UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

NEW YORK IMMIGRATION COALITION; COMMON CAUSE/NEW YORK; COMMUNITY VOICES HEARD; CITIZEN ACTION OF NEW YORK; and JENIFER BENN,

Plaintiffs,

v.

RENSSELAER COUNTY BOARD OF ELECTIONS; JASON SCHOFIELD in his official capacity as Commissioner of the Rensselaer County Board of Elections; STEVEN MCLAUGHLIN, in his official capacity as Rensselaer County Executive; FRANK MEROLA, in his official capacity as Rensselaer County Clerk; and MICHAEL STAMMEL, in his official capacity as Chairperson of the Rensselaer County Legislature,

Defendants.

Case No. 1:19-cv-00920-DNH-CFH

Judge: Hon. David N. Hurd

Magistrate Judge: Hon. Christian F. Hummel

Date: September 27th, 2019
Time: 10:00 a.m.

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Cases (cont.) **Page**

Cases (cont.) **Page**

Cases (cont.) **Page**

Cases (cont.) **Page**

Statutes

Other Authorities

INTRODUCTION

This case is about the right of qualified voters to participate in the electoral process, free from unlawful intimidation.[1] That right is now under attack in Rensselaer County, where County officials announced in July that they would "immediately" begin transmitting to ICE voter registration information for all county residents who register to vote at the DMV. Under this plan, the price of registering to vote through the "Motor Voter" program is a potential ICE investigation—at a time of heightened fear over sweeping raids of households and places of employment, family separation, mistaken detentions, and even deportation of U.S. citizens. The predictable consequence of the announcement of defendants' new policy is to deter otherwise eligible voters from registering to vote, in violation of Section 11(b) of the Voting Rights Act and the First and Fourteenth Amendments.

Defendants now advise this Court that they had no authority to issue the policy that is intimidating County residents out of registering to vote through the DMV, in the apparent belief that this somehow absolves them from liability for violating federal law. Quite the contrary. Defendants' admission only underscores the lawlessness of their actions.

The arguments in the motion to dismiss fail. The complaint's allegations of harm, which must be accepted as true for purposes of this motion, are more than sufficient to establish plaintiffs' standing. This case is also ripe for adjudication because defendants' actions are already intimidating people, and, despite the backpedaling in defendant Schofield's declaration, defendants have not actually withdrawn their commitment to turn over Motor Voter registration information to ICE. The complaint adequately alleges a violation of Section 11(b) of the VRA,

[1] In this brief, emphases were added to, and internal punctuation, brackets, quotation marks, and citations were omitted from, quotations (unless otherwise indicated).

because defendants' threats constitute actionable voter intimidation based on their impact on affected persons. Moreover, even if Section 11(b) required proof of a specific intent to intimidate—which it does not—the complaint explicitly and adequately alleges intent.

Defendants' assertion that plaintiffs fail to allege state action or a municipal policy is contradicted by the face of the complaint. As pleaded therein, defendants announced their new policy on the official County Facebook page, which bears the official county seal. Their press release spoke in the voice of the Board of Elections and quoted from each of the individual defendants, using their official titles. This is unquestionably state action, and the allegations adequately plead a policy sufficient for municipal liability. Finally, there is no basis for altering the case caption, which names the Board of Elections and county officials as proper defendants.

This Court should deny the motion and permit this case to proceed to discovery.[2]

BACKGROUND

The federal "Motor Voter" program requires that motor vehicle agencies provide the opportunity to register to vote to individuals applying for or renewing a driver's license, or updating their address with the DMV. *See* National Voter Registration Act ("NVRA"), 52 U.S.C. § 20504. Under the NVRA, the fact that a particular citizen registered to vote through the DMV (rather than in some other manner) must remain confidential. *See id.* § 20504(c)(2)(D)(iii) (forms at the DMV "shall include . . . a statement that . . . the office at which the applicant submits a voter registration application will remain confidential . . . ."); *id.* § 20507(a)(6) (requiring states to "ensure that the identity of the voter registration agency through which . . . [a] voter is registered is not disclosed to the public").

[2] If, however, the Court deems any portion of plaintiffs' allegations insufficient, plaintiffs request an opportunity to amend the complaint to allege additional facts.

Nonetheless, in late July, defendants announced a new policy of reporting the names and home addresses of DMV Motor Voter applicants to ICE. *See* Declaration of Jason Schofield, ECF No. 34-1 ("Schofield Decl.") Ex. A. Defendants announced the policy on the official County Facebook page. The County press release stated that the "Board of Elections will begin to share with U.S. Immigration, Customs and Enforcement . . . the names and addresses of people that have registered to vote in Rensselaer County through the Motor Voter Program . . . so the list of names can be reviewed by the federal agency to ascertain if any of these people are in the U.S. illegally." Defendants' announcement came shortly after the enactment of New York State's Green Light law, which will permit undocumented immigrants to acquire driver's licenses. *See* Declaration of Brenda Wright ("Wright Decl.") Ex. 1 (*Driver's License Access and Privacy Act*, S. 1747B (2019)).

Defendants hatched and announced the County's new policy without any consideration, consultation, or study by the Board of Elections. Moreover, the press release states inconsistent rationales for the policy. Some officials indicated that the policy was meant to aid in determining voter eligibility. For example, County Clerk Merola, who oversees DMV operations, explained that "[t]he New York city liberals who control the state legislature will stop at nothing to ensure that illegal's [sic] receive the same rights as citizens," and thus it was "important" to have "I.C.E. assist in reviewing voter registration documents." Schofield Decl. Ex. A. County Executive McLaughlin said that the policy was necessary to prevent attempts "to pad the voter rolls of Democrats" and that he would "fight the insanity that the Left is trying to foist on . . . good people." *Id*. But the press release also suggests that the policy was adopted in response to "a recent attempt to make the City of Troy a sanctuary city." *Id.* And Michael Stammel, the Chairperson of the County Legislature, explained that the provision is meant to enforce federal

immigration law: "We are serious about following federal immigration laws in Rensselaer County and are happy to be of any assistance that we can . . . ." *Id.*

Plaintiffs filed this lawsuit challenging defendants' actions because they are intimidating eligible persons out of registering to vote. Plaintiffs allege in Claim 1 that defendants' announcement of plans to turn voter information over to ICE violates the Voting Rights Act because it deters eligible voters from registering to vote out of fear of the potential consequences for them or their loved ones. Plaintiff Jenifer Benn, for example, has decided to not register to vote through the DMV out of fear that registering could result in negative consequences for her family, which includes a naturalized citizen and a legal permanent resident. Compl. ¶¶ 10, 30-33. And the four organizational plaintiffs — the New York Immigration Coalition, Common Cause/New York, Community Voices Heard, and Citizen Action of New York — are being forced to divert significant resources to counteract the harmful effects of the County's policy on their voter registration efforts and on their members. Compl. ¶¶ 15-27, 79-83.

Claim 2 alleges that Defendants' policy also violates the First and Fourteenth Amendment because it substantially burdens the right to vote without advancing any legitimate governmental purpose. In fact, ICE plays no role in administering voter registration or elections, or in enforcing election laws, and it does not offer citizenship verification services to local election officials.

STANDARD OF REVIEW

Dismissal under Rule 12(b)(1) is proper only "when the district court lacks the statutory or constitutional power to adjudicate." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). While a plaintiff bears the burden of alleging facts that suggest that she has standing to sue, "the complaint is to be construed liberally and all factual allegations must be accepted as

true." *Pitre v. Shenandoah*, 2015 WL 667540, at *2 (N.D.N.Y. 2015). But "a district court may consider evidence outside the pleadings." *Step By Step, Inc. v. City of Ogdensburg*, 176 F. Supp. 3d 112, 121 (N.D.N.Y. 2016).

A complaint's factual allegations are sufficient to survive a Rule 12(b)(6) motion to dismiss if they "raise a right to relief above the speculative level." *United States v. Bedi*, 318 F. Supp. 3d 561, 564-65 (N.D.N.Y. 2018). A court must "accept as true all of the factual allegations contained in the complaint and draw all reasonable inferences in the non-movant's favor." *Id.*

ARGUMENT

I. All plaintiffs have standing to sue.

A plaintiff satisfies Article III's "irreducible constitutional minimum" for standing if the plaintiff has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Each plaintiff has standing to sue.

A. Plaintiff Jenifer Benn has standing to sue.

Ms. Benn resides in Rensselaer County and is eligible to register to vote. She is not currently registered, and she has not yet updated the address on her driver's license since moving to Rensselaer County. The Motor Voter program would allow Ms. Benn to register to vote through the DMV at the same time she updates her address. Through her community work, Ms. Benn heard about defendants' plan to send all DMV registrations to ICE. Ms. Benn's family members include a naturalized citizen and a legal permanent resident. Ms. Benn is aware that ICE often mistakenly identifies naturalized citizens, legal permanent residents, and even U.S.-born citizens, as undocumented persons, and wrongfully subjects them to detention and removal proceedings. As a result of Defendants' actions, Ms. Benn is now fearful about registering to

vote through the DMV because of potential consequences to her and her family members if defendants notify ICE that she registered to vote through the DMV. Compl. ¶¶ 28-33.

Plaintiff Benn's allegations, though enough to establish injury on their own, are buttressed by other facts in the complaint. These include numerous examples of erroneous ICE detentions of citizens and non-citizens who are legally present in the United States. Compl. ¶¶ 60-63. The complaint also cites examples of thousands of eligible persons deciding to de-register to vote in response to the possibility that their state would turn over their voter information to a presidential advisory commission which, unlike ICE, had *no* law enforcement power. Compl. ¶¶ 64-66. And the complaint sets forth evidence that households of mixed immigration statuses (such as Ms. Benn's) are especially wary of having their information shared with government agencies, to the point where such families often refuse to contact authorities even when they are victims of serious crimes. Compl. ¶¶ 67-68. These well-pleaded allegations of intimidation are more than sufficient to establish Ms. Benn's standing. *See New York v. U.S. Dep't of Comm.*, 351 F. Supp. 3d 502, 575-576 (S.D.N.Y. 2019) (fear of harm based on governmental interaction that could draw attention to immigration status is sufficient to support standing), *affirmed in relevant part and reversed in part on other grounds sub nom. U.S. Dep't of Comm. v. New York*, 139 S. Ct. 2551, 2565-66 (2019).

In the face of these well-pleaded allegations, defendants present a hodge-podge of arguments, all of which boil down to urging the Court to invert the standard of review and not credit Ms. Benn's allegations. Defendants assert that Ms. Benn has no reason to worry about their threats because she is a citizen, Def. Br. 9-10, but that ignores that she resides in a mixed-status household, as well as the fact that even citizens might reasonably prefer not to have their names and home addresses shared with ICE. Defendants argue that Ms. Benn should not be

worried because they have not yet done what they've pledged to do or because defendants themselves see no danger of ICE acting unlawfully. Def. Br. 17. But defendants' beliefs as to how Ms. Benn *should* view their threats are irrelevant: the complaint alleges that Ms. Benn *has been* intimidated by defendants' actions and plausibly explains why. Compl. ¶¶ 28-33. This establishes standing. As the Supreme Court explained in its recent decision prohibiting the Census Bureau from adding a citizenship question to the 2020 census:

> [W]e are satisfied that . . . respondents have met their burden of showing that third parties will likely react in predictable ways to the citizenship question, even if they do so unlawfully . . . . [T]he District Court did not clearly err in crediting the Census Bureau's theory that the discrepancy is likely attributable at least in part to noncitizens' reluctance to answer a citizenship question. Respondents' theory of standing thus does not rest on mere speculation about the decisions of third parties; it relies instead on the predictable effect of Government action on the decisions of third parties.

U.S. Dep't of Comm., 139 S. Ct. at 2566; *see also New York*, 351 F. Supp. 3d at 575-576.

B. The organizational plaintiffs have standing on behalf of themselves and their members.

(1) Organizational standing

If an organization diverts resources to identify or counteract an allegedly unlawful action, or if the challenged action results in a frustration of the organization's mission, that organization has standing to bring suit. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). As the Second Circuit has explained, "where an organization diverts its resources away from its current activities, it has suffered an injury that has been repeatedly held to be independently sufficient to confer organizational standing." *Centro de la Communidad de Locust Valley v. City of Osprey*, 868 F.3d 104, 111 (2d Cir. 2017).

The complaint alleges that the organizational plaintiffs must divert resources to counteract the intimidating impact of defendants' actions and that those organizations will suffer a frustration of their missions. *See* Compl. ¶¶ 17-23; 79-80. Plaintiff NYIC, for example, is a policy and advocacy organization for groups that represent immigrant communities and

organizations in New York State.[3] Encouraging voter registration is a vital part of the work that its members do. Compl. ¶¶ 15-17. Defendants' actions will require NYIC to divert more resources toward dispelling the fears engendered by defendants' actions and registering voters now fearful of registering. Already, one of NYIC's member groups, CCSM, held a regional strategy meeting after the County announced its intention to share voter registration information. At this meeting, CCSM members, including members who reside in Rensselaer County, expressed concern about the new policy, and members and staff discussed strategies and plans to assist members and other constituents in registering to vote through other channels to avoid having their information shared with ICE. Compl. ¶¶ 79. The complaint includes similar allegations for the other plaintiffs: for Common Cause/New York, Compl. ¶¶ 18-20, 80; for Community Voices Heard, Compl. ¶¶ 21-23, 83; and for Citizen Action of New York, Compl. ¶¶ 24-27, 81-82. Those allegations suffice to establish standing. *See Common Cause Ind. v. Lawson*, __ F.3d __, 2019 WL 4022177, at *6 (7th Cir. 2019) ("Our sister circuits have upheld the standing of voter-advocacy organizations that challenged election laws based on similar drains on their resources. Like us, they have found that the organizations demonstrated the necessary injury in fact in the form of the unwanted demands on their resources.").

Defendants rely on *Young Advocates for Fair Educ. v. Cuomo* to argue that plaintiffs do not satisfy the *Havens Realty* test. 359 F. Supp. 3d 215 (E.D.N.Y. 2019) ("*YAFFED*"). Not so. In *YAFFED,* a non-profit group which advocated for improved education among Jewish students challenged New York's "Felder Amendment," which the group alleged would lead to less

[3] Indeed, the lead organizational plaintiff in this case, NYIC, was also a lead plaintiff in the litigation challenging the inclusion of a citizenship question in the Census, cited above. NYIC's standing to sue based on the need for diversion of resources and mission interference was upheld as satisfying the *Havens Realty* test. *See New York*, 351 F. Supp. 3d at 575-576.

rigorous secular education. *Id.* Plaintiff's primary standing theory was that "it has spent significant effort opposing the [Felder] Amendment . . . and thereby 'shift[ed] valuable resources away from its traditional advocacy and education efforts.'" *Id.* at 231 (quoting complaint). The *YAFFED* court concluded that organizational standing could not be based on an organization's activities opposing a bill, because "[i]f any plaintiff with a strong objection to a statute could manufacture standing by spending time and money opposing that very statute . . . there would be no real constraint upon standing at all." *Id*.

YAFFED is inapposite. Each plaintiff organization here serves its community and its mission through voter registration and voter engagement, Compl. ¶¶ 17, 20, 23, 27—not simply by advocating for or against governmental policies like the *YAFFED* plaintiff. The organizational plaintiffs here allege injury not because they oppose defendants' actions as a matter of policy preference, but rather because defendants' unlawful actions interfere with their mission of providing "services directly to the group harmed by the challenged government policy." *YAFFED*, 359 F. Supp. 3d at 232. Plaintiffs must spend *additional resources* registering people who otherwise would have registered through the DMV as well as to overcome voter intimidation and fear. Compl. ¶¶ 79-83. The additional resources now needed for this work, when many persons, like Ms. Benn, will be reluctant to take advantage of voter registration through the DMV, constitute a concrete diversion of resources that satisfies *Havens Realty*.[4]

[4] Indeed, one of the cases cited approvingly by the *YAFFED* court as establishing a sufficiently concrete organizational injury based on voter registration activities is *Common Cause/New York v. Brehm*, 344 F. Supp. 3d 542, 546-50 (S.D.N.Y. 2018), which was brought by one of the plaintiff organizations in this very case. In that case, as *YAFFED* observed, "[an] organization devoted to registering and mobilizing voters could challenge New York's procedures for placing voters on inactive status, where those procedures required the organization to spend time assisting affected voters." *YAFFED,* 359 F.3d at 232-33.

(2) Associational standing

An organization has associational standing to bring suit on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation in the lawsuit of each of the individual members." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).

NYIC, Common Cause/New York, and Citizen Action of New York all have made allegations sufficient to establish associational standing. Each has members affected by the defendants' actions who could otherwise sue on their own behalf. Compl. ¶¶ 79-82. Each organization is also seeking to protect interests germane to the organization's purposes. Compl. ¶¶ 15-27. And neither the claims asserted nor the relief requested requires the direct participation of individual members of the organizations. The primary relief requested is equitable in nature, and each of the organizations with affected members (NYIC, Common Cause/NY, and Citizen Action of New York) is also engaged in the lawsuit in its organizational capacity, so they will be able to adequately protect the rights of its members in this litigation. *See Warth v. Seldin*, 422 U.S. 490, 515 (1975) (when an association seeks equitable relief, "it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members . . . actually injured").

II. This case is ripe for adjudication.

The ripeness doctrine "prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 687 (2d Cir. 2013). Defendants' suggestion that this case is not ripe (Def. Br. 15-16) fails because plaintiffs have suffered a concrete, particularized, and cognizable injury from the actions defendants have *already taken*.

A. Constitutional Ripeness

Constitutional ripeness, like the first factor in the Court's standing inquiry, is a determination of whether plaintiffs' claimed injury is "actual or imminent." *Id.* at 688; *see also Brooklyn Legal Servs. Corp. B. v. Legal Servs. Corp.*, 462 F.3d 219, 225-26 (2d Cir. 2006) (considering ripeness "together with, and as part of, the standing inquiry."), *abrogated on other grounds by Bond v. United States*, 564 U.S. 211 (2011). Here, the injuries are already happening. *See supra* Section I.A-B. Therefore, this case is constitutionally ripe.

B. Prudential Ripeness

The prudential standing inquiry examines the fitness of the issues for adjudication and the hardship to the parties of delaying consideration. *See Walsh*, 714 F.3d at 691-92.

First, the legal issues in this case are fit for adjudication. When determining fitness, courts examine whether "the dispute presents legal questions and there is a concrete dispute between the parties." *Sharkey v. Quarantillo*, 541 F.3d 75, 89 (2d Cir. 2008). Plaintiffs' case presents a concrete dispute with predominantly legal questions: namely, whether the actions defendants *have already taken* violate Section 11(b) of the Voting Rights Act and the First and Fourteenth Amendment. And defendants are causing a *present* injury: the forgoing of electoral activities due to fear. As a result, this case is ripe even if some additional factual development may be necessary to understand the full harm of defendants' actions. *Walsh*, 714 F.3d at 691 (explaining that case is ripe for adjudication even though "the factual record is not yet fully developed" because "the dispute primarily presents legal questions and there is a concrete dispute between the parties").

The second prudential ripeness factor also supports judicial review. In assessing hardship, the Court asks "whether the challenged action creates a direct and immediate dilemma for the parties." *Id.* at 691. Here defendants' actions have caused plaintiffs significant hardship by

unlawfully intimidating eligible citizens. *See Siegel v. LePore*, 234 F.3d 1163, 1174 (11th Cir. 2000) ("Our conclusion that abstention is inappropriate is strengthened by the fact that Plaintiffs allege a constitutional violation of their voting rights."). Denying prompt judicial review would force Ms. Benn to choose between refraining from registering to vote or pursuing a course of conduct that she believes could put her family in danger; organizational plaintiffs would be likewise forced to choose between devoting time or funds (or both) to alleviate the harmful effects of defendants' announced policy or seeing their organizational mission undermined. That is a sufficient hardship. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167-68 (2014).[5]

C. Post-filing developments are not relevant to ripeness.

Although Defendants are now at pains to say that have not yet implemented their plans, this hedging came only *after* plaintiffs suffered injury and filed their complaint. Post-filing reconsiderations by the government do not go to the *ripeness* of a case but rather its *mootness*. *See, e.g.*, *Green Mt. Chrysler Plymouth Dodge Jeep v. Dalmasse*, 2006 WL 3469622, at *6 (D. Vt. 2006) (agencies can "revisit" decisions but that doesn't "affect[] . . . ripeness"). As a result, this Court can consider defendants' post-filing actions only when considering whether this case is presently moot. And it is not. Post-filing cessations moot a case only when it is "absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur," *Klein v. Qlik*

[5] Defendants' cases are not to the contrary. *Rivendell Winery, LLC v. Town of New Paltz* is about a zoning dispute, where "plaintiffs bear the high burden of proving that [there was] a . . . definitive position from a local authority to assess precisely how [plaintiffs] can use their property." 725 F. Supp. 2d 311, 317-18 (N.D.N.Y. 2010). *Nation v. Tanner* found that a group of plaintiffs did not have standing when no "actual[] civil or criminal action" had been threatened and the only threating communications from the municipality were to parties *other than the moving plaintiffs*. 108 F. Supp. 3d 29, 33 (N.D.N.Y. 2015). Here, by contrast, the County announced a new policy directed at potential registrants such as Ms. Benn and that policy has dissuaded potential eligible voters and already injured Ms. Benn and the organizational plaintiffs.

Techs., Inc., 906 F.3d 215, 224 (2d Cir. 2018), and defendants only state that they haven't provided the voter registration information "*as of this date*." Schofield Decl. ¶ 5.

III. The complaint properly alleges a violation of Section 11(b) of the Voting Rights Act.

Defendants state that "the settled law" of the Voting Rights Act "requires factual allegations of actual acts of intimidation or threats *and* an intention to intimidate." Def. Br. 17. They further argue that plaintiffs "have not, and cannot, allege" [sic] intentional intimidation "in their Complaint." Def. Br. 17. But defendants are wrong on both points. No "showing of [a] specific intent" to intimidate "is required" when bringing a claim under Section 11(b). *LULAC-Richmond Region Council v. Public Interest Legal Foundation*, 2018 WL 3848404, at *4 (E.D. Va. 2018). And even were defendants right on the law—which they are not—the complaint alleges that defendants acted with the specific intent to intimidate. Compl. ¶ 70; *see also id.* ¶¶ 1,7. Thus, defendants' legal argument is either wrong or, at the very least, irrelevant.

A. Section 11(b) does not have a specific intent requirement.

Three of the five cases that defendants cite for the proposition that Section 11(b) has a specific intent requirement—*Olagues v. Russoniello*, 770 F.2d 791, 804 (9th Cir. 1985), *vacated as moot*, 484 U.S. 806 (1987); *Willingham v. County of Albany*, 593 F. Supp. 2d 446, 462 (N.D.N.Y. 2006); and *Pincham v. Illinois Judicial Inquiry Bd.*, 681 F. Supp. 1309, 1317 (N.D. Ill. 1988)—do hold as much.[6] But they are wrongly decided and should not be followed.

A bit of statutory context shows why those prior cases got the law wrong. Before the

[6] Two of the defendants' cases do not, however. *United States v. Lefore County* "express[ed] . . . no view as to . . . the burden placed upon the government . . . under § 11 of the Voting Rights Act." 371 F.2d 368, 371 n.4 (5th Cir. 1967). And the unpublished *Dekom v. Nassau County* does not analyze Section 11(b)'s mens rea requirement; it instead quotes the distinctive statutory language of Section 131(b) (52 U.S.C. § 10101(b))—and turns on the defendants' specific action in the case (temporarily denying candidate access to a party convention), which had little to do with the right to register or vote. *See* 595 F. App'x 12, 15 (2d Cir. 2014).

Voting Rights Act was passed in 1965, the Department of Justice largely relied on Section 131(b) of the Civil Rights Act of 1957 to combat voter intimidation. Section 131(b)—which is now codified at 52 U.S.C. § 10101(b), but used to be codified at 42 U.S.C. § 1971(b)—provided:

> No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose . . . .

Given the requirement that the intimidating acts be "for the purpose" of interfering with the right to vote, courts interpreted Section 131(b) to impose a specific intent requirement. *See, e.g.*, *United States v. McLeod*, 385 F.2d 734, 740 (5th Cir. 1967); *Leflore Cty.*, 371 F.2d at 371. That specific intent requirement proved difficult for the Department of Justice to establish. As Attorney General Katzenbach explained during the consideration of the Voting Rights Act:

> The litigated cases amply demonstrate the inadequacy of present statutes . . . . [P]erhaps the most serious inadequacy results from the practice of . . . courts to require the Government to carry a very onerous burden of proof of 'purpose.' Since many types of intimidation, particularly economic intimidation, involve subtle forms of pressure, this treatment of the purpose requirement has rendered the statute largely ineffective.

Wright Decl. Ex. 2, at 12 (*Hearing on the Voting Rights Act of 1965 Before the H. Judiciary Comm.*, 89th Cong. (1965) (Statement by Att'y Gen. Katzenbach)).

Congress accordingly set out to eliminate Section 131(b)'s mens rea requirement in the Voting Rights Act. As a result, Section 11(b), which is codified at 52 U.S.C. § 10307(b), omits Section 131(b)'s "for the purpose of" language:

> No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any persons to vote or attempt to vote . . . .

Thus, "unlike" Section 131(b) of the Civil Rights Act of 1957 "which requires proof of a 'purpose' to interfere with the right to vote[,] no subjective purpose or intent need be shown" when bringing a Section 11(b) claim. Wright Decl. Ex. 3, at 20 (H.R. Rep. 89-439 (1965)).

Defendants' cases to the contrary fail to provide any justification for reimposing a specific intent requirement on Section 11(b). Instead, they all rely on the Ninth Circuit's decision in *Olagues* for that proposition. *See Willingham*, 593 F. Supp. 2d at 462; *Pincham*, 681 F. Supp. at 1317. But *Olagues* was mistaken in confusing the 11(b) standard for the 131(b) standard. *Olagues* imposed a specific intent requirement on the basis of a single case—the Fifth Circuit's opinion in *United States v. McLeod*. *See Olagues*, 770 F.2d at 804. *McLeod* was not a Section ***11(b)*** case—it was a Section ***131(b)*** case. *See McLeod*, 385 F.2d at 739-41. It "is . . . unpersuasive" reasoning, *LULAC*, 2018 WL 3848404, at *4, to rely on a case interpreting Section 131(b)'s mens rea requirement in order to interpret Section 11(b)'s mens rea requirement given that Section 11(b) was specifically drafted to avoid the pitfalls of Section 131(b)'s mens rea requirement. *See* H.R. Rep. 89-439, at 2462 (1965); *see also* Wright Decl. Ex. 4, at 14 (Ben Cady & Tom Glazer, *Voters Strike Back: Litigating Against Modern Voter Intimidation*, 39 N.Y.U. Rev. of Law & Social Change 173, 204-206 (2015)) ("The most logical reading of section 11(b), in light of its legislative history and its textual changes from section 131(b), is that it reaches any objectively intimidating conduct without regard to the defendant's intent."). This Court should therefore reject defendants' arguments that Section 11(b) has a specific intent requirement. *See LULAC*, 2018 WL 3848404, at *4 (rejecting application of a specific intent requirement in Section 11(b) cases).

B. Because Section 11(b) does not have a specific intent requirement, the County's actions violate Section 11(b) because they will deter individuals from registering to vote.

The Voting Right Act's broad prohibition on voter intimidation prohibits *any* acts that "intimidate, threaten or coerce." 52 U.S.C. § 10307(b). Although these terms are not defined in the Act, caselaw interpreting other federal and state statutes using the same words makes plain that voter intimidation is not limited to direct threats of physical harm. For example, *United*

States v. Beaty held that evicting or canceling contracts with individuals that register to vote could also violate Section 131(b). 288 F.2d 653, 656 (6th Cir. 1961). Likewise, the Ninth Circuit has explained that a California statute prohibiting "coercion or intimidation" with respect to voting "is not limited to displays or applications of force" but also covers intimidation "achieved through manipulation and suggestion." *United States v. Nguyen*, 673 F.3d 1259, 1264 (9th Cir. 2012). And those are far from the only cases.[7]

As a result, the County has violated Section 11(b) if it has either (i) taken an action that intimidates, threatens, or coerces objectively reasonable eligible voters out of registering to vote or (ii) attempted to do so. *See LULAC*, 2018 WL 3848404, at *3-4.[8] Under that standard, the County's actions constitute unlawful voter intimidation because they communicate to voters that a potential ICE investigation is the price of registering. Just as in *Daschle v. Thune*—where a campaign violated the Voting Rights Act by following voters to the polls and recording their license plates—County officials are too violating the Act by making clear to voters that they are being watched by ICE (an organization that has nothing to do with voting or any reliable process of voter roll maintenance). *See* Wright Decl. Ex. 5, at 1-2 (*Daschle*, ECF No. 6 (D.S.D. 2004)). And just as in *Nguyen*, where the Ninth Circuit held that a candidate's conduct likely constituted voter intimidation when he mailed letters to recently registered voters stating that if they voted

[7] *See also New York v. Horelick*, 424 F.2d 697, 703 (2d Cir. 1970) (Friendly, J.) (contrasting 11(b) of the Voting Rights Act with another provision of federal law that the court found applied only to "violent activity"); *United States v. Robinson*, 813 F.3d 251, 258 (6th Cir. 2016) (threatening eviction from rental properties); *McLeod*, 385 F.2d at 747-48 (making threats of unwarranted criminal prosecution); *United States v. Bruce*, 353 F.2d 474, 476-77 (5th Cir. 1965) (landowners invoking state trespass law to bar an insurance collector who had registered to vote from their property); *United States ex rel. Katzenbach v. Original Knights of the KKK*, 250 F. Supp. 330, 342 (E.D. La. 1965) (character assassination).

[8] Section 11(b) has no state action requirement. *See* 52 U.S.C. § 10307(b) (banning intimidation "whether acting under color of law or otherwise"); *LULAC*, 2018 WL 3848404, at *3.

their personal information would be collected on government computers that could be accessed by anti-immigrant groups, 673 F.3d at 1264-65, here County officials are deterring voters by pledging to hand over registrants' personal information to ICE when ICE is actively, and very publicly, conducting immigration raids across the country, and when there have been recent and high-profile examples of ICE erroneously detaining and even deporting U.S. citizens. The intimidating effect of the County's conduct will be amplified by its decision to brazenly violate the NVRA—a choice that should lead objectively reasonable voters to question how else elections officials might illegally use the voter registration database.[9]

The County tries to rebut that point by suggesting that it is "illogical" to conclude turning information over to ICE would intimidate an objectively reasonable voter. Def. 17. However, the complaint contains allegations—backed by data and conclusions from, among other entities, the U.S. Census Bureau—explaining why just threatening to turn over the data will intimidate eligible voters. *See* Comp. ¶¶ 67-69; *see also* Compl. ¶¶ 1, 4-9, 31-34, 59-66, 87-90. Rather than address the substance any of those allegations, defendants simply say the Court should not "countenance" them. Def. Br. 17. But that is irreconcilable with the standard of review. *See, e.g.*, *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 184-85 (2d Cir. 2012).

Nor does the fact that *some* information that the County is threatening to turn over to ICE could be obtained by a public records request, Def. Br. 5-6 & n.4, give the County a defense. For one, the information that the County announced it is disclosing—the specific list of citizens that

[9] For the same reason, this case will not interfere with County officials complying with their affirmative duties under state law. Def. Br. 6-7. County officials already have a duty to comply with the NVRA and the Voting Rights Act. And though not necessary, the complaint also explains (and the County nowhere rebuts) why there is no legitimate law enforcement basis for turning voter registration information over to ICE. Compl. ¶¶ 7, 71-77. ICE "plays no role in administering voter registration or elections, or in enforcing election laws, and it does not offer citizenship verification services to local election officials." Compl. ¶¶ 8, 72.

registered to vote *at the DMV*—is *not* public information. Federal law requires that the agency where a person registers to vote be kept confidential. *See, e.g.*, 52 U.S.C. §§ 20504(c)(2)(D)(iii), 20507(a)(6). The County cannot ignore federal law specifically protecting information from disclosure merely because someone asks for it in a public records request.

In addition, even assuming that *all* of the information the County is turning over is public information, and it is not, there would still be no immunity. That is because the process of making certain records public was itself a tactic of intimidation when the Voting Rights Act was passed. Mississippi, for example, amended its voting laws in April 1962 to make the names of potential registrants public. *See, e.g.*, Wright Decl. Ex. 6, at 9-10 (U.S. Comm'n on Civil Rights, *Voting in Mississippi* (1965)); *id.* at 39. And federal courts at the time recognized Mississippi's law for what it was: a tool of voter intimidation. *See, e.g.*, *King v. Cook*, 298 F. Supp. 584, 587 (D. Miss. 1969) (observing that Mississippi's "statutorily required publication of registration applicant's names," among other things, was one of the factors making Black citizens "generally hesitant to apply for voter registration"). So even if the County is disclosing information that could otherwise be obtained in a public records request, it is still violating the Voting Rights Act by intimidating objectively reasonable eligible voters. *Cf. LULAC*, 2018 WL 3848404, at *4 (complaint alleges a violation of Section 11(b) by alleging defendant released public voter registration data along with a "report condemning felonious voter registration").

C. Even if Section 11(b) has a specific intent requirement, the complaint alleges that defendants acted with the specific intent to intimidate.

Defendants claim that the complaint does not allege intentional intimidation. Def. Br. 17. Not so: the complaint alleges just that. Compl. ¶¶ 1, 7, 70. And those allegations are plausible. Fact-finders are allowed to infer that defendants intend the natural and plausible consequences of the actions they knowingly take. *See, e.g.*, *United States v. Corrigan*, 273 F. App'x 15, 16 (2d

Cir. 2008). The natural and probable consequence of the new policy will be to deter registration. *See* Compl. ¶¶ 64-69. So the complaint plausibly alleges intent. *See Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 91 (2d Cir. 2002) ("[M]otive and intent . . . may be inferred."). And though not necessary, the intent allegations are further buttressed by the allegations that the defendants' justification is pretextual and that the defendants are violating the NVRA. *See* Compl. ¶¶ 7, 8, 56, 73-74, 97; *e.g.*, *In re Pool Prods. Distrib. Mkt. Antitrust Litig.*, 988 F. Supp. 2d 696, 711 (E.D. La. 2013) (pretextual justifications and involvement in other illegal conspiracies buttress inference that defendants intended to act unlawfully).

D. Any First Amendment arguments are meritless.

Defendants allude to the First Amendment, recasting their actions as "constitutionally protected statements by four County officials about an ongoing public policy debate." Def. Br. 4. But plaintiffs challenge the defendants' plan to submit voter registration information to ICE, not their public policy views. "[C]onduct [is] not protected by the First Amendment merely because . . . it may have involved the use of language." *United States v. Rowlee*, 899 F.2d 1275, 1278 (2d Cir. 1990); *see also Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984) ("[P]otentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection.").[10]

[10] Moreover, defendants have no First Amendment "right to use governmental mechanics to convey a message." *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 127 (2011). And even if they did, the Voting Rights Act is a content-neutral regulation of conduct that bars no topic from discussion—indeed, it may be violated without speaking at all—and its purpose is to safeguard the integrity of federal elections. The Act is constitutional even if it indirectly burdens speech: "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest . . . can justify incidental limitations on First Amendment freedoms." *United States v. O'Brien*, 391 U.S. 367, 376 (1968); *e.g.*, *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298-99 (1984).

IV. The complaint properly alleges a violation of the First and Fourteenth Amendments

The First and Fourteenth Amendments make it unlawful to impose an undue burden on right to vote. *See Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992). The complaint alleges that defendants' new policy unduly burdens the right to vote by threatening unwarranted immigration investigations with no corresponding legitimate policy justification. Compl. ¶¶ 91-98.

Defendants do not challenge plaintiffs' application of the constitutional balancing test. Instead, defendants argue that the challenged conduct—using their official government titles and the official County Facebook page to issue a government press release announcing immediate government action, *see* Schofield Decl. Ex. A—somehow does not constitute either state action or governmental policy sufficient for municipal liability. That is wrong.

A. The complaint sufficiently alleges state action.

Defendants announced their new policy, during normal working hours, on the County Facebook page that bears the County seal. The press release purported to speak in the voice of the Board of Elections, and quoted from each of the individual defendants, using their official titles. The substance of the policy is that the Board of Elections will submit official voter registration data in its possession to ICE.

That is state action. Actions by government employees during the working day using an official title are "typically acts under color of state law." *Naffe v. Frey*, 789 F.3d 1030, 1037 (9th Cir. 2015); *accord West v. Atkins*, 487 U.S. 42, 49-50 (1988) ("[S]tate employment is generally sufficient to render the defendant a state actor."). Moreover, government officials do not lose their status as state actors when posting to social media: "Social media have recently become a crucial venue for public officials to disseminate news and information." *Leuthy v. LePage*, 2018 WL 4134628, at *2 (D. Me. 2018). As a result, even postings on personal social media accounts—let alone an official government account—can constitute state action. *See Knight First*

Amend. Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 235-36 (2d Cir. 2019). Accordingly, defendants cannot establish that they were engaged in purely private action here.

Moreover, the fact that defendants did not submit their announcement to the full Board of Elections does not give the defendants a get-out-of-jail-free card on state action. Defendants' misuse of their offices remains "action taken under color of state law" because their ability to use the County Facebook account to issue the press release was "made possible only because" of their state offices. *United States v. Classic*, 313 U.S. 299, 326 (1941).[11]

B. The complaint alleges the existence of a policy sufficient for municipal liability.

Under *Monell v. Department of Social Services of the City of New York*, municipal liability lies where official action is taken pursuant to an official "policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers"; "pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels;" or by a decision or course of action taken by an official with final policymaking authority in that area of the municipality's business. 436 U.S. 658, 690-91 (1978); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-83 (1986). Plaintiffs sufficiently plead municipal liability in at least two separate ways.

First, Plaintiffs plead the existence of an unconstitutional Board of Elections policy to share Motor Voter information with ICE. *See, e.g.*, Compl. ¶¶ 8, 11, 53, 54, 56, 72, 77, 80, 83 (describing the information-sharing scheme as a "policy"); *id.* ¶¶ 1, 10, 31, 52, 54, 55, 77, 93, 96, 97 (describing it as a "plan"). In fact, it is difficult to construe a plan announced—(1) by press release, (2) on the County's official Facebook page, (3) carrying the title "Rensselaer County

[11] *See also West*, 487 U.S. at 49-50 ("[A] defendant . . . acts under color of state law when he abuses the position given to him by the State."); *Home Telephone & Telegraph Co. v. Los Angeles*, 227 U.S. 278, 288 (1913).

Board of Elections to Share Motor Voter Info with ICE," and (4) quoting the county's policymaking public officials—as anything other than a policy sufficient for municipal liability. That defendants may have acted without securing an official vote does not save them for Section 1983 purposes, given the official nature of the policy announcement and the officials involved. As the Second Circuit has held, "[t]he policy or custom used to anchor liability need not be contained in an explicitly adopted rule or regulation." *Solucco v. N.Y.C. Police Dep't*, 971 F.2d 864, 870 (2d Cir. 1992); *Cash v. Cnty. of Erie*, 654 F.3d 324, 334 (2d Cir. 2011) ("A municipal policy may be pronounced or tacit and reflected in either action or inaction.").

Second, *Monell* made expressly clear that actions by "officials whose acts or edicts may fairly be said to represent official policy," gives rise to municipal liability under § 1983. *Pembaur*, 475 U.S. at 480. Here, the challenged conduct represents municipal policy because ***all*** officials who could conceivably have final policymaking authority in the context of this case (in particular, what is posted to the County Facebook account), including the County Executive, a Commissioner of the County Board of Elections, the Chairperson of the County Legislature, and the County Clerk, decided to post to the County Facebook account that the County would begin sharing DMV voter information with ICE.[12] And that remains true even if the defendants did not follow proper procedure in drafting the Facebook post or issuing the policy. *See, e.g.*, *Willingham v. City of Valparaiso*, 638 F. App'x 903, 907-08 (11th Cir. 2016) (mayor constitutes final policymaker notwithstanding the fact that "[h]e ignored both the City Charter's provisions

[12] That result does not change if the policy is considered to be the release of County records to ICE. County Clerk Merola is charged with "the care, custody and control of the public records and the court records in his County" 1964 N.Y. Op. Atty. Gen. (Inf.) 160, 1964 WL 108940 (N.Y.A.G.). Moreover, defendants themselves acknowledge that Commissioner Schofield is the policymaker who "receives and administers the voter registration information discussed in the" press release. Def. Br. 4 & n.3.

governing review of [the plaintiffs]'s termination, and he ignored his fellow commissioners' legal motions to overrule that termination decision").

In short, plaintiffs' allegations about both the circumstances of the policy's announcement and the final policymaking authority of those who promulgated it are sufficient—independently, but certainly when viewed together—to establish municipal liability under *Monell*. And contrary to defendants' conclusory statement about the lack of causation, Def. Br. 19, the complaint demonstrates that the policy is the moving force behind the unconstitutional interference with the right to vote and the related injuries to plaintiffs. *See, e.g.*, Comp. ¶ 78 ("Defendants' new policy of turning voter registration applications over to ICE . . . harms Plaintiffs in numerous ways."); *id.* ¶¶ 79-84, 98.

V. The Court should not alter the case caption.

This Court should not alter the case caption for four reasons.

First, defendants' cases concern the application of *Monell* in the context of Section 1983. As a result, they do not somehow establish or even explain why defendants are not proper defendants for the Voting Rights Act claim.

Second, as this Court observed in *Hulett v. City of Syracuse*, official-capacity claims against an officer are treated as claims against the municipality "absent a claim seeking injunctive relief to remedy an *ongoing* violation of federal law." 253 F. Supp. 3d 462, 498 (N.D.N.Y. 2017). Here, plaintiffs seek an injunction to remedy ongoing violations of the Voting Rights Act and Constitution. *See Compl.* ¶ 90; *id.*, Prayer for Relief ¶ 8 (seeking injunction).

Third, although official capacity claims are "another way of pleading an action against an entity of which an officer is an agent," *Monell*, 436 U.S. at 691 n.55, there is no redundancy here as to at least defendants McLaughlin, Merola, and Stammel because they are not agents of the

County Board of Elections, which is the named municipal defendant. *See, e.g.*, *Smith v. Schicker*, 2016 WL 4493512, at *2 (N.D. Ill. 2016) (claims against medical director at state prison were "not redundant because the complaint does not name" the prison health services provider of which the medical director was an agent).

Fourth, even when redundancy exists, courts can allow official capacity claims to proceed "where the alleged violations . . . occurred because of specific individuals" because "[n]aming them specifically . . . provide[s] a certain level of public accountability." *Chase v. City of Portsmouth*, 428 F. Supp. 2d 487, 489-90 (E.D. Va. 2006).

For all four reasons, the Court should leave the caption unchanged.[13]

CONCLUSION

The Court should deny the motion to dismiss.

September 10, 2019

Respectfully submitted,

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[13] Plaintiffs acknowledge that punitive damages may not be awarded against municipal entities or their officials sued in official capacity. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981).

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* Admitted in Massachusetts, not D.C.; practice consistent with D.C. App. R. 49(c)(3).

CERTIFICATE OF SERVICE

Pursuant to Local Rule 5.1(a), I hereby certify that on September 10, 2019, I, Benjamin L. Berwick, electronically filed the foregoing document using the N.D.N.Y. CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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