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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 DEFENDANT
SISKIYOU COUNTY'S MOTION TO
DISMISS**

Defendant Siskiyou County ("the County") moves to dismiss Plaintiffs' Third Amended Complaint ("TAC"). Mot. to Dismiss, ECF No. 72. Plaintiffs oppose the motion. Opp'n, ECF No. 74.¹ For the reasons set forth below, the Court GRANTS the County's motion to dismiss.²

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¹ Plaintiffs filed two briefs in opposition to the County's motion to dismiss: ECF Nos. 73, 74. The two briefs appear to be the same, and Plaintiffs filed both on time. The Court considers ECF No. 74 the operative opposition brief.

² This motion was determined suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for August 29, 2017.

1 I. FACTS

2 Plaintiffs—several Hmong individuals who own property in the
3 County—allege that after the Hmong population increased, the
4 County “launched an unlawful and discriminatory campaign” against
5 Plaintiffs. TAC ¶ 5. The Board of Supervisors passed two
6 ordinances restricting medical marijuana growth. TAC ¶ 6. The
7 County allegedly disproportionately enforced these ordinances
8 against Asian American individuals. TAC ¶ 11.

9 In early 2016, Plaintiffs “began registering to vote in
10 Siskiyou County, using the County-assigned parcel numbers of
11 their legally owned property as their residential address.” TAC
12 ¶ 18. The County Clerk flagged these voter registration forms
13 for possible voter fraud. TAC ¶ 19.

14 On two days in June 2016, County officers visited
15 Plaintiffs’ properties, and allegedly some officers carried
16 assault rifles. TAC ¶ 32. These visits scared some plaintiffs
17 out of voting in the June or November 2016 elections. TAC ¶¶ 54,
18 70, 82, 88, 108.

19 The restrictions on cultivating medical marijuana passed as
20 Measures T and U in the June election. TAC ¶ 36. Since then,
21 Plaintiffs allege the County has “deliberately policed
22 subdivisions where high concentrations of Asian American property
23 owners are known to reside.” TAC ¶ 36. Additionally, “notices
24 of nuisance violations have been issued overwhelmingly to Asian
25 property owners as opposed to white property owners, which
26 comprise the majority racial population in Siskiyou County.” TAC
27 ¶ 36.

28 In September 2016, the County “executed a series of search

1 warrants" on some of Plaintiffs' properties. SAC ¶ 42. The
2 searching officers "handcuffed and held at gunpoint" individuals
3 present during the searches and "ransacked" the properties of
4 those not present. SAC ¶ 43.

5 Plaintiffs brought two claims in their TAC: (1) racial
6 discrimination in violation of the Equal Protection Clause of the
7 Fourteenth Amendment and (2) retaliation in violation of the
8 First Amendment. TAC at 33, 38. The Court has already dismissed
9 Plaintiffs' second claim because "Plaintiffs did not raise a
10 First Amendment claim in any of their previous complaints, and
11 the Court gave Plaintiffs leave to amend only their second cause
12 of action for alleged violation of the Fourteenth Amendment."
13 Minute Order, ECF No. 71.

14 15 II. OPINION

16 A. Legal Standard

17 Government actors violate the Fourteenth Amendment's equal
18 protection clause when they "enforce a valid statute in a
19 discriminatory fashion." United States v. Steele, 461 F.2d
20 1148, 1151 (9th Cir. 1972). But, mere selectivity in enforcing
21 laws does not violate the Constitution. Id. To establish an
22 equal protection claim based on selective enforcement a
23 plaintiff must show the enforcement "(1) has a discriminatory
24 effect; and (2) is motivated by a discriminatory purpose."
25 Cuviello v. City & Cty. of S.F., 940 F. Supp. 2d 1071, 1097
26 (N.D. Cal. 2013).

27 In addition to showing discriminatory purpose and effect,
28 plaintiffs alleging selective enforcement against a municipality

1 must demonstrate the misconduct comes from a "policy, plan, or a
2 pervasive pattern." Rosenbaum v. City & Cty. of S.F., 484 F.3d
3 1142, 1153 (9th Cir. 2007).

4 B. Analysis

5 The County argues the Court should dismiss Plaintiffs'
6 equal protection claim because they have not alleged intentional
7 discrimination or that the County had a policy or custom of such
8 discrimination. Mot. at 11, 14. The Court agrees with the
9 County on both issues.

10 1. Intentional Discrimination

11 Plaintiffs must allege facts to support discriminatory
12 effect and intent to proceed on a selective enforcement claim.
13 Steele, 461 F.2d at 1151.

14 a. Discriminatory Effect

15 To show discriminatory effect, a plaintiff must allege
16 facts showing "others similarly situated generally have not been
17 prosecuted for conduct similar to that for which he was
18 prosecuted." United States v. Scott, 521 F.2d 1188, 1195 (9th
19 Cir. 1975). The plaintiff must "identify a similarly situated
20 class" against which the court can compare the plaintiff's
21 class. Morrow v. City of San Diego, No. 11-CV-01497-BAS-KSC,
22 2017 WL 3131547, at *3 (S.D. Cal. Jul. 21, 2017).

23 Plaintiffs allege "[a]t least 33 of the 39 total nuisance
24 violation notices (or approximately 85%) issued under the new
25 2016 Ordinance[s] were issued to Asian American property
26 owners." TAC ¶ 39. Plaintiffs also contend the "[n]on-Asian
27 American residents who received nuisance violation notices and
28 requested abatement hearings were provided hearings and were not

1 raided by the sheriff's department." TAC ¶ 41. Plaintiffs
2 further state two criminal cases were filed following the
3 property searches before the ordinances were passed, and "[b]oth
4 of the criminal cases were filed against Asian Americans [and]
5 [n]ot one single case was filed against non-Asian residents."
6 TAC ¶ 43.

7 The County argues such allegations cannot withstand a
8 motion to dismiss because "Plaintiffs do not allege that there
9 were large populations of other ethnicities that were illegally
10 growing marijuana in Siskiyou County, but that were not affected
11 by issuance of nuisance violations." Mot. at 5. The County
12 contends: "The conduct alleged in Plaintiffs' pleading occurred
13 not because Plaintiffs were Asian-Americans, but because they
14 were illegally growing large quantities of marijuana on their
15 properties." Reply at 5. Additionally, the above allegations
16 actually show the County enforced the ordinance against non-
17 Asian individuals by issuing nuisance violations to six non-
18 Asian individuals. Furthermore, even if Plaintiffs have
19 identified people against whom the County did not enforce the
20 ordinance, Plaintiffs fail to indicate how or whether these
21 other individuals were "similarly situated" to Plaintiffs.

22 Plaintiffs have not sufficiently alleged facts
23 demonstrating that the County failed to enforce the marijuana
24 ordinances against a similarly situated class of people, and
25 therefore have not shown discriminatory effect. See Wilkins v.
26 City of Tempe, No. CV09-00752-PHX-MHM, 2010 WL 94116, at *5 (D.
27 Ariz. Jan. 6, 2010)("Plaintiff's pleadings do not allege a
28 discriminatory effect, as he has not alleged facts demonstrating

1 that Defendants failed to enforce similar laws against similarly
2 situated individuals.").

3 b. Discriminatory Intent

4 To show discriminatory intent or purpose, plaintiffs must
5 allege facts showing the defendant enforced a law based "on an
6 impermissible ground, such as race, religion or control over the
7 exercise of their expression." United States v. Hooten, 662
8 F.2d 628, 634 (9th Cir. 1981).

9 The County argues Plaintiffs' allegations do not show
10 intentional discrimination, but instead "simply establish the
11 enforcement of a lawfully enacted voter-approved ordinance."
12 Mot. at 14. Additionally, the County asserts that "Plaintiffs
13 fail to specifically allege any fact to support their claim that
14 any action was taken against any Plaintiff *because* they were
15 Asian." Reply at 5 (emphasis in original).

16 Plaintiffs respond that their TAC alleges:

17 Defendant intentionally enacted SCC 10-14.030,
18 intentionally and exclusively enforced the local
19 ordinance against a protected racial group (Asian
20 Americans) in the county, intentionally launched a
21 voter fraud investigation against Plaintiffs (because
22 they are Asian American) because they registered to
vote, and intentionally raided the homes of Plaintiffs
prior to the general election in an effort to further
intimidate, harass and otherwise prevent Plaintiffs
from exercising their right to vote.

23 Opp'n at 10.

24 But Plaintiffs' argument relies on conclusory assertions of
25 intent without facts showing actual subjective intent.
26 Plaintiffs do not cite to any cases where merely alleging
27 discriminatory intent without supportive facts suffices to
28 establish an equal protection claim's "intent" requirement.

1 Plaintiffs have not shown discriminatory effect or intent, and
2 their equal protection claim therefore fails.

3 2. County Policy or Custom

4 The County argues Plaintiffs fail to allege the County had
5 a policy or practice that violated the equal protection clause.
6 Mot. at 11. The County asserts that even though Plaintiffs have
7 had multiple opportunities to amend their complaint "it is still
8 not clear which municipal policy was used to deprive them of any
9 federal right based on race." Mot. at 2.

10 Plaintiffs allege the County has had a practice or custom
11 of targeting Asian Americans "since 2015 after the County Board
12 of Supervisors enacted a local ordinance that was intended to
13 target Asian landowners in rural areas of the county." TAC
14 ¶ 134. Plaintiffs argue the facts in the complaint "show a
15 pattern and practice of Defendant targeting Asian Americans
16 disproportionately." Opp'n. at 8. Plaintiffs contend their
17 allegations "are not mere suspicions of Defendants' activity—
18 they actually occurred, and Defendant does not dispute [that]."
19 Id. at 10.

20 The County responds that it does not dispute the
21 allegations because the Court must take the Plaintiffs' alleged
22 facts as true in deciding this motion. Reply at 2. Even if all
23 these facts are true, the County argues, it still does not show
24 the County had a policy or custom of intentional discrimination
25 against Asian-Americans. Id. The County cites to a Ninth
26 Circuit case which articulated the requirement for a Monell
27 claim as follows:

28 Absent a formal governmental policy, [a plaintiff]

1 must show a "longstanding practice or custom which
2 constitutes the standard operating procedure of the
3 local government entity." Gillette, 979 F.2d at 1346-
4 47. The custom must be so "persistent and widespread"
5 that it constitutes a "permanent and well settled city
6 policy." Monell v. Dept. of Soc. Serv. of N.Y., 436
7 U.S. 658, 691 (1978). Liability for improper custom
8 may not be predicated on isolated or sporadic
9 incidents; it must be founded upon practices of
10 sufficient duration, frequency and consistency that
11 the conduct has become a traditional method of
12 carrying out policy.

13 Trevino v. Gates, 99 F.3d 911, 918 (9th Cir. 1996). The County
14 argues "the subject ordinances had not been in place for a
15 sufficient duration" to allow the development a custom of
16 discriminatory enforcement. Reply at 3.

17 Plaintiffs simply do not identify any "longstanding
18 practice or custom" of the County discriminatorily enforcing
19 medical marijuana ordinances and related laws against Asian
20 Americans. The Court finds Plaintiffs have failed to allege an
21 unconstitutional policy or custom sufficient to proceed on a
22 § 1983 claim against the County.

23 3. Other Arguments Warranting Dismissal

24 The County also makes other meritorious arguments in favor
25 of dismissing Plaintiffs' TAC. First, the County argues
26 Plaintiffs have not provided sufficient notice of the claim the
27 County must defend against. Mot. at 2. The County points out
28 that "[a]lthough the sole cause of action is titled 'racial
discrimination in violation of the equal protection clause of
the fourteenth amendment'" the terms "equal privileges and
immunities under the law" and "due process" also appear under
this claim. Id. The Court agrees with the County, and finds
that like Plaintiffs' previous complaints, the TAC fails to

1 clarify their precise theory of liability. Plaintiffs cannot
2 simply throw legal terms against the wall to see what sticks.

3 The County also argues this case is not a class action, and
4 Plaintiffs must address how the County's alleged
5 unconstitutional policy injured each individual plaintiff
6 specifically. Id. at 6. The TAC lays out facts specific to
7 each individual, but does not explain how these facts show the
8 County denied each individual equal protection under the law.
9 Plaintiffs take the same approach in their opposition brief.
10 They spend several pages listing facts alleged in the TAC, but
11 they do not apply the facts to the law, distinguish the cases
12 cited by the County, or analogize relevant cases to their facts.

13 For all the reasons discussed above, the Court dismisses
14 Plaintiffs' equal protection claim with prejudice. Plaintiffs
15 have already amended their complaint multiple times, and the
16 Court finds giving Plaintiffs another chance to amend futile.
17 See Centeno v. Wilson, No. 1:08-CV-1435-FJM, 2010 WL 1980157, at
18 *1 (E.D. Cal. May 17, 2010) ("A motion for leave to amend may be
19 denied if it appears to be futile or legally insufficient.")

20 C. Request for Sanctions

21 The County argues the Court should sanction Plaintiffs for
22 violating "court orders and court rules on multiple occasions."
23 Mot. at 1 n.1. Whether to impose sanctions falls within the
24 trial court's discretion. Ill. Tool Works, Inc. v. Phoenix Am.
25 Holdings, Inc., No. CV 08-5721CASMNX, 2009 WL 290249, at *1
26 (C.D. Cal. Feb. 3, 2009) (citing Fed. R. Civ. P. 11(c)).
27 Dismissing an action is a "severe sanction." Udom v. Fonseca,
28 846 F.2d 1236, 1238 (9th Cir. 1988). The Court does not dismiss

1 Plaintiffs' TAC to sanction Plaintiffs. But given this
2 dismissal with prejudice, the Court finds no need to impose
3 monetary sanctions on Plaintiffs' counsel. See Martinez v.
4 Lunes, No. 1:04CV06469-LJO-DLB, 2009 WL 1271864, at *2 (E.D.
5 Cal. Apr. 30, 2009) ("Given the severe nature of the sanction of
6 dismissal, the Court declines to recommend imposition of
7 monetary sanctions.").

8 D. Attorneys' Fees

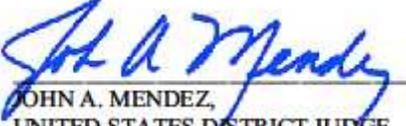
9 The County seeks attorneys' fees in its motion. Mot. at
10 15. The County's request does not provide the information
11 required by Local Rule 293(b). The Court denies the County's
12 request for attorneys' fees.

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14 III. ORDER

15 For the reasons set forth above, the Court GRANTS the
16 County's motion to dismiss with prejudice. The Court has
17 dismissed with prejudice all Plaintiffs' claims against all
18 defendants and therefore directs the Clerk of Court to close the
19 case.

20 IT IS SO ORDERED.

21 Dated: September 1, 2017

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23 
24 JOHN A. MENDEZ,
25 UNITED STATES DISTRICT JUDGE
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