

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; 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 a 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 on 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); 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; see *Nat’l Coal. on Black Civic Participation*, 512 F. Supp. 3d at 507.

5. Order, *id.* (Oct. 22, 2020), D.E. 27; see Docket Sheet, *id.* (Oct. 16, 2020) (Oct. 26, 2020, minutes); *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), *interlocutory appeal pending*, Docket Sheet, No. 21-495 (2d Cir. Mar. 23, 2021); 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

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 Marrero permitted New York's attorney general to intervene as a plaintiff.¹⁸ Judge Marrero denied intervention to someone who "has not identified any

(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*, 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; Docket Sheet, *supra* note 5 (Oct. 30, 2020, minutes); see 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).

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

The court of appeals dismissed an interlocutory appeal. Order, *Nat'l Coal. on Black Civic Participation v. Wohl*, No. 21-232 (2d Cir. June 22, 2021), D.E. 113.

17. Opinion, *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; 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 attempted appeal).

18. Opinion, *id.* (May 19, 2021), D.E. 101; see Intervention Complaint, *id.* (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).

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

19. Opinion at 2–3, *id.* (May 28, 2021), D.E. 115, 2021 WL 2183090.