MELVIN JOHNSON, et al.	*	IN THE
Plaintiffs	*	UNITED STATES
v.	*	DISTRICT COURT OF
MARYLAND STATE BOARD OF ELECTIONS, et al.	*	MARYLAND
	*	Case#: 8:17-CV-02867-DKC
Defendants		

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OPPOSITION TO MOTION TO DISMISS SECOND AMENDED COMPLAINT

NOW COMES, Plaintiffs Melvin Johnson, et al., by and through their attorney, J. Wyndal Gordon, of **THE LAW OFFICE OF J. WYNDAL GORDON, P.A.**, to submit this Opposition to Motion to Dismiss alleging as true the following:

I. STATEMENT OF FACTS

Plaintiffs, all pretrial detainees and eligible to register to vote during the November 6, 2016 General Election, brought suit against Defendant State Board of Elections, and State Board of Elections Administrator, Linda Lamone, because Defendants, respectively, denied and refused their right to information concerning voter registration and elections, their right to register to vote, their right to access to the ballot, and their right to vote in the 2016 General Election. (Pl. 2d Am. Compl.). Plaintiffs have alleged that Defendants' respective denials and refusals violated the State and Federal Constitutions. Plaintiffs submit that the general powers and duties conferred upon the respective election boards and State Election Administrator, Lamone, require the boards to create and implement

process for "inmate voting" given the unique position they occupy as eligible but financially unable, involuntarily restrained, citizens held in State custody. The failure or refusal to do so has denied Plaintiffs and others similarly situated their fundamental right to participate in the election process. In opposition to Lamone's motion to dismiss alleging that Plaintiffs have failed to state a claim for which relief can be granted, they submit the following:

II. STANDARD OF REVIEW

A complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) *(quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Facial plausibility exists "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. An inference of a mere possibility of misconduct is not sufficient to support a plausible claim. *Id*. at 679.

In analyzing a Rule 12 (b) (6) motion, the Court views all well-pleaded allegations in the light most favorable to the plaintiff. *Hamilton v. Pallozzi,* 165 F.Supp.3d 315, 319 (2016)*, Ibarra v. United States*, 120 F.3d 472, 474 (4th Cir.1997). "[F]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955. The Court "need not accept legal conclusions couched as facts or 'unwarranted inferences, unreasonable conclusions, or arguments.' " *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 365 (4th Cir. 2012) *quoting Giarratano v. Johnson*, 521 F.3d

298, 302 (4th Cir. 2008). Facts derived from sources beyond the four corners of the complaint also may be considered, including documents attached to the complaint, documents attached to the motion to dismiss "so long as they are integral to the complaint and authentic;" facts subject to judicial notice under Fed.R.Evid. 201 may be considered as well. *Philips v. Pitt Cty. Mem'l Hosp.*, 572 F.3d 176, 180 (2009) *citing Blankenship v. Manchin*, 471 F.3d 523, 526 n. 1 (4th Cir. 2006).

Upon review of the allegations contained in Plaintiffs complaint, Plaintiffs have raised sufficient factual matters that when accepted as true, clearly 'state claims to relief that is plausible on its face'.

III. LEGAL ANALYSIS

a. Lamone failed to perform her statutory duties

"The Constitution of the United States protects the right of all qualified citizens to vote in state as well as in federal elections." *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). The Supreme Court has specifically recognized that the Equal Protection Clause guarantees a pretrial detainee's right to vote. *See O'Brien v. Skinner*, 414 U.S. 524, 529-30 (1974). The Maryland Court of Appeals has specifically recognized that pretrial detainees have the right to register to vote. *Voters Organized for the Integrity of City Elections v. Baltimore City Elections Board*, 451 Md. 377, 398-99 (2017) ("Pretrial detainees and individuals incarcerated as a result only of a misdemeanor conviction who are eligible to register to vote may register to vote by mail, online, or with the assistance

of a volunteer. EL § 3-201(a)(3), (6), (7).”). It is against this backdrop that Plaintiffs clearly established rights --fortified by state election laws, and state and federal constitutions –are being denied by Defendants. Plaintiffs brings this civil action to redress their grievance.

Linda Lamone had certain powers and duties conferred to her by State election law and COMAR. EL § 2-103 (b); COMAR 33.07.03.01. Those powers and duties included the duty to supervise the operations of the local boards; to perform all duties and exercise all powers that are assigned by law to the State Administrator or delegated by the State Board; to implement, in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list; and to be the chief State election official. EL § 2-103 (b) (4) (5) (6) & (8). As it related to the local boards under Lamone’s operational supervision, they were *inter alia* statutorily required to: (1) oversee the conduct of all elections held in its county and ensure that the elections process is conducted in an *open, convenient, and impartial* manner; (2) provide the supplies and equipment necessary for the proper and efficient conduct of voter registration and election; and (3) provide to the general public timely information and notice, by publication or mail, concerning voter registration and elections. EL § 2-202 (b) (1) (3) & (7). Indeed, COMAR provided that the State and local boards shall give “*appropriate*” public notice of the services they provide, and that provisional ballots should be issued whenever possible. 33.05.03.01C, 33.19.04.01B.

Lamone and the Prince George's County Local Board of Election, under her direction and authority, failed or refused to comply with their statutory duties described above, when they knowingly and intentionally decided not to give Plaintiffs, and others similarly situated pretrial detainees, *appropriate* public notice of the voter registration and voting assistance services the State and local boards provide, because Plaintiffs were involuntarily held in a detention facility that is, ironically, run by government, and physically restrained from exercising their free will. EL §§ 9-305, 9-307, 9-308. Neither Plaintiffs nor their housing facility received any supplies or equipment for the proper and efficient conduct of voter registration and election. EL § 2-203(b)(3). Nor did they receive timely information and notice as members of the general public, involuntarily held in the custody of a government run institution, concerning voter registration and elections. EL § 2-202 (b) (1) (3) & (7). Lamone's failure or refusal to do any of the above discriminated against Plaintiffs on the basis of their pretrial detention status, and denied them the basic right to participate in the election process by, *inter alia*, registering and voting. *See Carrington v. Rash*, 380 U.S. 89 (1965) (once the States grant the franchise, they must *not* do so in a discriminatory manner).

The egregiousness of Lamone's failure or refusal to recognize Plaintiffs legitimate right to information on voter services, right to register, *and* right to vote in the 2016 Elections, is compounded by the fact that this information could have been very easily disseminated through the simplest and most cost effective means by creating and

distributing to the detention centers placards, flyers, or postcards, and/or conspicuously placing posters inside the jail, (Pl. 2d Am. Compl. ¶39). They also could have provided training to the correctional intake administrators to become Election volunteers, agents, or judges (which is actually a portable skill during election season) so they may intelligently inform inmates about their right to election information, to register, and to vote, despite their being involuntarily physically restrained from visiting the polls on their own free will. EL § 3-201 (a) (7), EL § 9-307; COMAR 33.19.04.03 and 33.19.04.01; Pl. 2d Am. Compl. ¶¶31 - 33).

Plaintiffs were uniquely situated when compared to other Maryland citizens –including nursing home residents --because they were involuntarily held and physically detained against their will by the county detention center. Defendants knew or should have known that Plaintiffs did not have the right, privilege, or unimpeded free will, to come and go as they pleased, or to freely access communication transmissions about the General Elections. Pretrial detainees did not have access to money, the internet, personal television, outdoor billboard and signs, mailers, voter publications, or any other information advising that their right to vote was unabridged by their pretrial detention.

As it stands, the same State and local government that involuntarily held Plaintiffs in custody but conceded that Plaintiffs retained the right to information about elections, the right to register to vote, and the right to vote, is the State and local government that has denied those rights. Defendant disregarded Plaintiffs voting rights like they were

illusory rather than constitutional guarantees. Such conduct should not be countenanced as acceptable or the 'new normal'. To the contrary, it is unfair, it is unconstitutional, and it is wrong.

Without Plaintiffs receiving *appropriate* public notice of information that both the Election Law Article and COMAR stated they were entitled to receive, Lamone, as the Statewide Administrator of the Prince George's County's local board and the State Board of Elections, both, violated Plaintiffs rights under the First and Fourteenth Amendment. For these and other reasons, Defendant's motion to dismiss should be respectfully DENIED.

b. Plaintiffs allegations contain sufficient facts to state a claim

> "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

Consistent with this principle, Maryland's election laws are purposed to inspire public confidence and trust by assuring that: (1) *all persons* served by the election system are *treated fairly and equitably*; (2) *all qualified persons* may register and vote; (3) those who administer elections *are well-trained*, that they serve those *who vote*; (4) *full information on elections is provided to the public*; (5) *citizen convenience* is emphasized in ***all*** aspects of the election process; (6) security and integrity are maintained in the casting of ballots, canvass of votes, and reporting of election results; (7) the prevention of

fraud and corruption is diligently pursued; and (8) any offenses that occur are prosecuted. *See* (Pl. 2d Am. Compl. ¶21); EL § 1-201.

Against this backdrop, Defendant argued in its motion that Plaintiffs have not offered any factual support for, nor explained how any particular policy of Defendant denied their access to the ballot and right to vote. Plaintiffs disagree. Defendant has clearly taken a grossly oversimplified approach to their interpretation of Plaintiffs complaint and may have perhaps missed the mark. Plaintiffs open their counter-argument by reminding that not only the factual allegations in their complaint but *all reasonable inferences* drawn therefrom are to construed in Plaintiffs favor under classic 12(b)(6) analysis. *See Hamilton*, 165 F.Supp.3d at 319. Along this vein, Plaintiffs submit that their entire complaint is replete with example after example demonstrating why their "claim[s] to relief [are] plausible on [their] face[s]." *Id*.

Plaintiffs complaint alleged that Defendant abused her powers and shirked her statutory duties by failing or refusing to provide Plaintiffs with information about the General election, and by failing or refusing to recognize their rights as citizens to receive said information, their rights to register for the 2016 General Election, and their rights to vote in the 2016 General Election. (Pl. 2d Am. Compl. 18 - 26, 37 - 42). Plaintiffs specifically alleged that despite meeting election law qualifications, they were denied access by the Defendant(s) to: (1) a voter registration application; (2) an absentee, provisional or regular ballot; (3) supplies and equipment necessary for the proper and

efficient conduct of voter registration and the election, (EL § 2-202 (b)) *see also* (Pl. 2d Am. Compl. ¶42); and (4) voting services provided by the Prince George's County Local and State Boards of Elections –such as the right to access election volunteers, judges, voting supplies (i.e., ballots –whether regular, provisional or absentee) or equipment, and the right to a voting agent. *See* EL § 2-301 (a) (7), 3-102, 3-204.1., 9-305, 9-307, 9-308, 9-404 (b); COMAR 33.19.04.01, 33.19.04.03*; see also Voters*, 451 Md. at 398-99. Plaintiffs further complained that: (1) they were treated "[un]fairly and [in]equitably" and thus discriminated against because of their involuntary pretrial detention status, (2) they were *not* provided "full information" on the General Election, (3) "citizen convenience" was neither *emphasized* nor considered on their behalf due to their incarceration, and (4) none of the aforementioned election law offenses were prosecuted. *Id*., *see also* EL §§ 1-201, 2-202 (b); Pl. 2d Am. Compl. ¶¶21, 29.

Plaintiffs further complained that they did not have the financial means nor physical wherewithal to cast a ballot as a result of their involuntary detention within Prince George's County Detention Center; nor were they suited by Defendant(s) with the knowledge to contact the local Election board while incarcerated to secure a 2016 General Election ballot even if they had the financial means to do so. (Pl. 2d Am. Compl. ¶¶18 - 19). Postage costs money, and money is a scarce resource in the jail, --the same as access to a reasonably equipped library to research the election laws of Maryland. Neither were available to Plaintiffs while they were incarcerated in the Prince George's

County Detention Center –and discovery will bare this out in greater detail. While in pretrial detention, Plaintiffs were pretty much cut-off from the greater society and mostly held *incommunicado*; Defendants were aware, --they just didn't care.

Further, Plaintiffs did not receive any information from Lamone, the local, or State boards, informing them that their right to register and to vote is retained during their pretrial incarceration. Furthermore, Plaintiffs alleged that local and State Boards did not have any "official local or statewide policies, procedures, or plan" nor did they make any arrangements to enfranchise Plaintiffs and others similarly situated --which was a total abdication of their statutory responsibilities. *Id*. at 16, 19, 36; *see also* EL §§ 2-102, 2-202 (b), 2-203(b), 3-102. Instead, Plaintiffs were falsely led to believe by *inter alia* Defendant(s)' failure or refusal to satisfy their legally bound duties, that due to their involuntarily imposed physical limitations (despite their will, ability, and legally sanctioned eligibility), they had no right to register and to vote; and that Defendant could legitimately use their pretrial detention status (having been convicted of no infamous voting crime nor serving time for a felony) to ignore them. (Pl. 2d Am. Compl. 22).

Linda Lamone is 100% responsible for the Prince George's County Board of Election (PrGeoCo Board) because it statutorily falls under her direct supervision, and she is expressly mentioned by name in paragraph 50 of Plaintiff's Second Amended Complaint for her alleged wrongdoing under Plaintiffs § 1983 and state constitutional tort claims. *See* EL § 2-103 (b) (4), (Pl. 2d Am. Compl. 50). By clear, reasonable, inference,

Plaintiffs allegations against the PrGeoCo Board are allegations against Lamone *sui juris* because PrGeoCo board is a non-suable entity in the action brought by Plaintiffs. *Id., see also* EL §§ 2-201 (a) (2), 3-204 (a)(1). In addition to the above, Plaintiffs expressly and very clearly alleged that the PrGeoCo Board, again, operationally supervised and controlled by Lamone, *et al.*, violated their rights by refusing to allow them to register and to vote despite having met all of the constitutional qualifications to do so. (Pl. 2d Am. Compl. ¶¶6, 24 - 26, 50). As an illustration of this, Plaintiffs present the following excerpts from their Second Amended Complaint:

> 6. Linda Lamone is the State Administrator of Elections statutorily charged with managing and supervising elections in the State and ensuring compliance with the requirements of the state code and any applicable federal law by all persons involved in the elections process, see Elect. Code §2-102; she is further charged with supervising *inter alia* the operations of the City/County Boards of Elections, see Elect. Code 2-103(4).
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> Plaintiffs incorporate by reference the allegations contained in paragraphs 1 - 25 as if fully set forth herein:
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> 24. Maryland Election Article § 3-102 guarantees the right to register and to vote to any individual who is a citizen of the United States; is at least 16 years old; is a resident of the State as of the day the individual seeks to register; and registers pursuant to the Article. *See also* Md. Const. Art. I §§ 1 and 2, Decl. of Rights Art. 7 & 24.
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> 25. Plaintiffs collectively, submit that they and similarly situated individuals held in pre-trial detention or serving a court-ordered sentence of imprisonment for misdemeanor offenses, who meet the above described qualifications, are being denied the right to register and vote, even though they do not fall within the narrow exception to this statute.
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> 26. The State's denial of the affected individuals rights to register

> and vote in the general election held on November 8th, 2016, is inconsistent with the Election Law Article, the State Constitution and Declaration of Rights, and the U.S. Constitution, as well as other laws governing the elections process as more fully explained below. (Pl. 2d Am. Compl. ¶¶6, 24 - 26).
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> * * *
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> 50. By violating the laws identified and explained in paragraphs 1 - 49, Defendants (collectively, including Linda Lamone in her capacity as compliance officer, manager, and supervisor over State elections and local boards, *see* paragraph 6) violated Plaintiffs clearly established rights under the State and Federal Constitutions identified in Counts I - I(c) above by *inter alia* engaging in a custom, policy and practice of unlawfully denying Plaintiffs their the right to register, vote, and their right to access the ballot, and flat-out denying Plaintiffs aforementioned rights, simply because they are pretrial detainees and/or misdemeanants serving time; as a result of said denials, Plaintiffs have been deprived of their State and constitutional rights as described throughout this complaint; that Plaintiffs have suffered extreme hardship and damages as pretrial detainees and/or individuals serving time on misdemeanor offenses.

As a comprehensive measure to ensure that their pleading requirements were met, Plaintiffs alleged that the additional placement of unreasonable impediments to exercising their right to vote violated their rights under the First and Fourteenth Amendment, (Pl. 2d Am. Compl. ¶18); and that "[e]ligible voters [and registrants], such as themselves, are and will continue to be greatly injured and irreparably harmed by the acts and omissions of Lamone, and the State and local boards of elections, by perpetually denying their right to register and to vote in the all elections held within the State solely because they are being involuntarily detained pretrial in a local detention center, or because they are serving time on a misdemeanor offense in a State or local correctional institution." (Pl. 2d Am. Compl. ¶23). For these and other reasons, Plaintiffs have clearly made claims that are

plausible on their face and for which relief can be granted. Accordingly, Defendant's Motion to Dismiss on this basis should be respectfully DENIED.

c. Plaintiffs established deliberate indifference

Defendant(s) argued that Plaintiffs have not alleged any facts that would establish "deliberate indifference" on the part of Lamone [and the State Board] as it related to her disenfranchisement of Plaintiffs as pretrial detainees. *But see Ritchie v. Donneley*, 324 Md. 344, 373 (1991) (A state public official alleged to have violated any article of the Maryland Declaration of Rights, is not entitled to qualified immunity.). Plaintiffs disagree and assert that they have established 'deliberate indifference' by clear, easy-to-follow, inferences drawn from the allegations contained in paragraphs 50 - 52 of their complaint:

> 50. By violating the laws identified and explained in paragraphs 1 - 49, Defendants (collectively, including ***Linda Lamone*** in her capacity as compliance officer, manager, and supervisor over State elections and local boards, *see* paragraph 6) violated Plaintiffs clearly established rights under the State and Federal Constitutions identified in Counts I - I(c) above by *inter alia* engaging in a custom, policy and practice of unlawfully denying Plaintiffs their the right to register, vote, and their right to access the ballot, and flat-out denying Plaintiffs aforementioned rights, simply because they are pretrial detainees and/or misdemeanants serving time; as a result of said denials, Plaintiffs have been deprived of their State and constitutional rights as described throughout this complaint; that Plaintiffs have suffered extreme hardship and damages as pretrial detainees and/or individuals serving time on misdemeanor offenses.
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> 51. That the State and local board cannot guarantee a fundamental right to participate in the electoral process as herein alleged, then take it away at the same time simply because it may be only slightly inconvenienced; and they cannot establish classes of voters to discriminate

against and, again, by doing so they violate Plaintiffs rights Counts I - I(c).

52. That the State and local boards have no compelling reason/interest for denying Plaintiffs their fundamental right to register, vote, or access to the ballot, that passes constitutional muster.

Based upon the foregoing, Plaintiffs submit that not only do the above allegations show deliberate indifference on behalf of all Defendants, and particularly Linda Lamone, no government official can escape liability when his/her conduct violates clearly established right when, at the time of the challenged conduct, "[t]he contours of [a] right [are] sufficiently clear" that every "reasonable official would have understood that what he [or she] [was] doing violates that right." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

It was Lamone's, the local's and State Board's duty to implement the voting process in the State for responsible citizens to participate. Pretrial detainees represent an eligible voting class of responsible citizens who were deliberately ignored and unlawfully discriminated against due to their detention status, and in Plaintiffs case, lack of financial resources. *See McDonald v. Board of Election Commissioners*, 394 U.S. 802, 806-07 (1969) ("[B]ecause of the overriding importance of voting rights, classifications 'which might invade or restrain them must be closely scrutinized and carefully confined' where those rights are asserted under the Equal Protection Clause; [a]nd a careful examination on our part is especially warranted where lines are drawn on the basis of *wealth* or race."). No resources were allocated by Defendant for the distribution of information, supplies --

such as provisional ballots, to the detention facility where Plaintiffs were involuntarily housed; and no plan was developed nor devised by Defendant to allow Plaintiffs to participate in any facet of the election process. *See e.g.*, (Pl. 2d Am. Compl. ¶36), EL § 9-401.

As mentioned at the outset, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry v. Sanders*, 376 U.S. at 17. The right to participate in an electoral process is necessarily structured to maintain the integrity of the democratic system. *Burdick v. Takushi*, 504 U.S. 428, 441 (1992). These rights were denied Plaintiffs and that is what precipitated the filing of instant action. Based upon the conduct of Lamone, *et al.*, alleged in Plaintiffs complaint, the integrity of the democratic system has been compromised with deliberate indifference. *See Id.* Defendant's motion to dismiss based upon its argument that Plaintiffs failed to show deliberate indifference should be respectfully DENIED.

d. Election Law enabling statute, laches, are irrelevant to Plaintiffs claims, immaterial to this case

Defendant's next argument that Plaintiffs were implicitly seeking relief under the rubric established under EL § 12-202 should be summarily rejected by the Court. It is irrelevant to Plaintiffs instant claims, immaterial to their case, and completely lacks merit. Plaintiffs did not argue or even suggest in this case that EL § 12-202 provided the basis

for any of the relief they were seeking and for the same reason, Plaintiffs submit that Lamone's defense of laches is irrelevant and immaterial to the instant causes of action at law. *Lyons Partnership, L.P. v. Morris Costumes, Inc*., 243 F.3d 789, 797 (4th Cir. 2001) ("First, laches is a doctrine that applies only in equity to bar equitable actions, not at law to bar legal actions."). Plaintiffs had three years from the date of injury to bring their claims, they did so within the first year. *See* CJ § 5-101 (3yr Statute of limitations for civil actions at law.), *Owens v. Okure*, 488 U.S. 235, 239 (1989) ("Title 42 U.S.C. § 1988 endorses the borrowing of state-law limitations provisions where doing so is consistent with federal law."), *see also United States v. Mack*, 295 U.S. 480, 489 (1935) (Cardozo, J.) ("Laches within the term of the statute of limitations is no defense at law"). It is for these reasons, Defendant's motion to dismiss based on the above stated reasons should be respectfully DENIED.

e. Unreported, unpersuasive cases cited hold no precedent

Defendant cited to a host of unreported, unpersuasive pretrial detainee quasi 'right to vote' cases from across the country to provide fodder for its assertion that Plaintiffs case should be dismissed. However, the cases cited hold no binding legal authority upon this court, *see In re Heilman*, 241 B.R. 137, 168 (D. Md. 1999) ("The Court notes that unreported opinions are not binding authority in this circuit.") and most are premised upon facts wholly distinguishable from Plaintiffs' in the instant case. The one case that resembles Plaintiffs' case the most comes out of Maryland's Court of

Appeals and it is a reported case; however, Defendant(s) chose to ignore it. The case is *Voters Organized for the Integrity of City Elections v. Baltimore City Elections Board*, 451 Md. 377 (2017), *supra*. In that case, the court examined the Appellant's complaint which was almost an exact replica of the one *sub judice*. After extrapolating the facts and distilling the issues, the Maryland Court of Appeals found the following:

> "VOICE and Mr. Giordano assert that "[t]he denial of pretrial detainees' and incarcerated misdemeanants' right to register and vote is inconsistent with the Election Law article." Taken in isolation, that statement is undoubtedly true. But it begs the question that their complaint actually raises --whether the general powers and duties conferred on the election boards by the State Election Law require the election boards to create a special system for "inmate voting" beyond what is available for any voter unable to appear at the voter's polling place on election day and whether the failure to do so is equivalent to a denial of the right to register and vote." *Voters*, at 399.

The Maryland Court of Appeals clearly observed that Plaintiffs complaint raised a question and thus stated a claim worthy of the court's consideration, Plaintiffs submit that the allegations contained in the instant complaint do the same. *See Hagans v. Lavine*, 415 U.S. 528, 543-44 (1974) (When a constitutional question such as equal protection of the fundamental right to vote over which this Court clearly has jurisdiction, is presented, the Court also has jurisdiction over the state "statutory" question.).

To be clear, in the *Voters* case, an organization, a civilian registered voter, and a pretrial detainee registered voter, brought claims challenging the State Board's failure to devise a plan or make arrangements for pretrial detainees to vote. After reviewing the

claim, the court found the Appellant's claim to be moot because, *inter alia*, there was not enough time to pass an order that could be implemented before the 2016 General Election, which, in fact, was the following day. In so holding, the court stated:

> In this case, it is evident that, once the complaint was filed, both sides and the Circuit Court cooperated in advancing this litigation expeditiously. The Circuit Court ruled immediately after holding a hearing. The parties then promptly briefed this appeal and oral argument was scheduled the day after the briefs were filed. But, by the time the appeal was argued to us, the early voting period was over and the general election was just hours away. Even if this Court, or the Circuit Court on remand from the appeal, were to order State officials to create a system of "inmate voting" for the 2016 general election, it would have been impossible to effectively accomplish such a task in the few hours remaining before the polls opened on election day. Given that election day is the busiest day of any year for election officials, such an order would not only have been ineffective, but counterproductive in ensuring an orderly election. In our view, the request for a TRO related to the November 8, 2016 general election was moot by the time it reached us on November 7. *Voters*, 451 Md. at 393-94.

For these and other reasons, Defendant's motion to dismiss for failure to state a claim based upon Defendant's reliance upon unreported, unpersuasive, pretrial detainee quasi 'right to vote' cases, should be respectfully DENIED.

e. Relief Defendant seeks perhaps is a more definite statement rather than dismissal of Plaintiffs constitutional violations

Last, Defendant argued that Plaintiffs complaint, at times, contained what Plaintiffs would describe as hyper-technical, persnickety, defects that in most cases appeared to criticize the form of Plaintiffs complaint rather than its actual substance, -- which really could be resolved through discovery. Nonetheless, Plaintiffs submit that

their pleading satisfies the liberal notice-pleading standard approved under Rule 8. *Swierkiewicz v. Sorema N. A*., 534 U.S. 506, 514 (2002) ("The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim.") *citing Conley v. Gibson*, 355 U.S. 41, 47 (1957) ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits").

Rule 8(a) of the Federal Rules of Civil Procedure requires only "a short and plain statement of the claim," and Rule 8 (e) (1) notes that "[e]ach averment of a pleading shall be simple, concise, and direct." Plaintiffs find Defendant(s) arguments that the defects pointed out in Plaintiffs complaint warrant a dismissal to be completely lacking in merit. Plaintiffs complaint "give[s] the defendant[(s)] fair notice of what the plaintiff's claim[s] [are] and the grounds upon which [they] rest[]." *Conley*, 355 U.S. at 47 (1957). Should the court disagree, then the remedy should not be to dismiss Plaintiffs very important constitutional claims, but to grant Plaintiffs leave to provide a more definite statement under Rule 12(e) or to amend their complaint pursuant to Rule 15. On the other hand, should the court agree with Plaintiffs that Defendants have been provided fair notice of their claims and the grounds upon which they rest, then Defendant's motion to dismiss should be respectfully DENIED *en toto*.

Rule 12(e) allows a party to make a motion for a more definite statement "[i]f a

pleading . . . is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading." Fed.R.Civ.P. 12(e). "The test is whether it is reasonable to require defendants to respond to the [pleading]." *Gilbert v. Bagley*, 492 F.Supp. 714, 749 (M.D.N.C.1980). Rule 12(e) must be read in connection with Rule 8, which sets the minimum pleading requirements. *Hodgson v. Virginia Baptist Hosp., Inc*., 482 F.2d 821, 822 (4th Cir.1973). Rule 8(a) requires that a pleading contain (1) "a short and plain statement of the grounds upon which the court's jurisdiction depends"; (2) "a short and plain statement of the claim showing that the pleader is entitled to relief"; and (3) "a demand for judgment." Fed.R.Civ.P. 8(a). Generally, a pleader need not go beyond the minimum requirements in Rule 8, but Rule 12(e) allows another party to ask for a more information when it is necessary to properly respond. The purpose of these relatively low pleading requirements is "to reduce reliance on pleadings to refine the evidentiary basis for a litigant's claim." *Hodgson*, 482 F.2d at 823.

Therefore, a motion for more definite statement is "designed to strike at unintelligibility rather than simple want of detail," and the motion will be granted only when the complaint is so vague and ambiguous that the defendant cannot frame a responsive pleading. *Frederick v. Koziol*, 727 F. Supp. 1019, 1021 (1990), *citing Scarbrough v. R–Way Furniture Co.*, 105 F.R.D. 90, 91 (E.D.Wis.1985); *see Wilson v. United States*, 585 F.Supp. 202, 205 (M.D. Pa.1984); *In re Arthur Treacher's Franchisee Litigation*, 92 F.R.D. 398, 406 (E.D.Pa.1981). It should never be used as a substitute for

the discovery process, especially where the information sought is readily available or properly sought through discovery. *Frederick*, 727 F. Supp. at 1021.

Plaintiffs complaint clearly satisfies the requirements of Rule 8. It alleged the court's jurisdiction; it provided a short and plain statement of a claim that entitles them to relief; and made a demand for judgment. After a complete review of Plaintiffs complaint in a manner consistent with Rule 8, the complaint was not so vague, ambiguous, or unintelligible, that Lamone could not formulate a response to it –because she actually did. It's just that the issues raised in Plaintiffs complaint of which Lamone was very critical are more aptly available or sought through discovery rather than relying on pleadings to refine the evidentiary basis for Plaintiffs claims. *See Hodgson*, 482 F.2d at 823, *supra*.

As it stands now, it would be next to impossible to read Plaintiffs complaint and not know they have made claims challenging the unconstitutionality of being denied their election law and voting rights because of their status as pretrial detainees --no matter how inartfully pled Defendant believes Plaintiffs complaint to be. It would be further next to impossible to read Plaintiffs complaint without an understanding that for the same reasons, they have sufficiently alleged facts that constitute violations of both § 1983 and the Maryland Constitution. If Plaintiffs prove to be correct in their assertions that Defendant(s) violated their clearly established rights under the First and Fourteenth Amendments by denying (1) their right to receive information concerning the 2016 General Election and all pertinent balloting issues (e.g., questions, referendums, etc.) and

provisions (e.g., availability of absentee, provisional and regular ballots, *see* (EL § 9-201, 9-305, 9-404(b); COMAR 33.19.04.01, 33.16.03.01); (2) their right to register to vote; (3) their right to vote; and (4) their right to voting services (e.g., volunteers, agents, assistance with marking ballots, *see* EL §§ 3-102, 9-305, 9-307, 9-308), --all of which Lamone was under a statutory duty as operations supervisor of the local boards to provide pursuant to State election law, --and none of which she actually did, then Plaintiffs have made out a claim for which relief can be granted under 42 U.S.C. 1983 which provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

And for the same reasons, Plaintiffs have made out a claim for which relief can be granted for violating their rights under Articles I §§1 & 2, Maryland Declaration of Rights Article 7 and 24. All of their claims are plausible on their face. The United States Supreme Court has held as a general matter, before the right to vote can be restricted, the purpose of the restriction and the assertedly overriding interest served by it must meet strict constitutional scrutiny. *McDonald*, 394 U.S. at 806-07. In order to meet this strict constitutional scrutiny, the Court has required the state to prove a compelling state interest to justify its restriction of the right to vote. *Id.* Neither Lamone nor the State of

Maryland have attempted to make any reasonable justification for contesting Plaintiffs right to register and to vote as pretrial detainees. *See also Murphree v. Winter*, 589 F.Supp. 374 (S.D. MS. 1984). Mere administrative inconvenience can never justify denial of a constitutional right. *See e.g., Dunn v. Blumstein*, 405 U.S. 330 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970); *Watson v. City of Memphis*, 373 U.S. 526, 537–38 (1963).

Therefore, it is no moment, despite contrary argument by Defendant, that Defendant(s) may need to enlist or solicit cooperation from the Department of Corrections --to perhaps hang some posters, distribute some flyers and placards, or train some correctional officers or administrators in voting in election laws and the use of handheld devices or the internet, --in order to fulfill their statutory duties owed to Plaintiffs and others similarly situated, and prevent the violation of their voting rights in perpetuity.

IV. CONCLUSION

For all of the reasons cited throughout this memorandum, Defendants motion to dismiss should be respectfully DENIED.

Respectfully submitted,

_____/s/_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, this _26th _ day of _Oct._, 2017, that the foregoing Opposition to Motion to Dismiss and Request for Hearing was served upon Defendants Counsel:

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MELVIN JOHNSON, et al.	*	IN THE
Plaintiffs	*	UNITED STATES
v.	*	DISTRICT COURT OF
MARYLAND STATE BOARD OF ELECTIONS, et al.	*	MARYLAND
	*	Case#: 8:17-CV-02867-DKC
Defendants		

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ORDER

UPON CONSIDERATION, of Defendants, Maryland State Board of Election's Motion to Dismiss, and the Opposition of Plaintiffs;

IT IS HEREBY ORDERED, this ___ day of ____, 2017, that the foregoing Motion be DENIED.

_____
Judge