IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MELVIN JOHNSON, *et al.*,	*	
Plaintiffs,	*	
v.	*	Civil Action No. 8:17-cv-02867-DKC
MARYLAND STATE BOARD OF ELECTIONS, *et al.*,	*	
Defendants.	*	

* * * * * * * * * * *

DEFENDANT LINDA LAMONE'S REPLY MEMORANDUM

Linda Lamone, Defendant, by her attorneys, submits this Reply Memorandum in reply to Plaintiffs' Opposition to Dismiss Second Amended Complaint and in further support of her motion to dismiss. For the reasons explained below, the Court should dismiss all claims brought against Defendants, Ms. Lamone, State Administrator of Elections, and the Maryland State Board of Elections ("State Board"), by Plaintiffs Melvin Johnson and Qaaree Palmer because the second amended complaint fails to state a claim upon which relief can be granted.

REPLY ARGUMENT

PLAINTIFFS' GENERALIZED ALLEGATIONS FAIL TO STATE A CLAIM.

"'[W]holly vague and conclusory allegations are not sufficient to withstand a motion to dismiss.' We do not have an obligation to make [Plaintiffs'] complaint for [them]." *Doe v. Va. Dep't of State Police*, 713 F.3d 745, 754 (4th Cir. 2013), *cert. denied*,

134 S.Ct. 1538 (2014) (internal citations omitted). This Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Contrary to Plaintiffs' assertions, the operative complaint is couched in vague generalities and legal conclusions. Notably absent are particularized allegations regarding actionable conduct against the individual Plaintiffs, Messrs. Johnson and Palmer. The examples are abundant:

- ¶ 15 speaks to "inmate voter registration and voting," "the affected individuals who are eligible to vote and housed in State owned facilities," "inmate voting rights," and those "in custody awaiting trial or serving time on a misdemeanor conviction(s)";
- ¶ 16 makes broad allegations as to "pre-trial detainees," "convicted misdemeanants," and "the number of inmates";
- ¶ 17 applies to "pre-trial detainees or convicted misdemeanants" in "Baltimore City, the 23 other counties, [and] the State of Maryland";
- ¶ 18 cites "an eligible registrant's/voter's usually unforeseen or untimely arrest and pre-trial";
- ¶ 19 asserts generalized allegations as to "these affected individuals" in "the detention center(s) in Baltimore City, the 23 other counties, or the correctional facilities within the State of Maryland" and "their inmates"; and
- ¶ 21 discusses "inmates" in "county detention centers and State intake and correctional institutions."

Indeed, it is not until ¶ 40 that Messrs. Johnson and Palmer are identified by name in connection with any allegedly tortious conduct taken against them, and, even then, the allegations fail to make specific factual averments as to each individual Plaintiff, instead referring to "pre-trial detainees, *such as* **Johnson and Palmer**, who are serving court-

ordered sentences of imprisonment for misdemeanor violations, and who were held in the custody and control of city/county detention centers, intake and correctional facilities throughout Maryland." 2d Am. Compl. ¶ 40 (emphasis added; bold in original). Thus, even where Plaintiffs purport to claim standing to bring claims for wrongful actions taken against them, in reality they assert generalized allegations as to others.

The failure to assert such specific allegations compels the complaint's dismissal. For that reason, the Seventh Circuit, in an unreported decision, dismissed a pretrial detainee's 42 U.S.C. § 1983 claims founded on the First and Fourteenth Amendments, stating:

> [Plaintiff] must assert some factual basis to suggest that the CCDOC records department maintains an express policy of denying inmates the right to vote, that its practice is 'so widespread as to have the force of law,' or that Sheahan, 'a person with policymaking authority,' 'made 'a deliberate choice to deny the inmates the right to vote, that is, he knew of and condoned the constitutional deprivation or acted with deliberate indifference to it, 'turn[ing] a blind eye for fear of what [he] might see' . . .

Henderson v. Sheahan, 1997 WL 819832, at *2, 134 F.3d 374 (7th Cir. 1997) (table) (internal citations omitted).

Plaintiffs wrongly assert that the complaint adequately pleads deliberate indifference. Pl. Opposition at 13. Their conclusory and formulaic allegations fail to come even come close. For deliberate indifference, they must show "'that a substantial risk of [serious harm] was longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus must have known about

it.'" *Cox v. Quinn*, 828 F.3d 227, 236 (4th Cir. 2016) (quoting *Parrish ex rel. Lee v, Cleveland*, 372 F.3d 294, 303 (4th Cir. 2004) (add'l citation omitted)). No such factual allegations lie in the second amended complaint.

Like *Sheahan*, the complaint here completely neglects to allege a *factual basis* for its repeated conclusion that the Defendants held an express policy of denying inmates at every State and local correctional facility in Maryland the rights to register and vote. Absent are particularized allegations that Ms. Lamone or that State Board made deliberate decisions to deny voting rights. Indeed, Plaintiffs' assertions themselves belie such conclusions: they complain about the State's purported neglect to have certain specialized registration and voting procedures, rather identifying any particular, deliberate and conscious actions Ms. Lamone or the State Board took to deny Plaintiffs' rights to register and vote in the last year's election. At bottom, as explained below, their grievance is not about what Ms. Lamone or the State Board did or not do, but what Plaintiffs contend a nonexistent Maryland election law should force elections officials to do.

A. Their Conclusory Allegations Demonstrate that Plaintiffs Lack Standing.

Plaintiffs' failure to advance adequate allegations compels dismissal for another reason: they cannot state a claim because they lack standing.

The constitutional dictates of Article III "require[] the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the Defendant,' and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision[.]'"

Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982) (internal citations omitted). Here, Plaintiffs fail to state facts demonstrating that they themselves suffered injury, nor do they properly allege particular illegal conduct by Ms. Lamone or the State Board, much less that their damages are the result of any actions by the Defendants and would likely be relieved by the resolution they seek.

This case is not a class action. In failing to make specific allegations supporting a cause of action for themselves, Plaintiffs cannot maintain claims on behalf of all pretrial detainees in all State and local correctional facilities in Maryland. "'[P]rudential standing' encompasses the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Doe v. Va. Dep't of State Police*, 713 F.3d at 753 (citation omitted). Courts have dismissed claims on this basis, *Doe,* 713 F.3d at 753 n.4 (citing *Frank Krasner Enters., Ltd. v. Montgomery Cnty.*, 401 F.3d 230, 236 n.7 (4th Cir. 2005)), and this Court should do likewise.

B. Plaintiffs' Generalized Allegations Fail to State A Claim for Specialized Registration and Voting Procedures.

Plaintiffs' Opposition acknowledges their unique legal theory: that "the general powers and duties conferred on the election board[] by the State Election Law require the election board[] to create a special system for 'inmate voting' beyond what is available on election day and [that] the failure to do so is equivalent to a denial of the right to register

and vote." *Voters Organized for the Integrity of City Elections v. Baltimore City Elections Bd.*, 451 Md. 377, 399 (2017); *see* Pl. Opposition at 16-17. In asserting this theory as a cause of action under § 1983, however, Plaintiffs fail to state a claim upon which relief can be granted under the U.S. Constitution and the corresponding Maryland constitutional and statutory provisions.

Aside from repeated claims that Plaintiffs, or more appropriately, *all* pretrial detainees and misdemeanants throughout all local and state correctional facilities in Maryland, were denied the right to vote, the complaint fails to make particularized allegations as to how the individual Plaintiffs were denied equal protection of law with respect to their voting rights. "Pretrial detainees have the right to send or receive mail in the same fashion as other members of the general public, subject only to restrictions necessary for the preservation of jail security." *Owens-El v. Robinson*, 442 F.Supp. 1368, 1388 (W.D. Pa. 1978). The complaint is devoid of specific allegations that Plaintiffs Johnson and Palmer could not use the mails, other communication methods such as telephone or the internet, or personal contact with individuals acting as their agents to register to vote and obtain a ballot for the 2016 general election, just like any other individual prospective voter.

In that regard, the closing deadline for the 2016 Presidential Election was October 18, 2016, for applications by mail, at a local election board, or at one of the voter-registration agencies designated by statute. Md. Code Ann., Elec. Law § 3-302 (closing registration "beginning at 9 p.m. on the 21st day preceding an election"). A registered

voter could then apply for, and then vote, an absentee ballot. The absentee-ballot-application deadlines likewise vary according to the way in which the voter applies. Elec. Law §§ 9-301 through 9-312. A voter who applied by mail or facsimile had to apply by November 1, 2016; a voter could apply online by November 4; and an individual could personally, or by an authorized agent, apply at the local board of elections until the close of the polls on election day itself. Elec. Law § 9-305(b), (c). Absentee-ballot provisions do not differentiate between pretrial detainees and any other voter who, for whatever reason, will wish or need to vote by absentee ballot.

While making broad statements as to unnamed inmates or detainees in unspecified local and state correctional facilities, Plaintiffs offer no facts to support a claim that they, Messrs. Johnson and Palmer, could not take advantage of the same registration procedures or absentee voting procedures as any other member of the public. They do not assert, for example, that they themselves lacked access to the postal service, telephone, or internet, by which they could have requested and received registration forms or absentees ballots. They make no allegations that they requested such access or that the defendants, or anyone else for that matter, denied them this access. The absence of such allegations proves fatal to their ability to assert a claim upon which relief can be granted, as one court recently held. *See Elder v. Cook Cnty. Dep't of Corr.*, No. 1-15-3428, 2016 WL 5846688, at *8 (Ill. App. Sept. 30, 2016) ("Where plaintiff does not allege that he even attempted to mail an application for an absentee ballot, plaintiff's complaint contains no acts that allege or

from which it may reasonably be inferred that defendants denied plaintiff the exercise of the franchise; therefore, no constitutional violation occurred.")

And Plaintiffs point to no legal authority supporting the proposition that the State Board or Ms. Lamone owed duties beyond those set forth in Maryland law to establish unique and special voter registration and voting procedures. *See Long v. Pierce*, No. 2:14-cv-00244-LJM-MJD, 2016 WL 912685, at *5 (S.D. Ind. March 10, 2016) (noting plaintiff's lack of authority holding that the failure to provide additional means for pretrial detainees to vote beyond absentee ballots is unconstitutional). Without citing any authority considering similar circumstances, Plaintiffs fault the Defendants for failing to implement procedures they were not authorized by law to put into effect, including directing correctional facilities, over which they held no legal authority, to take such steps. The failure to advance adequate allegations that Ms. Lamone or the State Board could implement such procedures in detention centers is another fatal deficiency. For that reason, the Second Circuit upheld dismissal of claims against an elections commission where the plaintiff "provided only conclusory allegations that [defendant's] authority and responsibility extended to ensuring that pre-trial detainees in local facilities were allowed to vote." *Wingate v. Horn*, No. 07-2521-pr, 2009 WL 320182 (2d Cir. Feb. 10, 2009) (unpublished). Similar tactics attempt to be employed here. Plaintiffs demand that specialized actions be taken to give pretrial detainees unique and select ballot access,

beyond that required of the State Board and Ms. Lamone by statute, even as no allegations exist that such procedures would have addressed their particular voting rights in this case.

In sum, Plaintiffs bid to utilize the courts for what should be a legislative resolution. Establishing a process for out-of-precinct voting by detainees at a polling place located in their detention facility would require legislation by the Maryland General Assembly. *See* Md. Const. art. I, § 3(b) (granting power to General Assembly to create a process for voting at a polling place outside voter's election district or ward). The Maryland Election Law Article requires a local board to "administer voter registration and absentee voting for nursing homes and assisted living facilities in accordance with procedures established by the State Administrator, subject to the approval of the State Board." Elec. Law § 2-202(b)(11). The general powers and duties set forth in § 2-202 neither require nor authorize local boards to administer a similar program for detention facilities, which do not serve as the permanent residence for the inmates temporarily incarcerated in such facilities. Rather, pretrial detainees may be registered anywhere, including out-of-state, and it is unknown how many reside in the very same precinct where the detention facility is located. While the Legislature also provided for in-person voter registration during the early voting period (but only at an early voting center in the individual's county of residence), it did not authorize election boards to conduct voter registration activities elsewhere or by other methods during early voting, which ended on November 3, 2016. Elec. Law § 3-305(a). Thus, Plaintiffs cannot state a claim upon which relief can be granted that the Defendants' actions unconstitutionally violated the election statutes.

C. Plaintiffs Cannot State a Federal Civil Rights Claim for Alleged Violations of Maryland Election Laws and Regulations.

Plaintiffs likewise cannot state a claim upon which relief can be granted under § 1983 that is founded on purported actions violating state election statutes. "The essential elements to be proved in any section 1983 action are (1) that the defendant was acting under color of state law in the actions complained of; and (2) that the defendant deprived plaintiff of a right, privilege or immunity secured by the Constitution or laws of the United States." *Clark v. Link*, 855 F.2d 156, 161 (4th Cir. 1988) (citation omitted). "If there is no violation of a federal right, there is no basis for a claim under § 1983." *Kalan v. Health Ctr. Comm'n of Orange Cnty.*, 198 F.Supp.3d 636, 641 (W.D. Va. 2016) (citing *Clark*, 855 F.2d at 161). Accordingly, Plaintiffs' prolonged attempts to establish a claim by asserting Ms. Lamone's purported violations of various Maryland elections laws and COMAR previsions, Pl. Opposition at 5-12, must fail. And even were it possible to assert a claim under § 1983 for violations of such state elections statutes, Plaintiffs cannot do so. *See* Memo. In Support of Motion to Dismiss at 14-16.

For similar reasons, Plaintiffs cannot maintain a claim for violation of the parallel Maryland equal protection constitutional provision, Article 24. "Although the Maryland Constitutional contains no express equal protection clause, it is settled that the Due Process Clause of the Maryland Constitution, contained in Article 24 of the Declaration of Rights, embodies the concept of equal protection of laws to the same extent as the Equal Protection Clause of the Fourteenth Amendment." *Murphy v. Edmonds*, 325 Md. 342, 353 (1992). Plaintiffs here "do not assert any greater right under Article 24 than is accorded under . . .

the Federal right," *In re 2012 Legislative Districting*, 436 Md. 121, 159 n.25 (2013), as they acknowledge in the second amended complaint, 2d Am. Compl. ¶ 44. The entire complaint should therefore be dismissed.

D. To the Extent Individual Capacity Claims Are Asserted, Ms. Lamone's Qualified Immunity Bars Them.

The complaint fails to advance allegations sufficient to overcome the qualified immunity to which Ms. Lamone is entitled as a public official.[1] Qualified immunity attaches when the official's conduct does not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This immunity applies in cases involving elections officials. *See, e.g., Hirschfeld v. Spanakos*, 909 F.Supp. 174 (S.D.N.Y. 1995), *rev'd on other grounds*, 104 F.3d 16 (2d Cir. 1997) (§ 1983 lawsuit). "Even defendants who violate constitutional rights enjoy qualified immunity . . . unless it is further demonstrated that their conduct was unreasonable under the applicable standard." *Davis v. Scherer*, 468 U.S. 183, 190 (1984). And that "defense may be overcome only when a plaintiff shows that the constitutional or statutory rights at issue 'were clearly established at the time the conduct at issue.'" *Kilgore v. McClelland*, 637 F.Supp. 1241, 1247 (W.D. Va. 1985) (quoting *Davis*,

[1] As previously noted, the operative complaint is vague and unclear. The State Board earlier moved to dismiss or for a more definite statement, which was previously incorporated in Ms. Lamone's motion to dismiss and accompanying memorandum. *See* Memo. In Support of Motion to Dismiss at 9 n.2.

468 U.S. at 197), *aff'd sub nom. McConnell v. Adams*, 829 F.2d 1319 (4th Cir. 1987), *cert. denied*, 486 U.S. 1006 (1988).

For the reasons stated above, the complaint fails to allege violations of a clearly established constitutional right of which Ms. Lamone would have known, nor make sufficient allegations that her conduct with respect to pretrial detainees' registration and voting was unreasonable. Further, given the absence of supporting authority for their legal theory, Plaintiffs do not allege a clearly established constitutional right that was violated. *Long v. Pierce*, 2016 WL 912685, at *5 (dismissing right to vote claim against all defendants where the plaintiff "point[ed] to no United States Supreme Court, Seventh Circuit, or other circuit court cases that have held that it is unconstitutional to fail to provide a means to detainees to vote in an election other than an absentee ballot, which the detainee may acquire for himself"). Any claims against Ms. Lamone in her individual capacity therefore should be dismissed.

CONCLUSION

For the reasons stated above, as well as in Ms. Lamone's motion to dismiss and accompanying memorandum, the second amended complaint should be dismissed with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 9th day of November, 2017, a copy of the foregoing was served, through filing via the Court's ECF system, on:

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