UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Texas Democratic Party, *et al*.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION NO. 5:20-CV-00438-FB
	§	
Greg Abbott, *et al*.,	§	
	§	
Defendants.	§	

AMICI CURIAE BRIEF OF PUBLIC INTEREST LEGAL FOUNDATION AND LANDMARK LEGAL FOUNDATION IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

The Public Interest Legal Foundation and Landmark Legal Foundation, by and through undersigned counsel, respectfully files this *amici curiae* brief in opposition to Plaintiffs' motion for preliminary injunction. (Doc. 10.).

Introduction

Voter intimidation is a serious allegation. Section 11(b) of the Voting Rights Act of 1965 ("VRA") states that "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…" 52 USC § 10307(b). The U.S. Department of Justice's website lists only two cases it has brought under the Section 11(b) of the VRA. *See* Cases Raising Claims Under Section 11(b) of the Voting Rights Act, https://www.justice.gov/crt/cases-raising-claims-under-section-11b-voting-rights-act. The first case involved the "deployment of armed and uniformed personnel at the entrance to the polling location." Complaint at 5, *United States v. New Black*

Panther Party, Case No. 2:09-CV-00065-SD (E.D. Pa., filed Jan. 7, 2009). The second case involved individuals "treating voters in a hostile and intimidating manner when they come into the courthouse to vote absentee ballots." Complaint at 15, *United States v. Brown*, Case No. 4:05-CV-33-TSL-LRA (S.D. Miss., filed Feb. 17, 2005). Undersigned counsel (Adams) was counsel for the United States in both of those cases.

Plaintiffs base their claim of voter intimidation on an informal letter of legal advice from the Texas Attorney General's office in response to a request for guidance from a state legislator. *Amici* suggest that applying the VRA to the facts of this case would be wholly beyond constitutional limits and contrary to the plain meaning of the statute. Most of all, it would stamp out speech protected by the First Amendment.

Amici have an interest in this matter. Landmark Legal Foundation is a national public interest law firm committed to preserving the principles of voter integrity, separation of powers, federalism, and defending individual rights and responsibilities. The Public Interest Legal Foundation's charitable missions include working to protect the fundamental right of individuals and persons to engage in constitutionally protected speech, ensuring the enforcement of voter qualification laws and election administration procedures, and providing assistance to states that seek to exercise their constitutional powers to determine the rules and laws pertaining to their own state elections. The Public Interest Legal Foundation has sought to advance the public's interest in balancing state control over elections with Congress's constitutional authority to protect the public from racial discrimination in voting. This is best done by ensuring that the VRA and other federal election laws are preserved and followed as the drafters intended not as those who are opposed to truthful speech would prefer.

Argument

I. Plaintiffs' Allegations Are Insufficient Under Section 11(b) of the VRA.

This case seeks to prohibit the Attorney General of Texas from communicating truthfully about state law. By characterizing the Attorney General's communications as "threats," (Doc. 10 at 26), the Plaintiffs present an alarming attack on free speech , the rule of law and the power of public officials, and their necessary and proper powers to participate in public discourse about the actions of their office. Simply providing guidance on the Attorney General's interpretation of state law cannot constitute violations of the VRA in this circumstance. If it did, it would constitute an unconstitutional application of the VRA. To allege that communications such as these constitute threats and voter intimidation is an attack on both constitutionally protected speech and on the power of a state official to communicate about state law.

A. Plaintiffs Fail to Plead a Violation of the VRA.

As an initial matter, the Plaintiffs have not pled a violation of the VRA Section 11(b), 52 U.S.C. § 10307(b). Plaintiffs' Amended Complaint alleges a violation of "Title 42 U.S.C. § 1985, part of the Civil Rights Act of 1871," not 52 U.S.C. § 10307(b). Yet, in their motion, Plaintiffs claim that they are seeking "a preliminary injunction pursuant to its as-applied claims relating to: … (3) voter intimidation in violation of 52 U.S.C. § 10307(b)." Doc. 10 at 14. They go on further to support the voter intimidation section of their argument by stating that "[i]t goes without saying that '[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…'" (Doc. 10 at 26 (citing 52 U.S.C. § 10307(b))). Plaintiffs are not likely to succeed on a claim that they did not assert in their complaint. However, even if Plaintiffs did plead a violation of Section 11(b) of the VRA, their claims fall woefully short.

B. Courts Have Rejected Much More Serious Allegations Under Section 11(b).

Courts have been unwilling to apply Section 11(b) even in cases with more serious allegations. For example, in *United States v. Brown*, Defendant Brown acting as the administrator of a county primary election, issued a press release listing 174 voters who he said "might be challenged under the authority of Miss. Code Ann. § 23-15-575 if they attempted to vote in the Democratic primary." *United States v. Brown*, 494 F. Supp. 2d 440, 474 (S.D. Miss. 2007). "Each of the 174 voters he identified is white." *Id*. at 474 n.53.

The Department of Justice argued "that Brown's public 'threat' to challenge persons on the list of 174 white voters if they attempted to vote in the 2003 Democratic primary violates Section 11(b)." *Id*. at 477 n. 56. The district court disagreed. "Although the court does conclude that there was a racial element to Brown's publication of this list, the court does not view the publication as the kind of threat or intimidation that was envisioned or covered by Section 11(b)." *Id*.

In *Gremillion v. Rinaudo*, the plaintiff alleged "that the Chief-of-Police of New Roads, Louisiana (the parish seat), Mr. Kerby Aguillard, who was neither a voting commissioner nor a poll watcher, assisted…voters in the voting machines while attired in his police uniform." *Gremillion v. Rinaudo*, 325 F. Supp. 375, 376 (E.D. La. 1971). The court dismissed the complaint, in part because it was "unable to perceive why assistance from a uniformed police officer, without anything more, should on its face be held to be coercion and intimidation in violation of the 1965 Voting Rights." *Id*. at 379.

Plaintiffs' allegation that an Attorney General's guidance letter is voter intimidation raises the important issue of what constitutes protected free speech versus "intimidation" and "coercion." Plaintiffs' theories of liability abuse the VRA and this case is part of a broader

national strategy to use the VRA to intimidate organizations and officials who seek to improve the integrity of American elections. To the Plaintiffs, mere public discussion of election integrity efforts is seen as threatening or coercive. Plaintiffs' allegations seek to expand the reach of Section 11(b) of the VRA beyond what the drafters intended and what courts have allowed. Moreover, Plaintiffs' version of Section 11(b) would intrude into the power reserved to the states to administer their own elections and speak truthfully about state election administration laws.

A factual circumstance more suited to Section 11(b) than Plaintiffs' allegations arose in the Eastern District of Pennsylvania in 2009. That case, *United States v. New Black Panther Party for Self-Defense, et al*., Case No. 2:09-CV-00065-SD, saw two members of the Defendant's party stood outside of a polling location wearing paramilitary uniforms, shouting racial slurs, and brandishing a weapon – a nightstick – in front of a polling place. Complaint at 2-3, *United States v. New Black Panther Party*, Case No. 2:09-CV-00065-SD (E.D. Pa., filed Jan. 7, 2009). The Department of Justice alleged that the defendants engaged in the following activities towards "protected individuals: brandishing a deadly weapon toward them, directing racial slurs and insults at them, and attempting to prevent their authorized ingress and egress at the polling locations." *Id*. at 7.[1]

A guidance letter from the Attorney General's office does not come close to those level of threats and intimidation.

II. History and Case Law Do Not Support Plaintiffs' Arguments Under the Twenty-Sixth Amendment.

The Plaintiffs also seek a preliminary injunction based on the "claim that the Attorney General's interpretation of state election law discriminates against young voters on account of

[1] A default judgment was entered against two of the defendants in the case enjoining them from repeating the behavior.

age, in violation of the Twenty-Sixth Amendment." (Doc. 10 at 15-16.) The Twenty-Sixth Amendment lowered the voting age from 21 years to 18 years. U.S. Const. Amend. 26. It prohibits the denial of the right to vote on account of age. *Id*. It does not prohibit reasonable protections used by states to ensure the integrity of the vote. The Attorney General's interpretation of Tex. Elec. Code § 82.003 does not deny any person the right to vote because of age. It is a commonsense condition imposed by the state to ensure an orderly election process.

Before the enactment of the Twenty-Sixth Amendment, Congress passed certain amendments to the Voting Rights Act that lowered the voting age from 21 to 18. As part of its findings, Congress noted that while the law imposed certain "national defense responsibilities" upon 18-year-olds, it denied those individuals the right to vote. Congress considered such treatment "particularly unfair" and should thus be remedied by lowering the voting age. These amendments did not create a universal ban on any secondary age requirements placed on absentee voting – they simply ensured those over 18 the right to vote. And Congress justified such prohibitions because the law obligated 18-year-olds to serve in the military but denied those individuals the right to vote. Congress, therefore, never considered whether an absentee voting requirement based on age would unduly burden the right to vote.

Because the Voting Rights Act amendments only applied to federal elections (not state and local elections), Congress, with support from the states, proposed an amendment to the Constitution for universal voting for all citizens over 18. *See Oregon v. Mitchell*, 400 U.S. 112 (1970). Ratification occurred after extensive debates on the abilities of 18-year-olds to conscientiously participate in the election process. Congress explained that most people between 18 and 21 had completed high school, most 18-year-olds bear all or most of an adult's responsibilities and that younger voters should be extended the opportunities to influence society

in a constructive manner. Cong. Research Service, *The Eighteen Year Old Vote: The Twenty-Sixth Amendment and Subsequent Voting Rates of Newly Enfranchised Age Groups*, May 20, 1983, Report No. 83-103.

Importantly, the debates describe absentee voting not as a privilege or inherent right but as a "special burden" used by states to "dissuade [young voters] from participating in the election." *United States v. Texas*, 445 F. Supp. 1245, 1254 (S.D. Tex. 1978) (*citing Senate Report No. 26, 92 Cong. 1st Sess.* (1971)). Congress labeled absentee voting laws a tool used to suppress young voters – not as an automatic right subject to the same scrutiny and protections as the general right to vote. Plaintiffs, in other words, have it exactly backwards. Congress never intended the Twenty-Sixth Amendment to apply within the context of absentee voting.

In earlier litigation, the Twenty-Sixth Amendment has been used to invalidate laws designating college students as domiciliaries of their parents' homes. These cases all involve the right to vote – not a perceived right to cast an absentee ballot. *See United States v. Texas*, 445 F. Supp. 1245. Nowhere in these cases do courts rule that age restrictions as applied to absentee voting are improper under the Twenty-Sixth Amendment. Rather, absentee voting was characterized as a tool used by states to suppress college-age citizens from voting. *See Jolicoeur v. Mihaly*, 5 Cal. 3d 565, 96 Cal. Rptr. 697, 488 P.2d 1 (Aug. 27, 1971) ("[R]espondents have abridged petitioners' right to vote in precisely one of the ways that Congress sought to avoid--by singling minor voters out for special treatment and effectively making many of them vote by absentee ballot.")

The ratification history and case law pertaining to the Twenty-Sixth Amendment do not support Plaintiffs' expansive interpretation. To the contrary, the debates suggest that Congress

considered absentee voting a barrier erected by states to dissuade young people from voting, not a matter subject to the Amendment's protections on the right to vote.

CONCLUSION

For the foregoing reasons, the Court should deny the Plaintiffs' motion for a preliminary injunction.

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Respectfully Submitted,

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*Application for admission *pro hac vice* to be filed if necessary

CERTIFICATE OF SERVICE

I certify that on May 14, 2020, I caused the foregoing to be filed with the United States District Court for the Western District of Texas via the Court's CM/ECF system, which will serve all registered users.

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