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,

-against-

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

RENSSELAER COUNTY BOARD OF ELECTIONS; JASON SCHOFIELD, in his official capacity as Commissioner of 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.

MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION PURSUANT TO FRCP 12(b)(1) and 12(b)(6)

DATED: September 19, 2019

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PRELIMINARY STATEMENT

Defendants, Rensselaer County Board of Elections (hereinafter referred to as "County"), Jason Schofield, Steven McLaughlin, Frank Merola, and Michael Stammel (collectively referred to as "County Defendants"), by and through their counsel *(Johnson & Laws, LLC)*, submit this reply memorandum in further support of the County Defendants' Rule 12(b) motion to dismiss Plaintiffs' Complaint (Dkt. No. 1) in its entirety.

On opposition, other than erroneously referring to the July 18, 2019 press release as a "policy", Plaintiffs remain unable to save the Complaint from dismissal since, other than relying on mere speculation, the Complaint contains no factual allegations that the County Defendants took any state action, i.e., passing a law, passing a resolution, and/or establishing a formal policy.[1] In fact, Plaintiffs admit that they are seeking remedies from this Court not in light of actual or particularized injuries suffered by Plaintiffs, but "out of **fear** of the **potential** consequences for them or their loved ones." (Dkt No. 44 at 13) (emphasis supplied). Finally, Plaintiffs now confirm that the Complaint does not contain any factual allegation that County Defendants actually took an action or refrained from taking actions they were required by law to take, which implicate any of the federal rights Plaintiffs allege were violated. For these reasons, the Complaint must be dismissed as a matter of law.

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[1] In fact, even though they have only sued the individually named County Defendants in their official capacities, Plaintiffs admit that "Defendants hatched and announced the County's new policy **without any consideration, consultation, or study by the Board of Elections**." (Dkt. No. 44 at 12) (emphasis supplied). Plaintiffs' own admissions in this regard demonstrate that there was no such "policy," merely public statements made by individually named County Defendants regarding a July 18, 2019 press release.

POINT I

BECAUSE OF PLAINTIFFS' LACK OF STANDING, THEIR CLAIMS MUST BE DISMISSED AS A MATTER OF LAW

Plaintiffs opposition arguments explicitly show that neither Plaintiff Benn nor the organizational Plaintiffs have standing to pursue the claims made in the Complaint. On opposition, Plaintiff Benn claims that although she is "eligible to register to vote," upon her election "she has not yet updated the address on her driver's license since moving to Rensselaer County" because "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" (Dkt. No. 44 at 14). Plaintiff Benn claims that she is subjectively afraid for the welfare of those legal family members because Plaintiff 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." (*Id.*). In opposition, the organizational Plaintiffs claim that, although they are advocacy groups, they "must spend additional resources registering people [to vote] who otherwise would have registered through the DMV as well as to overcome voter intimidation and fear."[2] (*Id.* at 18) (emphasis omitted). Even though the facts asserted in the Complaint and the admissions made in opposition to County Defendants' motion make clear that Plaintiffs have not suffered an injury in fact as a result of the July 18, 2019 press release, Plaintiffs attempt to manufacture standing with "six degrees of separation" allegations, such as claims that "mixed immigration…families often refuse to contact authorities even when they are victims of serious crimes" or by alleging that there are "numerous examples of ICE detentions of citizens and non-citizens who are legally present in

[2] Interestingly, Plaintiff do not state whether their sole individual Plaintiff (Ms. Benn) or any members of her family are one of those to which organizational Plaintiff represent as actual members of their organization.

the United States" which Plaintiffs contend create an environment of "intimidation…more than sufficient to establish" standing (*Id.* at 15).[3] Although compelling, these arguments are insufficient as a matter of law.

Remarkably, however, Plaintiffs concede that they: 1) have no direct relation to the content of the press release; 2) the press release did not reference Plaintiff Benn, her relatives with legal status to remain in the United States, or identified groups or individuals that Plaintiff organizations serve (as they are either educational or advocacy groups);[4] 3) Plaintiff Benn admits that she meets all qualifications to lawfully register to vote in Rensselaer County; and 4) Plaintiffs have not shown that they would be directly impacted by their fears, assumptions and speculation. Simply stated, Plaintiffs have not made a showing of any imminent or particularized injury, nor have they presented any allegations to support that the July 18, 2019 press release led to any particularized injury.

As this Court has previously opined, in order to sustain an injury that gives rise to standing, a plaintiff must have an injury in-fact, which must be particularized and concrete, and imminent

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[3] In support of this claim, Plaintiffs cite to *New York v. U.S. Dept. of Comm.*, 315 F.Supp 3d 502 (SDNY 2019). However, the instant case is plainly distinguishable as Plaintiffs' there alleged that they would suffer, among other things, loss of federal funds, degradation of census data, and diversion of resources. *See, also, DOC v. New York,* ___US___, 139 S Ct 2551 (2019) (finding standing for Plaintiffs in light of their particularized injuries and noting that claims of future injuries can only provide standing "if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur.")(citation omitted). Plaintiffs here, however, have made no such showing of particularized harm, as opposed to speculative future harm from a third-party, i.e, ICE, that is neither "certainly impending" nor shows that Plaintiffs are at a substantial risk of harm.

[4] New York Immigration Coalition's website states that "NYIC advocates for laws and policies to improve the lives of immigrants and all New Yorkers, particularly those that live in lower income communities." (https://www.nyic.org/about-us/what-we-do). Common Cause/New York's website advocates that "[a]t Common Cause New York, we're committed to protecting and expanding the freedom to vote for every eligible New Yorker." (https://www.commoncause.org/new-york/our-work/voting-elections). Community Voices Heard advocates in its website that, since 1994, they have been "working to build a society in which the systems that govern foster racial, social and economic justice not exploitation – particularly for low-income people of color." (https://www.cvhaction.org/what-we-do). Finally, Citizen Action of New York's identifies itself as a "grassroots" organization seeking social change by "look[ing] for opportunities to accomplish big changes – not small, incremental reforms. We work to elect progressive candidates to office who are committed to these issues." (https://citizenactionny.org/about).

(as opposed to hypothetical). *Koziol v. Hanna,* 107 F. Supp. 2d 170, 176 (N.D.N.Y. 2000). Moreover, the conduct complained of must cause the injury (as opposed to hypothetical injuries from a third-party such as ICE) and the injury would be redressed by a favorable court decision. *Id.* The requirements for organizational standing are the same as those for an individual plaintiff. *Young Advocates for Fair Educ. V. Cuomo,* 359 F. Supp. 3d 215 (E.D.N.Y. 2019)(holding that a diversion of resource theory is not enough to support standing that further opining that an organization that finds a statute, policy or law "politically or socially disagreeable" is likewise insufficient). Here, since Plaintiff have not and cannot show that they suffered an injury in-fact (since their alleged injury is clearly speculative and does not relate to any portion of the content of the July 18, 2019 press release), this Court is unable to redress any alleged injury.[5] As such, Plaintiffs lack standing and County Defendants' Rule 12(b) motion to dismiss must be granted as a matter of law.

POINT II

PLAINTIFFS' CLAIMS ARE NOT RIPE FOR ADJUDICATION

Since Plaintiffs remain unable to demonstrate an actual or imminent injury as a result of the July 18, 2019 press release, the Complaint is clearly not ripe for adjudication. Plaintiffs argue that there is prudential ripeness for the allegations contained in the Complaint. In order attempt to convince this Court of same, Plaintiffs repeatedly refer to the July 18, 2019 press release as a

[5] Plaintiffs claims of "associational standing" likewise fail. Under the three-prong standard laid out by the Supreme Court in *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 [1977]), Plaintiffs are unable to identify a member of their respective organizations to have ever been injured by the July 18, 2019 press release, that the alleged interests at stake as a result of the July 18, 2019 press release are the interests which are germane to each of the organizational Plaintiffs' purpose, nor that the allegations of the Complaint (nor the relief requested therein) requires participation of the organization's individual members. As to the third prong, in order for organizational Plaintiffs to show that the July 18, 2019 press release has intimidated its members from registering to vote, they must show the coercive effect of the press release. Accordingly, Plaintiffs are unable to establish associational or representative standing.

County "policy" or "action." As noted in Defendants' original moving papers, the July 18, 2019 press release is not a policy, nor does it constitute "state action" as the press release was not promoted by any new County Law, County resolution or County policy (Dkt. No. 34-1 ¶3). Accordingly, Plaintiffs are unable to show that the claims made in the Complaint are ripe for adjudication.

As explained in County Defendants' moving papers, contrary to Plaintiffs' contentions, there is no ripe controversy. Although Plaintiff Benn claims that she is subjectively "fearful" of registering to vote at the DMV, for the reasons stated above, her claims fall short of the requirements that she demonstrate that she has, in fact, suffered a particularized injury. Similarly, organizational Plaintiffs raise nothing more than public policy arguments, which fail to give this Court subject matter jurisdiction. *Nat'l Org. for Marriage, Inc. v. Walsh,* 714 F.3d 682 (2d Cir. 2013). Therefore, at a minimum, this Court should dismiss the Complaint without prejudice to allow Plaintiffs to re-asses such claims in the event that they become ripe. *See, Rivendell Winery, LLC v. Town of New Paltz,* 725 F. Supp. 311, 317-19 (N.D.N.Y. 2010).

Although Plaintiffs claim that there is both constitutional and prudential ripeness, the plain language of the Complaint and Plaintiffs' opposition papers show otherwise. First, as discussed further below, Plaintiffs cannot and have not shown proof of intent to intimidate. Second, the Complaint does not allege that Plaintiff Benn had any contact with the County DMV office, Board of Elections or any of the individually named County Defendants. Third, the Complaint fails to allege that, since the July 18, 2019 press release, the County Board of Elections or any of the individually named County Defendants sent information to ICE. Fourth, organizational Plaintiffs have not alleged that anyone residing within the County who is lawfully registered to vote at a DMV office had contact with ICE as a result of the July 18, 2019 press release. Simply stated,

there is absolutely no evidence or factual allegation that the contents of the July 18, 2019 press release violated the Voting Rights Act, or the First or Fourteenth Amendments. Thus, Plaintiffs have not and cannot show an injury that is actual or imminent, nor that the issues discussed in the Complaint are ripe for adjudication since the Complaint fails to show actual injury or hardship to the Plaintiffs. Thus, the absence of a ripe controversy compels dismissal of Plaintiffs' Complaint as a matter of law.

POINT III

THE COMPLAINT FAILS TO STATE VIOLATIONS OF THE VOTING RIGHTS ACT OR SHOWS THE REQUISITE "STATE ACTION" REQUIRED OF A VIABLE SECTION 1983 CLAIM

As explained fully in County Defendants' original moving papers, the July 18, 2019 press release neither violated the Voting Rights Act or constituted state action sufficient to satisfy the requirements of a Section 1983 action. Thus, the Complaint must be dismissed.

A. Voting Rights Act

Plaintiffs argue in opposition that they are not required to allege any facts demonstrating specific intent under the VRA (Dkt. No. 44 at 22-24). To attempt to support this theory, Plaintiffs rely solely on a ***single***, ***non-binding*** case in the Eastern District of Virginia (*id.* at 22); *LULAC v. Public Interest Legal Found.*, 2018 U.S. Dist. LEXIS 136524 (E.D. Va. 2018). Plaintiffs analysis here is misguided, however, as even *LULAC* underscored the importance of courts adhering to binding precedent when analyzing a claim under the VRA. *See LULAC*, 2018 U.S. Dist. LEXIS 136524 at *9 ("Therefore, in the absence of plain statutory text . . . or binding case law to the contrary. . . ."). Moreover, *LULAC* relied upon *Damon v. Hukowicz*, 964 F. Supp. 2d 120, 149 (D. Mass. 2013)—a case where a showing of specific intent was required—in *LULAC's* analysis of a VRA section 11(b) claim. As such, *LULAC* is neither relevant nor controlling in the instant matter.

In opposition, Plaintiffs are asking that this Court disregard applicable statutory authority *and* binding caselaw and, instead, adopt the noncontrolling decision of *one* Eastern District of Virginia case (Dkt. No. 44 at 22).[6] Critically, Plaintiffs ignore the germane text of the Voting Rights Act itself, which reads: "no person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce . . . *for the purpose of interfering with* the right of such other person to vote. . . ." *See* 52 U.S.C. § 10101(b). While this language was omitted in 52 U.S.C. § 10307(b), such remains the law with respect to general voting rights, and such has been the governing authority for recent cases within the Second Circuit that have all held that specific intent is indeed a mandatory requirement under the VRA.[7] *See e.g.*, *Willingham v. County of Albany*, 593 F. Supp. 2d 446, 462 (N.D.N.Y. 2006) (holding section 11(b) of the VRA protects "against conduct *intended* to intimidate, threaten, or coerce."); *Dekom v. Nassau County*, 595 Fed. Appx. 12, *15 (2d Cir. 2014). Additional binding caselaw has buttressed the conclusion that specific intent is, in fact, a requirement in the context of a VRA claim. *See Shannon v. Jacobowitz*, 394 F.3d 90, 96 (2d Cir. 2005); *Hoblock v. Albany County Bd. of Elections*, 422 F.3d 77, 97 (2d Cir. 2005); *Davis v. Garcia*, 2008 U.S. Dist. LEXIS 82204, *13-14 (S.D.N.Y. 2008).[8] Accordingly, Plaintiffs theory with respect to the VRA's specific intent requirement must be rejected as a matter of law.

Finally, Plaintiffs' alternative argument that they have adequately plead facts demonstrating Defendants acted with the requisite specific intent to maintain a section 11(b) VRA

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[6] Plaintiffs have not cited to a single case within the Second Circuit that has held that specific intent is not a requirement in a claim advanced under the Voting Rights Act.

[7] Notably, Plaintiffs erroneously alleges that *Olagues v. Russoniello*, 770 F.2d 791, 804 (9th Cir. 1985) was vacated as moot (Dkt. No. 44 at 22). However, *Olagues* was vacated on other grounds that did not invalidate its holding with respect to the relevant VRA claim—i.e., that specific intent is an absolute requirement under the VRA. *See Russoniello v. Olagues*, 484 U.S. 806 (1987).

[8] Plaintiffs concedes in opposition that controlling authority in this Circuit has held that specific intent is a requirement in a claim under the Voting Rights Act (Dkt. No. 44 at 22). Plaintiffs argument in opposition to this undisputed fact is merely that such cases were "wrongly decided and should not be followed" (*id.*).

claim must fail, as the Complaint alleges nothing more than purely conclusory and speculative allegations relating to Defendants "intent." To that end, Plaintiffs rely upon their allegations that "[t]he purpose and *predictable effect* of this conduct is to intimidate" (Dkt. No 376 at ¶ 1) (emphasis added), and "*[o]n information and belief*, Defendants intend the natural and probable consequences of their actions" (*id.* at ¶ 70) (emphasis added). Here, Plaintiffs have clearly failed to plead a single fact illustrating that Defendants possessed the requisite specific intent to intimidate any eligible voters from registering to vote in Rensselaer County and, therefore, Plaintiffs have failed to allege a plausible claim for relief.

B. 42 U.S.C. Section 1983

Plaintiffs remain unable to support their First and Fourteenth Amendment claim. Again, in an attempt to stave off dismissal of the Complaint, Plaintiffs repeatedly refer to the July 18, 2019 press release as a "policy." As stated above, and in County Defendants original moving papers, the press release was not a "policy" as it related to public comments uttered by County Defendants who were exercising their First Amendment rights. There can be no doubt that the July 18, 2019 press release contained protected speech, that had no force of law and was not made pursuant to County legislative action. In fact, the Complaint acknowledges that the press release was neither official or final – admissions that Plaintiffs now seek to distance themselves from.

Furthermore, Plaintiffs reliance upon *Knight First Amend. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 235-36 (2d Cir. 2019) is misguided. The *Knight* Plaintiffs were social media users who were blocked from accessing and interacting with the Twitter account of President Trump because they expressed views on his social media page that he disliked. Unlike in *Knight*, no conduct was taken by County Defendants to "ban" or otherwise exclude Plaintiffs. To the extent that Plaintiffs are attempting to argue that posts on a social media account alone constitute

"state action," i.e., the County's distribution of the press release on Facebook, that was not an issue before the Second Circuit on *Knight* and Plaintiffs are unable to offer any legal precedent that stands for that proposition. Similarly, Plaintiffs claims that County Defendants "misused their office" and therefore have taken action "under color of state law" is likewise mistaken. Again, Plaintiffs cite to distinguishable cases, i.e., where the Defendants were commissioners of elections, who were charged with conspiring to willfully alter and falsely count and certify the ballots of votes cast in a state primary election. *United States v. Classics*, 313 U.S. 299 (1941). Here, there are no allegations in the Complaint that County Defendants have "abused the position given to [them] by the State" (*West v. Atkins*, 487 U.S. 42, 49-50 [1988]); in fact that language appears nowhere in the Complaint. Instead, the facts of the Complaint simply show that County Defendants have merely asserted their opinions on and outlined a potential plan that is lawful in all respects. Thus, Plaintiffs' Complaint fails to include any well-plead factual allegations of any "state action" by County Defendants that could support a §1983 claim.

POINT IV

PLAINTIFFS' FAILURE TO PLEAD A *MONELL* CLAIM REQUIRES DISMISSAL OF THE COMPLAINT

Other than the Plaintiffs repeatedly labeling the July 18, 2019 press release as a "policy", they remain unable to identify an official policy that would support any claim plead under *Monell.* In fact, Plaintiffs concede that they have not brought a cause of action under *Monell* (Dkt. No. at 30). Moreover, assuming, *arguendo*, that this Court deems the July 18, 2019 press release to constitute a policy under *Monell*, as plead, the Complaint infers that the press release was not unlawful, nor has it causally related to any injury Plaintiffs' have suffered or will imminently suffer. As previously discussed in County Defendants' original moving papers, the July 18, 2019 press release has no force of law, nor was it made pursuant to any official action by the County

legislature. The arguments that the July 18, 2019 press release could influence voter registration is absurd, as the County Defendants do not administer or control voter registration information (*see,* Dkt. No. 34-1). Moreover, the disclosure of information discussed within the July 18, 2019 press release was already available to the public - and law enforcement - since at least 1977. Finally, Plaintiffs have not and cannot allege that, pursuant to the press release or any other County policy, that those lawfully able to register to vote and residing in the County have had their publicly-available information shared with law enforcement, or that the public accessibility to this information has changed since July 18, 2019. Accordingly, the Complaint must be dismissed as a matter of law.[9]

CONCLUSION

WHEREFORE, it is respectfully requested that the Court: (a) dismiss Plaintiffs' Complaint as against all County Defendants; and (b) grant such other and further relief in the County Defendants' favor as this Court deems just and proper.

Dated: August 19, 2019

Respectfully submitted,

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[9] Finally, on opposition, Plaintiffs' have acknowledged that they do not have a viable claim for punitive damages against any of the County Defendants (Dkt. No. 44 at 33). Furthermore, since Plaintiffs' have now confirmed that the are suing Messrs. Schofield, McLaughlin, Merola and Stammel in their individual capacities only, the only properly named Defendant is the County. *Monell v. New York City Dep't of Soc. Serv.*, 436 U.S. 658, 690 (1978); *Brandon v. Holt*, 469 U.S. 464, 471-72 (1985); *Hulett v. City of Fowler*, 253 F.Supp. 3d 462, 498-99 (N.D.N.Y. 2017). Thus, to the extent that this Court does not dismiss the Complaint as a matter of law, the caption must be amended to reflect the only proper Defendant: "RENSSELAER COUNTY AND ITS BOARD OF ELECTIONS".