IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

LEAGUE OF WOMEN VOTERS OF NEW HAMPSHIRE, *et al.*, Plaintiffs, v. **STEVE KRAMER, *et al.*,** Defendants.	Civil Action No. 1:24-cv-73-SM-TSM

PLAINTIFFS' RESPONSE TO AMICUS BRIEFS OF THE COOLIDGE REAGAN FOUNDATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Plaintiffs League of Women Voters of New Hampshire ("LWVNH") and League of Women Voters of the United States ("LWVUS") (collectively, the "League"), and Nancy Marashio, James Fieseher, and Patricia Gingrich (collectively, the "Individual Plaintiffs"), hereby respond to the amicus briefs submitted by the Coolidge Reagan Foundation (the "Foundation"). The Foundation has filed an amicus brief in support of Defendants' pending motions to dismiss Plaintiffs' claims, and an amicus brief in support of the Magistrate Judge's recommendation to deny Plaintiffs' motion for a preliminary injunction. ECF Nos. 110, 111. For the reasons discussed below, and those set forth in Plaintiffs' objections to the Magistrate Judge's recommendation and Plaintiffs' opposition to the motions to dismiss, the Foundation's arguments should be rejected.

PRELIMINARY STATEMENT

On the eve of the January 2024 New Hampshire Presidential Primary (the "New Hampshire Primary"), Defendants Steve Kramer, Voice Broadcasting Corporation ("Voice Broadcasting"), Life Corporation ("Life Corp."), and Lingo Telecom, LLC ("Lingo") (collectively, "Defendants") orchestrated an assault on New Hampshire citizens' right to vote by creating, authenticating, and disseminating thousands of deceptive robocalls (the "NH Robocalls"). Each of the Defendants played an integral role in ensuring that AI-generated or "deepfake" robocalls impersonating the President of the United States, and warning voters not to participate in the New Hampshire Primary, reached their intended target. Furthermore, each of the Defendants contributed to the misattribution—or "spoofing"—of the NH Robocalls to the former Chairwoman of the New Hampshire Democratic Party, misleading voters as to the source of the NH Robocalls, and intensifying the legitimacy of the threatening, intimidating, and coercive message conveyed therein.

As a result of their individual and collective actions, Defendants have violated the Voting Rights Act ("VRA"), New Hampshire Election Laws, and Telecommunications Consumer

Protection Act ("TCPA"). However, Defendants now seek to evade culpability for their involvement in generating, distributing, and falsifying these unlawful robocalls—both through their motions to dismiss this action and in their opposition to Plaintiffs' motion for a preliminary injunction, which seeks to enjoin Defendants from delivering more misrepresented, spoofed, or deepfaked robocalls to voters nationwide.

The Foundation has submitted two amicus briefs in support of Defendants' position in this litigation. *See generally* ECF Nos. 110, 111. The Foundation represents that it is a nonprofit organization "dedicated to protecting freedom of speech under the First Amendment and the integrity of the electoral process," and that the issues in this case "touch upon [the Foundation's] interests." ECF No. 111 at 1. Conspicuously absent, however, is any explanation of how the Foundation's amicus briefs—which argue in favor of stripping voters of their ability to seek legal protection from threatening, intimidating, and coercive conduct under the VRA—further its purported interest in protecting the integrity of the electoral process.

The Foundation's amicus briefs largely duplicate arguments already raised by Defendants themselves and refuted by Plaintiffs. As demonstrated below, each of the Foundations' arguments are unavailing. ***First***, Plaintiffs have standing to assert their claims, including for alleged violations of Section 11(b) of the VRA. ***Second***, Plaintiffs have demonstrated a risk of irreparable harm absent injunctive relief. ***Third***, Plaintiffs have demonstrated that they are likely to succeed on the merits of their claim under Section 11(b) of the VRA.[1]

[1] The Foundation also argues that Plaintiffs' proposed injunction fails to comply with the requirements of Federal Rule of Civil Procedure 65(d). ECF No. 111 at 7–9. Because the Foundation raises arguments that the parties fully addressed in their briefing regarding the proposed preliminary injunction, Plaintiffs do not repeat these arguments here. As Plaintiffs explained in their Objections to the Magistrate Judge's Report and Recommendation, Plaintiffs' requested relief falls within the scope of Rule 65(d)(1). *See* ECF No. 104 at 19–21. Even if the Court believes that certain terms or provisions in Plaintiffs' proposed preliminary injunction require further clarification, however, there is sufficient information in Plaintiffs' briefing and Amended Complaint for the Court to provide reasonable and easily adhered-to definitions. *See id.* at 20.

ARGUMENT

I. PLAINTIFFS HAVE STANDING TO PURSUE THEIR CLAIMS UNDER THE VOTING RIGHTS ACT

a. The League has organizational standing to assert its claims.

In its most recent amicus brief, the Foundation claims that the League failed to establish organizational standing for two main reasons. ECF No. 111 at 2–4. ***First***, the Foundation argues that the League has failed to demonstrate an injury-in-fact sufficient to give rise to a justiciable claim. *Id.* at 3. According to the Foundation, the League's argument "boils down to the notion" that it "has been harmed because it may have to provide somewhat different information to the public concerning the electoral process *if* misleading or otherwise illegal calls occur in the future." *Id.* The Foundation also contends that "[s]uch continuation of the League's current, ongoing public education efforts" does not constitute an injury-in-fact, and that the League "cannot voluntarily 'spend its way into standing' through 'public education' efforts." *Id.* (quoting *FDA v. All. for Hippocratic Med.*, 602 U.S. 367 (2024)).

The Foundation grossly oversimplifies the League's standing argument. The League was not harmed simply because it had to "provide somewhat different information to the public." *Id.* Rather, the League was harmed because the illegal robocalls directly interfered with its ability to continue its core business activities. *See FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 395 (2024) (holding that an organization suffers a particularized injury when the defendants' action "directly affected and interfered with [the organization]'s core business activities").

The League's core business goes beyond the scope of educating the public about misinformation campaigns—its core mission is focused on supporting the enfranchisement of all eligible voters, which it achieves by registering voters and encouraging voter participation. But the Defendants' robocall campaign forced the League to divert its limited resources—including

volunteers, funding, and time—away from its core voter-registration activities. Contrary to the Foundation's characterization, this was not simply a "continuation of the League's current, ongoing public education efforts." ECF No. 111 at 3. Instead, this was a rapid response to an illegal robocall campaign on the eve of an election, which required a significant and sudden shift in the League's resources, priorities, and goals. *See Nat'l Coal. on Black Civic Participation v. Wohl*, 498 F. Supp. 3d 457, 471 (S.D.N.Y. 2020) ("*Wohl I*") (concluding that the plaintiff nonprofit organization suffered an injury-in-fact sufficient to confer standing, where, in the aftermath of a robocall campaign, the organization had to "spend more time on voting-related outreach to combat Defendants' disinformation, leaving less time to work on its Census-related outreach" as a result).

Second, the Foundation argues that Plaintiffs' requested relief will not redress their claimed harm, because the League's diversion of resources will continue even if Defendants are enjoined from generating more robocalls. ECF No. 111 at 3–4; *see also id.* at 7; ECF No. 110 at 15. According to the Foundation, the League's "decision to reallocate its resources to responding to future possible AI-generated telephone calls is a response to the development and availability of this new technology, and would likely exist regardless of Defendants' conduct." ECF No. 111 at 4.

The Foundation attempts to downplay Defendants' role in the illegal robocall scheme by pointing the finger at other (hypothetical) bad actors who may engage in similar misconduct in the future. But this argument is unsuccessful. To establish redressability, Plaintiffs "need only show that a favorable ruling could potentially lessen [their] injury; [they] need not definitively demonstrate that a victory would completely remedy the harm." *Antilles Cement Corp. v. Fortuno*, 670 F.3d 310, 318 (1st Cir. 2012) (citations omitted). Here, Plaintiffs have shown that it is likely that requested relief would at least partially redress their injury, and, in fact, the combination of enjoining all Defendants would have a substantial likelihood of preventing the injury from

reoccurring. Whether third parties or other telecommunications companies are involved in future illegal robocalls is irrelevant.

To the extent that the Foundation argues that the League's injuries are not traceable to Defendants' conduct, this argument also fails. *See* ECF No. 111 at 7. Plaintiffs meet the standard of showing a likelihood of a sufficiently direct casual connection between Defendants' actions and the illegal robocalls intimidating, threatening, and confusing voters, because each of the Defendants was directly involved at a key step of the process. The Foundation's reliance on *Electronic Privacy Information Center v. Presidential Advisory Commission on Election Integrity*, 878 F.3d 371 (D.C. Cir. 2017), does not counsel otherwise. There, the D.C. Circuit held that the plaintiff organization had not suffered harm from its decision to have a "Law Fellow" file Freedom of Information Act ("FOIA") requests, where the organization did not offer any "specific facts" to suggest that the defendants' challenged violations "caused" the organization to submit those requests, and the organization likely "would have made similar FOIA requests" regardless of the defendants' conduct. *Id.* at 402. Here, by contrast, Plaintiffs have presented evidence regarding how Defendants' illegal robocall campaign directly caused the League to undertake substantial efforts—which, absent the NH Robocalls, the League would not have done. *See* Decl. of Celina Stewart ("Stewart Decl.") ¶¶ 10, 12, ECF No. 47-19 (describing the League's public-facing remedial measures, as well as its internal guidance and training provided to staff, that the League implemented in the immediate aftermath of the robocalls).

b. The Individual Plaintiffs have standing to assert their claims.

The Foundation argues that the Individual Plaintiffs lack standing because they failed to establish that they are likely to suffer future harm, ECF No. 111 at 2–3, but this argument also lacks merit.

The Foundation alleges that Plaintiffs have not provided proof that their injury is likely to reoccur, *id.* at 2, but that is incorrect. Plaintiffs have shown that the NH Robocalls were not an isolated incident, but rather, they were part of a longstanding pattern of illegal robocalls—which the Defendants, and particularly Lingo, have been unable (or deliberately refuse) to stop, despite increasing pressure from government agencies to comply with the law. *See, e.g.*, Multistate Litig. Task Force Letter, ECF No. 71-12; FTC Letter, ECF No. 71-13. Further, Plaintiffs have shown that Lingo has knowingly not complied with the STIR/SHAKEN framework, having falsely authenticated Life's illegal calls by marking over ten thousand with an "A" attestation, the highest-level attestation possible. *See* Lingo Notice of Apparent Liab., ECF No. 71-11 ¶¶ 7, 14 n.59. These examples demonstrate Lingo's refusal to comply with statutory and regulatory standards, in turn showing that, with or without Kramer and Life purchasing its services, Lingo can be expected to send illegal robocalls to intimidate, manipulate, and confuse voters. These are not mere allegations, but conclusions from expert agencies that Lingo continuously engaged in illegal conduct that led to the NH Robocalls.

The Foundation suggests that "the FCC's enforcement actions are []sufficient to alleviate any potential risk," but Plaintiffs disagree. ECF No. 111 at 3. Although Lingo agreed to settle the FCC's enforcement action against Lingo related to the NH Robocalls, *see* Notice of Settlement, ECF No. 91, the Consent Decree does not alleviate Plaintiffs' concerns—it only augments them. As Plaintiffs explained in their response to Lingo's Notice of Settlement, *see* ECF No. 93, Lingo admitted that at the time it facilitated the transmission of thousands of unlawful robocalls to New Hampshire voters, Lingo *did not have a compliance manual*, nor did it require its employees to complete annual training. ECF No. 91 at 2. Moreover, while Lingo professes to have "robust mitigation procedures," the FCC clearly concluded otherwise. *Id.* at 1,

5–6 (requiring Lingo to develop a compliance plan to "ensure future compliance" with the Communications Act of 1934, FCC rules, and related orders and decisions). Given the previously non-existent state of Lingo's compliance program, Plaintiffs have no assurance that Lingo will suddenly bring itself into full compliance with the Consent Decree.

As for the other Defendants, Life has worked with Kramer on robocalls since 2010. The fact that the company has ended its relationship with him does not mean that Life will not be used again to make illegal robocalls that intimidate voters. To the contrary, Life's fourteen-year history of working with Kramer indicates a propensity to traffic robocalls. Moreover, the fact that Voice did not have any legal or compliance team, *see* Decl. of Jeff Fournier, ECF No. 80-2 ¶ 24, undercuts any asserted commitment to avoid trafficking illegal robocall campaigns in the future. Kramer himself has said "with a mere $500 investment, anyone could replicate" his actions, Messages with Alex Seitz-Wald, ECF No. 71-28, at 4, but that requires participation by these companies.

II. PLAINTIFFS HAVE ESTABLISHED IRREPARABLE HARM

The Foundation contends that Plaintiffs have failed to establish irreparable harm for two reasons, each of which are unconvincing.[2] ECF No. 111 at 4–6.

First, the League's harm was not "self-inflicted" in response to mere "political expression," contrary to the Foundation's assertions. *Id.* at 5. Instead, the League's harm was necessitated by Defendants' unlawful, intimidating, threatening, and coercive robocall campaign.[3] Defendants'

[2] The Foundation also appears to raise a redressability and/or causation argument in its section on irreparable harm. ECF No. 111 at 7. However, this argument is properly construed as part of the standing inquiry, rather than the irreparable harm inquiry. Accordingly, Plaintiffs have addressed the Foundation's arguments in the prior section of this memoranda. *See supra* Section I.a.

[3] To the extent that the Foundation argues that Section 11(b) violates the First Amendment by impermissibly regulating speech, *see* ECF No. 111 at 5, the Foundation is mistaken. As the United States noted in its Statement of Interest, *see* ECF No 86 at 15 n.6, Section 11(b) is focused on conduct, not speech, and therefore it does not implicate the First Amendment. And even if the conduct prohibited by Section 11(b) fell within the scope

conduct forced the League to spend more time and resources to combat the NH Robocalls, leaving less time and resources to work on its core organizational mission of voter registration. Moreover, monetary relief after the fact will not make the League whole, as the League cannot recover the time and resources it has already spent—and will continue to spend—to combat the harm caused by Defendants, at the expense of its own organizational mission. *See Wohl I*, 498 F. Supp. 3d at 475 (holding that the plaintiff nonprofit organization suffered irreparable harm where it was forced to divert resources away from its work related to the Census to address a threatening robocall campaign, even though the Census had already concluded at the time of the injunction).

The Foundation's cited cases are distinguishable and do not support its position. To begin, in *Fair Housing Council v. Montgomery Newspapers*, 141 F.3d 71 (3d Cir. 1998), the Third Circuit held that a nonprofit organization failed to establish irreparable harm, where it planned to engage in a public education campaign in response to allegedly discriminatory advertisements. *Id.* at 76–77. In that case, however, the organization failed to demonstrate "that *anyone* other than the [organization's] staff even *read* the relevant advertisements," *id.* at 77, whereas here Plaintiffs have provided multiple declarations of voters who received Defendants' deceptive robocalls. Moreover, the Third Circuit observed that the organization "failed to show that any educational effort was ever implemented." *Id.* Instead, the organization alleged that, "at some future time, it would be required to spend" money "over the course of three years to repair damage caused by the discriminatory advertisements." *Id.* at 76–77 (internal quotation marks omitted). Here, by

of the First Amendment, Section 11(b) survives any level of scrutiny because it is narrowly tailored to further a compelling interest—the fundamental right to vote. *See Nat'l Coal. on Black Civic Participation v. Wohl*, 661 F. Supp. 3d 78, 121 (S.D.N.Y. 2023) ("*Wohl III*") ("This statute is narrowly tailored to ensure that mistaken false utterances are not penalized because the context of the speech itself is critical to determining whether speech is intimidating, threatening or coercive to voters."); *see also Burson v. Freeman*, 504 U.S. 191, 208 (1992) (plurality opinion) (recognizing the government's "compelling interest in securing the right to vote freely and effectively."). In any event, Defendants have not asserted that Section 11(b) violates the First Amendment as applied here.

contrast, the League has already implemented extensive efforts to mitigate against Defendants' robocall campaign, and it continues to do so.

Nor does *City of South Miami v. Governor*, 65 F.4th 631 (11th Cir. 2023), support the Foundation's argument. There, the Eleventh Circuit held that the organizational plaintiffs did not establish irreparable harm, where the organizations "failed to produce concrete evidence" that Florida's immigration law was "an imminent threat to their members or the immigrant community." *Id.* at 640. The Court concluded that the organization's fears that "local officers [would] profile[] anyone based on" the law were "highly speculative," and rested on "a highly attenuated chain of possibilities." *Id.* Here, the League's concerns are neither "highly speculative," nor do they rest on a "chain of possibilities." Rather, the League was rightfully concerned that Defendants' threatening and coercive robocalls, which targeted voters two days before the New Hampshire Primary and urged them not to vote, would have their intended effect. The FCC's enforcement actions against Lingo and Kramer, along with Kramer's numerous criminal charges, further demonstrate the severity of Defendants' robocall campaign and its risk to the integrity of elections. *See* ECF Nos. 71-3, 71-11.[4]

Second, the Foundation claims that the League "cannot credibly contend" that the NH Robocalls caused irreparable harm because the Democratic National Committee (the "DNC") also

[4] The Foundation's citation to *Our Watch With Tim Thompson v. Bonta*, 682 F. Supp. 3d 838 (E.D. Cal. 2023) is not relevant to the irreparable harm inquiry. In that case, the court held that a nonprofit advocacy organization failed to allege facts sufficient to show that it had standing at the motion to dismiss stage. *Id.* at 855. Accordingly, the court denied the organization's motion for a preliminary injunction without addressing irreparable harm, because the organization failed to meet its burden of showing that it was likely to succeed on the merits. *Id.*

Even in the standing context, however, *Our Watch With Tim Thompson* is inapposite. There, the court concluded that the organizational plaintiff lacked standing, because, among other things, its complaint was "devoid of any allegations pertaining to what [the organization]'s regular activities are and how SB 107's enactment specifically impacts the organization's functions." *Id.* at 848. Therefore, the court concluded, "at most, plaintiff has pled facts suggesting that its values have been undermined by SB 107." *Id.* Here, by contrast, the League has extensively demonstrated how Defendants' illegal robocall campaign has negatively impacted the League's core business functions.

discouraged people from participating in the New Hampshire Primary. ECF No. 111 at 6. Specifically, the Foundation points to a letter (the "DNC Letter") from the DNC's Rules & Bylaws Committee (the "Committee"), which was sent to the Chair of the New Hampshire Democratic Party (the "NH Democratic Party").[5] In this letter, the Committee deemed the New Hampshire Primary "non-compliant" and urged the NH Democratic Party and presidential candidates "not to participate." DNC Letter at 1.

The Foundation's attempt to undermine the League's irreparable harm argument with the DNC Letter is unavailing. As an initial matter, the DNC Letter is not analogous to the Defendants' unlawful, intimidating, threatening, and coercive conduct here. The NH Robocall Campaign specifically targeted individual voters and urged them not to vote in the New Hampshire Primary, while using a threat and a deepfake of President Biden's voice to do so. These robocalls posed a far greater likelihood of voter confusion and intimidation than the DNC Letter. By contrast, the DNC Letter is an authentic document which represented an ongoing conflict between the Committee and the NH Democratic Party regarding the proper order of the party's nominating calendar.[6] Additionally, because the DNC Letter was directed to the Chair of the NH Democratic Party, rather than individual voters via their personal phone lines, it posed far less risk of intimidating, threatening, or coercing voters. In any event, any harm caused by the DNC Letter does not alter the fact that the NH Robocall Campaign caused harm to voters and the League's organizational mission.

[5] *See* Letter from DNC Rules & Bylaws Comm. to New Hampshire Democratic Party Chair Raymond Buckley (Jan. 5, 2024), https://www.politico.com/f/?id=0000018c-e037-ddd0-a79f-e7778fe50000.

[6] *See* Lisa Kashinsky, *DNC Blasts NH Dems Over "Meaningless" Primary*, Politico (Jan. 6, 2024), https://www.politico.com/news/2024/01/06/dnc-nh-primary-00134174.

III. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIM UNDER SECTION 11(b) OF THE VOTING RIGHTS ACT

Lastly, the Foundation asserts that Plaintiffs failed to establish a likelihood of success on the merits of their claim under Section 11(b) of the VRA. ECF No. 111 at 9–13; *see also* ECF No. 110. Accordingly, the Foundation argues that (1) the Court should dismiss Count I of the amended complaint, ECF No. 110 at 25, and (2) the Court can uphold the Magistrate Judge's recommendation on this alternate basis, at least as to Count I, ECF No. 111 at 13. The Foundation raises three main arguments in support of its position, but each of these arguments lack merit.

First, the Foundation argues that Section 11(b) of the VRA is not enforceable through an implied private right of action. ECF No. 110 at 10. As Plaintiffs noted in their opposition to Defendants' motions to dismiss, ECF No. 85 at 10 n.2, this position is contrary to the majority of cases, which have concluded that Section 11(b) of the VRA "undoubtedly applies to private conduct, and private individuals are subject to its prohibitions." *Wohl I*, 498 F. Supp. 3d at 476; *see also Rhodes v. Siver*, No. 19-12550, 2021 WL 912393 (E.D. Mich. Mar. 10, 2021) (same); *Mich. Welfare Rights Org. v. Trump*, 600 F. Supp. 3d 85, 104 (D.D.C. 2022) ("The Court concludes that precedent and direction from the Court of Appeals for the District of Columbia Circuit and the Supreme Court support a finding of a private right of action."); *Ariz. Democratic Party v. Ariz. Republican Party*, No. 16 Civ. 03752-PHX-JJT, 2016 WL 8669978, at *4 (D. Ariz. Nov. 4, 2016) ("[Section 11(b)] does not exclude a private right of action for injunctive relief.").

The United States thoroughly addressed this argument in its Statement of Interest addressing important questions regarding interpretation of Section 11(b) of the VRA. ECF No. 86 at 5–11. The United States explained that Section 11(b) contains the requisite "rights-creating language" under *Alexander v. Sandoval*, 532 U.S. 275, 288–89 (2001). ECF No. 86 at 5–6. Additionally, the United States explained that "[t]he right of private citizens to bring suit to enforce

Section 11(b) is inherent in the text, structure, and history of the [VRA]." *Id.* at 5; *see id.* at 6–11. It is noteworthy that the Foundation fails to engage with the United States's arguments.

Second, the Foundation argues that even if private plaintiffs may sue for alleged Section 11(b) violations, Plaintiffs failed to establish a likelihood of success on the merits of its Section 11(b) claim. ECF No. 111 at 10–12. The Foundation asserts that Defendants' robocall message merely "conveyed a political message" and it "is not alleged to have actually made anyone feel intimidated, threatened or coerced." *Id.* at 10. The Foundation further contends that the Defendants' robocall message "is reasonably susceptible of a valid, non-threatening interpretation"—namely, that the Democrats "should not bother" voting in the New Hampshire Primary, because "it is much more important that they vote in the general election." *Id.* at 11.

Here, too, the Foundation's argument misses the mark. As Plaintiffs and the United States have previously explained, Section 11(b) prohibits any conduct that intimidates, threatens, or coerces voters—or *attempts to do so*. *See* ECF No. 86 at 11–19; ECF No. 85 at 7–13; *Wohl III*, 661 F. Supp. 3d at 121 ("Defendants' false utterances in the Robocall were made in order to intimidate or threaten voters who were exercising their right to vote."). And when assessing a Section 11(b) claim, courts use an objective standard that does not depend on the subjective reaction of targeted voters—the court determines whether the challenged conduct intimidates, threatens, or coerces a *reasonable voter*, or attempted to do so. *See Wohl I*, 498 F. Supp. 3d at 477 (applying a "reasonable recipient familiar with the context" standard to determine whether the challenged conduct would have "deter[red] individuals from exercising their voting rights").

Although the Foundation argues that Defendants' robocall message "is reasonably susceptible of a valid, non-threatening interpretation," this is not the relevant Section 11(b) inquiry. Again, courts must assess whether the challenged conduct objectively intimidates, threatens, or

coerces a *reasonable* voter—or attempted to do so. *See Wohl I*, 498 F. Supp. 3d at 477. The fact that the Foundation can brainstorm a benign interpretation of the NH Robocalls is irrelevant. Moreover, the Foundation's "non-threatening interpretation" is nonsensical. The NH Robocalls did more than tell voters to "not bother" voting—the NH Robocalls clearly represented that voting in the primary would cost voters their right to vote in the General Election. The NH Robocalls also included a number of elements that would be persuasive to a reasonable person. *See Wohl III*, 661 F. Supp. 3d at 123 (noting that the call "markedly lacked any outlandish details or other cues that may indicate to an ordinary listener that it should not be taken seriously"). The NH Robocalls deepfaked President Biden's voice and used language associated with President Biden, while identifying the sender as Kathy Sullivan, a respected figure in New Hampshire's Democratic Party and a leader of an effort to support President Biden's write-in campaign.

The cases cited by the Foundation are inapposite. For example, the Foundation points to *Delegates to the Republican National Convention v. Republican National Convention*, No. SACV 12-927, 2012 U.S. Dist. LEXIS 110681 (C.D. Cal. Aug. 7, 2012) ("*RNC*"), where the court rejected a claim under Section 1971(b) of the VRA. There, the plaintiffs alleged that a specific defendant removed elected delegates who refused to vote for a particular nominee at the national convention. *Id.* at *29. In doing so, the court noted that the statute's phrase—"intimidate, threaten or coerce"—did not encompass the defendant's challenged conduct—"namely, a political parties' *conditioning* of delegate status upon the putative delegate signing an affidavit promising to vote for a particular nominee where no state law or party rule expressly authorizes that affidavit." *Id.* at *42.

The challenged conduct in *RNC* is not analogous to the case at hand, where Defendants personally targeted thousands of potential or likely Democratic voters, urging them not to exercise their right to vote and using a threat to do it. Regardless, the court's underlying VRA analysis in

RNC does not help the Foundation's case, either. There, the court provided examples of other cases where defendants violated Section 1971(b) of the VRA, which involved extreme conduct such as violence and economic coercion that was motivated by racial animus. *Id.* at *40–41 (citing *United States by Katzenbach v. Original Knights of the Ku Klux Klan*, 250 F. Supp. 330, 355 (E.D. La. 1965)). Although the *RNC* court acknowledged that such extreme conduct was not "the only definition[] of the phrase 'intimidate, threaten or coerce,'" it observed that the plaintiffs did not allege "any acts akin to those done by defendants" in those cases. *Id.* at *41.

The Foundation's reliance on this out-of-circuit district court decision is thus unpersuasive. Those who violate the VRA have certainly evolved their tactics to intimidate, threaten, or coerce voters over the years, but this does not undermine the vigor of the VRA's protections. As the *Wohl I* court stated, "the forces and conflicts that animated Congress's adoption of the . . . voting rights legislation are playing out again . . . though with a difference." *Wohl I*, 498 F. Supp. 3d at 460. Although bad actors no longer use "guns, torches, burning crosses, and other dire methods perpetrated under the cover of white hoods" to intimidate, threaten, or coerce voters, today's tactics "using telephones, computers, and modern technology . . . serve the same deleterious ends." *Id.*

Third, the Foundation baldly asserts that the New Hampshire Primary is entirely exempt from the protections of Section 11(b), simply because the DNC Rules & Bylaws Committee declared that the New Hampshire Primary was "non-compliant." ECF No. 111 at 12 (quoting the DNC Letter). According to the Foundation, Section 11(b) is "inapplicable" to the New Hampshire Primary because "it was not an 'election' and did not involve 'vote[s]' for purposes of the VRA." *Id.* at 12 (quoting 52 U.S.C. § 10307(b), 10310(c)(1)).

As an initial matter, the Foundation's argument is predicated on facts about the New Hampshire Primary that were public knowledge when Defendants filed their motions to dismiss.

See ECF No. 110 at 22 n.5 (citing Politico article from January 6, 2024); *id.* at 23 n.6 (citing CNN Politics article from January 22, 2024). But Defendants did not rely on this information, as it has no bearing on the issues presently before this Court. As explained earlier, *see supra* Section II, the DNC Letter represented an ongoing disagreement between the DNC's Rules & Bylaws Committee and the New Hampshire Democratic Party regarding the order of the party's nominating calendar. But the Committee's interpretation of the New Hampshire Primary, and whether it complied with the relevant party rules and regulations, is not determinative of whether the New Hampshire Primary constituted an "election" involving "votes" for purposes of Section 11(b) of the VRA. The Foundation cites to no authority to suggest otherwise.

As the United States explained in its Statement of Interest, Section 11(b) casts a wide net of individuals who are protected from intimidation, threats, and coercion in voting. *See* ECF No. 86 at 5–6. The text of Section 11(b) specifies individuals who are protected by the provision—namely, those who are "voting or attempting to vote," "urging or aiding any person to vote or attempt to vote," or "exercising any powers or duties under" the VRA. 52 U.S.C. § 10307(b); Additionally, the VRA's definition of "vote" and "voting" are similarly broad—anyone who is taking any "action necessary to make a vote effective" is entitled to be free from intimidation, threats, and coercion while engaging in those activities. *Id.* § 10307(c)(1). These broad definitions demonstrate that voters who participated in the NH Primary were protected by Section 11(b).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court reject the arguments set forth in the Foundation's amicus briefs. Plaintiffs further request that the Court reject the Magistrate Judge's recommendation and grant Plaintiffs' motion for a preliminary injunction, and deny Defendants' motions to dismiss this action.

Dated: November 13, 2024

Respectfully submitted,

/s/ Mark R. Herring

William C. Saturley (NH Bar #2256)
Nathan R. Fennessy (NH Bar #264672)
Nicholas A. Dube (NH Bar #27464)

PretiFlaherty
57 N Main Street
New Hampshire 03301
(603) 410-1500
WSaturley@preti.com
Nfennessy@preti.com
Ndube@preti.com

Counsel for Plaintiffs

Courtney Hostetler* (MA Bar #683307)
John Bonifaz* (MA Bar #562478)
Ben Clements* (MA Bar #555802)
Amira Mattar* (NY Bar #5774450)

Free Speech For People
48 N. Pleasant St., Suite 304
Amherst, MA 01002
(617) 244-0234
chostetler@freespeechforpeople.org
jbonifaz@freespeechforpeople.org
bclements@freespeechforpeople.org
amira@freespeechforpeople.org

Counsel for Plaintiffs

Mark R. Herring* (DC Bar #90013124)
Matthew R. Nicely* (DC Bar #430564)
Caroline L. Wolverton* (DC Bar #496433)
Amanda S. McGinn* (DC Bar #1049085)
Joseph T. DiPiero* (DC Bar #1618536)
Maria Julia Hershey* (DC Bar #90020162)
Sara M. Hanna* (DC Bar #90017864)

Akin Gump Strauss Hauer & Feld LLP
2001 K Street, N.W.
Washington, DC 20006-1037
(202) 887-4000
mherring@akingump.com
mnicely@akingump.com
cwolverton@akingump.com
amcginn@akingump.com
jdipiero@akingump.com
mhershey@akingump.com
shanna@akingump.com

Counsel for Plaintiffs

**Admitted Pro Hac Vice*

CERTIFICATE OF SERVICE

The undersigned hereby certified that on November 13, 2024, the foregoing was electronically filed with the Court and served upon the following:

Boyd Garriott
Frank Scaduto
Michele E. Kenney
Thomas M. Johnson, Jr.
Wiley Rein LLP
2050 M Street NW
Washington, DC 20036
(210) 833-5573
Counsel for Defendant Lingo Telecom, LLC
Via ECF System

Steve Kramer
20 Cloverfield Drive
New Fairfield, CT 06812
Via US Mail

Wayne E. George
Ezra D. Church
Terese M. Schireson
Morgan Lewis & Bockius LLP
One Federal St
Boston, MA 02110-4104
Counsel for Defendants Life Corporation and Voice Broadcasting Corporation
Via ECF System

Richard J. Lehmann
Lehmann Major List PLLC
6 Garvin Falls Road
Concord, NH 03301
Counsel for Amicus Curiae Coolidge Reagan Foundation
Via ECF System

Dan Backer
Chalmers, Adams, Backer & Kaufman LLC
441 North Lee Street, Suite 300
Alexandria, VA 22314
Counsel for Amicus Curiae Coolidge Reagan Foundation
Via ECF System

A true and correct copy was also transmitted via electronic mail to Steve Kramer at gotvcalls@gmail.com.

Respectfully submitted,

/s/ Mark R. Herring
Mark R. Herring (DC Bar #90013124)