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

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.

Case No. 2:08-CV-13982

Honorable David M. Lawson
District Judge

Honorable Mona K. Majzoub
Magistrate Judge

Foster, Swift, Collins & Smith, P.C./Attorneys At Law

DEFENDANT MICHIGAN REPUBLICAN PARTY'S
MOTION TO DISMISS COMPLAINT

Defendant Michigan Republican Party moves for dismissal of the complaint.

1. The claims for declaratory and injunctive relief are not ripe for review because there is no likelihood that the Michigan Republican Party will use foreclosure lists as the basis for voter challenges, and therefore, there is no significant possibility of future harm to plaintiffs. This Court lacks subject matter jurisdiction. F.R.Civ.P. 12(b)(1).

2. The only factual allegation relating to the Michigan Republican Party is its public and unequivocal denial of any plan or intent to challenge voters based on foreclosure notices or proceedings. The complaint against the Michigan Republican Party fails to state a claim upon which relief can be granted. F.R.Civ.P. 12(b)(6).

3. The Michigan Republican Party's designated challengers do not act under color of state law. Therefore, plaintiffs have not stated a claim under 42 U.S.C. § 1983.

4. The Michigan Republican Party adopts the additional reasons for dismissal stated by Defendant Republican National Committee in its motion to dismiss. [R.16]

As required by L.R. 7.1, counsel for defendant Michigan Republican Party informed counsel for plaintiffs of its intention to move for dismissal of the complaint. Plaintiffs' counsel did not concur in dismissal.

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BRIEF IN SUPPORT OF
DEFENDANT MICHIGAN REPUBLICAN PARTY'S
MOTION TO DISMISS

Oral Argument Requested

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STATEMENT OF ISSUES PRESENTED

Issues raised by motion to dismiss under Rule 12(b)(1)

The complaint alleges that the Michigan Republican Party has denied any intention to challenge voters based on foreclosure lists. Affidavits from the Michigan Republican Party's chairperson and director of election day operations confirm that there have been no plans to make such challenges and that no such challenges will be made.

Whether plaintiffs have met their burden to prove that the claims for injunctive and declaratory relief are ripe for review?

Whether plaintiffs have met their burden to prove that this Court has subject matter jurisdiction?

Issues raised by motion to dismiss under Rule 12(b)(6)

The only factual allegation regarding the Michigan Republican Party is its denial of any plans or intention to challenge voters based on foreclosure lists.

Whether plaintiffs have made sufficient factual allegations to state a claim that the Michigan Republican Party will challenge voters based on foreclosure lists or has joined in a scheme with the other defendants to make such challenges?

Whether the Michigan Republican Party's designated challengers act under color of state law?

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CONTROLLING AUTHORITIES

Motion to dismiss for lack of subject matter jurisdiction

Adult Video Ass'n v. United States, 71 F.3d 563, 568 (6th Cir. 1995)

City of Los Angeles v. Lyons, 461 U.S. 95, 102, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983)

Moir v. Greater Cleveland Regional Transit Authority, 895 F.2d 266, 269 (6th Cir. 1990)

National Rifle Association of America v. Magaw, 132 F.3d 272, 284 (6th Cir. 1997)

Norton v. Ashcroft, 298 F.3d 547, 554 (6th Cir. 2002)

Motion to dismiss for failure to state a claim

Bell Atlantic Corp. v. Twombly, __ U.S. __ , 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)

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INTRODUCTION

At the threshold, the Michigan Republican Party objects to plaintiffs' undisguised effort to manipulate this Court for political motives and media attention. According to plaintiffs' own complaint, the Michigan Republican Party has never planned to challenge voters based on foreclosure lists. And again, based on the reports used as the sole basis for plaintiffs' federal court action, the Michigan Republican Party has no intention to challenge individuals whose homes have been subject to foreclosure.

The Michigan Republican Party also wants to clarify what is not disputed. According to plaintiffs' complaint and to the sworn affidavits filed with this motion:

> *Individuals who have suffered foreclosure of their homes will be able to exercise their rights to vote without any challenge or interference.*

The Michigan Republican Party wholeheartedly embraces the Supreme Court's holding that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964).

The Michigan Republican Party does not endorse or support the use of foreclosure lists as the basis for challenging an individual's eligibility to vote. To the contrary, it fully agrees with plaintiffs that "the presence of an address on a list of foreclosures provides no legitimate basis for challenging a voter's eligibility to vote…" [R.1 – Complaint ¶ 4]

The Michigan Republican Party confirms plaintiffs' allegation that it has "no plans to do anything" along these lines and "will not engage in the conduct alleged in this complaint." [*Id.* ¶ 51] Indeed, according to the complaint, the Michigan Republican Party unequivocally stated its vigorous disagreement with any such purported plan and its firm disavowal of any intent to

approve, participate in or support any such efforts. Under oath, the key officials of the Michigan Republican Party confirm that *no voter will be challenged based on a foreclosure notice or proceeding*.

The invocation of a federal court's subject matter jurisdiction should not be based on a blogger's unverified post. Nor should a defendant be compelled to defend a federal court action founded upon a single sentence in a blog.

However, the complaint against the Michigan Republican Party is not even supported by such a flimsy reed. According to the blog posting upon which plaintiffs rely, the Michigan Republican Party has publicly stated that *it does not support and will not participate in any voter challenges based on foreclosure lists*. In a Detroit Free Press article included in plaintiffs' allegations, the Michigan Republican Party informed the public that it "*won't allow its challengers to use foreclosure lists*." In a most curious approach, *plaintiffs rely on the Michigan Republican Party's denial as a basis for seeking relief.* [*Id.* ¶ 52]

Plaintiffs have not alleged and cannot demonstrate any likelihood that the Michigan Republican Party will use foreclosure lists to challenge voters in the upcoming elections. The Michigan Republican Party's public statements alleged in the complaint and the sworn affidavits by its key officials establish that it has never planned to challenge voters based on foreclosure lists and that it will not make such challenges.

Because the claims are not ripe, this Court should dismiss the complaint for lack of subject matter jurisdiction under Rule 12(b)(1). And even if the jurisdictional threshold is crossed, the allegations relating to the Michigan Republican Party fall far short of the requirements for stating a valid claim for relief. The complaint should be dismissed under Rule 12(b)(6).

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STATEMENT OF FACTS

A. Parties and relief requested

The individual plaintiffs are residents of Macomb County. They are registered to vote at their current addresses in that county. Each owns a home that has been subject to foreclosure. [R.1 – Complaint ¶ 6-8]

Obama for America is a political campaign. [*Id.* ¶ 15] The Democratic National Committee is the governing body of the Democratic Party of the United States. [*Id.* ¶ 16]

The Republican National Committee is the governing body of the Republican Party of the United States. [*Id.* ¶ 19] The Michigan Republican Party is the state central committee of the Republican Party of Michigan. [*Id.* ¶ 18] The Macomb County Republican Party is a county committee of the Republican Party of Michigan. [*Id.* ¶ 17]

Count I alleges that "Defendants have publicly stated that they intend to challenge voters' eligibility based on foreclosure of the voters' residences." [*Id.* ¶ 57] Plaintiffs assert that such challenges would violate the First and Fourteenth Amendments and 42 U.S.C. § 1983. [*Id.* ¶ 58] Count II alleges that "Defendants here entered into an agreement to intimidate and deny voters whose names have appeared on a foreclosure list their right to vote in the November 4, 2008 General Election." [*Id.* ¶ 61] Plaintiffs assert a violation of 42 U.S.C. § 1985(3). [*Id.* ¶ 62]

The relief sought in the complaint includes:

> A temporary, preliminary, and/or permanent order, prohibiting the Defendants … from challenging Michigan voters on the basis of the presence of particular property on a listing of foreclosure filings.
>
> An order declaring that the presence of a particular property on a listing of foreclosure filings 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. [*Id.* Prayer for Relief ¶¶ B & C]

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B. Affidavits

In support of the Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, the Michigan Republican Party has submitted affidavits from Saulius Anuzis, its chairperson, and Kelly Harrigan, its elections day operations director. [Anuzis affidavit - Exhibit 1; Harrigan affidavit – Exhibit 2] The affidavits state:

> • Neither the Michigan Republican Party nor anyone acting with its knowledge or approval has obtained lists of persons or addresses subject to foreclosure notices or proceedings. [Anuzis ¶ 3; Harrigan ¶ 4]
>
> • The Michigan Republican Party has no plans to obtain such foreclosure lists, either on its own or in concert with any other persons or organizations. [Anuzis ¶ 4; Harrigan ¶ 5]
>
> • The Michigan Republican Party will not make any challenges to voters based on any foreclosure notices or proceedings and will not endorse, approve or participate in any such challenges by other persons or organizations. [Anuzis ¶ 5; Harrigan ¶ 5]
>
> • No one at the Michigan Republican Party authorized James Carabelli, the chair of the Macomb County Republican Party to make the statement alleged in plaintiffs' complaint. [Anuzis ¶ 6-7; Harrigan ¶¶ 7] Mr. Carabelli's alleged statement does not represent the plans or intentions of the Michigan Republican Party. [Anuzis ¶ 7]
>
> • No one at the Michigan Republican Party has approved, endorsed or authorized any such activities by the Macomb County Republican Party or any county parties. No one at the Michigan Republican Party has agreed with anyone at the Republican National Committee to engage in any such activities. [Anuzis ¶ 8; Harrigan ¶ 8]

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C. Allegations in complaint

For purposes of the Rule 12(b)(6) motion, the following allegations are accepted as true. A court is "entitled to take notice of the full contents of the published articles referenced in the complaint." *Bell Atlantic Corp. v. Twombly*, __ U.S. __ , 127 S.Ct. 1955, 1973 n. 13, 167 L.Ed.2d 929 (2007). The web postings and press articles specifically identified in plaintiffs' complaint are attached as exhibits.

In a section entitled "*Voter Suppression circa 2008*," the complaint alleges that "the chairperson of the Republican Party in Macomb County intends for Republicans to challenge the right to vote of Michigan residents whose house has been the subject of a foreclosure notice." The complaint refers to a "press account" which asserts that the county chairperson said "[w]e will have a list of foreclosed homes and will make sure people aren't voting from those addresses." [*Id.* ¶ 34, citing <http://www.michiganmessenger.com/4076> – Exhibit 3][1]

The next paragraph alleges that "[P]ress 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, including because they live in homes for which foreclosure notices have been filed." [*Id.* ¶ 35] Unlike the previous paragraph, this allegation is *not supported by a reference to any "press account" or other source*. The previously cited blog post does not include any such report.[2]

---

[1] A subsequent paragraph alleges that the website "stands by the account" despite Mr. Carabelli's denial and demand for retraction. [*Id.* ¶ 52]

[2] The only specific reference in the paragraph relates to an alleged statement by an Ohio county chairperson that "Republicans have not ruled out challenging voters due to the existence of a foreclosure notice." [*Id.*] After the complaint was filed, the blog cited as the source of this allegation corrected its story and deleted the alleged statement. [Exhibit 3] Presumably, plaintiffs will withdraw the allegation since the source of their allegation has done so.

Neither paragraph 34 or 35 alleges any statements or actions by the Michigan Republican Party.

In section entitled "*Recent Statements by Defendant Republicans*," the complaint refers to alleged statements by "Defendant Republicans" that they 'have no plans to do anything,' … that they are 'unfamiliar with' any 'lose your home, lose your vote' scheme, … that they will not engage in the conduct alleged by this complaint, …. and that they intend to engage in traditional caging (using returned mail to make en masse challenges to voters before or at the polls)." [*Id.* ¶ 51 (references omitted)]

In the referenced articles, the statements are attributed to Michigan Republican Party representatives. The cited article from the Detroit Free Press (Sept. 12, 2008) reports:

> The Michigan Republican Party also won't allow its challengers to use foreclosure lists, spokesman Bill Nowling said.
>
> "What does a name on a foreclosure list tell us? Nothing," Nowling said. "We go into the polling place with the qualified voter file and that is all."
>
> A person's name and address on a foreclosure list doesn't mean he or she has left the home, Nowling said. [Exhibit 4]

The complaint then refers to statements by a "former GOP operative." [R.1 – Complaint ¶ 52] Neither the complaint nor the blog allege that the individual has any connection with the Michigan Republican Party. The only reference in the blog post regarding any of the defendants is omitted from the complaint, including the statement that "Republican leaders have since disavowed plans to use foreclosure lists as part of their plan to challenge the eligibility of some voters…" [Exhibit 5 - <http://www.michiganmessenger.com/4414>]

In a section entitled "*History of Defendants' Voter Suppression Tactics*," the complaint alleges conduct by the Republican National Committee in 1981, 1986 and 2004, and by the Republican Party of Ohio in 2004. The allegations refer to voter challenges in past elections.

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[*Id.* ¶¶ 24-28] Although this section refers to "Defendant Republicans" collectively, there are *no allegations about the Michigan Republican Party*.

ARGUMENT

I. The claims for declaratory and injunctive relief are not ripe for review because there is no likelihood that the Michigan Republican Party will use foreclosure lists as the basis for voter challenges.

As detailed in the statement of facts, plaintiffs premise their complaint on a disputed quote by a county party chairperson reported in a blog posting. This single comment – whether accurately reported or not – fails to create a justiciable controversy as to the Michigan Republican Party which has unambiguously denied any knowledge or participation in any such plan and has explicitly stated that it will not allow its challengers to use foreclosure lists.

Standard for Motion

Standard for factual Rule 12(b)(1) motion

Unless a claim is ripe, the complaint should be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1). *George Fischer Foundry Systems, Inc. v. Adolph H. Hottinger Maschinenbau GmbH*, 55 F.3d 1206, 1210 (6th Cir. 1995). A challenge to subject matter jurisdiction must be resolved at the threshold before deciding a Rule 12(b)(6) motion to dismiss for failure to state a claim. *Moir v. Greater Cleveland Regional Transit Authority*, 895 F.2d 266, 269 (6th Cir. 1990) (citing *Bell v. Hood*, 327 U.S. 678, 682, 66 S.Ct. 773, 90 L.Ed. 939 (1946)).

In response to a Rule 12(b)(1) motion, plaintiffs have the burden to prove the existence of subject matter jurisdiction. *Moir*, 895 F.3d at 269. The Michigan Republican Party's motion is a factual attack on subject matter jurisdiction. The applicable standard was summarized in *RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125 (6th Cir. 1996):

> Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction – its very power to hear the case – there is substantial

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> authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, *no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims*. *Id.* at 1143 (emphasis added)

A district court has discretion to allow affidavits, documents, and even a limited evidentiary hearing to resolve disputed jurisdictional facts. *Ohio Nat'l Life Ins. Co. v. U.S.*, 922 F.2d 320, 324 (6th Cir. 1991); *Moir*, 895 F.2d at 269.

Ripeness

The ripeness doctrine "is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 57 n. 18, 113 S.Ct. 2485, 125 L.Ed.2d 38 (1993). A court should examine (1) the likelihood that the harm alleged will ever come to pass; (2) the adequacy of the factual record to allow for meaningful adjudication; and (3) hardship to the parties if judicial review is denied. *Norton v. Ashcroft*, 298 F.3d 547, 554 (6th Cir. 2002); *Adult Video Ass'n v. United States*, 71 F.3d 563, 568 (6th Cir. 1995). Ripeness requires the court to exercise its discretion and "determine if judicial resolution would be desirable under all of the circumstances." *Brown v. Ferro Corp.*, 763 F.2d 798, 801 (6th Cir.) *cert. denied*, 474 U.S. 947 (1985).

The ripeness doctrine exists "to ensure that courts decide only existing, substantial controversies, not hypothetical questions or possibilities." *Dixie Fuel Co. v. Comm'r of Soc. Sec.*, 171 F.3d 1052, 1057 (6th Cir. 1999). A case is ordinarily ripe for review "only if the probability of the future event occurring is substantial and of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *National Rifle Association of America v. Magaw*, 132 F.3d 272, 284 (6th Cir. 1997).

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A. Plaintiffs cannot demonstrate that the Michigan Republican Party is likely to use foreclosure lists as the basis for voter challenges.

The lack of ripeness for plaintiffs' claims for declaratory and injunctive relief is evident from the complaint. The only factual allegations regarding the Michigan Republican Party are:

> 1. The Michigan Republican Party has publicly stated that a person's name on a foreclosure list does not support a challenge to voter eligibility. [R.1 – Complaint ¶ 51]
>
> 2. The Michigan Republican Party has also publicly announced that it won't allow its challengers to use foreclosure lists. [*Id.*]

Faced with explicit statements by the Michigan Republican Party that it has no intention to make foreclosure-list challenges, plaintiffs attempt to characterize them as "public relations maneuvers under pressure." [*Id.* ¶ 52] However, plaintiffs' apparent disbelief of these statements is not sufficient to establish the facial ripeness of its claim.

But to eliminate any possible doubt, the Michigan Republican Party has submitted affidavits from its chairperson and its director of election day programs. Under oath, these key officials have unambiguously stated that a person's name or address on a foreclosure list is not "good reason to believe" that a person is not a registered elector, and therefore, cannot be used as the basis for a challenge under Michigan election law. Mich. Comp. Laws § 168.733(c). Again under oath, the Michigan Republican Party officials verify that:

> 1. Neither the state party nor anyone acting with its knowledge or approval has obtained lists of persons or addresses subject to foreclosure notices or proceedings. [Anuzis ¶ 3; Harrigan ¶ 4]
>
> 2. The Michigan Republican Party has no plans to obtain such foreclosure lists, either on its own or in concert with any other persons or organizations. [Anuzis ¶ 4; Harrigan ¶ 5]
>
> 3. The Michigan Republican Party will not make any challenges to voters based on any foreclosure notices or proceedings and will not endorse, approve or participate in any such challenges by other persons or organizations. [Anuzis ¶ 5; Harrigan ¶ 6]

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Plaintiffs' complaint depends entirely on a disputed quote reported in a blog posting. According to the post, a county party chairperson said, "We will have a list of foreclosed homes and will make sure people aren't voting from those addresses." As noted in the complaint, the county chairperson denies making the statement; the author of the blog stands by her story. When asked about the comment, a representative of the Michigan Republican Party said that he was "unfamiliar with plans to use foreclosure lists to challenge votes." [R.1 – Complaint ¶ 51]

Here again, to verify that the Michigan Republican Party did not know about or authorize any alleged plan by the county chairperson, the affidavits by Saulius Anuzis and Kelly Harrigan state that:

> 1. After making inquiry of state party officials and representatives, they are not aware of any person at the Michigan Republican Party who spoke with Mr. Carabelli before the blog post about the alleged foreclosure-list plan. [Anuzis ¶ 6; Harrigan ¶ 6]
>
> 2. No one at the Michigan Republican Party authorized Mr. Carabelli to make the statement. [Anuzis ¶ 7; Harrigan ¶ 7]
>
> 3. No one at the Michigan Republican Party has approved, endorsed or authorized any such activities by the Macomb County Republican Party, any county parties or the Republican National Committee. [Anuzis ¶ 8; Harrigan ¶ 8]

In *Warshak v. United States*, 532 F.3d 521, 526 (6th Cir. 2008)(*en banc*), the Sixth Circuit held that an action for declaratory and injunctive relief against compelled disclosures of emails was not ripe because the court had "plenty of reason to doubt" that the defendant would engage in the challenged conduct *again*. The lack of ripeness is even more compelling here – where the Michigan Republican Party never planned to make foreclosure-based challenges in the first place.

The Michigan Republican Party never had any plans to use foreclosure lists to identify voters subject to challenges. It agrees that a person's name or address on a foreclosure list does not constitute "good reason to believe" that he or she is not a registered voter subject to challenge. There is no possibility that any potential voters will be harmed by the Michigan Republican Party.

B. Any voter challenge activities in other states and elections do not demonstrate that the Michigan Republican Party will engage in challenges based on foreclosure lists in the 2008 general election.

In their complaint, plaintiffs also include allegations about purported actions taken by other organizations. [R.1 – Complaint ¶ 24-29] Notably, *none of these allegations refer to the Michigan Republican Party*.

The allegations about past elections simply repeat the partisan invective which has all too commonly infected the campaign process. Needless to say, the Michigan Republican Party does not agree with plaintiffs' characterization of past efforts to verify voter eligibility. And, it's fair to assume that the Democratic National Committee and Obama for America would vigorously dispute allegations of election misconduct by their party. But the important point is that politically motivated accusations do not substitute for the proof required to invoke a federal court's subject matter jurisdiction.

The allegations in the complaint relate to events in different states and elections. *None involve Michigan. None involve voter challenges based on foreclosure lists*. Stripped of plaintiffs' colorful characterizations, the allegations can be summarized as (1) settlement agreements and consent decrees in 1982 and 1987 in which no party acknowledged any facts as

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true, (2) a 2004 district court order which was stayed by the Third Circuit,[3] and (3) events surrounding Ohio's 2004 election, resulting in orders prohibiting county clerks from holding mass voter eligibility hearings on short notice but allowing party challengers to make challenges at polling places.[4]

In any event, none of plaintiffs' allegations about these events demonstrate that there is any substantial likelihood that the Michigan Republican Party will challenge the eligibility of voters whose homes are subject to foreclosure notices or proceedings. In the related standing context[5], the Supreme Court has repeatedly stated that evidence of past wrongs *by the responsible defendant* is not sufficient to demonstrate a present justiciable controversy. "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief, however, if unaccompanied by any continuing, present adverse effects." *O'Shea v. Littleton*, 414 U.S. 488, 495-496, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974). See also, *City of Los Angeles v. Lyons*, 461 U.S. 95, 102, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) ("Past wrongs do not in themselves amount to that real and immediate threat of injury necessary to make out a case or controversy.") . While past actions may have some relevance, a claim is not ripe absent some demonstrated intention by the defendant to repeat the challenged conduct and cause present

[3] Order on Sur Petition for Rehearing En Banc, *Democratic National Committee v. Republican National Committee*, No 04-4186 (issued Nov. 2, 2004).

[4] *Summit County Democratic Central and Executive Committee v. Blackwell*, 388 F.3d 547 (6th Cir. 2004); *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004).

[5] Standing "bears close affinity" to ripeness. *Warth v. Seldin*, 422 U.S. 490, 499 n. 10, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). The doctrines involve "overlapping inquiries" as to whether the alleged harm has matured sufficiently to warrant judicial intervention. *Kardules v. City of Columbus*, 95 F.3d 1335, 1344 (6th Cir. 1996).

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injury to the plaintiff. *Renne v. Geary*, 501 U.S. 312, 321-322, 111 S.Ct. 2331, 115 L.Ed.2d 288 (1991).

These cases involve *past actions by the same defendant* who was alleged to be threatening future action against the plaintiffs. Using the allegations in *Lyons* for comparison, plaintiffs' argument is equivalent to asserting that the use of chokeholds by police in Miami years ago would be sufficient to demonstrate that police in Los Angeles are substantially likely to do so today. *Plaintiffs have the burden to demonstrate that the specific claim alleged against the Michigan Republican Party is ripe*. Whatever happened in other states during different elections does not demonstrate that the Michigan Republican Party will base voter challenges on information derived from foreclosure notices or proceedings.

II. The complaint fails to state a claim against the Michigan Republican Party. The only factual allegation is the Michigan Republican Party's denial of any knowledge about or intent to participate in any plans to challenge voters based on foreclosure lists.

STANDARD FOR MOTION

The pleading standard necessary to survive a Rule 12(b)(6) motion was clarified by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, __ U.S. __ , 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). The Court repudiated the "no set of facts" language from *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), which had been cited by many courts as the Rule 12(b)(6) standard.[6] The appropriate standard was described:

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, … a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do….Factual

[6] "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46.

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> allegations must be enough to raise a right to relief above the speculative level … on the assumption that all the allegations in the complaint are true (even if doubtful in fact). *Id.* 127 S.Ct. at 1965 (internal citations and quotations omitted).

The Court emphasized that "Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion, of entitlement to relief." *Id.* 127 S.Ct. at 1965 & n. 3.

"[A] complaint containing a statement of facts that merely creates a suspicion of a legally cognizable right of action is insufficient." *Bishop v. Lucent Technologies, Inc.*, 520 F.3d 516, 519 (6th Cir. 2008)(citing *Twombly*). "The factual allegations, assumed to be true, must do more than create speculation or suspicion of a legally cognizable cause of action; they must show entitlement to relief." *League of United Latin American Citizens (LULAC) v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007)(citing *Twombly*).

When evaluating a complaint's sufficiency, a district court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986). "[C]onclusory allegations or legal conclusions masquerading as factual allegations will not suffice to prevent a motion to dismiss." *Mezibov v. Allen*, 411 F.3d 712, 716 (6th Cir. 2005). The standard does not require a court "to swallow the plaintiff's invective hook, line and sinker; bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like need not be credited." *Mass. School of Law v. American Bar*, 142 F.3d 26, 40 (1st Cir. 1998).

A Rule 12(b)(6) motion primarily focuses on the complaint's allegations. However, a court is "entitled to take notice of the full contents of the published articles referenced in the complaint." *Twombly*, 127 S.Ct. at 1973 n. 13. See also, *Weiner v. Klais & Co.*, 108 F.3d 86, 89 (6th Cir. 1997); *Wyser-Pratte Mgmt. Co. v. Telxon Corp.*, 413 F.3d 553, 560 (6th Cir. 2005).

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ANALYSIS

Twombly explicitly holds that speculation and suspicion are not sufficient grounds for a federal lawsuit. Neither is political posturing.

A. The complaint lacks any factual allegations regarding the Michigan Republican Party other than its denial of any plans to challenge voters based on foreclosure lists.

The complaint noticeably lacks any *factual* allegation that the Michigan Republican Party has agreed to the foreclosure-challenge plan or has done anything to assist or support anyone else in carrying it out. To the contrary, the *only* factual allegations are that the Michigan Republican Party has explicitly repudiated any such challenges and "won't allow its challengers to use foreclosure lists."

Plaintiffs indiscriminately and persistently lump the national, state and county party committees into a single entity described as "Defendant Republicans." Throughout the lengthy complaint, plaintiffs try to parlay a disputed quote from a county chairperson into an orchestrated national and statewide campaign to obstruct the upcoming election.

A similar effort to sweep defendants into an alleged conspiracy despite the lack of any supporting factual allegations was recently held to be sanctionable. In *Fieger v. Cox*, 524 F.3d 770 (6th Cir. 2008), several attorneys, their law firm, and an advertising firm brought a vindictive prosecution action against a Michigan Supreme Court Justice, Michigan's Attorney General, Michigan's Secretary of State, and other individuals. The complaint alleged that the defendants conspired to violate the plaintiffs' constitutional rights during an investigation of potential election law violations. The district court dismissed the action against the Attorney General, Secretary of State, and the other individuals based on *Younger* abstention. The court dismissed the complaint against the Supreme Court Justice and imposed Rule 11 sanctions,

finding that the complaint was "wholly lacking in merit … spurred solely by plaintiffs' political and professional animus" toward the Justice. 524 F.3d at 774.

The Sixth Circuit affirmed, agreeing with the district court's finding that the complaint was "devoid of any allegations, let alone facts, to support [the Justice's] alleged participation in a conspiracy" against the plaintiffs. *Id.* at 776.

> It is "well-settled that conspiracy claims must be pled with some degree of specificity and that vague and conclusory allegations unsupported by material facts will not be sufficient to state such a claim under § 1983." *Gutierrez v. Lynch*, 826 F.2d 1534, 1538 (6th Cir.1987). Accordingly, pleading requirements governing civil conspiracies are relatively strict… *Id.*

See also, *Black & Yates v. Mahogany Ass'n*, 129 F.2d 227, 231 (3d Cir. 1942)("A general allegation of conspiracy without a statement of the facts is an allegation of a legal conclusion and insufficient of itself to constitute a cause of action."); *Rose v. Bartle*, 871 F.2d 331, (3d Cir. 1989)(conspiracy complaint must include "supportive factual allegations").

Plaintiffs' effort to construct a broad-ranging conspiracy based on a blog report of a disputed quote by a single county's chairperson is no less deficient, and indeed, no less sanctionable. The complaint seeks to frame a claim against three separate committees at three different levels of the Republican Party from the following:

> 1. A blog post attributing a quote to a county chairperson who denies making the statement.
>
> 2. Alleged voter challenges by the Republican National Committee that occurred in 1981, 1986 and 2004, took place in other states, and did not involve use of foreclosure lists.
>
> 3. A retracted newspaper report about a comment by an Ohio county chairperson.
>
> 4. A denial by the Michigan Republican Party of any intent to challenge voters based on foreclosure notices or lists.

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The complaint lacks factual allegations which are "enough to raise a right to relief above the speculative level." *Twombly*, 127 S.Ct. at 1965. While plaintiffs may pretend to be suspicious, they have not alleged any facts giving plausibility to their claim that the Michigan Republican Party plans to challenge voters based on foreclosure lists. Indeed, accepting the complaint's factual allegations as true, plaintiffs' only claim is that the Michigan Republican Party *will not allow its election challengers to use foreclosure lists*.

1. The alleged statement by a county chairperson is not a factual allegation relating to the Michigan Republican Party.

The complaint refers to a blog post which reports an alleged statement by James Carabelli, the chairperson of the Macomb County Republican Committee. [R.1 - Complaint ¶ 34] The blog quotes him as saying "We will have a list of foreclosed homes and will make sure that people aren't voting from those addresses." According to the blog, Mr. Carabelli said "the *local party* wanted to make sure proper electoral procedures were followed." (emphasis added) The posting repeatedly refers to "the Macomb GOP's plans" and "the Macomb County party's plans." [Exhibit 3]

The complaint does not allege that the county chairperson had any authority to speak on behalf of the Michigan Republican Party. Under Michigan law, the Michigan Republican Party is organized as a "state central committee." Mich. Comp. Laws § 168.597. The Macomb County Republican Party is organized as a "county executive committee. *Id.* § 168.599. The Michigan Republican Party has its own officers and members. *Id.* at § 168.597.

Plaintiffs have not alleged any facts showing that Mr. Carabelli's purported statement about the local party's plans can be attributed to the Michigan Republican Party.

Plaintiffs also make an allegation based on a blog post about a statement by an Ohio county chairperson can be dismissed out of hand. [*Id.* ¶ 35] The blog retracted its original report

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and acknowledged the supposed statement was never made. [Exhibit 3] Presumably, plaintiffs will retract the allegation as well.

2. Allegations about actions by the Republican National Committee in previous elections held in different states are not factual allegations relating to the Michigan Republican Party.

Coming from a different direction, plaintiffs make allegations about prior voter challenges used by the Republican National Committee in 1981, 1986 and 2004. The alleged conduct occurred in New Jersey, Louisiana and Ohio. [R.1 – Complaint ¶¶ 24-29]

There are no allegations that the Michigan Republican Party engaged in unlawful voter challenges in previous elections. As noted, the Michigan Republican Party is a separate and independent state committee. Its actions are not directed or controlled by the Republican National Committee, an entity formed under federal election law. Here again, plaintiffs have alleged no facts showing any relationship between the national and state party beyond shared political beliefs.

3. The only factual allegation relating to the Michigan Republican Party is an explicit denial of any intent to allow its challengers to use foreclosure lists.

As detailed in plaintiffs' complaint, the Michigan Republican Party has explicitly stated that the foreclosure of an individual's home has absolutely nothing to do with his or her eligibility to vote. According to plaintiffs' own allegations, the Michigan Republican Party will not allow its challengers to use foreclosure lists. [R.1 – Complaint ¶ 51] Apparently, plaintiffs assert that the Michigan Republican Party must be planning to challenge voters based on

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foreclosure lists because it has denied that it has any plans to do so. Lewis Carroll could hardly have drafted the complaint as well.[7]

Plaintiffs attempt to discredit the Michigan Republican Party's unambiguous statements as "public relations maneuvers under pressure." [*Id.* ¶ 52] However, their characterization is not a *factual* allegation. To the contrary, *plaintiffs do not allege that the Michigan Republican Party's denial of any plans to challenge voters based on foreclosure lists is not true*. And, just as clearly, plaintiffs have not alleged any facts to that effect. As the Supreme Court held in *Twombly*, suspicion is not enough to sustain a federal court action. 127 S.Ct. at 1965.

B. Taken as true, the factual allegations fail to state a claim for relief against the Michigan Republican Party.

Read as a whole, plaintiffs' complaint suffers the same deficiencies which led the Supreme Court to dismiss the complaint in *Twombly*. In that case, the plaintiffs alleged that regional telephone companies conspired to restrain trade in the local telephone and high-speed Internet businesses. In stating the Sherman Act claim, the complaint alleged that the defendant companies conspired to restrain trade in two ways: 1) by engaging in parallel conduct intended to prevent independent carriers from competing effectively; and 2) by agreeing not to compete with one another. There were no factual allegations about the anticompetitive agreement itself. Instead, the plaintiffs asserted that concerted action could be inferred from the defendants' failure to compete with each other and their parallel conduct in acting to prevent the plaintiffs from competing. *Id.* 127 S.Ct. at 1961-1963.

The Court concluded that "nothing contained in the complaint invests either the action or inaction alleged with a plausible suggestion of conspiracy." *Id.* at 1971. "[W]ithout some further

[7] "If I had a world of my own, everything would be nonsense. Nothing would be what it is, because everything would be what it isn't. And contrary wise, what is, it wouldn't be. And what it wouldn't be, it would. You see?" Lewis Carroll, *Alice in Wonderland*.

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factual enhancement," an allegation of parallel conduct "stops short of the line between possibility and plausibility of 'entitle[ment]' to relief." *Id.* at 1966. Although Rule 8(a) does not "require heightened fact pleading of specifics," a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Id.* at 1974. The Court held that the plaintiffs had not "nudged their claims across the line from conceivable to plausible." *Id*.

When a plaintiff alleges that the defendants have acted in concert, *Twombly* requires "enough factual matter (taken as true) to suggest that an agreement was made." *Id*. at 1965. Importantly, *Twombly* examined plausibility solely by reference to the *facts* alleged in the complaint. Thus, despite the plaintiffs' express allegations that the defendants "entered into a contract, combination or conspiracy to prevent competitive entry into their…markets and have agreed not to compete with one another," the Court held that dismissal was required because those statements were "merely legal conclusions." *Id.* at 1970. A "conclusory allegation of agreement at some unspecified point in time does not supply facts adequate to show illegality." *Id.* at 1966. Although the complaint does not need detailed factual matter, "Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion, of entitlement to relief." *Id.* at 1965 n. 3.

Plaintiffs' complaint similarly fails to plausibly allege that the defendants joined in a foreclosure-list "vote-suppression program" or that they are acting in concert "to strip the right to vote of individuals who reside in homes for which a notice of foreclosure has issued." [R.1 – Complaint ¶¶ 2-3] The complaint is replete with the magic words. See, *e.g.*, defendants are "acting in concert and with express and implicit agreement." [*Id.* ¶ 20] However, despite the repeated references to plots and schemes, plaintiffs have not met *Twombly*'s plausibility standard with any factual allegations about the Michigan Republican Party.

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The starting point for plaintiffs' complaint is the blog post regarding an alleged statement by the chairperson of the Macomb County Republican Party. Initially, the decision to file a lawsuit based on an internet posting – particularly one which was "flatly denied" in a press article *included in the complaint* – is questionable.[8]

However, even accepting the blog report as true, the statement by a county chairperson is not a factual allegation regarding the Michigan Republican Party's actions or intentions. Yet, even though plaintiffs allege only a single statement by a representative of a single county party committee, the complaint quickly and recklessly expands it – asserting that "Defendant Republicans have already announced through the news media that they are acquiring foreclosure lists and intend to use them." [*Id.* ¶ 34]

The county chairperson's reported statement is not a sufficient factual allegation that the Michigan Republican Party has agreed to join in any purported scheme. This is particularly true when plaintiffs also allege that the Michigan Republican Party has unambiguously denied any intent to participate in challenges based on foreclosure lists.

The next step in plaintiffs' complaint is a group of allegations about voter challenges by the Republican National Committee in other elections, in other states, and on different grounds. These allegations are combined with a reference to a statement attributed to the Michigan Republican Party about potential challenges based on returned mail.

While plaintiffs include extensive allegations about past and intended "caging," it is critical to focus on the substance of the complaint. The request for relief is limited to seeks an

[8] In *Garr v. U.S. Healthcare, Inc.*, 22 F.3d 1274 (3d Cir. 1994), a class action was filed two days after the plaintiffs' attorneys read an article in the *Wall Street Journal*. The Third Circuit affirmed the imposition of Rule 11 sanctions, finding that reliance on the article did not satisfy the reasonable inquiry standard especially since the article did not support the allegations. *Id.* at 1281.

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injunction against "challenging Michigan voters on the basis of the presence of particular property on a listing of foreclosure filings" and a declaration that "the presence of a particular property on a listing of foreclosure filings 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." [*Id.* Prayer for Relief ¶¶ B & C]

Although plaintiffs will certainly argue that prior challenges based on returned mail may have some relevance, these assertions cannot substitute for factual allegations which make a plausible case that the Michigan Republican Party has joined in a scheme to use foreclosure lists to suppress voting in the upcoming election. *The only fact alleged by plaintiffs is that the Michigan Republican Party believes that challenges based on foreclosure lists have no merit and denies that its challengers will engage in any such conduct.*

III. The challengers designated by Michigan Republican Party do not act under color of state law.

Even accepting plaintiffs' unsupported allegation that some sort of foreclosure list challenge system exists, the claim under 42 U.S.C. § 1983 should be dismissed because the challengers designated by the Michigan Republican Party do not act under color of law. Private parties, like the Michigan Republican Party, may be deemed to have acted under color of law in two circumstances: when they conspire with state officials, and when they willfully engage in joint activity with a state or its agents. See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152, 90 S.Ct. 1598, 1604, 26 L.Ed.2d 142 (1970) (quoting *United States v. Price*, 383 U.S. 787, 794, 86 S.Ct. 1152, 1157, 16 L.Ed.2d 267 (1966)); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 n. 21, 102 S.Ct. 2744, 2755 n. 21, 73 L.Ed.2d 482 (1982). The complaint has no factual allegations regarding a conspiracy with state officials. Therefore, section 1983 liability turns on whether the

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plaintiffs' complaint can support a finding of "joint activity" by the Michigan Republican Party and the precinct workers.

Mere recourse to state or local court procedures does not by itself constitute "joint activity" with the state sufficient to subject a private party to liability under section 1983. See, e.g., *Dennis v. Sparks*, 449 U.S. 24, 28, 101 S.Ct. 183, 186, 66 L.Ed.2d 185 (1980); *Crabtree v. Muchmore*, 904 F.2d 1475, 1476 (10th Cir.1990); *Jones v. Poindexter*, 903 F.2d 1006, 1010-1011 (4th Cir.1990); *Tunstall v. Office of Judicial Support*, 820 F.2d 631, 634 (3d Cir.1987). Consequently, section 1983 claims against private attorneys representing their clients in court are dismissed. See for example, *Hoai v. Vo*, 935 F 2d 308 (D.C. Cir. 1991); *MacFarlane v. Smith*, 947 F Supp 572 (D.N.H. 1996).

The present situation is no different than when a private attorney represents a client in court. Challengers, like attorneys, represent the Republican Party before the precinct inspectors. Challengers, like attorneys, have no decision-making authority but request relief from the decision-maker – either the judge or the precinct inspector as the case may be. Accordingly, any section 1983 claims against the Michigan Republican Party must be dismissed.

CONCLUSION

The *only* factual allegation about the "lose your home, lose your vote" scheme is a blog report about a statement purportedly made by a local party official – a statement which the complaint acknowledges has been denied. However, to decide the Michigan Republican Party's motion, there is no need to consider whether the blog post is accurate or whether plaintiffs' allegations about the Macomb County Republican Party state a plausible claim.

Plaintiffs have the burden to prove the existence of subject matter jurisdiction by demonstrating a ripe claim against the Michigan Republican Party. According to sworn

affidavits by key officials, it has never planned to make foreclosure-based challenges and will not allow its representatives to make any such challenges. There is *no* likelihood that the alleged harm will ever come to pass.

The complaint similarly fails to state a claim against the Michigan Republican Party. Plaintiffs do not allege that the Michigan Republican Party has approved or endorsed the purported scheme. The complaint does not allege that any representative of the Michigan Republican Party has made any statement or taken any action to join in the plan to make foreclosure-list challenges.

Rather, the complaint alleges that the Michigan Republican Party agrees with plaintiffs that "a person's name and address on a foreclosure list doesn't mean he or she has left the home." And more compellingly, the complaint alleges that the Michigan Republican Party "won't allow its challengers to use foreclosure lists." By alleging that the Michigan Republican Party agrees with their position and will not engage in the purported conduct, plaintiffs "have not nudged their claims across the line from conceivable to plausible."

Defendant Michigan Republican Party's motion to dismiss should be granted.

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I certify that on October 1, 2008, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

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