UNITED STATES DISTRICT COURT
FOR THE 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, v. RENSSELAER COUNTY BOARD OF ELECTIONS; JASON SCHOFIELD in his official capacity as Commissioner of the 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.	Case No. 1:19-cv-00920-DNH-CFH

BRIEF OF CAMPAIGN LEGAL CENTER AS *AMICUS CURIAE* IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT

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STATEMENT OF INTEREST

Amicus curiae Campaign Legal Center ("CLC") is a nonpartisan, nonprofit organization that has been working for over fifteen years to advance democracy through law. *Amicus* CLC has litigated many voting rights cases in federal courts, including the recent United States Supreme Court case *Rucho v. Common Cause*, No. 18-422 (2019); as counsel for Plaintiffs in *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (challenging Texas's photo ID law); and as counsel for Plaintiffs in *LULAC v. Reagan*, No. 2:17-cv-04102 (D. Ariz. 2017) (challenging Arizona's dual registration system). CLC has filed *amicus curiae* briefs in every major voting rights case before the Supreme Court in recent years, including *Cooper v. Harris*, 137 S.Ct. 1455 (2017), *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016), and *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). CLC also filed *amicus curiae* briefs in two recent District Court cases involving claims of voter intimidation brought under 42 U.S.C. § 1985(3) and Section 11(b) of the Voting Rights Act of 1965: *Cockrum v. Donald J. Trump for President*, No. 3:18-cv-00484-HEH (E.D. Va. 2018) and *LULAC v. Public Interest Legal Foundation*, No. 1:18-cv-00423-LO-IDD (E.D. Va. 2018). In sum, *amicus* CLC has a demonstrated interest in the protection of voting rights and the health of our representative democracy, and the interpretation and application of voter intimidation laws, including Section 11(b) of the Voting Rights Act of 1965, 52 U.S.C. § 10307(b).

SUMMARY OF ARGUMENT

Amicus CLC submits this brief to clarify several issues related to interpreting and applying Section 11(b) of the Voting Rights Act of 1965, 52 U.S.C. § 10307(b) (hereinafter, "Section 11(b).") CLC also seeks to explain why, based on the plain meaning of the terms "intimidate" and "intimidation" in Section 11(b), as well as relevant case law and legislative history, Defendants'

alleged conduct (as pled) fits squarely within the scope of that provision. Thus, Plaintiffs' Complaint states a colorable claim under Section 11(b).

Amicus CLC notes that, in the Memorandum in Support of Defendants' Motion to Dismiss, ("Defs. MTD"), Defendants erroneously state that claims under Section 11(b) require a showing of specific intent, ECF No. 34-3 at 17. A proper reading of the text and legislative history of Section 11(b) show that claims brought under that provision do not require such a showing of specific intent and are not limited in the manner that Defendants contend.

Defendants also assert an unreasonably narrow definition of "intimidation" that does not comport with the text and history of Section 11(b). The question of the meaning of the terms "intimidate" and "intimidation" is plainly before this Court; *amicus* CLC examines the ordinary meaning of these terms, their interpretation in federal and state civil rights cases and their interpretation by the U.S. Department of Justice, and assesses the application of these terms to Defendants' alleged conduct. *Amicus* CLC also alerts the Court to historical examples of voter intimidation that occurred during the era in which Congress enacted Section 11(b) and show that Defendants' alleged conduct falls squarely within the category of modern forms of actions that Section 11(b) sought to prohibit.

In sum, this brief seeks to explain the correct resolution of several significant interpretive issues relating to Section 11(b) and suggests that the Plaintiffs have pled sufficient facts, such that their claims should survive Defendants' Motion to Dismiss brought under Rule 12(b)(6).

ARGUMENT

I. THE PLAIN TEXT OF SECTION 11(B) AND A PROPER UNDERSTANDING OF ITS CONSTITUTIONAL BASIS DEMONSTRATE THAT IT DOES NOT REQUIRE A SHOWING OF SPECIFIC INTENT

Defendants assert that Section 11(b) requires a showing of specific intent to intimidate. Defs. MTD at 17. This proposition is demonstrably incorrect. The plain text of the provision, an understanding of the constitutional basis for the provision, applicable Supreme Court precedent, and the underlying congressional purpose make clear that Section 11(b) applies to conduct that has the effect of intimidating, threatening, or coercing eligible voters.

"As always, we begin with the text of the statute." *Limtiaco v. Camacho*, 549 U.S. 483, 488 (2007) (Thomas, J.). Section 11(b) provides:

> No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce, any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote . . . .

52 U.S.C. § 10307(b). On its face, the text of Section 11(b) contains no reference to any specific intent requirement, nor does it penalize conduct under any other explicit intent standard, such as conduct undertaken "knowingly" or "recklessly." Defendants thus face a high bar for arguing for imposing an unwritten specific intent standard where none exists based on the clear instructions of Congress. But our inquiry does not stop with the plain text; this brief lays out the constitutional authority underpinning Section 11(b) and explains how that authority, along with the congressional record and judicial precedent, support Plaintiffs' position that Section 11(b) can be invoked without a showing of specific intent.

A. The Constitutional Authority for Section 11(b) is the Elections Clause

While most of the Voting Rights Act ("VRA") was passed pursuant to the Fifteenth Amendment, which prohibits racial restrictions on voting by government actors, the House Report for Section 11(b) specifically invokes "article I, section 4, and the implied power of Congress to

protect Federal elections against corrupt influences[.]" H.R. Rep. No. 89-439, at 30 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2462.[1]

Article I, Section 4 of the U.S. Constitution ("the Elections Clause") grants Congress broad authority to regulate the time, place, and manner of elections. It state: "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators." U.S. Const. art. I, § 4. Therefore, even on the face of the Elections Clause alone, it is clear that any exercise of power thereunder may regulate the time, place, and manner of elections. Regulating voter intimidation falls squarely within regulating the "manner" of an election.

Supreme Court precedent confirms that the Elections Clause empowers Congress to combat voter intimidation by regulating conduct related to the "manner" of an election. More than 130 years ago, the Supreme Court explicitly relied on the Elections Clause to conclude that the power to regulate elections includes the power to enforce voter intimidation laws. *See ex parte Yarbrough*, 110 U.S. 651, 662 (1884) ("[W]hen, in the pursuance of a new demand for action, [Congress] . . . finds it necessary to make additional laws for the free, the pure, and the safe exercise of this right of voting, they stand upon the same ground, and are to be upheld for the same reasons.").

Fifty years later, the Supreme Court again recognized that Congress' power to regulate elections under the Elections Clause encompasses the "protection of voters." *See Smiley v. Holm*, 285 U.S. 355, 366 (1932). The Court stated:

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[1] *See also* "The [VRA] is designed primarily to enforce the 15th [A]mendment . . . and is also designed to enforce the 14th [A]mendment and article I, section 4." H.R. Rep. No. 89-439, at 6 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2462.

> It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, *protection of voters*, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.

Id. (emphasis added).

As recently as 2013, the Supreme Court stated that the Elections Clause's "substantive scope is broad." *Arizona v. Inter-Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8–9 (2013). "'Time, Places, and Manner,' we have written, are 'comprehensive words,' which 'embrace authority to provide a complete code for congressional elections.'" *Id*. (citing *Smiley*, 285 U.S. at 366). Even the narrowest interpretation of the Elections Clause would allow Congress to regulate activities related to the casting of ballots. *See id.* at 35 (Thomas, J., dissenting) (arguing that it is "difficult to maintain that the [Elections] Clause gives Congress power beyond regulating the casting of ballots and related activities"). Any reasonable reading of this authority must include preventing voter intimidation.

B. Section 11(b) Requires No Showing of Specific Intent

Section 11(b) was drafted specifically to prohibit acts that have the effect of intimidating voters, regardless of whether a defendant subjectively intended this result. Nothing in the text or legislative history of Section 11(b) indicates that claimants must demonstrate that a defendant intended that his actions intimidate voters. To the contrary, both the plain language and legislative history of the statute indicate that no showing of subjective intent is necessary to sustain a Section 11(b) claim.

When analyzing the text of Section 11(b), it is noteworthy that an antecedent to Section 11(b), Section 131(b) of the 1957 Civil Rights Act, 52 U.S.C. § 10101(b), requires specific intent. Section 131(b) states:

> No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person *for the purpose of* interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate . . . .

52 U.S.C. § 10101(b) (emphasis added). While similar to Section 11(b) in certain ways, this language differs in several critical respects. Most importantly, unlike Section 131(b), Section 11(b) does not contain the phrase "for the purpose of," emphasized above. Instead, Section 11(b) reads: "[n]o person, whether acting under color of law or otherwise, shall intimidate threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote . . . ." 52 U.S.C. § 10307(b).

Congress's omission of the phrase "for the purpose of" from Section 11(b) was purposeful. Before the passage of the VRA, the Department of Justice's prosecutions of voter intimidation were routinely frustrated by the fact that Section 131(b) required claimants to prove something about the state of mind of the defendants. *See* Gilda R. Daniels, *Voter Deception*, 43 Ind. L. Rev. 343, 360–61 (2010). In 1965, testifying before the House Judiciary Committee in support of the passage of 11(b), Attorney General Nicholas Katzenbach, one of the drafters of the VRA, lamented this feature of existing voter intimidation laws, such as Section 131(b). *See* Voting Rights Act of 1965: Hearing Before the H. Judiciary Comm., 111th Cong. (2010), https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/03-18-1965.pdf. He explained "perhaps the most serious inadequacy results from the practice of some district courts to require the Government to carry a very onerous burden of proof of 'purpose.' Since many types of intimidation, particularly economic intimidation, involve subtle forms of pressure, this treatment

of the purpose requirement has rendered the statute largely ineffective." *Id*. at 12. In contrast, Katzenbach believed Section 11(b) was a "substantial improvement" in part because "no subjective 'purpose' need be shown . . . in order to prove intimidation . . . . This represents a deliberate and, in [Katzenbach's] judgment, constructive departure from the language and construction of [Section § 131(b)]." *Id*. Katzenbach explained that, instead of relying on a showing of intent, under Section 11(b), "defendants would be deemed to intend the natural consequences of their acts." *Id*.

The VRA's House Report shows that Congress adopted Katzenbach's reasoning: "[t]he prohibited acts of intimidation need not be racially motivated; indeed, unlike [Section 131(b)] (which requires proof of a 'purpose' to interfere with the right to vote) no subjective purpose or intent need be shown." Ben Cady & Tom Glazer, *Voters Strike Back: Litigating Against Modern Voter Intimidation*, 39 N.Y.U. Rev. L. & Soc. Change 173, 190 (2015). In other words, Congress carefully worded Section 11(b) to ensure that plaintiffs would not have to prove defendants' subjective intent. *See id.* at 205 ("The most logical reading of [S]ection 11(b), in light of its legislative history and its textual changes from [S]ection 131(b), is that it reaches any objectively intimidating conduct without regard to the defendant's intent.").

Defendants' Motion cites several cases to support their claim that Section 11(b) requires proof of specific intent, all of which are inapposite for various reasons.

Defendants cite *Olagues v. Russoniello*, 770 F.3d 791, 802 (9th Cir. 1985), for the proposition that a showing of subjective intent is "an essential element" of a claim under Section 11(b). *Olagues*, which was reheard *en banc*, 797 F.2d 1511 (9th Cir. 1986), and then vacated by the Supreme Court on mootness grounds, 484 U.S. 806 (1987), has no precedential value. *See County of Los Angeles v. Davis*, 440 U.S. 625, 634 n. 6 (1979) ("Of necessity, our decision

'vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect . . . .'"). Moreover, the Ninth Circuit's *Olagues* decision relies on the Fifth Circuit's interpretation of the intent requirement in Section 131(b) in *United States v. McLeod*, 385 F.2d 734 (5th Cir. 1967), which does not address Section 11(b) at all. By relying on *McLeod*, the *Olagues* court erroneously conflated Sections 11(b) and 131(b), mistakenly asserting in a cursory manner that both provisions require a showing of subjective intent to intimidate, with no acknowledgement of the material differences between plain language of both statutes. 797 F.2d 1511, 1522 (9th Cir. 1986).[2]

Similarly, in *Dekom v. Nassau County*, the Second Circuit erroneously quoted the intent language of Section 131(b) analyzing a claim brought under Section 11(b). 595 Fed. Appx. 12, 14-15 (2d Cir. 2014). As described above, there are material differences between the language of Sections 11(b) and 131(b), and the court in *Dekom* failed to distinguish the two statutes.

Defendants' reliance on *United States v. Leflore County*, 371 F.2d 368 (5th Cir. 1967) is also misplaced, as that case's discussion of subjective intent also occurred in the context of a Section 131(b) claim. *Id.* at 371. Indeed, the court in *Leflore County* noted that it "express[ed] [t]here no view as to whether the burden placed upon the Government would differ, and if so in what respects, under § 11 of the Voting Rights Act of 1965[.]" *Id*. at 371 n. 4.

Finally, Defendants' citation to *Willingham v. County of Albany*, 593 F. Supp. 2d 446, 463 (N.D.N.Y. 2006), in this context is particularly confusing. In *Willingham*, this Court rejected

[2] Defendants also cite to *Pincham v. Illinois Judicial Inquiry Bd.*, 681 F. Supp. 1309, 1317 (N.D. Ill. 1988), *aff'd*, 872 F.2d 1341 (7th Cir. 1989), which relies on the *McLeod* and *Olagues* courts' incorrect interpretation of 11(b). The interpretation of Section 11(b) in *Olagues* is unfortunate, but this Court is not bound by it or its progeny and need not repeat its errors. Instead, the Court should look to the plain language of the text and the congressional intent behind Section 11(b) to correctly interpret the provision to not require proof of specific intent.

Defendants' position that Section 11(b) requires a showing of specific intent, noting that, in Section 11(b) claims, "unlike [Section 131(b)] (which requires proof of a 'purpose' to interfere with the right to vote), no subjective purpose or intent need be shown." *Id*. at 462.

II. DEFENDANTS' ALLEGED CONDUCT RISES TO THE LEVEL OF "INTIMIDATION" AS THAT TERM IS COMMONLY UNDERSTOOD, AND AS THE TERM WAS USED BY CONGRESS WHEN ENACTING SECTION 11(b).

In their Complaint, Plaintiffs allege that "Rensselaer County officials have pledged to turn over voter registration data of United States citizens to U.S. Immigration and Customs Enforcement (ICE) on an immediate an ongoing basis, in flagrant disregard of both federal and state laws prohibiting such disclosures." Compl., ECF No. 1, at ¶ 1; *see also id.* at ¶¶ 53–56. These alleged disclosures include the names and addresses of all individuals who register to vote at the Department of Motor Vehicles in Rensselaer County. *Id*. at ¶ 2. Defendants respond that they have taken no action that constitutes an "act of intimidation" cognizable under the VRA, and therefore Plaintiffs' Complaint fails to allege a violation of the VRA. Defs. Mot. to Dis. at 17.

The Defendants' alleged conduct is the type of serious intimidation that Section 11(b) proscribes. To understand that the alleged conduct constitutes intimidation, one must discern the meaning of the term "intimidation" as used in the statute. In statutory interpretation, words are given "their 'ordinary or natural' meaning." *Leocal v. Ashcroft*, 543 U.S. 1, 8-9 (2004) (quoting *Smith v. United States*, 508 U.S. 223, 228 (1993)). Under that standard, the facts as alleged in the Plaintiffs' Complaint fall squarely within the conduct prohibited by Section 11(b).

A. Defendants' Alleged Conduct Falls Within the Commonly Understood Meaning of the Term "Intimidation" Under Section 11(b).

With respect to the natural and ordinary interpretation of "intimidation" in Section 11(b), this Court may draw guidance from at least four sources: at the most basic level, dictionary

definitions of the term in question provide helpful guidance; second, the Court can look to the interpretation of the word "intimidation" in the context of the other federal civil rights cases; third, it can conduct the same inquiry with respect to *state* civil rights cases; finally, this Court can look to the interpretation of the term "intimidation" by the Department of Justice. Each of these sources suggests that the alleged conduct constitutes intimidation for the purposes of Section 11(b).

Beginning with the most basic understanding of the term "intimidate," in the mid-1960's, Webster's Dictionary defined the word "intimidate" as "to frighten; to make timid or fearful; to inspire or affect with fear; to deter, as by threats." *See U.S. v. Harvey*, 250 F.Supp. 219, 236 (E.D. La. 1966) (quoting Webster's Dictionary); *see also* Cady & Glazer, *supra*, at 196 (citing multiple general use and legal dictionaries and determining that "to 'intimidate' is to make another person fearful, especially in order to influence his or her conduct"). This definition does not mention methods—whether physical, psychological, or otherwise; it merely notes the state of mind that the perpetrator implants in the victim(s).

Moving to federal civil rights cases, federal courts have interpreted the term "intimidation" in the context of Section 11(b) and have made clear that "intimidation" is not limited to overt displays of physical force and violence, but extends to a range of conduct that would reasonably place an individual in fear. *See, e.g., LULAC v. PILF*, 2018 WL 3848404, at *1-4 (E.D. Va. Aug. 13, 2018) (finding that the publication of a list of individuals' names and personal information in "a report condemning felonious voter registration in a clear effort to subject the named individuals to public opprobrium" was sufficient to show a finding of intimidation); *Damon v. Hukowitz*, 964 F. Supp. 2d 120, 149 (D. Mass. 2013) ("Intimidation means putting a person in fear for the purpose of compelling or deterring his or conduct.").

Statutes other than Section 11(b) also use the term "intimidation", and the definition of that term in cases dealing with those statutes is instructive insofar as they provide guidance on the types of conduct that can be considered intimidating. In interpreting the term "intimidate" in the context of Section 131(b) of the Civil Rights Act, 52 U.S.C. § 10101(b), federal courts have found that "intimidation" goes far beyond simple threats of physical violence. *See U.S. v. Beaty*, 288 F.2d 653, 656 (6th Cir. 1961) ("[T]hreats, intimidation, or coercion may take on [many] forms."); *U.S. v. Bruce*, 353 F.2d 474, 476-77 (5th Cir. 1965) (finding that declining to renew a teacher's contract "as a means of coercing or intimidating the teacher as to her right to vote" was sufficient to show intimidation); *People v. Horelick*, 424 F.2d 697, 703 (2d Cir. 1970) (Noting that 18 U.S.C. § 245(b) is "[u]nlike the voting rights acts" (including Section 131(b)), in that Section 245(b) requires "force or threat of force."); *see also* Cady & Glazer, *supra*, at 193–202 (summarizing several cases where courts interpreted the term "intimidate" or "intimidation" with respect to civil rights).

Another similar use of the term can be found in 42 U.S.C. § 1985(w), which prohibits conspiracies to intimidate parties or witnesses in connection with legal proceedings. In interpreting that section, a district court held that emotional stress, not merely physical injury, could give rise to a claim for witness intimidation under that provision. *Silverman v. Newspaper & Mail Deliverers' Union of N.Y. and Vicinity*, No. 97-cv-0040 (RLE), 1999 WL 893398, at *4 (S.D.N.Y. Oct. 18, 1999). The court explained that though the Civil Rights Act of 1871 was "adopted to address physical intimidation . . . which often resulted from Klan violence," this "was not the only goal of the statute." *Id*. Further, the court found that the statute was "also designed to address improper interference with the judicial process," and therefore the plaintiff could bring a claim alleging that there was interference "with the witness' ability to give 'free, full and truthful testimony' in federal court." *Id*.

Similarly, 42 U.S.C. § 3617 makes it unlawful to "intimidate, threaten, or interfere with" a person for enjoying or exercising fair housing rights. In cases involving this statute, courts have held that plaintiffs stated claims for intimidation even where the defendants' conduct did not include physical violence. *See, e.g., People Helpers, Inc. v. City of Richmond*, 789 F. Supp. 725, 733 (E.D. Va. 1992) (excessive investigations by the city of a rental property); *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*, 338 F.3d 327, 330 (7th Cir. 2004).

Cases involving state statutes prohibiting electoral intimidation can also be useful in this context—particularly those with fact patterns similar to this case. In *United States v. Nguyen*, the defendant was alleged to have been involved with a campaign to mail 14,000 letters to newly registered voters with Hispanic surnames; the letters warned the recipients that if they voted in the election, their personal information would be collected by the government and made available to organizations that were "against immigration." 673 F.3d 1259, 1261 (9th Cir. 2012). That court found that, for purposes of California's state voter intimidation statute, the word "intimidation" is not "limited to displays or applications of force, but can be achieved through manipulation and suggestion," that is, intimidation may be "subtle, rather than forcefully coercive." *Id*. at 1265.

The U.S. Department of Justice has defined intimidation as conduct designed to "deter or influence voting activity through threats to deprive voters of something they already have, such as jobs, government benefits, or in extreme cases, their personal safety." Craig C. Donsanto & Nancy L. Simmons, Public Integrity Section, U.S. Dep't of Justice, *Federal Prosecution of Election Offenses* 54 (7th ed. 2007), https:/www.justice.gov/sites/default/files/criminal/legacy/2013/09/30/electbook-0507.pdf.

The descriptions and examples of intimidation outlined in this section demonstrate that there is a variety of ways to intimidate individuals with respect to their civil rights. Regarding the

release of sensitive personal information and its ability to constitute conduct that intimidates or injures, we can gain additional insight into the effect of the release of such information from various national sources. The release of personally identifiable information is considered to put individuals at harm of "identity theft, embarrassment, or blackmail," according to the *Guide to Protecting the Confidentiality of Personally Identifiable Information (PII)*, Erika McCallister *et al.*, National Institute of Standards and Technology ES-1 (2010), http://nvlpubs.nist.gov/nistpubs/Legacy/SP/nistspecialpublication800-122.pdf. The publication or release of individuals' identities, especially in connection with alleged illegal activity (such as the implication that they are illegally registering to vote as non-citizens), has already been found to constitute intimidation for purposes of claims under Section 11(b). *See LULAC v. PILF*, 2018 WL 3848404, at *1-4 (E.D. Va. Aug. 13, 2018).

Indeed, the State of New York has already indicated that information provided to the Department of Motor Vehicles ("DMV") is highly sensitive, and should not be disclosed to immigration enforcement agencies. On July 17, 2019, Governor Andrew Cuomo signed the "Driver's License Access and Privacy Act" (also called the "Green Light Act"), Ch. 37, Laws of 2019, into law. The Green Light Act, which comes into effect on December 14, 2019, prohibits disclosure by the DMV of "[a]ny portion of any record retained by the commissioner in relation to a non-commercial driver's license or learner's permit application or renewal application that contains the photo image or [other personally identifying information] of the holder of, or applicant for, such license or permit" or the original identity and residency documents submitted with such an application—except to the applicant or pursuant to a court order. N.Y. S1747-B. Additionally, the Green Light Act specifically prohibits the DMV from disclosing or making accessible any records to an agency that primarily enforces immigration law (such as ICE) except pursuant to a

court order. *Id*. Moreover, the National Voter Registration Act of 1993 ("NVRA") limits the use of information gathered by state driver's license agencies through voter registration applications for any purpose other than voter registration. 52 U.S.C. § 20504(b). The NVRA specifically designates the fact that a particular citizen registered to vote through an agency such as the DMV as confidential information, and prohibits the disclosure of that fact. *See* 52 U.S.C. §§ 20504(c)(2)(D)(iii); 20507(a)(6).

Plaintiffs have pled colorable claims of intimidation under Section 11(b) by the disclosure of voters' registration information to immigration enforcement officials in violation of New York and federal law.

B. Defendants' Alleged Conduct is a Modern Form of the Acts that Section 11(b) Sought to Prohibit.

At the time Congress enacted Section 11(b), a wide variety of methods were used to intimidate voters in addition to overt physical violence and economic harm. For example, segregationists produced and disseminated lists of names and addresses of black citizens who had registered to vote or who were against segregation. *See, e.g., U.S. ex rel. Katzenbach v. Original Knights of KKK*, 250 F. Supp. 330, 342 (E.D. La. 1965) (describing intimidating KKK handbills posted to identify specific individuals and businesses that the KKK was targeting). In Haywood County, Tennessee, after African Americans began to register to vote in 1960, more than 100 white citizens organized a "systematic campaign of intimidation," including preparing and circulating a list of black citizens to be denied credit. *Voting Rights: Hearings Before the S. Subcomm. On Constitutional Rights of the Committee on the Judiciary*, 85 Cong. 293–99 (1957) (describing the plight of a black family in rural Alabama forced to move to another state after being featured in a *Life* magazine story discussing their support for desegregation).

Publication of black voters' names and addresses was such an effective method of intimidation that, in 1962, the Mississippi Legislature codified the practice, establishing a requirement that, by law, the names of all applicants attempting to register to vote be published in a local newspaper once a week for two weeks. United States Commission on Civil Rights, *Voting in Mississippi* 9 (1965). This requirement removed any hope of anonymity for black voters, thereby exacerbating fears of intimidation and reprisal. *See id.* at 61; *see also King v. Cook*, 298 F. Supp. 584, 587 (N.D. Miss. 1969) ("Reticence to apply for registration might have been intensified . . . by publication in the local newspaper of the names and addresses of all applying for registration . . . ."). As the United States Commission on Civil Rights noted, "[i]n this climate a single incident of reprisal may be sufficient to deter many potential registrants." *Voting in Mississippi* at 39.

And such incidents did occur. In one case, a woman who registered to vote had her name published in the local newspaper and, the next day, she was arrested on a charge of passing a bad check for $5.15. *Id*. at 23. In another case, a retired schoolteacher registered to vote and, when her name was published in the newspaper, she returned home to find a life-sized effigy of a woman hanging above her mailbox. *Id*. at 27. She testified that she thought this was done "to scare [her]," and, although she did go to the county seat to register, the woman testified that "fear of violence made her unwilling to go to her polling place to vote in the elections which followed." *Id*.

Mississippi's registration requirements were so restrictive that, in 1965, the United States Department of Justice challenged them in federal court. While the district court dismissed the complaint, the Supreme Court, in a unanimous decision, held that "the allegations of this complaint were too serious, the right to vote in this country is too precious . . . for this complaint to have been dismissed." *United States v. Mississippi*, 380 U.S. 128, 144 (1965). The Mississippi Legislature repealed the provision regarding publication of voter information in June 1965, before the lower

court could rule on it. *See King*, 298 F. Supp. At 587. However, repeal of Mississippi's law did not end the intimidation of potential voters through collection and publication of their names and addressed.

The Defendants' alleged conduct is a modern form of such intimidating acts. The alleged release of voter registration information to immigration enforcement agencies such as ICE could, if proven, dissuade individuals from exercising their right to vote in an effort to avoid drawing scrutiny from ICE. The dissemination of Plaintiffs' voter registration information to ICE is arguably more egregious given the New York Green Light Act and National Voter Registration Act's prohibitions on the disclosure of that information, and ICE's recent and highly publicized wrongful arrests and detentions of U.S. citizens based on incomplete government records and bad data. *See* Joel Rubin & Paige St. John, *Must Reads: ICE held an American man in custody for 1,273 days. He's not the only one who had to prove his citizenship*, L.A. Times, Apr. 27, 2018, *available at* https://www.latimes.com/local/lanow/la-me-citizens-ice-20180427-htmlstory.html (describing ICE's recent history of wrongful arrests of U.S. Citizens); Meagan Flynn, *U.S. citizen freed after nearly a month in immigration custody, family says*, Washington Post, Jul. 24, 2019, *available at* https://www.washingtonpost.com/nation/2019/07/23/francisco-erwin-galicia-ice-cpb-us-citizen-detained-texas/ (describing a recent incident when ICE detained a U.S. citizen for over a month).

CONCLUSION

For the foregoing reasons, the court should deny the Defendants' motion to dismiss.

Dated this 12th day of September, 2019.

Respectfully submitted,

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**motion for admission pro hac vice forthcoming*

CERTIFICATE OF SERVICE

The foregoing Motion for Leave to File *Amicus Curiae* Brief, Proposed Order, and Brief of *Amicus Curiae* Campaign Legal Center were filed this 12th day of September, 2019 through the Court's Electronic Filing System. I hereby certify that counsel for all parties will be served and may obtain copies electronically through the operation of the Electronic Filing System.

/s/ *Jonathan Diaz*
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