

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,

vs.

MACOMB COUNTY REPUBLICAN PARTY,
MICHIGAN REPUBLICAN PARTY, REPUBLICAN
NATIONAL COMMITTEE, and JOHN DOES #1-
100,

Defendants.

Case No. 2:08-cv-13982-DML-MKM
Hon. David M. Lawson

**DEFENDANT MACOMB
COUNTY REPUBLICAN
PARTY'S MOTION TO DISMISS**

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**DEFENDANT MACOMB COUNTY REPUBLICAN PARTY'S MOTION TO
DISMISS**

Defendant Macomb County Republican Party ("Macomb County"), by its attorneys, Honigman Miller Schwartz & Cohn LLP, moves to dismiss Plaintiffs' Complaint pursuant to Fed. R. Civ. P. 12(b)(1) for lack of jurisdiction and Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

In compliance with Local Rule 7.1, Macomb County's counsel called Plaintiffs' counsel on October 7, 2008, to explain the basis for and seek concurrence in the relief requested in the Motion and concurrence was denied.

Respectfully submitted,

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Dated: October 8, 2008

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**DEFENDANT MACOMB
COUNTY REPUBLICAN
PARTY'S BRIEF IN SUPPORT OF
MOTION TO DISMISS**

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TABLE OF CONTENTS

INDEX OF AUTHORITIES..... ii

STATEMENT OF ISSUES PRESENTED..... iv

CONTROLLING OR MOST APPROPRIATE AUTHORITY FOR RELIEF SOUGHT.....v

I. INTRODUCTION1

II. STATEMENT OF FACTS1

 A. PARTIES1

 B. PERTINENT AND UNDISPUTED FACTS2

III. ARGUMENT.....4

 A. THIS COURT LACKS SUBJECT MATTER JURISDICTION4

 1. RULE 12(b)(1).....4

 2. PLAINTIFFS’ CLAIMS ARE NOT RIPE FOR REVIEW.....6

 3. PLAINTIFFS LACK STANDING.....8

 4. PLAINTIFFS’ CLAIMS ARE MOOT9

 B. PLAINTIFFS HAVE FAILED TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED10

 1. RULE 12(B)(6)10

 2. COUNT I FAILS TO STATE A CLAIM UNDER 42 U.S.C. § 1983.....12

 3. COUNT II FAILS TO STATE A CLAIM UNDER 42 U.S.C. § 1985.....14

IV. CONCLUSION AND REQUEST FOR RELIEF17

INDEX OF AUTHORITIES

Cases

Accord Oxford Asset Mgmt. v. Jaharis, 297 F.3d 1182 (11th Cir. 2002) 12

Adult Video Ass’n v. United States Dep’t of Justice, 71 F.3d 563 (6th Cir. 1995)..... 6

Angel v. Kentucky, 314 F.3d 262 (6th Cir. 2002) 4

Association of Cleveland Fire Fighters v. City of Cleveland, 502 F.3d 545 (6th Cir. 2007) 12

Babbitt v. United Farm Workers Nat’l Union, 442 U.S. 289; 99 S. Ct. 2301; 60 L. Ed.2d 895 (1979)..... 7

Bell Atlantic Corp. v. Twombly, ___ U.S. ___; 127 S. Ct. 1955; 167 L. Ed.2d 929 (2007)... 10, 12

Brentwood Acad. v. Tennessee Secondary School Athletic Ass’n, 531 U.S. 288; 121 S.Ct. 924; 148 L. Ed.2d 807 (2001)..... 13

Briggs v. Ohio Elections Comm’n, 61 F.3d 487 (6th Cir. 1995) 6

Center for Bio-Ethical Reform, Inc. v. City of Springboro, 477 F.3d 807 (6th Cir. 2007)..... 14

Coalition to Defend Affirmative Action v. Regents of the University of Michigan, 539 F. Supp. 2d. 960 (E.D. Mich. 2008)..... 9

Conley v. Gibson, 355 U.S. 41; 78 S. Ct. 99, 2 L.Ed.2d 80 (1957)..... 11

Friends of the Earth, Inc. v. Laidlaw Environmental Service Inc., 528 U.S. 167; 120 S. Ct. 693; 145 L. Ed.2d 610 (2000) 9

Gen-Probe, Inc. v. Amoco Corp., Inc., 926 F. Supp. 948 (S.D. Cal. 1996)..... 12

Gregory v. Shelby County, 220 F.3d 433 (6th Cir. 2000)..... 13

Gutierrez v. Lynch, 826 F.2d 1534 (6th Cir. 1987)..... 15

Howerton v. Gabica, 708 F.2d 380 (9th Cir. 1983)..... 13

Lujan v. Defenders of Wildlife, 504 U.S. 555; 112 S. Ct. 2130; 119 L. Ed.2d 351 (1992) 6, 8

Memphis Tennessee Area Local v. City of Memphis, 361 F.3d 898 (6th Cir. 2004) 13

Mezibor v. Allen, 411 F.3d 712 (6th Cir. 2005)..... 13

Miyazawa v. City of Cincinnati, 45 F.3d 126 (6th Cir. 1995)..... 8

Moir v. Greater Cleveland Regional Transit Auth., 895 F.2d 266 (6th Cir. 1990) 5

Mosley v. Hairstom, 980 F.2d 469 (6th Cir. 1996)..... 9

Newell v. Brown, 981 F.2d 880 (6th Cir. 1992)..... 14

Ohio Nat’l Life Ins. Co. v. United States, 922 F.2d 320 (6th Cir. 1990)..... 5

Peoples Rights Org., Inc. v. City of Columbus, 152 F.3d 522 (6th Cir. 1998)..... 7

Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530 (9th Cir. 1984)..... 10

Roth v. United States, 952 F.2d 611 (1st Cir. 1991)..... 12

Sprewell v. Golden State Warriors, 266 F.3d 979 (9th Cir. 2001)..... 12

Thomas v. Union Carbide Agric. Products Co., 473 U.S. 568; 105 S.Ct. 3325; 87 L.Ed.2
409 (1985)..... 7

Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568, 580; 105 S. Ct. 3325;
87 L.Ed.2 409 (1985)..... 7

United Steelworkers of America, Local 2116 v. Cyclops Corp., 860 F.2d 189 (6th Cir.
1988)..... 7

Western Mining Council v. Watt, 643 F.2d 618 (9th Cir. 1981)..... 12

Wolotsky v. Huhn, 960 F.2d 1331 (6th Cir. 1992)..... 13

Other Authorities

42 U.S.C. § 1983..... 12, 14

42 U.S.C. § 1985..... 14

C. Wright and A. Miller, *Federal Practice and Procedures* § 1286 (3d ed. 2004)..... 12

U.S. Const. art. III, § 2..... 4, 6

Rules

Fed. R. Civ. P. 8..... 10

Fed. R. Civ. P. 8(a)(2)..... 10

Fed. R. Civ. P. 12(b)(1)..... 4, 17

Fed. R. Civ. P. 12(b)(6)..... 10, 17

STATEMENT OF ISSUES PRESENTED

- I. Whether Plaintiffs' Claims are ripe for review given that Plaintiffs concede that the Defendants have each denied any intention to engage in the very conduct which the Plaintiffs ask this Court to enjoin?
- II. Whether Plaintiffs lack standing given that the harm alleged in the Complaint is not actual, imminent or even realistically likely to ever occur?
- III. Whether Plaintiffs' claims are moot given that Macomb County does not engage in poll challenges, has under oath stated that it will not engage in poll challenges and the Secretary of State has recently stated that it is the State's position that any challenges based on a notice of foreclosure will be rejected?
- IV. Whether Plaintiffs have failed to state a claim pursuant to 42 U.S.C. § 1983 because Plaintiffs failed to allege that Macomb County was acting under color of state law or depriving Plaintiffs of a federally protected right?
- V. Whether Plaintiffs have failed to state a claim pursuant to 42 U.S.C. § 1985 because Plaintiffs have failed to allege any facts to support any agreement between the Defendants, any facts indicating any act in furtherance of said agreement or that the Plaintiffs are members of a protected class?

CONTROLLING OR MOST APPROPRIATE AUTHORITY FOR RELIEF SOUGHT

Cases

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Bell Atlantic Corp. v. Twombly, ___ U.S. ___; 127 S. Ct. 1955; 167 L. Ed.2d 929 (2007)
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Lujan v. Defenders of Wildlife, 504 U.S. 555; 112 S. Ct. 2130; 119 L. Ed.2d 351 (1992)
Mezibor v. Allen, 411 F.3d 712 (6th Cir. 2005)
Mosley v. Hairstom, 980 F.2d 469 (6th Cir. 1996)

Statutes or Constitution

U.S. Const. art III, § 2
42 U.S.C. § 1983
42 U.S.C. § 1985

Rules

Fed. R. Civ. P. 12(b)(1)
Fed. R. Civ. P. 12(b)(6)

I. INTRODUCTION

This case is a classic example of political maneuvering and posturing without any concern whatsoever for the actual factual or legal support for the claims advanced. The Plaintiffs here, in an arguably sanctionable move, have filed a Complaint for Injunctive and Declaratory Relief, purportedly seeking to prevent the Defendants from doing something they have never done, have no plan to do, and have publicly and under oath, affirmatively stated they will not do – namely, make challenges to voter eligibility at the polls based merely on a notice of foreclosure. This Court lacks jurisdiction to issue an opinion where there is no dispute and no injury. Plaintiffs have also completely failed to allege any facts to support a claim upon which relief can be granted.

II. STATEMENT OF FACTS

A. Parties

The individual Plaintiffs are residents of Macomb County who are registered to vote at their current addresses and whose homes are all subject to foreclosure. Plaintiffs' Complaint for Declaratory and Injunctive Relief ("Complaint") at ¶¶ 6-8. Obama for America is a political campaign (*id.* at ¶ 15) and the Democratic National Committee is the governing body of the Democratic Party of the United States. *Id.* at ¶ 16.

The Republican National Committee ("RNC") is the governing body of the Republican Party of the United States *Id.* at ¶ 19. The Michigan Republican Party ("MRP") is the State Central Committee of the Republican Party of Michigan. *Id.* at ¶ 18. The Macomb County Republican Party ("Macomb County") is a county committee of the Republican Party of Michigan. *Id.* at ¶ 17. These three committees are separate legal entities, with their own governance and procedures. One committee cannot legally bind, and does not have the authority to speak for, another committee.

B. Pertinent and Undisputed Facts

James Carabelli is the Chairman for Macomb County. On September 9, 2008, Eartha Melzer, a reporter for a blog entitled the Michigan Messenger, called Mr. Carabelli on his cell phone and requested the opportunity to ask him questions concerning the issues affecting Macomb County voters, which he agreed to do. Exhibit 1, Affidavit of James Carabelli (“Carabelli Aff” at ¶ 4). The conversation lasted approximately 4 minutes. *Id.* at ¶ 5. The following day, the Center for Independent Media published an article on the Michigan Messenger blog, purportedly as a result of that conversation, which then led to this lawsuit. *Id.* at ¶ 9; Complaint at ¶ 34. The actual content of the parties’ conversation is hotly disputed, a fact of which both parties would and do agree. *Id.* at ¶¶ 9-13; *Id.* at ¶ 51. Ms. Melzer claims that Mr. Carabelli told her that Macomb County would be using foreclosure notice lists to challenge voter eligibility at the polls. *Id.* at ¶ 9; *Id.* at ¶ 34. Mr. Carabelli contends that assertion is completely false, that he never made that statement or even had heard of such a basis for challenge and, in fact, Macomb County does not even engage in poll challenging. *Id.* at ¶¶ 9-13; *Id.* at ¶ 51. Mr. Carabelli further asserts that instead, he had merely said in response to Ms. Melzer’s question as to what were the most significant issues facing Macomb County voters: “high unemployment and foreclosure rates.” *Id.* at ¶ 6. Later in that conversation, when asked about potential poll challenges, Mr. Carabelli states that he could not answer that question, given that Macomb County does not engage in poll challenging. *Id.* at ¶ 7.

Mr. Carabelli adamantly denies making the statements attributed to him by Ms. Melzer, and denies ever having a plan, or knowledge of a plan, to use foreclosure notice lists as a basis for challenge. *Id.* at ¶¶ 9-13; *Id.* at ¶ 51. The MRP, who coordinates the poll challenges for the State, has also denied any intention to use foreclosure notice lists to raise challenges, as has the RNC. Indeed, Plaintiffs concede that all of the Defendants deny having any plan or intention to

use foreclosure notice lists at the polls and that Mr. Carabelli denies making any such assertion otherwise. Complaint at ¶ 51.

Nonetheless, Plaintiffs filed a Complaint for Declaratory and Injunctive Relief setting forth a plethora of alleged historical examples of the Republican Party's purported past practices concerning voter challenges, not one of which are relevant to the instant lawsuit, and not one of which involve Macomb County. Indeed, the sole basis for the instant suit is the unverified blog purporting to describe the disputed conversation with Mr. Carabelli. The Plaintiffs' own Complaint, in a section titled "Recent Statements by Defendant Republicans" admits that Defendants have affirmatively stated that they "have no plans to do anything," . . . that they are "unfamiliar with" any "lose your home, lose your vote" scheme, and that "they will not engage in the conduct alleged by this complaint[.]" *Id.* at ¶ 51 (references omitted).

Plaintiffs do not explain why they believe they still have a viable cause of action, despite the Defendants' denials that any such plan exists or will be utilized, other than to assert that these Defendants apparently cannot be trusted based on alleged prior unrelated attempts at voter suppression, as alleged in the Complaint. Yet these allegations all relate to unrelated complaints in other jurisdictions, which have since been resolved years ago (some in the Republicans' favor) and not even one of these alleged historical instances assert any wrongdoing or conduct on the part of Macomb County. Plaintiffs' repeated attempts to blur the clear legal distinction between the three Defendant committees is not sufficient to state a claim. These three committees are legally separate and distinct and there are no allegations, facts or legally viable theories to support the Plaintiffs' apparent assumption that the conduct of one can be legally attributed to the other. To even suggest that the alleged unrelated conduct of a Republican Party committee in

Ohio or New Jersey several years ago is relevant to the current claims concerning Macomb County is disingenuous, at best.

Furthermore, since the filing of Plaintiffs' Complaint, the Michigan Secretary of State has issued a press release (and a written statement is forthcoming) to the clerks of each county and city, stating that the use of foreclosure notice lists as the basis for a challenge to voter eligibility is not valid under Michigan Election Law and must be rejected if made at the polls. Exhibit 2. Accordingly, even if someone were to make a challenge based on the mere act of foreclosure, the clerks would be without discretion in this regard and would be obligated to reject such a challenge.

Despite the outright denial of Mr. Carabelli of any statements attributed to him concerning the use of foreclosure notice lists, the denial of any intention to do so, and the Secretary of State's statement that such a challenge will not be recognized under Michigan law, the Plaintiffs are inexplicably maintaining this lawsuit to seek an injunction against parties for action they have never and will not commit. Plaintiffs' Complaint is obviously not a legitimate or viable cause of action and must be dismissed.

III. ARGUMENT

A. This Court Lacks Subject Matter Jurisdiction

1. Rule 12(b)(1)

Article III of the Constitution limits federal jurisdiction to actual cases and controversies. U.S. Const. art. III, § 2. A challenge to subject matter jurisdiction must be resolved by this Court as a threshold matter. Defendant Macomb County files this Motion pursuant to Fed. R. Civ. P. 12(b)(1), because Plaintiffs lack standing, and these claims are not ripe and/or are moot. In response to a Rule 12(b)(1) motion, Plaintiffs have the burden of demonstrating and establishing jurisdiction. *Angel v. Kentucky*, 314 F.3d 262, 264 (6th Cir. 2002); *Moir v. Greater Cleveland*

Regional Transit Auth., 895 F.2d 266, 269 (6th Cir. 1990). 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. United States*, 922 F.2d 320, 324 (6th Cir. 1990); *Moir*, 895 F.2d at 269.

Defendant Macomb County is submitting in support of this jurisdictional motion to dismiss, two affidavits. The first affidavit is from James Carabelli; the Chairman of Macomb County and alleged author of the statements that form the basis for Plaintiffs' Complaint. See Exhibit 1. Mr. Carabelli denies making any statement that he or the Republican Party at any level intended to use notices of foreclosures as a basis to challenge voters' eligibility. He denies any knowledge of such a plan and affirmatively states that neither he nor any other person affiliated with Macomb County, have ever had, or have now, any intention of using such lists. He further states that Macomb County does not even engage in poll challenges and will not be doing so during the November election.

The second affidavit is submitted by Stephanie Pazdro, Political Director for Macomb County. Exhibit 3. Ms. Pazdro denies any knowledge of any plan to use foreclosure notice lists by Macomb County or any other Republican Party Committee. Ms. Pazdro states further that Macomb County does not engage in poll challenges; rather it is all coordinated at the state level. Ms. Pazdro states further that there has never been any discussion or strategy to proceed in that manner and she does not have any foreclosure notice list or intention to obtain such a list.

Plaintiffs' Complaint concedes and, indeed, affirmatively states, that Defendants deny any plan to use foreclosure notice lists for voter challenges. Complaint at ¶ 51. Macomb County does not even have poll challengers or participate in the poll challenge process. Moreover, and significantly, since the Plaintiffs have filed their Complaint, the Secretary of State, the Chief

Election Officer for the State, has issued a press statement, through her Director of the Bureau of Elections, and written instructions to the county and city clerks are forthcoming, expressly instructing that challenges based on foreclosure notice lists are not valid under Michigan law and must be rejected. See Exhibit 2. Accordingly, the State has spoken on this issue. Even if someone chose to assert a specious challenge based merely on the presence of a person on a foreclosure list, that challenge will be unsuccessful, as the local election administrators are obviously bound by the direction of the Secretary of State on this issue.

This case is thus a complete waste of everyone's time and money. No ruling by this Court will impact the rights of the litigants or guide future conduct, and no harm to the Plaintiffs is imminent or even marginally likely to occur.

2. Plaintiffs' Claims are Not Ripe for Review

It is settled federal jurisprudence that Article III of the United States Constitution prohibits federal courts from issuing advisory opinions. U.S. Const. art. III, § 2. Art III § 2 extends judicial power only to actual cases or controversies. *Id.* In order for a case to be justiciable and not an advisory opinion, two criteria must be met: (1) there must be an actual dispute between the litigants; and (2) there must be a substantial likelihood that a federal court decision in favor of a claimant will have some effect. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61; 112 S. Ct. 2130; 119 L. Ed.2d 351 (1992) (it must be likely, rather than merely speculative, that the injury will be redressed by a favorable decision); *Briggs v. Ohio Elections Comm'n*, 61 F.3d 487, 491 (6th Cir. 1995) ("Our jurisdiction depends upon finding that Briggs has suffered some threatened or actual injury resulting from the potentially illegal action") (internal citations omitted). The ripeness doctrine "is to prevent the Courts, through premature adjudication, from entangling themselves in abstract disagreements. *Adult Video Ass'n v. United States Dep't of Justice*, 71 F.3d 563, 567 (6th Cir. 1995). See also *Peoples Rights Org., Inc. v.*

City of Columbus, 152 F.3d 522, 527 (6th Cir. 1998) (citing *Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568, 580; 105 S.Ct. 3325; 87 L.Ed.2 409 (1985)) (same).

The Sixth Circuit weighs three factors in deciding whether a case is ripe for review: (1) the hardship to the parties if judicial review is denied at the pre-enforcement stage; (2) the likelihood that the injury alleged by the plaintiff will ever occur; and (3) the fitness of the case for judicial resolution. *United Steelworkers of America, Local 2116 v. Cyclops Corp.*, 860 F.2d 189, 194-95 (6th Cir. 1988). “[T]he ripeness requirement aims to prevent the Court from entangling itself in ‘abstract disagreements.’” *Peoples Rights Org.*, 152 F.3d at 527 (citing *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 580; 105 S. Ct. 3325; 87 L.Ed.2 409 (1985)). “We pay particular attention to the likelihood that the harm alleged by plaintiffs will ever come to pass.” *United Steelworkers*, 860 F.2d at 194. A case is not ripe when it involves “contingent future events that may not occur as anticipated; or indeed may not occur at all.” *Thomas*, 473 U.S. at 580-81 (internal citation omitted). There must be a “realistic danger of sustaining a direct injury.” *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298; 99 S. Ct. 2301; 60 L. Ed.2d 895 (1979).

Plaintiffs’ claims here are clearly not ripe for review, given they are entirely speculative and there is no realistic danger of Plaintiffs sustaining any injury. Plaintiffs’ Complaint is premised entirely on speculation, conjecture, and assumptions, based on a singular unverified (and, indeed, denied) statement on a web blog. Mr. Carabelli immediately and publicly denounced making any such or similar statement and has submitted an affidavit supporting that denial. The MRP and the RNC have also expressly denied, publicly and by affidavit, that there will be any challenges made at the polls based on foreclosure status. Thus, the Defendants all state under oath that they have never made challenges based on foreclosure notice lists and will

not do so at this election. Macomb County does not even engage in poll challenging. The Secretary of State has formally stated that any challenges based on foreclosure status will be rejected.

Accordingly, there is no claim for this Court to adjudicate and no realistic or even possible danger that the harm alleged could ever actually occur. Any decision by this Court on these issues would merely be of an advisory nature, which is clearly not permitted by Article III.

3. Plaintiffs Lack Standing

The standing doctrine requires that a litigant have suffered an injury in fact that is fairly traceable to the defendant's alleged unlawful conduct and likely to be remedied by the requested relief. *Lujan*, 504 U.S. at 560-61. In a case where a plaintiff seeks declaratory or injunctive relief, the plaintiff must demonstrate "actual present harm or a significant possibility of future harm to justify pre-enforcement relief." *Peoples Rights Org.*, 152 F.3d at 527. Voter standing requires a voter to show that the threat of injury is real or immediate – not hypothetical, as is the case here. *Miyazawa v. City of Cincinnati*, 45 F.3d 126, 127 (6th Cir. 1995).

Lujan requires three elements to be met to establish standing: (1) plaintiff must have suffered an "injury in fact" which is concrete and particularized, as well as actual or imminent, not conjectural or hypothetical; (2) there is causation between the injury and conduct of the defendant; and (3) it must be likely and not speculative that the injury will be redressed by a favorable decision of the Court. *Lujan*, 504 U.S. at 560-61. It is the Plaintiffs' burden to demonstrate each such element to establish standing.

Plaintiffs here cannot establish even one of the three requisite elements for standing. Plaintiffs appear to allege that Macomb County will challenge voters based on foreclosure lists at the polls, but Macomb County has denied that it even has poll challengers; much less that such a plan as hypothesized by the Plaintiffs exists. Moreover the Secretary of State has stated that any

such challenge will be rejected by the election administrators. Accordingly, there is no injury or any reasonable likelihood of injury. Given that Macomb County does not do poll challenges, it could not possibly cause the harm of which Plaintiffs speculate may occur. Given that Defendants will not do what Plaintiffs seek to enjoin, any decision by this Court would, at best, constitute an advisory opinion, as it could not actually redress any injury, as none exists.

4. Plaintiffs' Claims are Moot

Mootness “refers to live controversies, those that persist in definite and concrete form even after intervening events have made some changes in the parties’ circumstances.” *Mosley v. Hairstom*, 980 F.2d 469, 414 (6th Cir. 1996). “A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” *Friends of the Earth, Inc. v. Laidlaw Environmental Service Inc.*, 528 U.S. 167, 170; 120 S. Ct. 693; 145 L. Ed.2d 610 (2000).

Here, Macomb County has never engaged in the allegedly wrongful conduct, and has publicly and under oath stated that it will not do the sole act complained of in Plaintiffs’ Complaint. Moreover, this Defendant does not even engage in, or participate in, poll challenges and will not do so at the November election.

This circumstance is similar to the scenario in *Coalition to Defend Affirmative Action v. Regents of the University of Michigan*, 539 F. Supp. 2d. 960 (E.D. Mich. 2008), where an injunction was sought, in part to prohibit the University of Michigan from considering race in evaluating transfer applications in light of Proposal 2. The University submitted an uncontested affidavit that race had never been considered as a factor in evaluating transfer applications and that Michigan would not change that policy even if Proposal 2 were ultimately struck down. *Id.* at 970. This Court stated in this regard:

In this case it is inappropriate to second guess [the University of] Michigan's representation when the evidence suggests its historical and future avoidance of consideration of race in transfer applications is not mere lip-service. Where a defendant's voluntary cessation of a challenged practice may be inherently suspect, there is nothing suspicious about a defendant proclaiming that it will continue to abide by a policy it has employed for years and which has not been changed materially by the commencement of litigation or the predicate events of that litigation. Michigan has not voluntarily *ceased* a challenged practice; it has simply stood by a course of action that is valid under Proposal 2.

Id. (internal citation omitted). Likewise, these Defendants have never engaged in the conduct complained of and have stated they will not do so in the future, regardless of the decision of this Court. Critically, since the filing of Plaintiffs' Complaint, the Secretary of State, the Chief Election Officer of the State, has expressly instructed that such challenges are invalid and will be rejected, further rendering any possible theory by Plaintiffs moot.

Again, any opinion by this Court would be based on a hypothetical set of facts and would affect the rights of none of the litigants. This Court simply lacks jurisdiction.

B. Plaintiffs Have Failed to State a Claim Upon Which Relief May be Granted

A complaint may be dismissed for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). A claim may be dismissed as a matter of law if it fails to plead (1) a cognizable legal theory, or (2) sufficient facts under a cognizable claim. *See Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984).

1. Rule 12(b)(6)

The Supreme Court recently revisited and clarified Fed. R. Civ. P. 8's requirement that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *See Bell Atlantic Corp. v. Twombly*, ___ U.S. ___; 127 S. Ct. 1955, 1959; 167 L. Ed.2d 929 (2007) (citing Fed. R. Civ. P. 8(a)(2)). The *Twombly* Court affirmed that the complaint must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Id.*

(internal quotation marks and citations omitted). In clarifying what constitutes fair notice, the Court rejected the pleading standard enunciated by the Court in 1957 in *Conley v. Gibson*, which held that 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.” *Id.* (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46; 78 S. Ct. 99, 2 L.Ed.2d 80 (1957)). Observing that *Conley’s* “no set of facts” formulation has been misunderstood and misapplied for more than fifty years, the Supreme Court deemed it now “best forgotten.” *Id.* at 1969.

Rejecting *Conley*, *Twombly* clarified that Rule 8 requires a “showing” and not merely a blanket assertion of entitlement to relief. *Id.* at 1965, n. 3. The Court made very clear what Rule 8 requires of a plaintiff:

While a complaint . . . does not need detailed factual allegations, a plaintiff’s obligation to provide the “grounds” of his “entitlement to relief” requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the complaint’s allegations are true.

Id. at 1959 (citations and footnote omitted). Pleadings compliant with Rule 8 must express a “plausible entitlement to relief.” *Id.* at 1967. If a complaint fails to meet this standard, the deficiency should “be exposed at the point of minimum expenditure of time and money by the parties and the court.” *Id.* at 1966 (citation omitted).

The Supreme Court explained that only by requiring a plaintiff to plead sufficient allegations could the “potentially enormous expense” of discovery be avoided in cases where the complaint shows no plausible entitlement to relief. *Id.* at 1967.

It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through “careful case management,” given the

common lament that the success of judicial supervision in checking discovery abuse has been on the modest side. And it is self-evident that the problem of discovery abuse cannot be solved by “careful scrutiny of evidence at the summary judgment stage,” must less “lucid instructions to juries”; the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.

Id. at 1967 (internal citations omitted). This decision is of course followed by the Sixth Circuit. *See, e.g., Association of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545, 548 (6th Cir. 2007).

Twombly is wholly consistent with well established circuit precedent that a district court need not accept conclusory legal allegations, “unwarranted deductions of fact, or unreasonable inferences.” *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *see also Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). *Accord Oxford Asset Mgmt. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002) (“conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal”); *Roth v. United States*, 952 F.2d 611, 613 (1st Cir. 1991) (court need not accept as true complaint’s “bald assertions, periphrastic circumlocutions, unsubstantiated conclusions, or outright vituperation”) (internal citation omitted); *Gen-Probe, Inc. v. Amoco Corp., Inc.*, 926 F. Supp. 948 at 961 (S.D. Cal. 1996) (observing that even under *Conley*’s liberal pleading standard, a plaintiff “must provide facts that ‘outline or adumbrate’ a viable claim for relief”); C. Wright and A. Miller, *Federal Practice and Procedures* § 1286 (3d ed. 2004) (“a pleader’s conclusory allegations of law, unsupported factual assertions, and unwarranted inferences do not have to be accepted by the federal court as true, particularly on a Rule 12(b)(6) motion to dismiss”).

2. Count I fails to state a claim under 42 U.S.C. § 1983

A claim filed pursuant to 42 U.S.C. § 1983 requires the Plaintiffs to establish (1) that the Defendants acted under color of state law, and (2) that the offending conduct deprived Plaintiffs

of a right secured by federal law. *Mezibor v. Allen*, 411 F.3d 712 (6th Cir. 2005); *Gregory v. Shelby County*, 220 F.3d 433 (6th Cir. 2000). Plaintiffs here can meet neither of those elements.

Defendant Macomb County is a private party, who is neither affiliated with the State nor acting in conjunction with the State with respect to poll challenges. For private conduct to constitute state action, there must be “such a close nexus between the State and the challenged action” that the behavior “may be fairly treated as that of the State itself.” *Brentwood Acad. v. Tennessee Secondary School Athletic Ass’n*, 531 U.S. 288, 295; 121 S.Ct. 924; 148 L. Ed.2d 807 (2001) (citation omitted).

Three distinct tests are used to determine when the actions of a private individual constitute state action: (1) the public function test; (2) the state compulsion test; and (3) the governmental nexus test. *Memphis Tennessee Area Local v. City of Memphis*, 361 F.3d 898, 905 (6th Cir. 2004). The public function test “requires that the private entity exercise powers which are traditionally exclusively reserved to the State.” *Id.* (quoting *Wolotsky v. Huhn*, 960 F.2d 1331 (6th Cir. 1992)). The state compulsion test requires proof that the state significantly encouraged or somehow coerced the private party to take a particular action. *Id.* Finally, the nexus test requires a sufficiently close relationship between the state and the private actor so that the action taken may be attributed to the state. *Id.* The purpose of these tests is to determine whether “significant” state involvement in the action is sufficient to attribute “under color of state law” activity to a private party. *Howerton v. Gabica*, 708 F.2d 380, 382 (9th Cir. 1983).

Plaintiffs have failed to allege any facts that would support the application of any of these tests to the case at bar. Indeed, Plaintiffs’ inability to establish this essential element of their cause of action is blatantly obvious, given the State’s express statement that foreclosure notice lists will not and cannot be used as a basis to challenge voter eligibility. Accordingly, were

Defendants actually planning to do what Plaintiffs suggest (which they are not), it would be directly contrary to the position of the State! Accordingly, Plaintiffs' § 1983 claim fails as a matter of law, because Plaintiffs have not alleged, and cannot demonstrate, that Macomb County was at any time acting under color of state law.

Plaintiffs have also failed to properly allege a deprivation of their constitutional rights, the second element required for a § 1983 claim. Plaintiffs have completely failed to meet their burden in this regard. This case is based on an alleged strategy in Macomb County based on a disputed and unverified statement allegedly made by the Chairman to a blog reporter. Even if true, however, Plaintiffs have failed to even allege how this one person's statement, which he denies, and which if made, was by someone who does not engage in poll challenges and has no authority or ability to bind the MRP, the only Defendant that actually does coordinate poll challenges, could possibly deprive a Macomb County resident of his or her right to vote. The allegations here are fatally lacking and Plaintiffs' § 1983 claim must fail.

3. Count II Fails to State a Claim Under 42 U.S.C. § 1985

A claim filed pursuant to § 1985(3) requires (1) a conspiracy involving 2 or more persons, (2) for the purpose of depriving, directly or indirectly, a person or class of persons of the equal protection of the laws, and (3) an act in furtherance of the conspiracy, (4) which caused injury to a person or a deprivation of a protected right. *Center for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807 (6th Cir. 2007).

A § 1985(3) complaint must "allege both a conspiracy and some class-based discriminatory animus behind the conspirators' action." *Id.* at 832 (quoting *Newell v. Brown*, 981 F.2d 880, 886 (6th Cir. 1992)). Further, "conspiracy claims must be pled with some degree of specificity and . . . vague and conclusory allegations unsupported by material facts will not be

sufficient to state a claim.” *Id.* (quoting *Gutierrez v. Lynch*, 826 F.2d 1534, 1538-39 (6th Cir. 1987)).

In *Center for Bio-Ethical Reform*, plaintiffs, an anti-abortion advocacy group, brought a § 1983 action against the city, township, police officers and others arguing deprivations of their constitutional rights and conspiracy to violate their civil rights based on the alleged conduct of city police officers in detaining plaintiffs while they were driving billboard trucks depicting graphic abortion images. The Court rejected the claim for conspiracy filed pursuant to § 1985(3) because, as here, the plaintiffs did not even allege that the defendants acted with a discriminatory animus based on a constitutionally protected classification. *Id.* at 832. Further, the plaintiffs’ complaint failed to set forth specific allegations supporting their conspiracy claim, but rather vaguely asserted that the defendants “conspired.” *Id.*

Plaintiffs here likewise have wholly failed to allege a viable claim for conspiracy between the three Defendants. Plaintiffs use the term “Defendant Republicans” throughout their complaint as if they assume they were acting together or jointly in some manner, but have no actual facts, or even factual allegations, to support their conclusory assumptions.

Plaintiffs state that “Defendant Republicans in this case *appear* to have plotted” Complaint at ¶ 30 (emphasis supplied) or “*On information and belief*, Defendants here entered into an agreement to intimidate. . .” *Id.* at ¶ 61 (emphasis supplied). Plaintiffs cite to the one blog entry (which they concede Macomb County disputes) as an announcement somehow by all three Defendants of an intention to acquire and use foreclosure notice lists to make poll challenges. *Id.* at ¶ 34. There are, however, no allegations at all connecting Macomb County to the MRP or the RNC. Plaintiffs later allege that “press accounts” link the MRP with the RNC

(but not Macomb County) to engage in a coordinated election integrity program, yet fail to cite to any such alleged press accounts. *Id.* at ¶ 35.

Plaintiffs then concede that all three Defendants have affirmatively stated they have no intention or plan to use foreclosure lists. *Id.* at ¶ 51. Plaintiffs attempt to negate these undisputed facts by asserting that these statements provide them with “little comfort” given the “Defendant Republicans’ clear statements in the record of their plans and their long history of voter suppression tactics.” *Id.* at ¶ 52. These contentions are ludicrous.

One outright denied, unverified statement by the Chairman of Macomb County, who has no authority or involvement with poll challenging and does not represent or speak for the MRP or RNC, can hardly be deemed a “clear statement” by all the Defendants of their plans and agreement. In fact, there is not even one allegation evidencing an agreement between the Defendants, much less any action taken in furtherance of this nonexistent agreement.

Finally, Plaintiffs have failed to allege, nor can they, that foreclosed upon persons are members of a protected class. If Plaintiffs are even suggesting that some race-based or gender-based protections should apply equally to them, Plaintiffs would be asking this Court to brush aside the historical struggles and mistreatment of minorities and women in favor of some sort of hypothesized mistreatment of homeowners dealing with foreclosure and decades of precedent to the contrary.

Plaintiffs have simply failed to state a claim for relief.

IV. CONCLUSION AND REQUEST FOR RELIEF

For the reasons set forth above, Defendant Macomb County Republican Party respectfully requests that this Honorable Court dismiss Plaintiffs' Complaint with prejudice pursuant to Fed. R. Civ. P. 12(b)(1) or, in the alternative, pursuant to Fed. R. Civ. P. 12(b)(6).

Respectfully submitted,

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Dated: October 8, 2008

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,

vs.

MACOMB COUNTY REPUBLICAN PARTY,
MICHIGAN REPUBLICAN PARTY, REPUBLICAN
NATIONAL COMMITTEE, and JOHN DOES #1-
100,

Defendants.

Case No. 2:08-cv-13982-DML-MKM
Hon. David M. Lawson

CERTIFICATE OF SERVICE

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CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2008, I electronically filed Defendant Macomb County Republican Party's Motion to Dismiss, Brief in Support of Motion to Dismiss, Unopposed Motion for Expedited Consideration, Appearance of Counsel, along with this Certificate of Service to the Clerk of the Court using the ECF system which will send notification of such filing to the above-referenced attorneys of record.

s/John D. Pirich
John D. Pirich