IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MI FAMILIA VOTA EDUCATION FUND, SARA SCHWARTZ, and MARLA LOPEZ,
Plaintiffs,

v.

DONALD J. TRUMP, in his individual and official capacity as President of the United States; WILLIAM P. BARR, in his official capacity as Attorney General; and CHAD F. WOLF, in his official capacity as Acting Secretary of Homeland Security,
Defendants.

Case No. 1:20-cv-3030-RJL

OPPOSITION OF PRESIDENT DONALD J. TRUMP IN HIS INDIVIDUAL CAPACITY TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, AND SPEEDY DECLARATORY JUDGMENT

Plaintiffs ask this Court not only to entertain a lawsuit against the President of the United States, but also to condemn, less than a week before the November election, certain political "statements" that Plaintiffs dislike. Doc. 2 at 1. If that sounds like a radically improper use of judicial power, that's because it is. Defendant President Donald J. Trump, in his individual capacity, joins the Government's opposition and incorporates its reasons for denying Plaintiffs' motion. *See* Doc. 18. President Trump would highlight six points: The President is absolutely immune in his individual capacity; Plaintiffs lack Article III standing; Plaintiffs lack a cause of action; Plaintiffs' claim fails on the merits; Plaintiffs waited too long to file their motion; and Plaintiffs have no right to an expedited declaration. This Court should thus deny their motion. This Court could also sua sponte dismiss Plaintiffs' complaint for lack of subject-matter jurisdiction. *See* Fed. R. Civ. P. 12(h)(3).[1]

[1] Because Plaintiffs waited to sue until shortly before the election, these proceedings are highly truncated. President Trump reserves his right to raise other arguments and defenses if this case proceeds further.

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Immunity: Plaintiffs' claims and the relief sought in their motion are, as applied to the President, barred by absolute immunity. The "doctrine of absolute immunity serves to bar—absolutely—suits against the President of the United States, in his individual capacity, whenever he is acting … 'within the "outer perimeter" of his official responsibility.'" *Jackson v. Bush*, 448 F. Supp. 2d 198, 201 (D.D.C. 2006) (Leon, J.) (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982)). Even outside that perimeter, "courts do not have jurisdiction to enjoin [the President], and have never submitted the President to declaratory relief." *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) (cleaned up); *see Newdow v. Bush*, 355 F. Supp. 2d 265, 281-82 (D.D.C. 2005) (questioning "whether the President may be enjoined for actions taken outside the compass of his official duties" and stressing "there has *never* been an injunction against the President issued and sustained by the federal courts"). Here, Plaintiffs seek declarations and injunctions that would run directly against the President. *See* Doc. 2 at 2-3. And their requested relief either would regulate the President's official duties, *see id.*, or would require this Court to hold the President liable for what Plaintiffs claim are official acts, *see* Doc. 1 at 11-22 (relying on presidential pardons, White House statements, and nearly 20 tweets); *id.* at 4 (alleging that tweets are "official statements by the President"). This case is thus barred by absolute immunity, *Mississippi v. Johnson*, 71 U.S. 475, 500-01 (1866), even if Plaintiffs were correct that the President somehow violated a federal statute, *Fitzgerald*, 457 U.S. at 756.

Standing: As the Government explains in detail, Plaintiffs' lack Article III standing. *See* Doc. 18 at 22-36. The President would add two points. First, if this Court accepts Plaintiffs' theory of standing, then *every* eligible voter in *every* State can sue the President on the same grounds. While Article III sometimes allows plaintiffs to vindicate widespread injuries, Plaintiffs' theory of injury is so widespread that it's really "the kind of undifferentiated, generalized grievance about the conduct of government that [courts] have refused to countenance." *Lance v. Coffman*, 549 U.S. 437, 442 (2007); *see*

also Valley Forge Christian Coll. v. AUSCS, 454 U.S. 464, 489 (1982). Second, Plaintiffs' standing turns on the notion that the President has objectively chilled Americans' willingness to vote. *Laird v. Tatum*, 408 U.S. 1, 10-15 (1972). That suggestion is utterly implausible, as voters are currently engaged in unprecedented levels of mail-in and early voting. *See, e.g.*, Doughtery & Day, *Mail Balloting Is Fueling Historic Early Voting in the 2020 Election*, Wall St. J. (Oct. 26, 2020 6:37 p.m.), on.wsj.com/3mth93S; Garrison, *'Unprecedented': Voter Turnout in Election Could Reach Highest Rate in More than a Century*, USA Today (Oct. 21, 2020 2:37 p.m.), bit.ly/34xuJwZ. This Court can take judicial notice of that fact.

Cause of Action: Plaintiffs' motion relies solely on section 11(b) of the Voting Rights Act, 52 U.S.C. §10307(b), but that statute contains no private right of action. The Act has no express private right of action: It authorizes only "the Attorney General" to seek equitable relief. §10308(d). No private right of action can be implied either. True, in *Allen v. State Board of Elections*, the Supreme Court held that private citizens can bring certain claims for declaratory relief under section 5 of the Voting Rights Act. 393 U.S. 544, 554-56 (1989); *see generally Reaves v. DOJ*, 355 F. Supp. 2d 510, 514 (D.D.C. 2005). But neither the Supreme Court nor the D.C. Circuit has found a private right of action for injunctive or declaratory relief in section 11(b), and *Allen*'s approach to implied private rights of action has been overruled. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017) (citing *Allen* as an example of the "different approach to recognizing implied causes of action" that's no longer "in place"). Under the approach that this Court must apply today, section 11(b) plainly lacks a private right of action. *See Johnson v. Interstate Mgmt. Co., LLC*, 849 F.3d 1093, 1097-98 (D.C. Cir. 2017). Nor can Plaintiffs vindicate violations of section 11(b) through 42 U.S.C. §1983, since section 11(b) does not create individual federal rights. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 289-90 (2002).

Merits: Plaintiffs have not alleged—let alone likely proved—that the President intentionally "intimidate[d], threaten[ed], or coerce[d] … any person for voting or attempting to vote." 52 U.S.C. §10307(b). Plaintiffs' motion is replete with allegations that have nothing to do with voting, nothing

to do with the President, or both. Setting those aside, Plaintiffs' case boils down to complaints that the President has encouraged poll watchers to observe in-person voting and complaints that the President has criticized mail-in voting. Doc. 2-1 at 17-21, 30-31. But these statements by the President were not directed at *voting*; they were directed at voter *fraud*. Far from threats or intimidation, efforts to discourage fraud are "legitima[te]" because "the risk of voter fraud" is "real" and "could affect the outcome of a close election." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 196 (2008) (lead op. of Stevens, J.); *e.g.*, *Parson v. Alcorn*, 157 F. Supp. 3d 479, 498 (E.D. Va. 2016) (warnings against illegal voting do not violate section 11(b)). Even if Plaintiffs don't believe in voter fraud, the First Amendment protects the President's right to express his contrary view. *See Buckley v. Valeo*, 424 U.S. 1, 39 (1976) ("[C]ampaign speech by individuals … and candidates" is "'at the core of our electoral process and of the First Amendment freedoms.'"). Nor can Plaintiffs prove that these warnings about voter fraud were made with the "specific intent" of preventing legitimate voting—an element required by the caselaw and the plain meaning of "threaten" and "intimidate." *Parson*, 157 F. Supp. 3d at 498; *Olagues v. Russoniello*, 770 F.2d 791, 804 (9th Cir. 1985); *United States v. Harvey*, 250 F. Supp. 219, 236-37 (E.D. La. 1966).[2]

Delay: Even if Plaintiffs' claims had merit, their eleventh-hour motion comes much too late. A "party requesting a preliminary injunction must generally show reasonable diligence … in election law cases as elsewhere." *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018). Plaintiffs filed this motion only 13 days before election day, even though many of their allegations are years old. And Plaintiffs are asking this Court to enter a coercive order against the President—one of the candidates running in that election—at a time when absentee and early voting are *already* underway. Granting immediate

[2] Plaintiffs also fault the President for various issues with the Post Office. Doc. 2-1 at 20-21. Even if these allegations were true, they would not possibly fit the language of section 11(b), which governs only "intimidat[ion], threat[s], or coerc[ion]" of "[a] person for voting or attempting to vote." 52 U.S.C. §10307(b). These allegations are likely also moot in light of a recent settlement. *See* Naylor, *Postal Service Agrees to Reverse Service Cutbacks Ahead of Election*, NPR (Oct. 15, 2020), n.pr/3mid0zw.

relief would thus be "against the public interest," as it could have "a needlessly 'chaotic and disruptive effect upon the electoral process.'" *Id.* at 1945. And because "plaintiffs could have sought a preliminary injunction much earlier," the "balance of equities among the parties" weighs strongly against them. *Id.* at 1944. As the Supreme Court has stated over and over, this sort of "last-minute litigation" must be rejected to ensure "citizens (including the losing candidates and their supporters) [have] confidence in the fairness of the election." *Democratic Nat'l Comm. v. Wis. State Leg.*, 2020 WL 6275871, at *4 (U.S. Oct. 26, 2020) (Kavanaugh, J., concurring in denial of application to vacate stay) (collecting cases).

Declaratory Relief: As the Government explains, Plaintiffs are not entitled to an expedited declaration in the infancy of this fact-intensive case. Doc. 18 at 53-55. Much is in dispute and needs to be litigated. Plaintiffs' case relies on cherry-picked statements that are taken heavily out of context. And the President has a right to conduct discovery—including depositions that probe Plaintiffs' Article III standing, which currently rests on untested declarations and highly implausible assertions. Even Plaintiffs concede that "'expedited discovery is permitted and frequently granted'" in cases involving expedited declarations. Doc. 2-1 at 33. Their attempt to deprive the President of discovery and other procedural rights does not honor "[t]he high respect that is owed to the office of the Chief Executive" in cases against the President in his individual capacity. *Clinton v. Jones*, 520 U.S. 681, 707 (1997). And their insistence on a rapid declaration betrays what this case is really about: persuading a federal court to make a political statement about one candidate in the middle of a crucial election.

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The Court should deny Plaintiffs' motion and sua sponte dismiss their claims against the President.

Dated: October 27, 2020

Respectfully submitted,

/s/ Cameron T. Norris

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CERTIFICATE OF SERVICE

I filed this document with the Court via ECF, which will electronically notify all counsel of record.

Dated: October 27, 2020 */s/ Cameron T. Norris*