

VOTER HARASSMENT AND THE LIMITS OF STATE AND FEDERAL POWER

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Acts of voter harassment are often difficult to prevent. One longstanding, albeit underused, tool for addressing such harassment is found in section 11(b) of the Voting Rights Act (VRA). Continued use of the provision, however, is threatened by recent decisions restricting private enforcement of the VRA. This Essay examines one challenge to such enforcement, exploring the linkage between section 11(b)'s prohibition on voter intimidation and the enforcement of constitutional voting guarantees, on which private enforcement of the provision presently depends. It invites consideration of the idea that this linkage is sufficient and private enforcement is appropriate because section 11(b) provides a remedy when state and local efforts to operate equitable voting processes fall short.

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INTRODUCTION

“[B]eware of vote by mail.” This message was disseminated hundreds of thousands of times to Black voters in Illinois, Michigan, New York, Ohio, and Pennsylvania in the months leading up to the 2020 presidential election.¹ A phone call from a woman who identified herself as “Tamika Taylor from Project 1599” told recipients that the personal identification information required to submit a mail-in ballot would be kept in a “public database” for use by law enforcement officials “to track down old warrants,” by credit card companies to collect outstanding debts, and, potentially, by the CDC to track people “for mandatory vaccines.”² None of this, of course, was true. The robocalls promoted deliberately false information as part of a scheme designed to suppress voter participation in predominately Black communities.³

After the election, the two men who concocted the scheme, Jack Burkman and Jacob Wohl, faced a slew of criminal and civil charges in

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1. *People v. Burkman*, Nos. 164638–39, 2024 WL 2982804, at *2 (Mich. June 13, 2024).

2. *Id.*

3. *Id.*

multiple jurisdictions.⁴ In Ohio, the men pled guilty to telecommunications fraud under state law.⁵ In Michigan, proceedings remain ongoing on felony charges that the defendants used “corrupt means” to “deter” voter participation in an election in violation of state law.⁶ In New York, a federal district court held in *NCBCP v. Wohl*⁷ that Burkman and Wohl’s conduct violated a mix of state and federal civil rights laws,⁸ including section 11(b) of the Voting Rights Act (VRA), which bars voter intimidation.⁹

This Essay focuses on that section 11(b) violation, using it as an entry point to consider some broader questions about the relationship between federal and state power over elections, on the one hand, and the damage that follows from voter harassment, on the other. Part I unpacks why the section 11(b) violation found in *NCBCP v. Wohl* would have been thrown out had it been pressed in a number of other jurisdictions. It turns out that the *NCBCP* ruling rested, in the first instance, on what has since become a contested point—namely, that private plaintiffs may enforce section 11(b)’s ban on voter harassment. As the Essay will explain, the existence of a private right of action to enforce section 11(b) depends, in part,¹⁰ on whether its ban may be understood to enforce the Fourteenth and Fifteenth Amendments. From one view, section 11(b) cannot be so understood given that the provision bans privately initiated harassment. Another perspective, however, allows for the characterization so long as the section 11(b) ban helps to prevent or remedy constitutional defects in state election administration.

Part II of the Essay evaluates whether section 11(b) may be so characterized. It explores a range of state responses to privately initiated voter harassment, ranging from state efforts that encourage and immunize such harassment, to less calculated failures to stop it, to affirmative efforts to prevent this type of harassment in the first instance

4. Christine Hauser, *Right-Wing Operatives Plead Guilty in Voter-Suppression Scheme*, N.Y. TIMES (Oct. 25, 2022), <https://www.nytimes.com/2022/10/25/us/politics/ohio-robocalls-wohl-burkman-guilty.html>.

5. *Id.*

6. *Burkman*, 2024 WL 2982894, at *7.

7. *Nat’l Coal. on Black Civic Participation v. Wohl*, 661 F. Supp. 3d 78 (S.D.N.Y. 2023).

8. *Id.* at 90.

9. Voting Rights Act § 11(b), 52 U.S.C. § 10307(b).

10. A separate challenge to private enforcement of section 11(b) comes from recent decisions that reject private enforcement of the VRA’s section 2. *See, e.g., Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 86 F.4th 1204 (8th Cir. 2023). The rationale for blocking privately initiated section 2 claims would also block private enforcement of section 11(b), as at least one district court has held. *See Schilling v. Washburne*, 592 F. Supp. 3d 492, 498–99 (W.D. Va. 2022) (reading the statute’s express grant of litigating authority to the U.S. Attorney General to preclude concurrent private enforcement of section 11(b)); *see also infra* notes 24–34 and accompanying text.

and hold its perpetrators accountable. This Part invites consideration of the idea that the section 11(b) prohibition should be understood to enforce the Fourteenth and Fifteenth Amendments in all of these contexts. The idea on offer is that Congress's power to enforce these Amendments encompasses measures that disrupt state-imposed burdens on the right to vote, as well as those that bolster state efforts to operate equitable voting processes. It understands Congress's enforcement power in this realm to allow for actions that may complement state initiatives rather than being limited to those that displace or supplant them. In exploring this idea, this Part parses competing conceptions of the right to vote and explores the ways in which state action connected to voting differs from other types of state conduct.

I. PRIVATE ENFORCEMENT OF SECTION 11(b)

Enacted in 1965, section 11(b) of the Voting Rights Act prohibits acts that “intimidate, threaten, or coerce . . . any person for voting or attempting to vote.”¹¹ In contrast to more well-known VRA provisions like sections 2 and 5, the section 11(b) prohibition applies to private action as well as public conduct. Indeed, the statutory text is explicit on this point, making reference to the conduct not only of public officials but also of any person “whether acting under color of law or otherwise.”¹²

Section 11(b) offers plaintiffs distinct advantages over other civil rights statutes that also reach private action. Section 11(b), for instance, neither requires proof of a conspiracy among the defendants nor mandates that they act with the purpose to intimidate.¹³ In addition, plaintiffs bringing section 11(b) claims have long been deemed eligible for an award of attorney's fees should they prevail.¹⁴ Litigants have relied on section 11(b) sporadically for many decades,¹⁵ with more recent interest in the provision likely stemming from a confluence of factors,

11. 52 U.S.C. § 10307(b).

12. *Id.*

13. *Cf.* 42 U.S.C. § 1985(3) (section 2 of the Ku Klux Klan Act of 1871, requiring proof of conspiracy); 52 U.S.C. § 10101(b) (section 131(b) of the Civil Rights Act of 1957, requiring proof of discriminatory intent); *see also* Carly E. Zipper, *Let Us Not Be Intimidated: Past and Present Applications of Section 11(b) of the Voting Rights Act*, 97 WASH. L. REV. 301, 320 (2022).

14. 52 U.S.C. § 10310(e) (authorizing the award of reasonable attorney's fees to “the prevailing party, other than the United States” in any proceeding “to enforce the voting guarantees of the fourteenth or fifteenth amendment”); *see also infra* Part II (discussing whether 11(b) may be characterized as enforcing these constitutional voting guarantees).

15. *See* Zipper, *supra* note 13, at 320–21; Ben Cady & Tom Glazer, *Voters Strike Back: Litigation Against Modern Voter Intimidation*, 39 N.Y.U. REV. L. & SOC. CHANGE 173, 176 (2015).

including the expiration of a longstanding nationwide section 11(b) consent decree, the increasingly limited reach of other VRA provisions, and a rise overall in threatening conduct in connection with voting.¹⁶

Among the more recent section 11(b) claims is the one brought against Burkman and Wohl’s robocall scheme. Plaintiffs—a mix of voters targeted by the calls and a voting rights organization—argued that the scheme operated as a threat or intimidation within the meaning of section 11(b).¹⁷ The district court agreed, finding that the calls “may cause reasonable Black voters to resist voting out of fear.”¹⁸ Judge Victor Marrero observed that the calls resembled conduct—from the photographing of license plates to warnings about sharing voter information—that courts had previously found to be threatening or intimidating in violation of section 11(b).¹⁹

Before reaching that conclusion, however, Judge Marrero first had to resolve the defendants’ contention that section 11(b) affords no private right of action. Burkman and Wohl had argued that only the Attorney General of the United States was authorized to bring a section 11(b) claim, and, thus, that the claim initiated by private litigants in the case should be dismissed. “That is incorrect,” Judge Marrero wrote, explaining that “[c]onsistent with Section 11(b)’s broad reach, both the government and private parties may sue to enforce Section 11(b).”²⁰ As authority, the judge cited two relatively recent district court decisions that recognized private enforcement of section 11(b) and a law review article that asserted the same.²¹

This discussion was undeniably brief. Timing may have been a factor given that the ruling was issued one week before the 2020 presidential election. But *NCBCP*’s limited analysis on this point also reflected the fact that the question appeared wholly settled at the time. Private parties had been invoking section 11(b) for decades, such that

16. See *DNC v. RNC*, No. 18-1215, 2019 WL 117555, at *1 (3d Cir. Jan. 7, 2019); *Shelby County v. Holder*, 570 U.S. 529 (2013); *Brnovich v. DNC*, 141 S. Ct. 2321 (2021); Zipper, *supra* note 13, at 316–22.

17. *Nat’l Coal. on Black Civic Participation v. Wohl*, 498 F. Supp. 3d 457, 463–65 (S.D.N.Y. 2020).

18. *Id.* at 483.

19. *Id.* at 482–85 (discussing cases).

20. *Id.* at 476.

21. See *id.* (first citing *Ariz. Democratic Party v. Ariz. Republican Party*, No. CV-16-03752-PHX-JJT, 2016 WL 8669978, at *4 (D. Ariz. Nov. 4, 2016) (citing *Allen v. State Bd. of Elections*, 393 U.S. 544, 555–56 (1969)); then citing Cady & Glazer, *supra* note 15, at 183; and then citing *League of United Latin Am. Citizens v. Pub. Int. Legal Found.*, No. 18-CV-00423, 2018 WL 3848404, at *1 (E.D. Va. Aug. 13, 2018)).

private enforcement of the provision—along with a number of other VRA provisions—was largely uncontroversial.²²

Eight months later, the legal terrain shifted. On July 1, 2021, Justice Gorsuch, joined by Justice Thomas, wrote a concurring opinion in *Brnovich v. DNC*²³ to “flag one thing”—the contention that, while the Court had long “assumed” that private parties could enforce section 2 of the VRA, it had never actually decided the question.²⁴ The suggestion, of course, was that, under proper analysis of the VRA’s text, structure, and relevant precedent, no such private right of action exists. The rationale for that idea, developed years earlier in a dissent by Justice Thomas, extends beyond section 2 to encompass private enforcement of VRA provisions like section 11(b) as well.²⁵

By February 2022, a federal district court in Arkansas had taken up Justice Gorsuch’s invitation to review the longstanding “assum[ption]” about private enforcement of section 2. The Arkansas State Conference of the NAACP had challenged a 2021 redistricting plan adopted for the Arkansas State House of Representatives, arguing that the plan diluted Black voting strength in violation of the VRA’s section 2.²⁶ Judge Lee Rudofsky acknowledged that the plaintiff had presented what was “a strong merits case that at least some of the challenged districts in the Board Plan are unlawful under § 2.”²⁷ The judge nevertheless concluded that the court could not reach the merits because “a thorough analysis of the text and structure of the Voting Rights Act, and a painstaking journey through relevant caselaw” led him to conclude that only the U.S. Attorney General could press the claim.²⁸

A month later, a federal district court in Virginia issued a corresponding ruling regarding section 11(b). In *Schilling v. Washburne*,²⁹ Judge Norman Moon found that the allegations brought by a voter against election workers sufficed to state a § 1983 claim based on a denial of the right to vote, but that the voter’s section 11(b) claim should nevertheless be dismissed.³⁰ The court held that the VRA’s text and structure, and, in particular, section 12(d)’s express delegation of

22. See, e.g., *Whatley v. City of Vidalia*, 399 F.2d 521 (5th Cir. 1968) (removal case in which private parties invoked 11(b)’s protection); see *Allen*, 393 U.S. at 555–57 (recognizing private right to enforce section 5 of the VRA).

23. *Brnovich v. DNC*, 141 S. Ct. 2321 (2021).

24. *Id.* at 2350 (Gorsuch, J., concurring).

25. *Morse v. Republican Party of Va.*, 517 U.S. 186, 286–89 (1996) (Thomas, J., dissenting).

26. See *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 586 F. Supp. 3d 893, 895–96 (E.D. Ark. 2022), *aff’d*, 86 F.4th 1204 (8th Cir. 2023).

27. *Id.* at 896–97.

28. *Id.* at 897.

29. *Schilling v. Washburne*, 592 F. Supp. 3d 492 (W.D. Va. 2022).

30. *Id.* at 495.

enforcement authority to the Attorney General, precluded private enforcement of section 11(b).³¹

These newly articulated limits on private enforcement of the VRA are controversial and subject to well-founded criticism.³² The section 2 ruling, in particular, gained national attention that only grew after the appellate court affirmed the ruling, thereby barring private parties from bringing section 2 claims in any of the seven states that fall within the jurisdiction of the Eighth Circuit.³³ Supreme Court review of the issue is all but certain, albeit less imminent than initially thought after the plaintiffs in that case opted not to petition for certiorari.³⁴

There is, however, a separate and significant challenge to private enforcement of section 11(b) that applies only to this provision. It has received comparably less attention, but is nevertheless one well worth exploring, particularly at a symposium devoted to state law and federal elections. This claim, which emerges from an intricate web of doctrine, turns on the relationship between the federal prohibition on voter intimidation and state efforts to address the practice. As such, it does not question—and indeed implicitly recognizes the legitimacy of—private enforcement of the much of the VRA, including section 2. The claim instead is that private enforcement of section 11(b), and only 11(b), is improper.

This claim, which will take a few steps to distill, appears to have provided the basis for a relatively recent ruling that blocked private enforcement of section 11(b). In September 2023, a federal district court in Georgia dismissed a section 11(b) charge brought by an individual voter against the producers of the movie *2000 Mules*.³⁵ Security footage used in that movie showed Georgia resident Mark Andrews depositing five absentee ballots in a Gwinnett County ballot drop box on October 6, 2020. Voiceover narration from Dinesh D’Souza labeled Andrews a “mule” and accused him of participating in a “coordinated ring of paid

31. *Id.* at 498.

32. *See, e.g.,* Richard Hasen, *Eighth Circuit’s Holding that Private Plaintiffs Do Not Have Right To Sue To Enforce Section 2 of the Voting Rights Act Would Decimate the Rights of Minority Voters; Supreme Court Review Almost Certain*, ELECTION L. BLOG (Nov. 20, 2023), <https://electionlawblog.org/?p=139769> [<https://perma.cc/4VFL-8UD8>] (calling ruling “detrimental” and its analysis “wooden”). I agree. *See* Ellen D. Katz, *Curbing Private Enforcement of the Voting Rights Act: Some Thoughts on Recent Developments*, 123 MICH. L. REV. ONLINE 23 (2024).

33. *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 86 F.4th 1204 (8th Cir. 2023).

34. Hansi Lo Wang, *After Controversial Court Rulings, a Voting Rights Act Lawsuit Takes an Unusual Turn*, NPR (July 4, 2024, 5:00 AM), <https://www.npr.org/2024/07/04/nx-s1-5025758/voting-rights-act-arkansas-supreme-court-section-1983> [<https://perma.cc/3687-G7PR>] (reporting that plaintiffs opted not to seek Supreme Court review).

35. *Andrews v. D’Souza*, 696 F. Supp. 3d 1332, 1339–40 (N.D. Ga. 2023).

ballot trafficking” that “dumped” “fraudulent votes . . . en masse into mail in drop boxes.”³⁶ This accusation was repeated in materials publicizing the film that often included images of Andrews’ face and the license plate of his car. All the while, Andrews had done nothing wrong. The Gwinnett County resident acted in full compliance with Georgia law when he delivered his ballot along with the ballots completed by his wife and his three adult children.³⁷

Andrews sued, claiming, *inter alia*, that the producers of *2000 Mules* engaged in voter intimidation in violation of section 11(b). Without disputing the charge, the court held that section 11(b) was not among the VRA provisions for which private enforcement was permitted. Judge Steven Grimberg recognized that private plaintiffs were eligible to bring claims under those VRA provisions that “enforce the voting guarantees of the fourteenth or fifteenth amendment,” but nevertheless concluded that 11(b) could not be so characterized.³⁸ His opinion in *Andrews v. D’Souza*³⁹ suggested two reasons as to why. First, it stated that there was insufficient evidence that section 11(b) was “designed” to enforce the voting guarantees of the Fourteenth and Fifteenth Amendments, and, second, that there was “no identifiable link” between the rights section 11(b) creates and the VRA’s language supporting private enforcement.⁴⁰

It turns out that the first point rests on notably shaky ground. As it happens, there is concrete evidence that Congress “designed” section 11(b) to enforce the voting guarantees set forth in Fourteenth and Fifteenth Amendments. On July 6, 1965, Representative Emanuel Celler said so explicitly in a speech on the House floor. Just a month before President Johnson would sign the VRA into law, Representative Celler told the House that section 11(b) of the proposed legislation was “primarily . . . an exercise of the power of Congress to enact ‘appropriate legislation’ to enforce the 15th amendment’s ban on racial discrimination in voting.”⁴¹ Representative Celler explained further “that Section 11(b) can also be sustained on 14th amendment grounds,” as an exercise of Congress’s “duty to . . . insure the equal protection of the

36. *Id.* at 1341.

37. *Id.* D’Souza would ultimately admit as much. See Dinesh D’Souza, *Statement on 2000 Mules*, D’SOUZA MEDIA, <https://dineshdsouza.com/statement-on-2000-mules/> [<https://perma.cc/PL5J-Z2SF>] (“I owe this individual, Mark Andrews, an apology. I now understand that the surveillance videos used in the film were characterized on the basis of inaccurate information provided to me and my team.”); Donie O’Sullivan, *‘2000 Mules’ Creator Admits Some of Film’s Claims Are Flawed*, CNN (Dec. 2, 2024, 11:59 PM), <https://www.cnn.com/2024/12/02/politics/2000-mules-creator-admits-some-of-films-claims-are-flawed/index.html>.

38. *Andrews*, 696 F. Supp. 3d at 1351.

39. 696 F. Supp. 3d 1332 (N.D. Ga. 2023).

40. *Id.* at 1351.

41. 111 CONG. REC. 15651 (1965).

laws.”⁴² At the time, Representative Celler was Chair of the House Judiciary Committee and a chief of sponsor of the bill.⁴³

Judge Grimberg’s opinion in *Andrews* did not mention Representative Celler’s statement. Perhaps the court was unaware of it and would have ruled differently had it known Representative Celler made these comments. More likely, however, the statement would not have altered the decision. Whether or not the court shared the skepticism about legislative history voiced in a related ruling that blocked private enforcement of section 2,⁴⁴ Representative Celler’s statement, standing alone, does not resolve the district court’s second and more weighty concern about private enforcement of section 11(b)—that there is “no identifiable link” between the rights section 11(b) creates and VRA language “demonstrating congressional intent to provide a private remedy for a violation of those rights.”⁴⁵

The court was referencing VRA language found in sections 3 and 14 that envisions private enforcement of statutory provisions that themselves “enforce the voting guarantees of the fourteenth or fifteenth amendment.”⁴⁶ The court, however, did not elaborate either on the nature of the link it believed was required between this language and the rights created by section 11(b), or on why it deemed this link to be absent.

It is possible, of course, that the court thought the deficiency was the fact that section 11(b) proscribes conduct that is not itself unconstitutional. As Judge Grimberg noted, the VRA contains language that anticipates private enforcement of VRA provisions that “enforce the voting guarantees of the fourteenth or fifteenth amendment.”⁴⁷ Because

42. *Id.*

43. See Biography of Emanuel Celler, BIOGRAPHICAL DIRECTORY U.S. CONG. 1774-PRESENT, <https://bioguideretro.congress.gov/Home/MemberDetails?memIndex=c000264> (last visited Feb. 20, 2025); *Voting Rights Act*, ASS’N CTRS. FOR STUDY CONG., <https://acsc.lib.udel.edu/exhibits/show/legislation/vra> [https://perma.cc/9Q22-MF3N].

44. *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 86 F. 4th 1204, 1213–14 (8th Cir. 2023). The court dismissed legislative history of the VRA that expressly supported private enforcement of section 2, deeming it irrelevant to the question whether a private right to enforce section 2 should be implied. Whatever the merits of that view, and there are sound reasons to dispute it, Representative Celler’s statements inform a distinct question. They identify the constitutional provisions a new statutory provision would enforce, and thus they support the claim Congress meant for section 11(b) to be among the provisions that enforce the Fourteenth and Fifteenth Amendments.

45. *Andrews*, 696 F. Supp. 3d at 1351.

46. See 52 U.S.C. § 10302(a)–(c) (setting forth the procedures available when “the Attorney General or aggrieved person institutes a proceeding under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment”); § 10310(e) (allowing “the prevailing party, other than the United States,” to seek attorney’s fees “in any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment”).

47. *Andrews*, 696 F. Supp. 3d at 1351 (quoting § 10310(e)).

violations of these Amendments require state action,⁴⁸ the producers of *2000 Mules* could not themselves violate any of the voting guarantees of these Amendments. Targeting Andrews as they did, however objectionable, did not violate these constitutional provisions, even if it facially ran afoul of section 11(b)'s ban on privately initiated voter intimidation. A Fifteenth Amendment violation, moreover, requires not only state action but also evidence of race-based discrimination.⁴⁹ There happens to be good reason to think that the *2000 Mules* defendants targeted Andrews, who is Black, because of his race,⁵⁰ but a section 11(b) violation does not require any showing of a racially discriminatory motive.⁵¹

And yet, it is improbable that section 11(b)'s proscription of constitutional conduct explains why the court in *Andrews* thought section 11(b) lacked the "identifiable link" to the Fourteenth and Fifteenth Amendments' guarantees on which private enforcement of the provision hinges. Much of the VRA regulates conduct that is plainly constitutional, and these provisions have nevertheless long been understood to be enforcing voting guarantees grounded in the Fourteenth and Fifteenth Amendments. For instance, as enacted in 1965, the VRA authorized the suspension of literacy tests in designated jurisdictions even as governing precedent made clear the constitutionality of such tests both in principle and in most applications.⁵² Subsequent amendments then suspended literacy tests nationwide and thereafter made the suspension permanent.⁵³ All the while, precedent upholding the constitutionality of literacy tests

48. See, e.g., *United States v. Morrison*, 529 U.S. 598, 621 (1994); *James v. Bowman*, 190 U.S. 127, 136 (1903); *The Civil Rights Cases*, 109 U.S. 3, 11 (1883).

49. See *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980) ("[A]ction by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose.").

50. See, e.g., Doug Bock Clark, *Close to 100,000 Voter Registrations Were Challenged in Georgia — Almost All by Just Six Right-Wing Activists*, PROPUBLICA (July 13, 2023, 7:00 AM), <https://www.propublica.org/article/right-wing-activists-georgia-voter-challenges> [https://perma.cc/VBU2-6WPE]; Kristine Phillips, 'Damaging to Our Democracy': Trump Election Lawsuits Targeted Areas with Large Black, Latino Populations, USA TODAY (Dec. 1, 2020, 4:27 PM), <https://www.usatoday.com/story/news/politics/2020/12/01/trump-voter-fraud-claims-target-counties-more-black-latino-votes/6391908002/> [https://perma.cc/XF37-L38Q]; Juana Summers, *Trump Push To Invalidate Votes in Heavily Black Cities Alarms Civil Rights Groups*, NPR (Nov. 24, 2020, 6:26 AM), <https://www.npr.org/2020/11/24/938187233/trump-push-to-invalidate-votes-in-heavily-black-cities-alarms-civil-rights-group> [https://perma.cc/7K2D-PTAT]; Zipper, *supra* note 13, at 325 (observing that "history has overwhelmingly shown that Black voters are more often the targets of intimidation").

51. See Katz, *supra* note 32, at 36.

52. *Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45, 53–54 (1959).

53. 6.22.1970: RN Signs the Voting Rights Act Amendments of 1970, RICHARD NIXON FOUND. (June 24, 2011), <https://www.nixonfoundation.org/2011/06/6-22-1970-rn-signs-the-voting-rights-act-amendments-of-1970/> [https://perma.cc/U7YD-WDNM].

was never questioned.⁵⁴ So too, the VRA's longstanding prohibition on electoral practices that produce racially disparate "results" is widely understood to enforce the specified constitutional voting guarantees even though only intentionally discriminatory conduct is unconstitutional.⁵⁵

It is more likely that the court in *Andrews* thought section 11(b) lacked the "identifiable link" to constitutional voting guarantees because the provision regulates private action. On this view, the defect with Mark Andrews's section 11(b) claim was not that the conduct he challenged was itself constitutional, but instead that the defendants were private individuals rather than public officials. The regulation of private conduct offers a bright line rule that separates claims that are understood to be enforcing the voting guarantees of the Fourteenth and Fifteenth Amendments, and those that are not.

Without doubt, language in pivotal Supreme Court decisions suggests that Congress may not reach private action when enforcing the Fourteenth and Fifteenth Amendments.⁵⁶ As the next Part discusses, these decisions may be better read to embrace a less absolute position, one tying Congress's enforcement power to a contextual assessment of state law and conduct, the targeted practice, and the substantive right at issue. This understanding of congressional power is one, admittedly, that a majority of the present Supreme Court is unlikely to support. Nevertheless, it remains one worth considering not only because it is the better reading of Congress's constitutional power, but also because evaluation of it provides an opportunity to think critically about both state power over federal elections and the nature of voter harassment itself.

Before turning to those issues, however, it is worth flagging what is—and what is not—at stake in the present debate. First, nothing in *Andrews*, or, for that matter, in any of the other recent cases limiting private enforcement of the VRA, restricts Congress's ability to amend the statute to provide explicit authorization to private plaintiffs to enforce the provisions that they have, for so long, been enforcing. Second, the constitutionality of section 11(b) is not in serious question, as it is not contingent on identification of the linkage *Andrews* found lacking. The Constitution's Elections Clause provides sufficient power to support section 11(b), at least as applied to federal elections.⁵⁷ Back in 1965, Representative Celler said precisely this, noting that the clause offered a

54. See *City of Rome v. United States*, 446 U.S. 156, 175 (1980); *Oregon v. Mitchell*, 400 U.S. 112, 144 (1970); *South Carolina v. Katzenbach*, 383 U.S. 301, 333 (1966); *Lassiter*, 360 U.S. at 53–54.

55. See *Allen v. Milligan*, 143 S. Ct. 1487, 1516–17 (2023).

56. See cases cited *supra* note 48.

57. See U.S. CONST. art. I, § 4 ("The 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 Senators.").

“third basis for sustaining 11(b).”⁵⁸ He cited the Elections Clause, along with the Seventeenth Amendment, and noted “[i]t is settled that the language of these constitutional provisions is broad enough to authorize a Federal statute directed against intimidation of voters.”⁵⁹

II. VOTER HARASSMENT AND STATE ACTION

The notion that privately initiated acts of voter intimidation lack an “identifiable link” to the Fourteenth and Fifteenth Amendment’s voting guarantees is not a new idea. More than a century before *Andrews* endorsed this belief, the Supreme Court relied on the same idea to strike down a federal law in *James v. Bowman*.⁶⁰ The provision at issue was a surviving remnant of the Enforcement Act of 1870, then known as section 5507. This provision authorized punishment for “[e]very person who prevents, hinders, controls, or intimidates another from exercising . . . the right of suffrage, to whom that right is guaranteed by the Fifteenth Amendment.”⁶¹ Decided in 1903, *James* addressed a federal indictment that charged that “by means of bribery,” the defendants “unlawfully and feloniously intimidated and prevented” various “men of African descent, colored men, negroes, and not white men, being citizens of Kentucky and of the United States” “from exercising their lawful right of voting” for a congressional representative.⁶² The Court tossed out the charge, holding that Congress lacked power to enact section 5507, primarily because the provision regulated purely private conduct.⁶³

“[I]t may be noticed,” Justice David Brewer wrote for the Court, “that this indictment charges no wrong done by the State of Kentucky, or by any one acting under its authority.”⁶⁴ Instead, the election interference it alleged “was purely an individual act of the defendant.”⁶⁵

58. 111 CONG. REC. 15651 (1965).

59. *Id.*

60. 190 U.S. 127 (1903).

61. *Id.* at 128.

62. *Id.* at 127.

63. *James* identified two additional problems with the statute. One was that it regulated both state and federal elections and thus could not be supported by the Constitution’s Elections Clause, apparently not even when applied to conduct involving a federal election. *Id.* at 139–40. The other deficiency identified was that the provision was not limited to conduct taken “on account of race, color or previous condition of servitude,” and thus could not be supported by the Fifteenth Amendment. *See id.* at 139. The Court insisted that the conduct charged was not alleged to be racially motivated, and that racial terms used in the indictment “merely describe[] the parties wronged”; that the men targeted were not bribed “because they were colored men, but because they were voters”; and that “[n]o discrimination on account of race, color, or previous condition of servitude is charged.” *Id.*

64. *Id.* at 139.

65. *Id.*

This mattered, the *James* Court held, because a statutory provision that “purports to punish purely individual action cannot be sustained as an appropriate exercise of the power conferred by the Fifteenth Amendment upon Congress to prevent action by the State through some one or more of its official representatives.”⁶⁶

Six decades later, Representative Celler stated without equivocation that a new federal ban on privately initiated voter intimidation was appropriate legislation enforcing both the Fourteenth and Fifteenth Amendments.⁶⁷ Like section 5507 before it, section 11(b) of the new Voting Rights Act purported to bar both private and public actions that intimidate, threaten, or coerce others from voting. Without mentioning section 5507 or *James*, Representative Celler distinguished both by tying section 11(b) to public misconduct.⁶⁸ While the *James* Court scrapped section 5507 because the Justices understood it to target “no wrong done by the State,”⁶⁹ Celler insisted that section 11(b) had been crafted to address two types of official wrongdoing.⁷⁰ He explained that 11(b)’s “sanctions against private intimidation of voters, Negro and white, are essential to eradicate effects of official racial discrimination in voting” and to provide a remedy when “[s]tate and local law enforcement officials are unwilling to punish or prevent violence in intimidation of voters.”⁷¹

Representative Celler did not spell out the precise mechanism by which section 11(b) would prevent or remedy the official wrongdoing he described. Most likely, he thought that the linkages were self-evident. After all, the voters most frequently confronting “official discrimination in voting” had long been subject to privately initiated acts of harassment and intimidation as well. Relentless official discrimination in voting and beyond left them distinctly vulnerable to private harassment, both by diminishing their access to the resources needed to combat it and by bolstering sentiments among the perpetrators that their targets were properly excluded from the electorate. Meanwhile, the unwillingness of public officials to “punish or prevent” private acts of voter harassment ensured that such acts would not only continue but expand. Section 11(b) responded to these circumstances by outlawing privately initiated acts of voter harassment and thereby diminishing the prospect of their recurrence.

To be sure, not everyone was convinced. One of the first cases brought under section 11(b) addressed allegations that various defendants violated the new statute when they evicted Black tenant farmers and fired

66. *Id.*

67. *See* 111 CONG. REC. 15651 (1965).

68. *See id.*

69. *James*, 190 U.S. at 139.

70. 111 CONG. REC. 15651 (1965).

71. *Id.*

Black workers because they had allegedly registered to vote.⁷² In *United States v. Harvey*,⁷³ a district court rejected the section 11(b) charges in part because the defendants were private individuals. Citing *James*, the court wrote: “Congress simply does not have the power . . . to provide the punishment of purely individual actions tending to interfere with a person’s right to vote in state or local elections.”⁷⁴

Technically dicta,⁷⁵ *Harvey*’s conception of congressional power was soon overshadowed by Supreme Court decisions that embraced a more capacious view of Congress’s ability to enforce the Fourteenth and Fifteenth Amendments. In foundational opinions upholding other core provisions of the new VRA, the Justices recognized decidedly broad congressional power to craft remedies for violations of these Amendments. The Court, for instance, described Congress’s wide discretion “to assess and weigh conflicting considerations” in crafting remedies in an arena of “specially informed legislative competence.”⁷⁶ Coming close to disclaiming a judicial role entirely, the Justices posited: “It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.”⁷⁷

This deference was evident in 1970, when the Court, in *Oregon v. Mitchell*,⁷⁸ upheld the amended VRA’s new five-year nationwide suspension of literacy tests.⁷⁹ The Court linked Congress’s suspension of these race-neutral, facially constitutional tests to goals that stood in more attenuated relation to state wrongdoing than those Representative Celler cited when presenting section 11(b). The Justices variously endorsed the suspension as a legitimate mechanism to increase voter registration in nonwhite communities, help remedy long-lasting educational deficits resulting from de jure school segregation, block further discrimination

72. *United States v. Harvey*, 250 F. Supp. 219, 221–22 (E.D. La. 1966).

73. 250 F. Supp. 219 (E.D. La. 1966).

74. *Id.* at 226; *see also id.* (questioning the adequacy of the evidence the defendants had engaged in the alleged conduct, and whether the allegations, if proven, constituted a threat within the meaning of section 11(b)).

75. *See Cady & Glazer, supra* note 15, at 173, 238 (2015) (describing *Harvey* as an outlier and its analysis of congressional power as dicta).

76. *Katzenbach v. Morgan*, 384 U.S. 641, 653, 656 (1966).

77. *Id.* at 653; *see also Oregon v. Mitchell*, 400 U.S. 112, 132–33 (1970) (opinion of Black, J.) (plurality opinion) (stating that Congress “could have found” that literacy tests had racially disparate effects and “could have concluded” that “condition[ing]” the vote on literacy violates the Equal Protection Clause); *id.* at 216–17 (Harlan, J., dissenting in part and concurring in part) (noting that “Congress could have determined that racial prejudice is prevalent throughout the Nation, and that literacy tests unduly lend themselves to discriminatory application” and that “the choice which Congress made was within the range of reasonable”).

78. 400 U.S. 112 (1970) (plurality opinion).

79. *Id.* at 118.

stemming from reliance on tests known to be susceptible to biased implementation, and even facilitate the free movement of people.⁸⁰

While these decisions did not specifically address Congress's power to enact section 11(b), they upheld bans on wholly constitutional conduct with rationales suggesting that section 11(b) could similarly be characterized as appropriate legislation enforcing the Fourteenth and Fifteenth Amendments. For this reason—as well as the availability of the Constitution's Elections Clause as independent support for most applications of section 11(b)⁸¹—a direct challenge to the provision's status as enforcement legislation did not emerge.

Nor did an indirect challenge. The Court's then-expansive approach to implied private rights of action⁸²—including a broad ruling that recognized the ability of private plaintiffs to bring claims under section 5 of the VRA—meant that private enforcement of section 11(b) proceeded without significant dispute.⁸³ A more miserly approach to implied rights of action might have invited questions, at least after the 1975 VRA amendments, as to whether section 11(b) was a “statute [that] enforce[s] the voting guarantees of the fourteenth or fifteenth amendment.”⁸⁴ But the Court's more capacious approach to private enforcement at the time meant that neither defendants nor reviewing courts had reason to ask whether section 11(b) claims were of the type of VRA claims that private litigants might most plausibly pursue. More precisely, they had no cause to question whether section 11(b) was, as section 3 of the VRA suggested, enforcing Fourteenth or Fifteenth Amendment voting guarantees.

Over time, however, the Supreme Court developed a more circumscribed approach to both implied private rights of action and Congress's power to enforce the Fourteenth and Fifteenth Amendments. Regarding the latter, *City of Boerne v. Flores*⁸⁵ and the related decisions that followed accorded Congress far less discretion in this realm and demanded a much tighter fit between statutory prohibitions and

80. *Id.* at 132–33 (opinion of Black, J.) (voter registration and educational inequality); *id.* at 147 (Douglas, J., concurring in part and dissenting in part) (educational inequality and potential for discriminatory application); *id.* at 216–17 (Harlan, J., concurring in part and dissenting in part) (discriminatory application); *id.* at 235–36 (Brennan, J., concurring in part and dissenting in part) (educational inequality); *id.* at 283–84 (Stewart, J., concurring in part and dissenting in part) (discrimination and free movement).

81. *See supra* note 59 and accompanying text.

82. *See generally* *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964).

83. *See Allen v. State Bd. of Elections*, 393 U.S. 544, 554–57 (1969).

84. 52 U.S.C. § 10302(a)–(c) (discussing “proceeding[s] instituted by the Attorney General or an aggrieved person under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment”).

85. 521 U.S. 507 (1997).

constitutional protections than previously required.⁸⁶ The Court scrapped various statutes under this new approach. Deeming most remedies in search of a problem, the Justices labelled the records amassed in support of enactment insufficient, noting they documented too few contemporary constitutional violations to justify the statutory remedies provided.⁸⁷

The notable exception is *United States v. Morrison*,⁸⁸ which involved a constitutional challenge to a provision of the Violence Against Women Act (VAWA).⁸⁹ Enacted in 1994, VAWA was supported by an extensive congressional record that documented widespread unconstitutional discrimination within state criminal justice systems in cases involving gender-motivated violence.⁹⁰ Writing for the Court in *Morrison*, Chief Justice William Rehnquist described this record as “voluminous” and expressed no doubt that it supported the claim that “there is pervasive bias in various state justice systems against victims of gender-motivated violence.”⁹¹

The Court in *Morrison* did not dispute that the documented bias violated the Fourteenth Amendment but nevertheless held that Congress lacked authority to address it with the VAWA provision under challenge. More precisely, *Morrison* held that Congress’s power to enforce the Fourteenth Amendment was insufficient to support the enactment of VAWA’s section 13981, which authorized survivors of gender-motivated violence to bring civil actions against the perpetrators.⁹² Noting “the time-honored principle” that the Fourteenth Amendment prohibits only state action, Chief Justice Rehnquist’s opinion in *Morrison* approvingly cited prior decisions that struck down federal laws in which Congress had targeted private action ostensibly through its power to enforce the Fourteenth Amendment.⁹³

86. See *id.* (striking down the Religious Freedom Restoration Act); *Shelby County v. Holder*, 570 U.S. 529 (2013) (striking down the VRA’s section 4(b) coverage formula).

87. See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88–91 (2000); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 672–75 (1999); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 640–47 (1999); *Flores*, 521 U.S. at 530–32.

88. 529 U.S. 598 (2000).

89. *Id.* at 601–07.

90. *Id.* at 628–31 (Souter, J., dissenting).

91. *Id.* at 619–20 (noting evidence that “many participants in state justice systems are perpetuating an array of erroneous stereotypes and assumptions” and “that these discriminatory stereotypes often result in insufficient investigation and prosecution of gender-motivated crime, inappropriate focus on the behavior and credibility of the victims of that crime, and unacceptably lenient punishments for those who are actually convicted of gender-motivated violence”).

92. *Id.* at 626–27.

93. *Id.* at 620–21.

Like VAWA's section 13981, section 11(b) of the VRA authorizes a civil action against private individuals for misconduct that is indisputably constitutional. This similarity does not imply section 11(b)'s unconstitutionality, given that the Elections Clause provides independent support for section 11(b) that largely immunizes it from constitutional challenge. The resemblance nevertheless raises a question about the propriety of private enforcement of section 11(b), given that such enforcement is linked to the provision's connection to the voting protections of the Fourteenth and Fifteenth Amendments. More concretely, insofar as *Morrison* is best read to hold that Congress may never reach private conduct when enforcing these Amendments, section 11(b) would be tough to characterize as a provision enforcing those Amendments. Most likely, it would not be deemed a provision eligible for private enforcement.

Morrison, however, is better read more narrowly. Notably, the decision observed that section 13981 "visit[ed] no consequence whatever on any Virginia public official involved in investigating or prosecuting" the assault on the plaintiff.⁹⁴ The suggestion is that section 13981's defect was not that it reached private action generally, but instead that it did so in a manner not structured to incentivize needed criminal justice reform. True, the measure held promise as a means to discourage acts of gender-motivated violence, and, thus, a potential mechanism to reduce unconstitutional conduct within state criminal justice systems. Fewer cases plausibly translates into fewer opportunities for law enforcement officials to engage in unconstitutionally biased conduct. Still, section 13981 was not designed to challenge or otherwise modify this unconstitutional conduct. The Justices thus viewed the provision as a standalone private remedy that left biased state action unchecked.⁹⁵

The VRA's section 11(b) appears subject to similar critique. Like VAWA's civil remedy, it both targets private conduct and "visits no consequence" on any public official for wrongdoing of any sort. And yet, sections 11(b) and 13981 differ in an important way. The private conduct each provision targets stands in different temporal relation to the public conduct each seeks to address. More concretely, recourse to the criminal justice system by those injured by gender-motivated violence occurs after the act or acts of violence for which section 13981 provides a civil remedy. That is, the constitutional violations documented in the congressional record supporting VAWA took place well after the violent

94. *Id.* at 626.

95. See Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 2054 n.352 (2003); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441 (2000); see also Evan Caminker, *Private Remedies for Public Wrongs Under Section 5*, 33 LOY. L.A. L. REV. 1351, 1362–64 (2000).

acts for which the statute provides a civil remedy. By contrast, the privately initiated voter harassment targeted by section 11(b) more typically operates concurrently with the public conduct—and the accompanying constitutional infringements—that section 11(b) is best understood to address.

This timing matters. Privately initiated acts of gender-motivated violence do not themselves make it more difficult for public officials to act in accordance with their constitutional obligations. To be sure, these acts and the gender bias documented in VAWA’s original congressional record are not wholly independent phenomena, and yet, public law enforcement officials should remain able to do their jobs in a constitutionally compliant manner regardless of whether instances of such private violence persist or expand. The same cannot be said about privately initiated acts of voter harassment. Rather than preceding public involvement, these acts typically take place within a state-created electoral ecosystem, most often occurring as the targeted voters are engaging with state-mandated procedures for casting their ballots. These private acts accordingly become intertwined with public ones in a manner that makes it more difficult for public officials to operate a constitutionally compliant electoral process.

To see why, let’s return to the example with which we began. The 2020 robocall campaign targeted Black voters in five states to suppress their votes in advance of a presidential election.⁹⁶ Perpetrated by private actors, the campaign, standing alone, gave rise to no constitutional injury. Nor was it a form of voter harassment that state officials were, to use Representative Celler’s language, “unwilling to punish or prevent.” To be sure, public officials in these states were unable to prevent the robocall campaign in the first instance, but there is no indication that they had been unwilling to do so. Several officials, moreover, aggressively pursued criminal and civil claims against Burkman and Wohl, securing judgments in some jurisdictions and continuing to pursue claims in at least one state.⁹⁷

Of course, the robocall campaign was tied to official discrimination of a different sort. A long and relentless history of such discrimination in voting and beyond shaped why the perpetrators targeted the voters they did with the specific message they crafted. The campaign cynically preyed on many of these communities’ longstanding and well-founded mistrust of public officials in arenas ranging from criminal justice to public health to election administration. Put differently, this privately initiated harassment was, in many ways, a product and an effect of longstanding official discrimination in multiple realms. The section 11(b)

96. *People v. Burkman*, Nos. 164638–39, 2024 WL 2982804, at *2 (Mich. June 13, 2024).

97. See Hauser, *supra* note 4.

claim that followed might be understood in this sense, much like the VRA's longstanding ban on literacy tests, as an effort "to eradicate the effects of official racial discrimination" as Representative Celler proposed it would. Still, it seems probable that this purpose may no longer be sufficient to characterize a federal statute based on it as enforcing constitutional guarantees pertaining to voting or otherwise.⁹⁸

Nevertheless, the 2020 robocall campaign and similar acts of voter harassment might (and in my view should) be understood to implicate a distinct constitutional injury. Consider the following: Governing precedent recognizes a Fourteenth Amendment right to vote free from burdens imposed without sufficient justification.⁹⁹ Under certain circumstances, the failure of public officials to shield voters from privately initiated acts of voter harassment may give rise to such a burden. More precisely, that failure makes it more difficult for those targeted to vote. This is particularly so when the harassment occurs as these voters are actively engaging with state procedures for casting their ballots by, for instance, approaching a polling place, placing their ballots in a state-authorized drop box, or completing a mail-in ballot at home.

Public officials cannot block all acts of private harassment. Some officials are affirmatively unwilling to do so, and others are simply indifferent to the problem. Many, however, attempt in good faith to prevent such harassment, but their efforts are nevertheless unsuccessful. Resources may be insufficient, competing concerns may require prioritization, and mistakes, big and small, may have radiating effects. Put differently, the routine and predictable failures of election administration, even in a system overseen by public actors operating in good faith, can and will contribute to significant burdens on the right to vote.

While such burdens, of course, will not always give rise to a constitutional violation, we should understand that harms of a constitutional dimension may result when privately initiated voter harassment operates within an electoral ecosystem in which efforts to prevent such harassment necessarily fall short. We can and should acknowledge these harms without committing to the proposition that the public officials overseeing the system are actively violating with the Constitution. Rather, we might understand the relationship between privately initiated voter harassment and resulting burdens on the right to vote as providing the necessary linkage between a section 11(b) claim and constitutional voting guarantees. More precisely, section 11(b) is best understood to offer a mechanism to address private voter harassment not

98. See, e.g., *Coleman v. Ct. of Appeals of Md.*, 566 U.S. 30 (2012); *Morrison*, 529 U.S. 598.

99. See *Burdick v. Takushi*, 504 U.S. 428, 433–34 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 787–89 (1983).

only when state and local officials refuse to stop it, but also when their efforts fall short, as they inevitably will. In the latter context, the provision supplements the work of state and local officials, by penalizing and hence discouraging private acts of voter intimidation and thereby making it less likely that routine failures of public election administration will give rise to constitutional injuries.

This argument provides a template for preserving private enforcement of section 11(b), insofar as such enforcement turns on its status as a provision enforcing the voting guarantees of the Fourteenth and Fifteenth Amendments. There remains, however, an additional question as to whether private enforcement of section 11(b) hinges on our current understanding of congressional power rather than the understanding that prevailed when Congress enacted the VRA. The argument that it should emphasize that the VRA envisions private enforcement only of claims that themselves enforce the voting guarantees of the Fourteenth and Fifteenth Amendments, and posits that the reference is to a fluid category of claims, the contents of which were intended to ebb and flow as our conception of Congress's enforcement power evolved. The VRA's text undeniably allows for this interpretation, even if it does not inexorably mandate it.

A competing—and, to my mind, more compelling—view focuses on the rules that govern implied private rights of action rather than on the scope of Congress's constitutional powers. Because private enforcement of a statute that does not expressly authorize it depends on whether Congress meant to provide for such enforcement,¹⁰⁰ it should not matter whether Congress could, at present, enact section 11(b) in the first instance using its power to enforce the Fourteenth and Fifteenth Amendments. Instead, the issue should turn on whether section 11(b) was among the provisions Congress understood to enforce “the voting guarantees” of these Amendments at the time it crafted this language. On this point, Representative Celler stated unequivocally that it was, and it was a position supported by prevailing caselaw when Congress made relevant amendments to the statute.¹⁰¹

100. See *Alexander v. Sandoval*, 532 U.S. 275, 286–89 (2001).

101. See *supra* note 41 and accompanying text; see also *Morse v. Republican Party of Va.*, 517 U.S. 186, 230–31 (1996) (opinion of Stevens, J.) (plurality opinion) (stating that evaluation of any congressional action to authorize private enforcement “must take into account its contemporary legal context” and “a ‘backdrop’ of decisions” against which Congress acted (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 698–99, 698 n.22 (1979))).

CONCLUSION

Voter intimidation takes many forms. Over time, documented instances have included overt violence,¹⁰² bribery,¹⁰³ evictions and firings,¹⁰⁴ threatened criminal and civil sanctions,¹⁰⁵ and defamation.¹⁰⁶ The practice is certain to continue and to evolve. Perpetrators will employ new techniques and technologies that all but ensure public efforts to protect voters will fall short. Back in 1965, Representative Celler presented section 11(b) as a tool to remedy voter intimidation when state and local officials were “unwilling to punish or prevent” it and “to eradicate effects” of official discrimination.¹⁰⁷ Section 11(b) serves these purposes, but it advances another one as well: It provides a mechanism to bolster state and local enforcement efforts directed at protecting voters from private acts of harassment and intimidation. Section 11(b) complements state efforts to protect the right to vote, and, in so doing, helps enforce the voting guarantees of the Fourteenth and Fifteenth Amendment. This support, and the ability of private plaintiffs to pursue these claims, should continue.

102. See, e.g., *United States v. Clark*, 249 F. Supp. 722, 722, 728–29 (S.D. Ala. 1965); *United States v. Wood*, 295 F.2d 772, 776 (5th Cir. 1961).

103. See, e.g., *James v. Bowman*, 190 U.S. 127 (1903).

104. See, e.g., *United States v. Harvey*, 250 F. Supp. 219 (E.D. La. 1966).

105. See, e.g., *People v. Burkman*, Nos. 164638–39, 2024 WL 2982804, at *2 (Mich. June 13, 2024).

106. See, e.g., *Andrews v. D’Souza*, 696 F. Supp. 3d 1332 (N.D. Ga. 2023).

107. 111 CONG. REC. 15651 (1965).