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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JESSE VANG, et al,
Plaintiffs,
v.
SHERIFF JON LOPEY, et al,
Defendants.

No. 2:16-cv-2172-JAM-CMK

**ORDER GRANTING DEFENDANTS ALEX
NISHIMURA AND CAL FIRE'S MOTION
TO DISMISS**

Plaintiffs, several Hmong individuals who own property in Siskiyou County ("the County"), allege Defendants California Department of Forestry and Fire Protection ("Cal Fire") and Alex Nishimura ("Nishimura"), an investigator for the California Secretary of State, violated the Constitution and state and federal law in investigating allegations of voter fraud. Second Amended Complaint ("SAC"), ECF No. 56. Cal Fire and Nishimura (collectively "Defendants") move to dismiss Plaintiffs' SAC. ECF No. 58. Plaintiffs oppose the motion. ECF No. 60.¹

¹ This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for April 4, 2017.

1 I. FACTS

2 The Court takes the facts alleged by Plaintiffs as true for
3 purposes of this motion.

4 Many members of the Hmong community in the County attempted
5 to register to vote before the June 2016 election. SAC ¶ 18.
6 County clerk Colleen Setzer forwarded copies of several voter
7 registration cards to the California Secretary of State Election
8 Fraud Division for investigation. SAC ¶ 19. Around May 2016,
9 Plaintiffs received letters from Nishimura indicating the
10 Secretary of State would begin conducting a voter fraud
11 investigation. SAC ¶ 24.

12 On June 1, 2016, Cal Fire officer Monte Whipple and other
13 individuals from Siskiyou County participated in voter fraud
14 investigations. SAC ¶ 27. Members of these investigation teams
15 told Plaintiffs "they could not use their property to register to
16 vote, and would be prosecuted if they attempted to vote." SAC
17 ¶ 31. The investigation team included "at least one officer of a
18 government agency carrying an assault rifle." Id.

19 On June 2, an investigation team visited Dang Xiong's
20 property. SAC ¶ 73. "As Mr. Xiong approached the vehicles, the
21 sheriff's officer and the person in the CAL-FIRE truck pulled out
22 two assault rifles." SAC ¶ 74. Xiong feared voting after his
23 interaction with the armed Cal Fire agent, but Xiong still voted on
24 June 7 using a provisional ballot. SAC ¶ 78.

25 Also on June 2, Nishimura visited Plaintiff Jesse Vang's
26 property and told Vang "he would go to jail if he voted on June
27 7, 2016, because he did not register properly online." SAC
28 ¶¶ 47-50. Vang did not vote in the June or November elections

1 because he feared arrest if he voted. SAC ¶ 54.

2 Plaintiffs do not make any other specific factual
3 allegations against Nishimura or Cal Fire in their SAC.

4 Plaintiffs bring nine claims in total. Six of these claims
5 are against Cal Fire and Nishimura: (1) unreasonable search and
6 seizure under § 1983, (2) violation of the Fourteenth Amendment
7 under § 1983, (3) negligence, (4) violation of California
8 Elections Code § 14027, (5) violation of § 2 of the Voting Rights
9 Act ("VRA"), and (6) negligent infliction of emotional distress
10 ("NIED"). SAC at 29-38. Plaintiffs bring a seventh claim
11 against only Cal Fire for negligent hiring and supervision. SAC
12 at 36.

14 II. OPINION

15 A. Claims Against Cal Fire

16 Cal Fire argues that other than the VRA claim, the Eleventh
17 Amendment bars "all of Plaintiff's claims against the state
18 agency CAL FIRE." Mot. at 4.

19 1. § 1983 Claims Against Cal Fire (First and Second 20 Causes of Action)

21 The Eleventh Amendment bars a citizen from bringing a suit
22 against the citizen's own state in federal court. Clark v.
23 California Dep't of Forestry & Fire Prot., 2016 WL 4411816, at *5
24 (N.D. Cal. Aug. 19, 2016). "This immunity also extends to state
25 agencies and departments," including Cal Fire. Id.

26 Some exceptions exist to state sovereign immunity, such as if
27 a state expressly waives its immunity and consents to suit in
28 federal court or if Congress overrides that immunity. Moreno v.

1 Thomas, 490 F. Supp. 2d 1055, 1059 (C.D. Cal. 2007). "The State of
2 California has not waived its Eleventh Amendment immunity with
3 respect to claims brought under § 1983 in federal court, and the
4 Supreme Court has held that § 1983 was not intended to abrogate a
5 State's Eleventh Amendment immunity." Id. (internal quotation
6 marks and citations omitted). But, the Eleventh Amendment "does
7 not preclude a suit against state officers for prospective relief
8 from an ongoing violation of federal law." Children's Hosp. &
9 Health Ctr. v. Belshe, 188 F.3d 1090, 1095 (9th Cir. 1999).

10 Plaintiffs argue their first two claims should proceed against
11 Cal Fire because they seek "prospective injunctive and declaratory
12 relief." Opp'n at 6. But the Eleventh Amendment exception for
13 pursuing injunctive relief applies only to "state officers," not to
14 state agencies. See Children's Hosp., 188 F. 3d. at 1095. The
15 Court therefore finds Cal Fire is immune from liability for
16 Plaintiffs' § 1983 claims, and thus dismisses Plaintiffs' first two
17 claims against Cal Fire with prejudice.

18 2. State Common Law Claims Against Cal Fire (Fifth,
19 Sixth, and Ninth Causes of Action)

20 Plaintiffs assert three California state common law claims
21 against Cal Fire: negligence, negligent hiring/supervision, and
22 NIED. SAC at 35-36, 40. As stated in this Court's previous
23 Order, "[i]t is well-settled that there is no common law tort
24 liability for public entities in California; instead, such
25 liability must be based on statute." Cardinal v. Buchnoff, 2010
26 WL 3609489, at *2 (S.D. Cal. Sept. 14, 2010). Plaintiffs' fifth,
27 sixth, and ninth claims are based on common law, not statute, and
28 thus are dismissed as brought against Cal Fire with prejudice.

1 3. California Elections Code § 14027 (Seventh Cause
2 of Action)

3 Plaintiffs allege Cal Fire “use[d] an ‘at-large election’ to
4 pass Measures T and U, in an intentional, unlawful and selective
5 way for the purpose of disenfranchising Plaintiffs” in violation
6 of California Elections Code § 14027. SAC ¶ 155. The Court
7 discussed § 14027 in its previous Order and stated that it
8 “appl[ies] to elections of *candidates*.” 1/13/17 Order at 12, ECF
9 No. 51. Plaintiffs have once again failed to “cite to any
10 authority to support their contention that [§ 14027] appl[ies] to
11 passage of measures or propositions.” See id. The Court
12 dismisses Plaintiffs’ seventh claim for violation of California
13 Election Code § 14027 as brought against Cal Fire and Nishimura
14 with prejudice.

15 4. Violation of the Voting Rights Act (Eighth Cause
16 of Action)

17 Plaintiffs allege Cal Fire violated 52 U.S.C. § 10303(f)(2)
18 by “impos[ing] voting qualifications and/or prerequisites to
19 voting and/or standards, practices, or procedures in a manner
20 resulting in a denial or abridgement of the right of Plaintiffs
21 . . . to vote on account of race or color.” SAC ¶ 158. Section
22 10303(f)(2) states that “[n]o voting qualification or
23 prerequisite to voting, or standard, practice, or procedure
24 shall be imposed or applied by any State or political
25 subdivision to deny or abridge the right of any citizen of the
26 United States to vote because he is a member of a language
27 minority group.” 52 U.S.C. § 10303(f)(2).

28 Cal Fire argues the presence of one of its officers during

1 an investigation into voter fraud "does not amount to an
2 imposition of a prerequisite, or 'standard, practice, or
3 procedure' in violation of the Voting Rights Act." Mot. at 15.
4 Plaintiffs respond that the "voter provisions, intimidation
5 tactics and restrictions which targeted Plaintiffs [and
6 interfered] with Plaintiffs['] right to vote, rose to a
7 'standard, practice, or procedure' from which a court must find
8 a violation of § 2 of the Voting Rights Act." Opp'n at 13.
9 Plaintiffs do not cite to any legal authority to support this
10 claim.

11 The only factual allegations against Cal Fire are that Cal
12 Fire officials assisted with a voter fraud investigation on two
13 days in June 2016 while carrying assault rifles. The Court
14 finds these allegations insufficient to allege Cal Fire's
15 conduct rose to the level of the imposition of a "standard,
16 practice, or procedure" with the intent to deny Plaintiffs the
17 right to vote. The Court dismisses the VRA claim as brought
18 against Cal Fire with prejudice.

19 The Court also dismisses the VRA claim as brought against
20 Nishimura with prejudice because Nishimura is not a "State or
21 political subdivision" to which the VRA applies.

22 B. Remaining Claims Against Nishimura

23 1. Search and Seizure § 1983 Claim (First Cause of
24 Action)

25 Nishimura argues that Plaintiffs have not stated a § 1983
26 unlawful search and seizure against him. Mot. at 8-9.
27 Plaintiffs respond that "Nishimura authored an investigatory
28 letter," asked one plaintiff for his name and identification,

1 and threatened the same plaintiff that he would go to jail if he
2 voted in the June 2016 election. Opp'n at 7.

3 But state officials do not violate the right against search
4 and seizure when they "ask questions of an individual [or] ask
5 to examine the individual's identification." United States v.
6 Gutierrez-Llamas, 24 F. App'x 787, 788 (9th Cir. 2001). As to
7 the allegations that Nishimura "authored an investigatory
8 letter" and told a plaintiff that he could go to jail,
9 Plaintiffs do not provide any legal authority stating these
10 actions constitute unlawful search and seizure. Plaintiffs make
11 other allegations against Nishimura in their opposition brief—
12 i.e. Nishimura engaged in some planning meetings with County
13 officials—but none of these allegations appear in Plaintiffs'
14 SAC.

15 There are no allegations that Nishimura personally searched
16 or seized any of Plaintiffs' persons or property. The Court
17 therefore dismisses Plaintiffs' first claim as brought against
18 Nishimura with prejudice.

19 2. Due Process Claim (Second Cause of Action)

20 Plaintiffs allege Nishimura was "deliberately indifferent
21 to the health and safety of Plaintiffs" or "acted with purpose
22 to cause harm" in violation of the Fourteenth Amendment. SAC
23 ¶ 130.

24 i. Deliberate Indifference

25 The Fourteenth Amendment's Due Process Clause "does not
26 confer any affirmative right to governmental aid and typically
27 does not impose a duty on the state to protect individuals from
28 third parties." A.D. v. California Highway Patrol, 712 F.3d

1 446, 453 (9th Cir. 2013) (internal quotation marks omitted).
2 There are two exceptions to this rule: (1) the "special
3 relationship" exception—when a custodial relationship exists
4 between the plaintiff and the State such that the State assumes
5 some responsibility for the plaintiff's safety and well-being;
6 and (2) the "state-created danger" exception—when the state
7 affirmatively places the plaintiff in danger by acting with
8 deliberate indifference to a known and obvious danger. Id.

9 Plaintiffs have not pled facts to support that either of
10 the two exceptions apply. Plaintiffs' "deliberate indifference"
11 claim against Nishimura fails, and the Court dismisses it with
12 prejudice.

13 ii. Purpose to Harm

14 A law enforcement officer violates the Fourteenth Amendment
15 when he acts with "a purpose to cause harm unrelated to the
16 legitimate object of arrest." Estate of Kosakoff ex rel.
17 Kosakoff v. City of San Diego, 460 F. App'x 652, 655 (9th Cir.
18 2011). Plaintiffs do not indicate in their SAC or in their
19 opposition how Nishimura acted with "purpose to cause harm"
20 toward Plaintiffs.

21 The Court dismisses the first and second claims as brought
22 against Nishimura with prejudice. Because Plaintiffs have not
23 stated § 1983 claims against Nishimura and because the Court
24 dismisses those claims with prejudice, the Court need not
25 address Nishimura's assertions of Eleventh Amendment immunity
26 and qualified immunity.

27 3. State Law Claims (Fifth and Ninth Claims)

28 In addition to the California Elections Code § 14027 claim—

1 which the Court dismissed above—Plaintiffs bring two other state
2 claims against Nishimura: negligence and NIED. SAC at 35, 40.

3 Nishimura argues California Government Code § 821.6 shields
4 him from liability from Plaintiffs' state law claims. Mot. at
5 11. Section 821.6 states that "[a] public employee is not
6 liable for injury caused by his instituting or prosecuting any
7 judicial or administrative proceeding within the scope of his
8 employment, even if he acts maliciously and without probable
9 cause." Cal. Gov't Code § 821.6.

10 California courts construe section 821.6 broadly. Gillan v.
11 City of San Marino, 147 Cal. App. 4th 1033, 1048 (2007). "Section
12 821.6 is not limited to conduct occurring during formal
13 proceedings. It also extends to actions taken in preparation for
14 formal proceedings. Because investigation is 'an essential step'
15 toward the institution of formal proceedings, it is also cloaked
16 with immunity." Clark v. Cty. of Tulare, 2010 WL 5437195, at *2
17 (E.D. Cal. Dec. 27, 2010) (quoting Javor v. Taggart, 98
18 Cal.App.4th 795, 808 (2002)) (internal punctuation omitted).

19 Plaintiffs argue Nishimura's "actions exceed the scope of
20 immunity protection" offered by § 821.6. Opp'n at 12.
21 Plaintiffs do not provide any legal authority to support their
22 contention that Nishimura's actions in investigating potential
23 voter fraud exceeded § 821.6 immunity. Nishimura argues
24 "Plaintiffs have only alleged that Nishimura sent letters
25 requesting Plaintiffs fill out a questionnaire and visited and
26 spoke with Plaintiffs in furtherance of his investigation . . .
27 These actions are well within the [§ 821.6] immunity." Mot. at
28 11.

1 The Court agrees with Nishimura. The factual allegations
2 against him arose in the context of his investigation of
3 potential voter fraud and § 821.6 therefore shields him from
4 liability for state law claims. The Court dismisses the fifth
5 and ninth causes of action as brought against Nishimura with
6 prejudice.

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II. ORDER

For the reasons set forth above, the Court GRANTS Defendants' motion to dismiss with prejudice. Nishimura and Cal Fire are dismissed as defendants in this case.

IT IS SO ORDERED.

Dated: May 3, 2017



JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE