

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:22-cv-00581-CNS-NRN

Colorado Montana Wyoming
State Area Conference of the NAACP,
League of Women Voters of Colorado, and
Mi Familia Vota
Plaintiff(s)

v.

United States Election Integrity Plan,
Shawn Smith, Ashley Epp,
and Holly Kasun
Defendant(s)

DEFENDANT EPP TRIAL BRIEF

This matter is coming before the court for a five-day bench trial on July 15, 2024. Defendant Epp accordingly submits the following pretrial brief to the court in consideration of the unprecedented nature of these proceedings. Plaintiffs' allegations before this court as well as their requested relief are unprecedented in the history of Section 11(b) of the Voting Rights Act of 1965 and the long history of American Suffrage.

As a result, the court must view these allegations with great skepticism and with the appropriate historical context at trial.

i. Questioning the Outcome of an Election is Not Intimidation

Plaintiffs are asking the court to find Defendants liable for voter suppression and voter

intimidation, coercion, and threats. Plaintiffs rely on conflating questioning the outcome of an election with voter suppression and voter intimidation, coercion, and threats. This argument fails, and their requested relief would be unprecedented if granted by the court. Questioning the outcome of elections has a long history in the United States of America prior to 2020, from 1800 to 2016. Importantly, the American People's questioning of the outcomes of US elections have led to many reforms over many decades to strengthen and protect the electoral franchise.

The 1800 US Presidential election between Thomas Jefferson and incumbent President John Adams was sent to the House of Representatives, and, after 36 rounds of voting, the body elected Jefferson.¹ This outcome of this election inspired the creation of the 12th Amendment.

The 1824 US Presidential election of John Quincy Adams went to the House of Representatives when no candidate earned a majority of electoral votes. This race was also decided after 36 ballots, in the new US capitol building — not at the ballot box.²³

The 1860 US Presidential election tore the nation apart, with South Carolina voting to secede just a few weeks after Lincoln's victory.⁴ This election was unprecedented as Lincoln's name was eliminated from the ballot in 10 Southern States, effectively denying him the opportunity to win those states' electoral votes. This election was reported as unprecedented at the time.⁵

The next election in 1864, during the Civil War, brought the introduction of mail-in ballots.⁶ Many argued the mail-in system was vulnerable to manipulation, allowing fraudulent votes to be cast and potentially altering the outcome of the election. President Lincoln ordered the

¹ "Disputed Presidential Elections," Annals of Congress (March 28, 1800, Volume 10, Pages 127 – 128)

² "Electoral College votes were counted, but no candidate received a majority of the vote." Register of Debates (February 9, 1825.)

³ "John Quincy Adams elected president by the House of Representatives." Register of Debates (February 9, 1825.)

⁴ "Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union" (Adopted December 24, 1860)

⁵ *New-York daily tribune*. Thursday, November 08, 1860, Page 4, Image 4. "The political contest just closed so suspiciously has presented some aspects so peculiar as to deserve more than a passing recognition."

⁶ Carter, Russ W. "War Ballots: Military Voting by Mail from the Civil War to WWII." Military Postal History Society, 2005.

investigation of election fraud in 1865. “Please procure the record, and report to me, on the case of Edward Donahue, Jr. about election fraud.”⁷

In New York City, in 1836, Tammany Hall Grand Sachem Martin Van Buren was elected President of the United States.⁸ William “Boss” Tweed rose to power in 1863, and by 1871, Tweed’s corruption and abuse of power had become widely known. According to Tweed Biographer, Kenneth D. Ackerman, “It’s hard not to admire the skill behind Tweed’s system ... The Tweed ring at its height was an engineering marvel, strong and solid, strategically deployed to control key power points: the courts, the legislature, the treasury and the ballot box. Its frauds had a grandeur of scale and an elegance of structure: money-laundering, profit sharing and organization.”⁹ Notably, Tweed punished those who questioned his electoral practices. “As Tweed later said, The ballots made no result; the counters made the result. Sometimes the ring simply ignored the ballots and falsified election results. Tammany candidates often received more votes than there were eligible voters in a district. In addition, the ring used intimidation and street violence by hiring thugs or crooked cops to sway voters’ minds and received payoffs from criminal activities it allowed to flourish.”¹⁰¹¹ Tweed died in prison in 1878.

In 1876, in the name of preventing another Civil War, the Congress established a 15-member commission to decide the election between Samuel Tilden and Rutherford B. Hayes. The commission chose Hayes, and Southern Democrats made sufficient threats that a compromise was decided in February 1877 to prevent another Civil War. That compromise effectively ended Reconstruction, as Hayes agreed to remove all federal troops from the South. “In the South, the

⁷ “Abraham Lincoln Investigates Voter Fraud in the 1864 Presidential Election.” Autograph letter signed, on Executive Mansion letterhead, Washington, February 27, 1865, to Joseph Holt, who was the Judge Advocate General of the U.S. Army.

⁸ Inconsistency and hypocrisy of Martin Van Buren. [N.P, 1848] Pdf. <https://www.loc.gov/item/11016608/>.

⁹ NY Times: 'Boss Tweed': The Fellowship of the Ring. NY Times, March 27, 2005.

¹⁰ Bill of Rights Institute. William “Boss” Tweed and Political Machines. (2024)

¹¹ Ackerman, Kenneth D. “Boss Tweed: The Rise and Fall of the Corrupt Pol Who Conceived the Soul of Modern New York. New York: Carroll and Graf, 2005.

tragic aftermath of the so-called Compromise of 1877 was further intimidation of Black voters, the murder of more Republican leaders, and longtime Democratic rule.” This election led to the Potter Committee of 1878 and 1879, which, “aimed to discredit President Hayes's title to the presidency by showing that the Republican party had carried the vital states of Florida and Louisiana by fraud. The committee alleged that nationally prominent Republicans, sent to those states by President Grant to observe the count, had encouraged local officials to make spurious charges that Democrats had carried the election by intimidating Black voters.”¹²

By 1888, “ballot fraud was so common it developed its own vocabulary. ‘Colonizers’ were groups of bought voters who moved en masse to turn the voting tide in doubtful wards. ‘Floaters’ flitted like honeybees wafting from party to party, casting ballots in response to the highest bidder. ‘Repeaters’ voted early and, sometimes in disguise, often. In Indiana, the absence of any voter registration especially invited such doings.”¹³

In the wake of the 1888 election, Grover Cleveland “called upon good citizens everywhere, to rise above ‘lethargy and indifference,’ to ‘restore the purity of their suffrage.’”¹⁴ A ballot-reform landslide swamped the nation’s legislatures and by 1892, citizens in 38 states voted by secret ballot.¹⁵

In 1948, the power of the media establishment over our elections came sharply into focus, with the ill-fated Chicago Tribune headline “Dewey Defeats Truman.” According to the media, President Harry S. Truman was deeply unpopular, in divided government with a Republican Congress, and facing a dismal approval rating: Only 1 in 3 Americans approved of Truman.¹⁶ A

¹² Fairclough, Adam. “Bulldozed and betrayed: Louisiana and the stolen elections of 1876. Baton Rouge, Louisiana State University Press, [2021]

¹³ Ackerman, S.J. “The Vote That Failed.” Smithsonian, November 1998.

¹⁴ Parker, George F. “Recollections of Grover Cleveland. CASSELL PUBLISHING COMPANY, 1892.

¹⁵ Populist Party Platform. July 4, 1892. “The conditions which surround us best justify our co-operation; we meet in the midst of a nation brought to the verge of moral, political, and material ruin. Corruption dominates the ballot-box, the Legislatures, the Congress, and touches even the ermine of the bench.”

¹⁶ The American Presidency Project, citing Gallup data. <https://www.presidency.ucsb.edu/statistics/data/harry-s->

Dewey +5 Gallup poll went live on Election Day, despite being taken in mid-October, and the world, including Truman, believed he'd lost on election night. But the media got it wrong, and Truman won.

In 2000, the media got it wrong again, as mainstream broadcast media announced that Vice President Al Gore had won the state of Florida – when it was still too close to call. Recounts awarded the state to George W. Bush and lawsuits were filed. The election was decided when the US Supreme Court ruled to stop the Florida recount on the grounds that it violated equal protections.¹⁷ The Bush v. Gore controversy led to the Help America Vote Act, legislation signed in 2002 to modernize US elections.

HAVA gave birth to the elections industry, and US elections have become increasingly centralized and dependent on private vendors with little meaningful oversight ever since. Since the passage of HAVA, no Presidential election has been held without allegations of irregularities, fraud, and corruption — on both sides of the political aisle.

In 2004, Democrat John Kerry raised concerns about voter access, claiming eligibility requirements suppressed the vote to such an extent that it may have affected the outcome of the election.¹⁸

In the 2008 election, ACORN community organizers had to admit that of the 1.3 million new voters they registered, only a third (450,000) were legitimate.^{19,20}

In 2012, according to Pew Research Center's "2012 Survey of the Performance of American Elections,"²¹ nearly 20 million voters experienced at least one problem when voting in

truman-public-approval

¹⁷ Bush v. Gore, 531 US 98 - Supreme Court 2000. The Court stated that one source of the fundamental right to vote "lies in the equal weight accorded to each vote and the equal dignity owed to each voter," and concluded that Florida could not "value one person's vote over that of another."

¹⁸ Kennedy, Robert F. Rolling Stone. "Was the 2004 Election Stolen?" June 5, 2006.

¹⁹ House Hearing, 111th Congress. Committee on the Judiciary. March 19, 2009.

²⁰ 2010 Fiscal Year appropriations, as challenged in *Acorn v. US*, 618 F. 3d 125 - Court of Appeals, 2nd Circuit 2010

²¹ Elections Performance Index 2012. The PEW Charitable Trusts. April 2014. (<https://www.pewtrusts.org/>-

the 2012 presidential election, ranging from long lines at the polls to issues with voter registration and voting machines. The study estimates that 20% of registered voters did not vote.”

In 2016, Secretary of State Hillary Clinton was unexpectedly defeated on election night by Donald John Trump. In the wake of this election, Democrats claimed President Trump had “colluded” with Russia to steal the election, and launched the Mueller investigation²² which eventually found no evidence of collusion. Democrats also created the movie, *Kill Chain: The Cyber War on America’s Elections*²³, about the vulnerabilities of our centralized, technology-enabled voting system. Additionally, many lawsuits followed the 2016 election, including Curling v. Raffensberger, which is still in court in Georgia today. Notably, the presentation of witnesses and evidence in *Curling* has confirmed the Defendants’ well documented concerns about the vulnerabilities of our current election system.²⁴

Despite officially conceding in 2016, Democrats referred to President Trump as illegitimate²⁵ throughout his Presidency. Candidate Clinton wrote a book about it²⁶ and went on a speaking tour about the election being stolen from her²⁷. Plaintiff LWVCO published, “The 2016 Presidential Election was Rigged” on November 23, 2016. (Kas. Ex. 21) And on President Trump’s Inauguration Day — January 20, 2017 — Plaintiff Counsel Free Speech For People launched a campaign to impeach the President, announcing the effort in a Washington Post article entitled, “The Campaign to Impeach President Trump Has Begun.”²⁸

/media/assets/2014/04/07/epi_brief.pdf)

²² Mueller, Robert S. “Report On The Investigation Into Russian Interference In The 2016 Presidential Election” March 2019

²³ Ardizzone, Simon. “Kill Chain: The Cyber War on America's Elections” (Released March 26, 2020 on HBO)

²⁴ Curling v. Raffensperger, 403 F. Supp. 3d 1311 (N.D. Ga. 2019)

²⁵ Video compilation on x.com “10 minutes of Democrats denying election results.” @kaneokathe great. July 14, 2023 (<https://x.com/KaneokoaTheGreat/status/1680009961722757121>)

²⁶ Clinton, Hillary R. “What Happened.” Simon & Schuster, September 1, 2017.

²⁷ Itkowitz, Colby. “Hillary Clinton: Trump is an Illegitimate President” Washington Post, September 26, 2019.

²⁸ Gold, Matea. Washington Post. “The campaign to impeach President Trump has begun.” January 20, 2017. “At the moment, the new commander in chief was sworn in, a campaign to build public support for his impeachment went live at ImpeachDonaldTrumpNow.org, spearheaded by two liberal advocacy groups aiming to lay the groundwork for his eventual ejection from the White House. The organizers behind the campaign, Free Speech for People, and

To Defendant Epp’s knowledge, no one was prosecuted for questioning the outcome of the 2016 election. Speech that is critical of the government is our most protected form of expression in America.²⁹

Finally, in the run up to 2020, amid a deadly pandemic, there were 92 lawsuits specifically dealing with election procedural changes across multiple states. Of these, 30 were decided on the merits according to an analyst by an attorney and academic data scientists and, of those 30, Republican plaintiffs prevailed in 22.³⁰ In other words, the courts confirmed that there were unprecedented changes being made to our processes before the 2020 elections.

Such litigation was found even here in Colorado. During the time of Defendants’ alleged conduct, Secretary Griswold was engaged in active litigation with Judicial Watch about the hygiene of Colorado’s voter rolls. In fact, Secretary Griswold entered a consent decree in that litigation in 2023.³¹

Concerns about the accuracy of the voter rolls and the impact of inaccuracies was and remains warranted. The Defendants had cause to question the outcome of the election, and they are well within their rights to do so. Questioning the outcomes of elections has a long, well-litigated history in our great nation. The court must reject the notion that questioning the outcome of elections is anything other than First Amendment protected speech. Plaintiffs are asking for the court to grant injunctive relief that amounts to the court placing a content-based or idea-based restriction on the First Amendment.

ii. Political Canvassing is Not Intimidation

The factual record of this case is devoid of any intimidating act. In combination with

RootsAction...”

²⁹ Goldberg, Kevin. “17 Freedom of Speech Court Cases You Should Know.” “Freedom of speech court cases, like these and many others in courts across the country, ensure that people can continually push back on government attempts to infringe on First Amendment rights.” Freedom Forum. Copyright, 2024.

³⁰ Alexander, Rachel. “2020 US Presidential Election Related Lawsuits.” March 2, 2024 (https://election-integrity.info/2020_Election_Cases.htm)

³¹ JW v Griswold Colorado NVRA Settlement 02992

questioning the outcome of elections, Plaintiffs conflate political canvassing — the act of knocking on doors for a political purpose — with intimidation. This argument fails as canvassing is protected First Amendment activity, as determined repeatedly by the courts, including the US Supreme Court.

- Lawful canvassing is protected by the First Amendment and “so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved,” and restrictions on canvassing are “invalid because in conflict with the freedom of speech and press.” (Martin v. City of Struthers, 319 US 141 - Supreme Court 1943)
- Martin was reaffirmed by the Supreme Court in 2002 in Watchtower Bible, “our precedent is clear that there must be a balance between these interests and the effect of the regulations on First Amendment rights.” (Watchtower Bible & Tract Soc. of NY, Inc. v. Village of Stratton, 536 US 150 - Supreme Court 2002, quoting Martin).
- “The First Amendment protects [one’s] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing...” And, “...the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as `core political speech.” Meyer v. Grant, 486 US 414 - Supreme Court 1988.
- The ACLU also affirms the rights of Americans to conduct political canvassing, “A federal appeals court in Pennsylvania has made it crystal clear that you cannot be asked to register, get a permit or even to notify local officials about your canvassing plans.” SEIU, LOCAL 3 v. MUNICIPALITY OF MT. LEBANON, Court of Appeals, 3rd Circuit 2006.

Canvassing is not intimidation. It is protected First Amendment activity. For USEIP’s canvassing to become intimidation, it must include an intimidating act. Plaintiffs have alleged

several intimidating and criminal acts against the defendants, including brandishing firearms, aggressively questioning people about protected characteristics (such as citizenship), posturing as government officials, and wearing “official looking badges.” (ECF No. 01) These allegations are false, salacious, and libelous, and the evidence and witness testimony at trial will prove that these allegations are entirely without factual support. The court must reject Plaintiffs’ attempts to conflate lawful canvassing with voter intimidation.

iii. Plaintiffs 11(b) Claim is Unprecedented in Terms of Voting or Voting Activity

The KKK Act establishes the basis for an individual to bring legal action against any individuals or organizations conspiring “to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote.” Section 11(b) of the Voting Rights Act of 1965 states, “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.”

The matter before the court is one of at least six Section 11(b) cases following the 2020 and 2022 elections. Every one of these cases, with the sole exception of the matter before the court, dealt with voting and voting activity during the voting period (or election period).

- Nat'l Coal. on Black Civic Participation v. Wohl, 498 F. Supp. 3d 457 - Dist. Court, SD New York 2020
- Michigan Welfare Rights Organization v. Trump, 600 F. Supp. 3d 85 - Dist. Court, Dist. of Columbia 2022
- FAIR FIGHT INC. v. TRUE THE VOTE, Dist. Court, ND Georgia 2024
- ARIZONA ALLIANCE FOR RETIRED AMERICANS v. CLEAN ELECTIONS USA, Dist. Court, D. Arizona 2022
- BEAUMONT CHAPTER OF THE NAACP v. Jefferson County, Dist. Court, ED Texas 2023

The matter before the court is the single outlier in all modern Section 11(b) cases under the Voting Rights Act of 1965; that is, it's the only case that claims Section 11(b) harm outside of the election period or voting period. Plaintiffs' allege that voters were deterred from voting or voting activity, support or advocacy, by being visited at their homes in the summer of 2021. There was no imminent election. There was no voting. There was no voting activity. Further, Defendants were asking voters to verify the government's record of their past activity — an election that was settled where the victors had already taken their seats. At no point was anyone asked about their future voting activity or an upcoming election.

Defendants' canvassing was intended to check the government's work and verify the government's assertions about an election in the rear-view mirror. The record is devoid of factual support that Defendants were attempting to influence the conduct of any voter in any future election; the record is flush with evidence that Defendants were seeking to check the government's work in the public interest of safeguarding the electoral franchise.

CONCLUSION

Defendants questioning the outcome of a US Presidential election is not unprecedented, even for Plaintiffs and their counsel in the wake of the 2016 election. Questioning the outcome of elections has happened throughout our nation's history, and it has been a contributing factor in positive changes to the electoral franchise.

Canvassing is a protected First Amendment activity, well preserved in case law. Plaintiffs themselves engage in canvassing activity, as considered by the Kansas Supreme Court earlier this year.³² Plaintiffs' allegations of Defendants' conduct are unprecedented when considered against the history of Section 11(b) cases. Plaintiffs are asking the court to remove all timeliness considerations for the "voting period," to find that voting and voting activity is happening all the

³² LEAGUE OF WOMEN VOTERS OF KANSAS v. Schwab, Kan: Supreme Court 2024

time.

Plaintiffs' request for relief is also unprecedented, as they are asking the court to restrict Defendants' First Amendment rights — the rights to question the government, redress of grievances, voice support and advocacy, conduct canvassing — not based on any objective matter of law or factual examination of Defendants' conduct, but based on the content and idea of Defendants' effort. There is no intimidating act, and there is no voter that claims to be intimidated by the Defendants. The lone witness claiming to have been visited by USEIP did not make that assertion until 18 months after her encounter, after an interconnected investigation across local, state and federal government entities found no evidence of a crime — and didn't mention the Defendants at all.

Plaintiffs know that Defendants' conduct is lawfully protected. After months of discovery and years of this litigation, Plaintiffs also know that Defendants are not guilty of the conduct they allege, and therefore not liable. But Plaintiffs continue to seek injunctive relief against the Defendants. As the record is devoid of factual support to justify Plaintiffs' requested relief, the preponderance of the evidence, as it will be presented at trial, suggests that Plaintiffs are seeking injunctive relief due to (1) their perceived understanding of Defendants' political affiliations, and (2) the idea and/or content of Defendants' lawfully protected activities.

Given the unprecedented nature of both Plaintiffs' claims as well as their requested relief, the Court must consider this matter with great skepticism at trial, and enter judgement on behalf of the Defendants.

/s/ Ashley Epp

Dated: June 19, 2024

Ashley Epp
asheinamerica@protonmail.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been electronically served through ECF this 19th day of June 2024, to all counsel of record.

/s/Ashley Epp

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