuit and other courts have held that the use of trademarks constitutes speech protected by the First Amendment, even when used only to designate source. *Sambo's Restaurants v. Ann Arbor*, 663 F.2d 686, 694 (6th Cir. 1981); *see also, e.g., Bad Frog Brewery v. New York Liquor Auth.*, 134 F.3d 87, 94-97 (2d Cir. 1998). Using trademarks in domain names is analogous to using trademarks in book titles, to which the courts give First Amendment protection because they are part of the authors' expression and call attention to the fact that the works in question contain content on those topics. *E.g., Twin Peaks Production v. Publications Int'l*, 996 F.2d 1366, 1379 (2d Cir. 1993); *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989). *Accord Mattel v. Walking Mountain*

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<sup>2</sup> *E.g., L.L. Bean v. Drake Publishers*, 811 F.2d 26, 33 (1st Cir. 1987); *Bally Total Fitness Holding Corp. v. Faber*, 29 F. Supp. 2d 1161, 1167 (C.D. Cal 1998); *ACLU of Georgia v. Miller*, 977 F. Supp. 1228, 1233 (N.D. Ga. 1997); *Lighthawk v. Robertson*, 812 F. Supp 1095, 1097-1101 (W.D. Wash 1993); *Stop the Olympic Prison v. United States Olympic Comm.*, 489 F. Supp. 1112, 1124-1125 (S.D.N.Y. 1980).

*Prods.*, 353 F.3d 792, 807 (9th Cir. 2003). Indeed, it is precisely because of the expressive content in Dalton’s domain name that plaintiffs object to its use. Domain names exist to provide memorable identifiers to help Internet users identify websites in which they are interested. Dalton’s use of his domain names communicates to web users that his site contains information about the Hamilton County Republican Party. Therefore, the domain name is “speech” to which the First Amendment applies. *See Ficker v. Tuohy*, 305 F. Supp. 2d 569, 572 (D. Md. 2004) (denying a preliminary injunction demanded by congressional candidate Robin Ficker against an opponent in a Republican primary who maintained the critical website robinficker.com, and recognizing the “First Amendment’s particularly important role in political campaigns”).

The Supreme Court has repeatedly held that injunctions barring defendants from speaking, printing, or broadcasting statements about topics of public concern are prior restraints that require the most extraordinary justifications before they may be approved. *New York Times v. United States*, 403 U.S. 713 (1971); *Near v. Minnesota*, 283 U.S. 697 (1931). When an injunction is entered based on a finding of likelihood of success in establishing illegal speech, instead of a final adjudication, it is a prior restraint subject to strict First Amendment scrutiny. *Auburn Police Union v. Carpenter*, 8 F.3d 886, 903 (1st Cir. 1993); *see also Carroll v. Commissioners of Princess Anne*, 393 U.S. 175 (1968). The law is clear and unequivocal – prior restraints are not permitted except in the most exceptional circumstances, involving “a grave threat to a critical government interest or to a constitutional right.” *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 225 (6th Cir. 1996); *Seven Hills v. Aryan Nations*, 76 Ohio St. 3d 304, 307 (Ohio 1996) (noting the “heavy presumption” against prior restraints on speech). No such circumstance is present here, and thus the preliminary injunction should be denied.

**B. Plaintiff is Unlikely to Succeed in its Trademark Infringement Claim**

Prior to obtaining a temporary restraining order or preliminary injunction, a plaintiff must demonstrate that it is likely to succeed on the merits of the case. *City of Cleveland v. Cleveland Electrical Illuminating Co.*, 115 Ohio App. 3d 1, 12 (Ohio Ct. App. 1996). Plaintiff cannot demonstrate a likelihood of success under the trademark law against a site that is both noncommercial and not confusing.

**1. The Trademark Laws Do Not Apply to Dalton’s Noncommercial Use of a Trademark**

Trademark law creates a commercial tort. The limitation of trademark law to commercial uses appears in the statutory language and case law, and its existence follows from the limitations that the First Amendment places on the exercise of government authority restricting free speech. *Taubman*, 319 F.3d at 774. The Ohio common law of trademark infringement is codified in the Ohio Deceptive Trade Practices Act. *Worthington Foods, Inc. v. Kellogg Co.*, 732 F. Supp. 1417, 1431 (S.D. Ohio 1990). Although plaintiff acknowledges this fact, *see* Plaintiff’s Memorandum at 7, it nowhere quotes the relevant statutory language, which on its face covers only conduct occurring “in the course of the person’s business, vocation, or occupation.” Ohio Rev. Code § 4165.02(A). The plain language of the Act is not implicated here, where the defendant’s use of the plaintiff’s mark is for political, rather than commercial, purposes.

Similarly, although plaintiff relies heavily on federal cases interpreting the Lanham Act as a guide to interpreting Ohio’s law of trademark infringement, it fails to cite the leading Sixth Circuit case on the issue – *Taubman v. WebFeats*, 319 F.3d 770. *Taubman* involved a consumer who criticized a neighboring shopping mall called “Shops at Willow Bend” on a website he established at [shopsatwillowbend.com](http://shopsatwillowbend.com). Judge Suhrheinrich’s opinion for the panel held that any

use of a mark not “in connection with the sale . . . or advertising of any goods or services” fell outside the jurisdiction of the Lanham Act and was protected by the First Amendment. *Id.* at 774-75. The court further held that the defendant’s use of the plaintiff’s trademark in his domain name for the purpose of criticism did not constitute commercial use under the Act. *Id.* The court concluded that, even if visitors to a website would likely be confused as to the site’s origin, the trademark laws were inapplicable so long as there was no confusion as to the origin of the parties’ *goods and services*. *Id.*<sup>3</sup> Similarly, the court in *Bosley Medical Institute, Inc. v. Kremer*, held that the defendant’s use of the domain name bosleymedical.com to criticize Bosley Medical Institute, Inc. did not implicate the Lanham Act, because the defendant used the domain name solely to criticize the company and not to offer goods and services for sale. 403 F.3d 672, 679-80 (9th Cir. 2005).

The limitation of trademark law to commercial situations follows from the distinctions that First Amendment law draws between commercial and noncommercial speech. The fundamental precept of trademark law is that it prevents uses of trademarks that are misleading, in that they are “likely” to be “confusing” to consumers. *Moseley v. V Secret Catalogue*, 537 U.S. 418, 429-430 (2003). To constitute infringement, use of the trademark need not be deliberately confusing, and it need not actually constitute a “false” statement of origin. Because these standards do not meet the First Amendment’s requirements for prohibiting noncommercial

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<sup>3</sup> See also *CPC Int’l v. Skippy Inc.*, 214 F3d 456, 461-62 (CA4 2000) (the purposes of the trademark laws are related to giving consumers accurate information about commercial products and do not prevent critics from commenting on commercial products); *White v. Samsung Electronics America*, 971 F2d 1395, 1401 (CA9 1992) (rules against exploitation of personality permissible under First Amendment because of commercial speech context); *E&J Gallo Winery v. Gallo Cattle Co.*, 967 F2d 1280, 1297 (CA9 1992) (trademark injunction permissible because it limits commercial speech).

speech, the First Amendment provides an important reason to construe the trademark laws to apply only to commercial goods and speech. *See Taubman*, 319 F.3d at 774-75.

Dalton's website is patently noncommercial in character. The website is dedicated to the communication of opinions and information about the Hamilton County Republican Party. It contains no advertisements. *See Affidavit*. Dalton devotes his site entirely to the expression of his personal political views. *Id.* Dalton never sold any good or services on his website, and never received any revenue of any kind for the content of his website. *Id.* Nor has Dalton ever offered to sell his domain names to the plaintiff or to anyone else. *Id.* Moreover, not only is Dalton not engaged in commercial speech, but he is not even criticizing a commercial product or a commercial company. Dalton's website is devoted to a discussion of political issues, with no nexus to commerce or economic activity. The trademark laws are thus entirely inapplicable to his conduct.

**2. Viewers are Unlikely to be Confused About Whether the Hamilton County Republican Party Sponsors Dalton's Website**

To succeed on a claim of trademark infringement, a plaintiff must show "likelihood of confusion." *Worthington Foods, Inc. v. Kellogg Co.*, 732 F. Supp. 1417, 1432 (S.D. Ohio 1990). Dalton's website is not confusing and does not suggest that it is sponsored by the Hamilton County Republican Party. The site prominently contains a disparaging picture of President Bush, and is devoted entirely to criticism of Republican judges. In this context, no reasonable person would believe that the website was actually sponsored by the Republican Party.<sup>4</sup>

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<sup>4</sup> Plaintiff argues that Dalton's use of the Republican Party elephant logo near the bottom of his website, accompanied with the text "Make a Concealed Contribution," misleadingly implies that users can make a donation to the Hamilton County Republican Party from his website. However, this portion of the site is an obvious parody, stating that visitors may make a *concealed* contribution to the party, and includes a link to a news story regarding an alleged concealed contribution made by the Hamilton County Republican Party to the state treasurer's campaign.

Furthermore, in response to this litigation Dalton added a prominent disclaimer to the top of his web page stating “This is an unofficial site and critical of the republican party. It is not sponsored by, affiliated with, or related to any political party.” *See* Affidavit. The disclaimer provides links to official Hamilton County Republican Party websites. The use of a disclaimer and a link to the official site were cited by the court in *Taubman* in holding that the defendant’s use of the plaintiff’s mark was not likely to cause consumer confusion. *Taubman*, 319 F.3d at 776.

The fact that Dalton uses the name of the Hamilton County Republican Party in his domain name does not make the website any more confusing. Domain names often designate the subject of websites, not just their source. Consequently, numerous federal courts have held that trademarks may be used as domain names for websites that are about markholders or about trademarked goods or services, even sites that are operated by persons other than the markholders, because the names do not occasion confusion about source. Thus, the court in *Taubman* found no likelihood of confusion even though the defendant used the plaintiff’s trademark – “Shops at Willow Bend” – in his domain name [shopsatwillowbend.com](http://shopsatwillowbend.com). *Taubman*, 319 F.3d at 772. Similarly, the Fourth Circuit in *Lamparello v. Falwell* held that the defendant’s use of the domain name [fallwell.com](http://fallwell.com) did not create a likelihood of confusion with Reverend Jerry Falwell, where the defendant used his website to criticize Falwell, and did not offer any

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No visitor is likely to be misled by the elephant logo in this context, especially since the link is near the bottom of the page, where readers will see it only after they have been exposed to the anti-Republican nature of the website. Plaintiff also suggests that another link directing visitors to the website of the Democratic Congressional Campaign Committee (“DCCC”) may lead people to mistakenly believe they are visiting a site supportive of the Republican Party. However, the link to the DCCC site states: “Tell Republicans: Return DeLay’s Dirty Money.” *See* Affidavit. Nobody would click that link expecting to visit an official Republican website. Furthermore, the DCCC site could not lead any reasonable viewer to believe that the organization supports Republican candidates. *See* <http://www.dccc.org/campaignforchange/petitions/armpac/default/>.

goods or services in competition with him. 420 F.3d 309, 315 (4th Cir. 2005); *see also TMI v. Maxwell*, 368 F.3d 433 (5th Cir. 2004); *Lucas Nursery and Landscaping v. Grosse*, 359 F.3d 806 (6th Cir. 2004); *Ficker*, 305 F. Supp. 2d at 572; *Crown Pontiac v. Ballock*, 287 F. Supp. 2d 1256 (N.D. Ala. 2003); *Northland Ins. Co. v. Blaylock*, 115 F. Supp. 2d 1108 (D. Minn. 2000). The Seventh Circuit reached a similar result even in the commercial context in *Ty v. Prettyman*, 306 F.3d 509 (2002). The decision in *Prettyman* overturned an injunction issued against an unauthorized reseller of Beanie babies who used the name “bargainbeanies.com” for her marketing website. Because *Prettyman* was entitled under trademark law to tell the consuming public that she sold Beanie babies through her website, Judge Posner held that trademark law could not be used to deprive *Prettyman* of the right to truthfully identify the content of her website by placing the trademark “Beanie” in her domain name.

Cases involving critical websites fall under the rubric of “nominative fair use,” where the speaker uses the trademark to speak about the trademark holder or its goods and services. *Brookfield Communications v. West Coast Video*, 174 F.3d 1036, 1065-66 (9th Cir. 1999); *New Kids on the Block v. New America Pub.*, 971 F.2d 302, 306-309 (CA9 1992). For example, the courts consistently hold that fair use, construed consistently with the First Amendment, allows publishers or authors of books or other expressive works about famous persons to use such persons’ names in the titles of the books. *Twin Peaks Prod. v. Publications Int’l*, 996 F.2d 1366, 1379 (2d Cir. 1993); *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989); *Mattel v. MCA Records*, 296 F.3d 894, 902 (9th Cir. 2002). Domain names can play the same role as book titles in denominating the subject of underlying websites. For example, “apples.com” is the domain name of a website about apples, not the website of Apple computer company. Just as the title of a book may use a trademark truthfully to describe the content of the book, so may Dalton use a

trademark as a domain name truthfully to describe the contents of his website. As Justice Holmes said in *Prestonettes v. Coty*, 264 U.S. 359, 368 (1924): “When the mark is used in a way that does not deceive the public, we see no such sanctity in the word as to prevent its being used to tell the truth. It is not taboo.”

Plaintiff relies on the multi-factor test laid out in *Cesare v. Work*, 36 Ohio App. 3d 26, 28 (Ohio Ct. App. 1987), and relied on by various cases in the Sixth Circuit. These factors, however, are merely a rough guide to determining the ultimate question in a trademark case: whether the defendant’s use of the mark creates a likelihood of confusion among customers as to the origin of the parties’ goods or services. Many of these factors are inapplicable when a defendant uses the plaintiff’s mark for the purpose of public criticism. *See Lamparello*, 420 F.3d 309, 315 & n.3 (noting that a website dedicated to criticism of the markholder “will seldom create a likelihood of confusion”). For example, the fact that Dalton’s use of the mark is identical to the plaintiff’s mark is not relevant here, because Dalton’s website is *about* the Hamilton County Republican Party and thus constitutes fair use. Indeed, similarity of marks will always be present when the defendant uses the plaintiff’s mark to identify the plaintiff as the target of criticism. Similarly, the strength of the plaintiff’s mark is not a relevant factor when a defendant uses the mark for the purpose of fair-use identification of the plaintiff. The strength of the plaintiff’s mark in this context only makes it easier for a defendant to publicly identify the target of his criticisms. And Dalton’s use of the Hamilton County Republican Party’s name is not evidence of an intent to confuse, but merely of an intent to identify the subject of his criticism. To hold otherwise would be to say that any fair use would support a finding of bad

intent.<sup>5</sup> In short, the test set forth in *Cesare* is simply inapplicable in the context of political criticism, and the court need not rely on these factors if it determines that the defendants' use is not likely to cause confusion. *See, e.g., Taubman*, 319 F.3d at 776-77 (finding no likelihood of confusion in analyzing a website devoted to criticism of a company based on the website's use of a disclaimer).

Those factors of the *Cesare* test that are arguably relevant in this context weigh in favor of Dalton. First, the services of Dalton and the plaintiff are not related, because the Hamilton County Republican Party is a political party, while Dalton's website is merely a forum in which to express his political opinions. Dalton does not compete with the Republican Party in any way other than by expressing political ideas that are contrary to those held by the Party. *See Lamparello*, 420 F.3d at 315 & n.3 (holding that consumers are unlikely to be confused by a website that offers only criticism and no competing goods or services). Second, plaintiff has not produced any evidence of actual confusion. Third, plaintiff argues that the likely degree of consumer care weighs in its favor, but presents no evidence of this. It is difficult to believe, especially after the addition of a disclaimer, that even the most careless consumer could be confused as to the fact that Dalton's site is critical toward the Hamilton County Republican Party. On the contrary, courts recognize the increasing sophistication of Internet users and their ability to find what they want when a first web visit does not meet their expectations.

*Entrepreneur Media v. Smith*, 279 F.3d 1135, 1147 (9th Cir. 2002) (“[C]onsumers are aware that domain names for different Web sites are often quite similar . . . and that very small differences matter.”); *Strick Corp. v. Strickland*, 162 F. Supp. 2d 372, 377 (E.D. Pa. 2001). The remaining two factors – the marketing channels used and the likelihood of expansion of product lines – are

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<sup>5</sup> Dalton's inclusion of content strongly critical of the Republican Party and his addition of a disclaimer further negate any inference of intent to confuse visitors to his website.

impossible to apply in this context, where the defendant does not sell or market any products or services on his website.

**C. The Remaining Preliminary Injunction Factors Also Favor the Defendant**

In addition to demonstrating a likelihood of success on the merits, the plaintiff must also establish several other factors to obtaining a temporary restraining order or a preliminary injunction. First, plaintiff must establish that “the issuance of the injunction will prevent irreparable harm.” *City of Cleveland*, 115 Ohio App. at 12. Plaintiff claims that it will be irreparably harmed by the continued existence of Dalton’s website. However, plaintiff has an adequate remedy at law for any continued infringement in the form of money damages. Furthermore, plaintiff’s claim of irreparable injury is undercut by its issuance of a November 18 press release regarding Dalton’s website in which it identifies the allegedly infringing domain name. *See Affidavit*. The fact that the plaintiff is advertising the allegedly infringing website and thereby drawing more visitors to the site belies the urgency of its requested injunctive relief. *Id.*

Second, plaintiff must show that balance of the equities weighs in its favor. *Id.* Plaintiff argues that the equities favor its side because it has used the mark in commerce for longer than Dalton. However, this would be the case any time a defendant used an established mark for the purpose of criticism. The balance of equities actually favors Dalton in this case because, if an injunction were granted, the plaintiff would benefit little from the removal of a site that is not confusing, while Dalton would suffer a very serious prior restraint on his right to free speech. *See Ficker*, 305 F. Supp. 2d at 571 (recognizing the defendant’s freedom of speech rights in balancing the equities of enjoining a political website). In the absence of an injunction, however, both parties will be able to continue to openly express their political views on their respective

web pages. Further, Dalton's inclusion of a link at the top of his page ensures that visitors to his site will easily be able to find the official Hamilton County Republican Party webpage. *See id.* at 571-72 (holding that the balance of equities clearly favored the defendant where the allegedly infringing website included a disclaimer and a link to the official site). As the court in *Taubman* recognized, the presence of such a link may actually benefit the owner of the trademark by "serv[ing] to re-direct lost customers to [the plaintiff's] site that might otherwise be lost." *Taubman*, 319 F.3d at 777. Furthermore, plaintiff's equitable argument is undercut by the fact that it is responsible for increasing hits to the allegedly infringing website with its November 18 press release.

Finally, plaintiff must show that the public interest will be served by the granting of the requested restraining order. *City of Cleveland*, 115 Ohio App. at 12. Plaintiff argues that a restraining order would advance the general purpose of the trademark law to prevent consumer confusion. However, as already explained, Dalton's site is not likely to confuse anyone, and contains a link to the Hamilton County Republican Party's official site. Furthermore, the public interest is not served by restraining free political debate. *Ficker*, 305 F. Supp. 2d at 572 (concluding that the public interest in preventing confusion is undercut by the interest in preventing encroachment on the right to free speech).

**D. The Injunction Demanded by Plaintiff is Overly Broad**

Even if an injunction were appropriate, the First Amendment requires that the least intrusive remedy should be selected, even in the commercial context, but especially where otherwise protected speech is involved. *CPC v. Skippy*, 214 F.3d 456, 461 (4th Cir. 2000); *Anheuser-Busch v. Balducci Pubs.*, 28 F.3d 769, 778 (8th Cir. 1994); *Better Business Bureau v. Medical Directors*, 681 F.2d 397, 404-405 (5th Cir. 1982). Despite this fundamental

proposition, plaintiff here demands a sweeping injunction that would completely prohibit Dalton from using the identifier “Hamilton County Republican Party” anywhere “in the greater Hamilton County area” or on the Internet. Plaintiff’s Motion at 1. Such an injunction would utterly prohibit Dalton from discussing one of the two primary political parties in his county of residence and would thus preclude him from engaging in many discussions about local politics. Moreover, plaintiff demands that Dalton turn over all of his domain names related to the Hamilton County Republican Party, when such relief is not necessary to protect against the likelihood of confusion. The most that plaintiff can legitimately request here is that Dalton take reasonable steps to ensure that visitors to his website are not confused – for example, by requiring the disclaimer that Dalton has already voluntarily added to his site.

### **CONCLUSION**

Plaintiff’s motion for a preliminary restraining order and preliminary injunction should be denied.

Date: \_\_\_\_\_

Respectfully submitted,

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Bruce Whitman  
**CONTACT INFO**

Gregory A. Beck  
DC Bar No. 494479  
Paul Alan Levy  
DC Bar No. 946400  
Public Citizen Litigation Group  
1600 20th Street, NW  
Washington, DC 20009  
(202) 588-1000

*Attorneys for the defendant, Michael E. Dalton*