

Enjoining False Robocalls About Voting by Mail

National Coalition on Black Civic Participation v. Wohl
(Victor Marrero, S.D.N.Y. 1:20-cv-8668)

A district judge required private parties who had made robocalls threatening voters with false statements about voting by mail to make curative robocalls.

Subject: Campaign activities. *Topics:* Campaign materials; early voting; absentee ballots; corporate electioneering; intervention; matters for state courts; pro se party; interlocutory appeal; Covid-19.

An October 16, 2020, federal complaint filed in the Southern District of New York accused defendants of intimidating voters during the global Covid-19 infectious pandemic with robocalls warning voters not to vote by mail: “Voters deceived by these messages face a harmful choice: expose yourself and your family to increased risk of contracting COVID-19 by voting in person, or do not vote.”¹ The plaintiffs were an organization and eight voters in New York, Pennsylvania, and Ohio.² The defendants were two persons, two of their businesses, and ten Does.³ The plaintiffs filed a proposed temporary restraining order on October 22.⁴

Judge Victor Marrero ordered a written response to the request for a temporary restraining order by October 23 and set the case for a telephonic hearing on Monday, October 26, posting contact information in the public record.⁵ The individual defendants, who were also facing criminal prosecution, appeared at the hearing pro se.⁶ An attorney filed a brief on their behalf on the following day.⁷

1. Complaint at 1, Nat’l Coal. on Black Civic Participation v. Wohl, No. 1:20-cv-8668 (S.D.N.Y. Oct. 19, 2020), D.E. 11 (correcting a Friday, October 16, 2020, filing error); Nat’l Coal. on Black Civic Participation v. Wohl, ___ F. Supp. 3d ___, ___, 2023 WL 2403012 (S.D.N.Y. 2023) (pp.1, 14 of opinion filed at S.D.N.Y. No. 1:20-cv-8668, D.E. 256); see Nat’l Coal. on Black Civic Participation v. Wohl, 512 F. Supp. 3d 500, 504–05 (S.D.N.Y. 2021); Nat’l Coal. on Black Civic Participation v. Wohl, 498 F. Supp. 3d 457, 463 (S.D.N.Y. 2020).

2. Complaint, *supra* note 1, at 3–4.

3. *Id.* at 4–5.

4. Proposed Order, *Nat’l Coal. on Black Civic Participation*, No. 1:20-cv-8668 (S.D.N.Y. Oct. 22, 2020), D.E. 12; *Nat’l Coal. on Black Civic Participation*, ___ F. Supp. 3d at ___, 2023 WL 2403012 (p.14 of opinion filed at S.D.N.Y. No. 1:20-cv-8668, D.E. 256); see *Nat’l Coal. on Black Civic Participation*, 512 F. Supp. 3d at 507.

5. Order, *Nat’l Coal. on Black Civic Participation*, No. 1:20-cv-8668 (S.D.N.Y. Oct. 22, 2020), D.E. 27; see Docket Sheet, *id.* (Oct. 16, 2020) (minutes, Oct. 26, 2020); *Nat’l Coal. on Black Civic Participation*, ___ F. Supp. 3d at ___, 2023 WL 2403012 (p.14 of opinion filed at S.D.N.Y. No. 1:20-cv-8668, D.E. 256); *Nat’l Coal. on Black Civic Participation*, 498 F. Supp. 3d at 465–66.

6. *Nat’l Coal. on Black Civic Participation*, 498 F. Supp. 3d at 466, 468, 474–75; Opinion at 3–4, *Nat’l Coal. on Black Civic Participation*, No. 1:20-cv-8668 (S.D.N.Y. Feb. 22, 2021), D.E. 77, 2021 WL 694557 (denying a renewed defense motion to stay the case pending criminal proceedings in state court), *appeal dismissed for lack of a final order*, Order, No. 21-495

Judge Marrero granted the plaintiffs a temporary restraining order on Wednesday.⁸ Referring to the defendants' actions as electoral terror, "this Court finds that the information Defendants' calls convey is manifestly false and meant to intimidate citizens from exercising voting rights."⁹ The robocalls asserted that voting by mail would subject voters to enhanced private and government surveillance.¹⁰ Judge Marrero ordered the defendants to make curative robocalls to all recipients of the false robocalls informing them of the court's findings.¹¹

Judge Marrero ordered evidence of compliance submitted by 5:00 p.m. on October 29.¹² Instead, the defendants' attorney submitted a letter outlining difficulties in complying with the court's order arising from pending criminal prosecutions.¹³ Following negotiations among the parties and two teleconference hearings on October 30, Judge Marrero determined that information submitted by the defendants remained insufficient to assess compliance with his order.¹⁴ An interlocutory appeal from the temporary restraining order was withdrawn.¹⁵

In January 2021, Judge Marrero denied the defendants' motion to dismiss the case.¹⁶ In February, Judge Marrero denied defendants a stay pending resolution of their criminal prosecutions in Michigan and Ohio.¹⁷ In May, Judge

(2d Cir. June 22, 2021), D.E. 92, 2021 WL 3852252; *see also* Oralandar Brand-Williams, *2 Conservative Activists to Be Tried in Robocall Plot*, Detroit News, Oct. 30, 2020, at A5; Beth LeBlanc, *Two Appear in Voter Intimidation Case*, Detroit News, Oct. 9, 2020, at A4; Darrel Rowland, *Ohio Considering Charges in Voter Intimidation*, Cincinnati Enquirer, Oct. 18, 2020, at A15.

One defendant said at the hearing, "We rushed as fast as we could to get a lawyer, and we have secured him as of yesterday, and he will be available on the case literally within 24 hours or so." Transcript at 3, *Nat'l Coal. on Black Civic Participation*, No. 1:20-cv-8668 (S.D.N.Y. Oct. 26, 2020, filed Nov. 2, 2020), D.E. 53.

7. Defendants' Brief, *Nat'l Coal. on Black Civic Participation*, No. 1:20-cv-8668 (S.D.N.Y. Oct. 27, 2020), D.E. 36; *Nat'l Coal. on Black Civic Participation*, 498 F. Supp. 3d at 469.

8. *Nat'l Coal. on Black Civic Participation*, 498 F. Supp. 3d 457; *Nat'l Coal. on Black Civic Participation*, ___ F. Supp. 3d at ___, 2023 WL 2403012 (p.14 of opinion filed at S.D.N.Y. No. 1:20-cv-8668, D.E. 256); *Nat'l Coal. on Black Civic Participation*, 512 F. Supp. 3d at 507; *see* Opinion, *Nat'l Coal. on Black Civic Participation*, No. 1:20-cv-8668 (S.D.N.Y. Oct. 29, 2020), D.E. 41, 2020 WL 6365336 (denying reconsideration).

9. *Nat'l Coal. on Black Civic Participation*, 498 F. Supp. 3d at 464.

10. *Id.* at 466.

11. *Id.* at 490 (scripting the message).

12. *Id.*

13. Letter, *Nat'l Coal. on Black Civic Participation*, No. 1:20-cv-8668 (S.D.N.Y. Oct. 29, 2020), D.E. 43.

14. Opinion, *id.* (Oct. 30, 2020), D.E. 49; *see* Letters, *id.* (Oct. 3, 2020), D.E. 46 to 48; *Nat'l Coal. on Black Civic Participation* Docket Sheet, *supra* note 5 (minutes, Oct. 30, 2020); *see also* Oralandar Brand-Williams, *Judge Criticizes Activists' Remedy for Robocalls*, Detroit News, Oct. 31, 2020, at A6.

15. Order, *Nat'l Coal. on Black Civic Participation v. Wohl*, No. 20-3724 (2d Cir. Nov. 9, 2020), D.E. 11.

16. *Nat'l Coal. on Black Civic Participation v. Wohl*, 512 F. Supp. 3d 500 (S.D.N.Y. 2021).

17. Opinion, *Nat'l Coal. on Black Civic Participation*, No. 1:20-cv-8668 (S.D.N.Y. Feb. 22,

Marrero permitted New York’s attorney general to intervene as a plaintiff, adding a California robocall business as a defendant.¹⁸ Judge Marrero denied intervention to someone who “has not identified any claim or defense he wishes to assert that shares a common question of law or fact with the main action”; the prospective intervenor sought to challenge the attorney general’s “selective enforcement of voting rights laws and alleged misconduct in connection with the 2017 New York City government elections.”¹⁹ On September 17, Judge Marrero denied a motion to dismiss the attorney general’s complaint in intervention.²⁰

The original and intervening plaintiffs filed an amended complaint on November 12, 2021.²¹ On June 2, 2022, Judge Marrero issued a consent decree governing the California business’s robocalls.²² The individual defendants pleaded guilty in the Ohio prosecution in October.²³ Judge Marrero granted the plaintiffs summary judgment on March 8, 2023.²⁴ He concluded, “Defendants set into motion a full-scale voter suppression operation during the summer of 2020 to discourage eligible voters from voting by targeting mail-in voting in the 2020 Election.”²⁵ A jury trial on remedies is set to begin on January 29, 2024.²⁶

2021), D.E. 77, 2021 WL 694557; *see Order, Nat’l Coal. on Black Civic Participation v. Wohl*, No. 21-232 (2d Cir. June 22, 2021), D.E. 113, 2021 WL 3852252 (dismissing an interlocutory appeal).

18. Opinion, *Nat’l Coal. on Black Civic Participation*, No. 1:20-cv-8668 (S.D.N.Y. May 19, 2021), D.E. 101; *see Nat’l Coal. on Black Civic Participation v. Wohl*, ___ F. Supp. 3d ___, ___, 2023 WL 2403012 (S.D.N.Y. 2023) (pp.1–2, 16 of opinion filed at S.D.N.Y. No. 1:20-cv-8668, D.E. 256); Intervention Complaint, *Nat’l Coal. on Black Civic Participation*, No. 1:20-cv-8668 (S.D.N.Y. May 19, 2021), D.E. 102; N.Y. Att’y Gen. Letter, *id.* (May 6, 2021), D.E. 92; *see also* Opinion, *id.* (Sept. 17, 2021), D.E. 140, 2021 WL 4254802 (denying a motion to dismiss new defendants).

19. Opinion at 2–3, *Nat’l Coal. on Black Civic Participation*, No. 1:20-cv-8668 (S.D.N.Y. May 28, 2021), D.E. 115, 2021 WL 2183090.

20. Opinion, *id.* (Sept. 17, 2021), D.E. 140, 2021 WL 4254802; *Nat’l Coal. on Black Civic Participation*, ___ F. Supp. 3d at ___, 2023 WL 2403012 (p.16 of opinion filed at S.D.N.Y. No. 1:20-cv-8668, D.E. 256).

21. Amended Complaint, *Nat’l Coal. on Black Civic Participation*, No. 1:20-cv-8668 (S.D.N.Y. Nov. 12, 2021), D.E. 149.

22. Consent Decree, *id.* (June 2, 2022), D.E. 196; *Nat’l Coal. on Black Civic Participation*, ___ F. Supp. 3d at ___, 2023 WL 2403012 (p.16 of opinion filed at S.D.N.Y. No. 1:20-cv-8668, D.E. 256).

23. Letter, *Nat’l Coal. on Black Civic Participation*, No. 1:20-cv-8668 (S.D.N.Y. Jan. 9, 2023), D.E. 252 (attaching a plea transcript); *Nat’l Coal. on Black Civic Participation*, ___ F. Supp. 3d at ___, 2023 WL 2403012 (p.15 of opinion filed at S.D.N.Y. No. 1:20-cv-8668, D.E. 256); *see Christine Hauser, 2 Plead Guilty Over Robocalls Meant to Curb Voting by Mail*, N.Y. Times, Oct. 26, 2022, at A11.

24. *Nat’l Coal. on Black Civic Participation*, ___ F. Supp. 3d ___, 2023 WL 2403012 (opinion filed at S.D.N.Y. No. 1:20-cv-8668, D.E. 256).

25. *Id.* at ___ (p.5 of filed opinion).

26. Order, *Nat’l Coal. on Black Civic Participation*, No. 1:20-cv-8668 (S.D.N.Y. Aug. 31, 2023), D.E. 318.