UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK
ALBANY DIVISION

NY Citizens Audit Civic Fund, Inc., Marly Hornik, Executive Director NY Citizens Audit Civic Fund, Inc., et al.

Case No.**1:25-cv-01447 (MAD-MJK)**

Plaintiffs

v.

Letitia James, in her capacity as New York State Attorney General (NYSAG) and individually, et al.

Defendants

PLAINTFFS OPPOSITON TO DFENDANTS' RULE 12(B) MOTION TO DISMISS

1. The within, together with the exhibit annexed, the declarations of plaintiffs Karen Ambrosetti and Joseph Atkinson and the complaint with its exhibits incorporated by reference, are collectively submitted in opposition to defendants FRCP 12(b)(6) motion.

Defendants Contentions

2. Defendants contend the complaint, which they describe as "*a regurgitation of debunked conspiracy theories*", should be dismissed because 1) the 11th Amendment bars injunctive relief or money damages against state officials administering state law, 2) plaintiffs have failed to adequately plead a First Amendment retaliation claim because they "have not plausibly alleged a causal connection between defendants' actions and their protected activities or that their First Amendment rights were chilled"; 3) there is no private right of action under 52 U.S.C. § 10101 (b) and/or because plaintiffs right to vote was not implicated; 4) there are no viable due process claims because no life liberty or property interests are involved in the case, and/or because the plaintiffs' were owed no response from the government to their petitions and/or because the claims are duplicative of the First Amendment claims; 5) no Composition Clause claim is viable because plaintiffs can't prove the election outcomes were false; and 6) because the defamation

claim is time-barred.

3. Plaintiffs submit none of the contentions support dismissal, especially at this pre-discovery stage of the case. The complaint, with the exhibits made a part thereof, plausibly alleges facts sufficient to survive dismissal under Fed. R. Civ. P. 12(b)(6) per the applicable case law which directs the Court to accept all well–pleaded allegations as true and to draw reasonable inferences in plaintiffs' favor. *Ashcroft v. Iqbal*, 556 U.S. 662,678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) Accordingly, the motion should be denied in its entirety.

4. Concerning the 11th Amendment, the law is clear that interference with clearly established constitutional rights strips state officials of qualified immunity and subjects them to an action for damages. *National Rifle Association v. Vullo*, 602 U.S. 175 (2004); *Scheur v. Rhodes*, 386 U.S. 232 (1974); *Monroe v. Pape,* 365 U.S. 167 (1961). In this case defendants interfered with plaintiffs clearly established rights to be free from government retaliation for protected speech, *Hartman v. Moore*, 547 U.S. 250, 256 (2006); see also *Holzemer v. City of Memphis*, 621 F.3d 512, 520 (6th Cir. 2010) (*Retaliation by public officials against the exercise of First Amendment rights is itself a violation of the First Amendment*) Id.; to be free from government interference with their canvassing activities, *Watchtower Society v. Village of Stratton*, 536 U.S. 150 (2002) and to be free from intimidation against their right to vote, which includes the right to ensure their votes were appropriately counted undiluted by fraudulent votes. *Anderson v. United States*, 417 U.S. 211, 227 (1974) (*Every voter in a federal . . . election . . . whether he votes for a candidate with little chance of winning or one with little chance of losing, has a right under the Constitution to have his vote fairly counted, without its being distorted by fraudulently cast votes*.) Id. Further, the law is clear that the administration of an election in which federal offices are on the ballot renders state officials federal officers for purposes of the election, and state laws

federal laws subject to federal jurisdiction and enforcement. *In re Coy*, 127 U.S. 731 (1888) (*It is, perhaps, since the decision in* Ex Parte Clarke, *100 U. S. 399, past debate that Congress has the power under the Constitution to adopt the laws of the several states respecting the mode of electing members of Congress, and, as resulting from that power, the right to prescribe punishment for infractions of the laws so adopted. This Court has held more than once that Congress...has adopted these laws, and, with them, the officers created under them, making them for the purposes of the election of representatives in Congress its officers.*) Id

5. Concerning the First Amendment claim, plaintiffs have plausibly alleged a causal connection between their First Amendment protected activities and defendants bad-faith, retaliatory actions, and that their First Amendment rights were chilled. *Sadallah v. City of Utica,* 383 F.3d 34, 38 (2nd Cir. 2004) The Court is referred to the Compl. **¶¶ 6. 13, 65, 66, 68, 70, 75, 80, 83, 89 and 90**, to the Atkinson and Ambrosetti declarations annexed, to Plaintiffs 11.12.25 letter to the Court (Doc. 12) annexed as **Ex. 1** and to the timeline set forth infra which clearly shows the chronological connection between plaintiffs First Amendment protected activities, the defendants' defamatory retaliation and the chilling effect. Before the campaign by defendants, NYCA had made well-received presentations to town boards; the BOE made the town boards hostile and 363 presentations futile, increasing plaintiffs' fear of unfair vote counting; the OAG investigation ended the presentations as NYCA hemorrhaged volunteers and funds.

6. Concerning the 52 U.S.C. § 10101 (b) voter intimidation claim, the right to vote includes all activities associated with voting, from registration through the counting of the votes and includes ensuring that properly cast ballots are not diluted by fraudulent ones. *Anderson v. United States*, 417 U.S. 211, 227 (1974). There is a private right of action. *Blessing v. Freestone*, 520 U.S.329, 340-341 (1997); *Wisniewski v. Rodale, Inc.,* 510 F.3d 294, 302 (3rd Cir. 2007)

7. Concerning the due process claims, life liberty and/or property interests are involved in plaintiffs' claims, *Puglisi v. Town of Hempstead, Dept. of Sanitation, Sanitary Dist. No.2*, 545

Fed. Appx. 23, 26 (2nd Cir. 2013) and the due process claims are not duplicative of the First Amendment claims. *Velez v. Levy*, 401 F.3d 75, 93-94; *Sadallah v. City of Utica,* 383 F.3d 34, 38 (2nd Cir. 2004); *Bush v. Gore,* 531 U.S 98, 105 (Unequal treatment in recounts violates due process by devaluing votes.)

8. Concerning the composition clause, defendants contend that plaintiffs have no claim unless they can prove, pre-discovery, that elections outcomes were incorrect. That is upside-down. Plaintiffs have a clear constitutional right in the election of their representatives to a fairly counted vote. *Thornburg v. Gingles,* 478 U.S. 30 (1986); *Anderson v. United States*, 417 U.S. 211, 227 (1974) Plaintiffs' audits of defendants' official records show that in the 2020 NYS election 254,713 votes recorded in NYC were not included the NYS certified totals, and 272,435 more votes were recorded than voters who voted; in the 2022 NYS election, there were 745,294 votes cast and counted from registrants with materially deficient records, 35,312 more votes recorded than voters who voted, and an overall vote error rate of 12%, exceeding the margin of victory for the 2022 US Senate, Governor and Attorney General's races, among others.(Compl. **Ex. 4,6,7,8,9**) The 2024 general election was equally disastrous. The defendants failed to control registration, voting, or counting according to the rules. It is defendants who cannot prove their certification of winners in any election was remotely correct, *usurping the right of qualified voters to choose*. Id

9. Concerning the defamation claim, the criminal investigation is ongoing as far as plaintiffs are aware, so the statute of limitations should be tolled. Additionally, plaintiff Marly Hornik continues to be attacked in the press over the issue so the statute of limitations is ongoing.

Background

10. The following is a timeline of events from the time NYCA first reviewed NYSVoter in October 2021 through November 28, 2023 following the defendant AG's issuance of the cease

and desist order and opening of its criminal investigation. At that point, NYCA ceased operating:

i. October 12, 2021 NYCA receives first copy of NYSVoter and begins audit;
ii. May 9, 2022 Petition for Redress of Grievances, including millions of clearly described, particular violations of state law, submitted to defendants, signed by 5,000 qualified voters of New York State and asking for a response within 30 days;
iii. June 2, 2022 No response from defendants, **violating the right of petitioners and the instant plaintiffs to choose representatives (Article I, § 2)**;
iv. June 27, 2022 NYCA presents evidence of algorithms embedded in NYSVoter controlling ID assignment to NY State Police Special Investigations Unit, who immediately passes the evidence and investigatory jurisdiction to the FBI;
v. June – December 2022 NYCA presents the Petition to County Legislatures, and reports on the data to multiple County Sheriffs and District Attorneys (above including Suffolk, Rensselaer, Dutchess, Onondaga, Clinton, Greene, Monroe, Putnam, Chautauqua, Cattaraugus, Saratoga, Ulster, and Orange counties);
vi. January 17, 2023 NYCA organizes an advocacy day in Albany and provides over 90 New York State legislators with the "Study in Deficits" report and summary;
vii. March 2023 NYCA begins Resolution presentations to Town Boards after receiving little support from County or State legislators, towns show interest and start signing the Resolution for an end-to-end audit of the 2022 general election;
viii. April 5, 2023 BOE sends first defamatory letter stating that "a group" is making "unequivocally false" claims about elections, and "no one has seen their data," along with "False Claims Explained" missive, **violating Fifth Amendment procedural due process rights of petitioners and the instant plaintiffs, suppressing free speech, interfering with the right to petition under color of official status, and beginning their campaign of voter intimidation.**
ix. Town officials and others reject NYCA presentations, disallow the presentations even during public comment periods, local media defame NYCA and town officials who support NYCA, local BOE parrots NYSBOE statements, **stigma-plus violations of plaintiffs' right under Fifth Amendment procedural due process are established**;
x. May 1, 2023 NYCA makes a formal presentation to the NYS Legislature Election Law Committees regarding the audit findings and the discovery of hidden algorithms in NYSVoter controlling the assignment of ID numbers;
xi. May 25, 2023 the double-blind peer-reviewed study regarding the algorithms in NYSVoter is published in the *Journal of Information Warfare* and the presence of steganography is confirmed, indicating a Loss of Control penetration of New York's election cyber-infrastructure;

xii. August 17, 2023 NYCA sends "The Reign of Error" to BOE Law Enforcement Division, with each individual materially deficient record and vote, as extracted from NYSVoter, asking for a reply within 10 days;

xiii. August 29, 2023 On day 10, the BOE "Election Imposters" story is covered on the front page of newspapers statewide, **conscience shocking**;

xiv. NYCA canvass and Resolution activities are suspended and volunteers start quitting;

xv. September 6, 2023 BOE meeting, Stavisky states "We are on the offensive now", **conscience shocking**;

xvi. September 20, 2023 NYCA sends "The Reign of Error" comprehensive report and records to the US Department of Homeland Security, Department of Justice Office of Public Integrity, and FBI;

xvii. September 21, 2023 OAG publishes Cease and Desist letter in front page news stories statewide, identifying NYCA as the subject of an investigation under the Ku Klux Klan Act, a post-Civil War criminal statute designed to secure the rights of black citizens against lynching by mobs that included law enforcement agents, **conscience shocking**;

xviii. October 5, 2023 BOE sends second letter to county commissioners about NYCA, along with extended "False Claims Explained" document, **conscience shocking**;

xix. November 22, 2023 OAG issues first subpoena against NYCA for extensive document production;

xx. November 28, 2023 BOE sends letter and "False Claims Explained" to NYS Association of Sheriffs, NYS Association of District Attorneys, and NYS Association of Counties, **continuing the violations of First and Fifth Amendment rights, demonstrating the coordinated timeline between BOE and OAG, establishing the retaliation campaign as the final response, and establishing the Fourteenth Amendment substantive due process "shocks the conscience" total deprivation and usurpation by defendants of the right to choose representatives under Article I, § 2;**

xxi. NYCA ceases all activities, hundreds or thousands of volunteers flee in terror, NYCA spends all funds on complying with extraordinary document demands and legal defense, Marly Hornik continually fields hostile communications from volunteers about her compliance with legally required document production containing their personal names and information, and NYCA and Marly Hornik are totally stigmatized internally, statewide, and nationally via the continual recycling of OAG investigation story feeding a continually hostile narrative;

xxii. The 2024 general election in New York State is administered and certified by SBOE under the same rights-depriving conditions as 2020 and 2022, with the full knowledge of defendants.

11. Following the cease and desist order and opening of the criminal investigation the AG's office, tag teaming with the BOE, harassed NYCA with extremely burdensome document demands concerning NYCA's canvassing activities. In addition to the AG's demands first made on September 21, 2023, it made a further 16-page demand on November 22, 2023 and continuing demands well into 2024. (Compl. **Ex. 22, 27, 28**) The cease and desist order and criminal investigation by the AG's office required NYCA to retain legal counsel which, together with the cost of compliance with the subpoenas, drained NYCA's remaining funds, leaving it broke and with few volunteers, the vast majority having been frightened away by BOE and AG's actions.

12. To date, defendants have not produced a single report documenting any criminal or untoward conduct by any NYCA canvasser at any time, or evidence that NYCA trained canvassers to intimidate black voters or any voters. This despite the claim they had such reports in 2023 and despite NYCA's requests that such reports be produced. Nor have any charges been brought against any NYCA personnel. In short, the widely publicized criminal claims made by defendants against NYCA in 2023 were fabricated as a pretext to shut down NYCA's First Amendment activities, which were exposing the gross negligence and/or criminality of the defendants in the conduct of NYS elections, including the 2022 election of defendant James, the individual who ordered the pretextual cease and desist letter and criminal investigation against NYCA who has a history as AG of abusing the powers of her office against political adversaries.

13. The foregoing demonstrates a clear timeline tying NYCA's protected First Amendment activities in exposing NYS election fraud in federal elections administered by the defendants to retaliatory actions taken by those defendants in conjunction one with the other to silence and destroy NYCA and so prevent the continued exposure of their gross negligence or worse.

14. Plaintiffs' respectfully request the Court consider the foregoing background and the need for discovery in evaluating defendants' motion to dismiss.

ARGUMENT

I. Eleventh Amendment Immunity Does Not Apply

15. The Eleventh Amendment does not bar the within action or any of the claims for relief, including *damages* against the state officials sued in their *individual* capacity. *See Scheur v. Rhodes*, 416 U.S. 232 (1974); *Ex Parte Young,* 203.US 123 (1908) ("when a state officer acts under a state law in a manner violative of the Constitution, he 'comes in conflict with the superior authority of the Constitution, and he is in that case stripped of his official…character and subjected in his person to the consequences of his individual conduct.); *also Hafer v. Melo*, 502 U.S. 21, 30–31 (1991); *Pena v. Gardner*, 976 F.2d 469, 472; *See Anderson v. Creighton,* 483 U.S. 635, 638, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) ("When government officials abuse their offices, `action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees.'" (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 814, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982))).

16. Additionally, "[c]ompensatory damages ... are mandatory; once liability is found, the jury is required to award compensatory damages in an amount appropriate to compensate the plaintiff for his loss." Smith v. Wade, 461 U.S. 30, 52, 103 S. Ct. 1625, 75 L.Ed.2d 632 (1983); *Borunda v. Richmond*, 885 F.2d 1384, 1389. These damages include "actual losses, mental anguish and humiliation, impairment of reputation, and out-of-pocket losses." *See Borunda*, 885 F.2d at 1389; *Knudson v. City of Ellensburg*, 832 F.2d 1142, 1149.

17. Acting under color of state law, defendants violated original rights (Art. I, § 2) and incorporated constitutional rights of the plaintiffs (complaint, ¶ 96), including the rights to canvass, to petition for redress of grievances and to speak freely (*Watchtower Society v. Village of Stratton*, 536 U.S. 150 (2002)).

18. As defendants knowingly interfered with plaintiffs' rights, the 11th Amendment cannot shield them from money judgments in their individual capacities. A government official "will not be shielded from liability if he acts "with such disregard of the [plaintiff's] clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith."" *Procunier v. Navarette*, 434 U.S. 555, 562 (1978)), citing *Wood v. Strickland*, 420 U.S. 308, at 322 (1975).

19. Plaintiffs' losses are $100,000 in actual losses in legal defense and compliance expenses; $1,000,000 each in mental anguish and humiliation due to the complete loss of faith in government to protect their rights or provide justice, and fear of further retaliation for seeking redress of enumerated, valid election grievances; $1,000,000 each in impairment of reputation to Marly Hornik, Diane Sare and NYCA; and out-of-pocket losses to NYCA in loss of fundraising, due to diminished public perception of NYCA's credibility and problem-solving ability, of $10,000,000 for the period of April, 2023 to the present.

20. Nor does the 11th Amendment bar declaratory or injunctive relief against the defendants in their official capacities. The case involves elections for federal officers, making the defendants congressional officials subject to federal jurisdiction and enforcement. *See In re Coy,* 127 U.S. 731 (1888) ("Congress…has adopted these [state election] laws, and, with them, the officers created under them, making them for the purposes of the election of representatives in Congress its officers."). Plaintiffs are therefore not seeking injunctive relief against Defendants in their official capacity to "compel state officials to conform to state law." (MOL p. 5) Each official capacity claim relates to an ongoing violation of Plaintiffs' constitutional rights under Art. I, § 2, the First, Fifth and Fourteenth Amendments, and the Voting Rights Act of 1965. In MURPHY v. LYNN, 118 F.3d 938, 947 (Jul 8, 1997), the court ruled that overlapping state-law violations do

not preclude a §1983 cause of action when a federal constitutional right is alleged. ("Plaintiffs are not barred from pursuing this Section(s) 1983 action because New York State law provides a remedy.") "The elements of a § 1983 claim…include (1) the deprivation of a federal constitutional or statutory right, and (2) by a person acting under color of state law. *Velez v. Levy*, 401 F.3d 75, 84 (2d Cir. 2005) (citing *Gomez v. Toledo*, 446 U.S. 635, 640 (1980)). Thus, "[t]he first step in any such claim is to identify the specific constitutional right allegedly infringed." *Id.* (citing *Graham v. Connor*, 490 U.S. 386, 394 (1989); and *Baker*, 443 U.S. at 140)." Dale v. Biegasiewicz, 17-CV-01211F, 12 (Oct 21, 2020). "Misuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law is action taken "under color of" state law." *Monroe v Pape*., 365 U.S. 167, 168 (Feb 20, 1961).

21. Additionally, the Pennhurst doctrine Defendants rely on "does not compel dismissal of claims for prospective relief against state officers in their official capacities for alleged violations of federal law simply because the party seeking such relief refers to state law in order to bolster their federal claim." *Vega v. Semple*, 963 F.3d 259, 46 (Jun 29, 2020) Indeed, it would be impossible to vindicate constitutional rights under the Composition Clause *without* referring to state law, as the clause is self-reflexive: If state voter qualifications are not adhered to, then the right of qualified voters to choose their representatives has been jeopardized.

22. The Supreme Court extended this understanding in *Ex Parte Siebold*, 100 US 317 (1879), "The due and fair election of these representatives is of vital importance to the United States…It certainly is not bound to stand by as a passive spectator when duties are violated and outrageous frauds are committed… A violation of duty is an offence against the United States, for which the offender is justly amenable to that government. No official position can shelter him from this responsibility."

23. In *In re Coy,* 127 U.S. 731 (1888). In *Coy,* election officials had conspired to steal a local race which shared the ballot with a congressional election. Conceding guilt, the officials tried to avoid federal charges by arguing that they had committed no crime against Congress. The Supreme Court upheld their convictions, sending the election officials to federal prison. The current edition of the Department of Justice publication, *Federal Prosecution of Election Offenses*, says, "Coy is still good law."[1] Defendant BOE maintains NYSVoter, a federal document containing federal information audited by Plaintiffs, on behalf of the federal government.[2]

24. The Court in *U.S. v. Classic*, 313 U.S. 299 (1941) confirmed that state election officials have a constitutional obligation to ensure that elections are conducted honestly and lawfully. In *Anderson v. United States,* 417 U.S. 211, 227 (1974), the Court found that election law infractions erode public confidence and violate federal law, necessitating stringent enforcement.

25. This was a deliberate part of the constitutional scheme. Following the plan of the Convention, the Supreme Court recognized that the Constitution divests the states of original power over elections. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804-05 (1995) ([T]he provisions governing elections reveal the Framers' understanding that powers over the election of federal officers had to be delegated to, rather than reserved by, the States[.]")

26. The right to choose representatives, in Article I, § 2, covers not only *who* has the right to vote:"The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature,"

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[1] *Federal Prosecution of Election Offenses*, Eighth Edition (2017). Washington, D.C.: Department of Justice, Public Integrity Division. Retrieved on February 17, 2025 from https://www.justice.gov/criminal/file/1029066/dl

[2] 52 U.S.C. § 21083(a)(1)(A)(viii)

but that qualified votes only are honestly counted. "Since the constitutional command is without restriction or limitation, this right, unlike those guaranteed by the Fourteenth and Fifteenth Amendments, is secured against the action of individuals, as well as of States." *U.S. v Classic,* 313 U.S. 299 (1941). The systemic errors and violations documented by Plaintiffs demonstrate abrogation of the right beyond state law into a constitutionally secured federal interest, protectable against state actors.

27. Finally, when systemic errors in the qualification of voters, acceptance of votes, and certification of counts are discovered, as a matter of judicial efficiency it is impossible to enumerate and rectify each one as an individual state law violation. It is the core Article I right of the people that is usurped when the election process becomes systemically corrupt. "Should the people of any state by any means be deprived of the right of suffrage, it was judged proper that it should be remedied by the general government." *Oregon v. Mitchell*, 400 U.S. 112, 134 (1970), quoting James Madison.

28. Defendants have not established Eleventh Amendment immunity from official or personal liability.

II. Plaintiffs Have Adequately Stated a First Amendment Retaliation Claim

29. Defendants allege the complaint should be dismissed because plaintiffs "have not plausibly alleged a causal connection between defendants' actions and their protected activities, or that their First Amendment rights were chilled". That is untrue. Causal connection, protected activities, chilling and additional injuries are documented in plaintiffs' complaint at **¶¶ 6. 13, 65, 66, 68, 70, 75, 80, 83, 89 and 90**, in plaintiff's 11.20.25 letter to the Court (**Ex. 1**) filed in opposition to defendants' motion application (**Doc. 12**), are reiterated in summary form in the timeline of events, *supra* ***¶10 i-xx***, and are further set forth in the Ambrosetti and Atkinson Declarations annexed.

30. "The First Amendment prohibits government officials from subjecting an individual to retaliatory actions... for speaking out... Official reprisal for protected speech offends the Constitution [because] it threatens to inhibit exercise of the protected right." Hartman v. Moore, 547 U.S. 250, 256 (2006); *see also Holzemer v. City of Memphis*, 621 F.3d 512, 520 (6th Cir. 2010) ("The First Amendment right to criticize public officials is well-established and supported by a plethora of Supreme Court precedent... Retaliation by public officials against the exercise of First Amendment rights is itself a violation of the First Amendment.")

31. Plaintiffs have adequately stated a retaliation claim which interfered with their First Amendment rights to petition their representatives for redress on their findings of voter roll, voting and certification problems in the conduct of elections; in their right to canvass, openly discussing lawfully obtained public records with respect to the elections; and with respect to having their votes counted fairly in New York elections. Contrary to defendants claim that plaintiffs' have done no more in their complaint than make a "naked assertion of a chill", the plaintiffs have, in numerous places in their complaint, exhibits, in the timeline *supra,* and the annexed documents, provided specific detail of the chilling effect defendants actions had on them.

32. Plaintiffs have requested injunctive relief against these First Amendment injuries in asking that the ongoing disparagement of NYCA and individual plaintiff volunteers in front of their statewide representatives be halted, by specifically mandating Defendants send retraction letters as requested in the Complaint, "Prayer for Relief, II(f)."

III. Plaintiffs Have Sufficiently Pled a 52 U.S.C. §10101(b) Voter Intimidation Claim

33. Plaintiff's Compl, **¶¶ 85-86**, recites 52 USC §10101(b) and §10101(e).

34. At Compl, **¶¶ 89-90**, plaintiffs allege defendants engaged in a conspiracy to intimidate

them and all NYS voters in the exercise of their right to vote in violation of 52 USC § 10101(b).

35. Defendants publicly targeted plaintiffs' efforts to expose flaws in the NYSVoter Database, a protected voting right (National Voter Registration Act, 52 U.S.C. § 20507(i)(1), "Each State shall maintain for at least 2 years and *shall make available for public inspection*…all records concerning the implementation of programs and activities conducted *for the purpose of ensuring the accuracy and currency* of official lists of eligible voters." (emphasis added)). Defendants' actions (*see timeline, supra*) intimidated plaintiffs by publicly threatening state enforcement to stigmatize their verification of voter rolls and questioning of vote counts, thereby rendering their votes meaningless, denying them the right to vote, and leaving Plaintiffs without recourse or remedy.

36. Defendants' attempt in their MOL to narrowly define "vote" to the mere casting of ballots, regardless of whether the counting process was "appropriate," fails to recognize the full scope of the right according to Congress (52 USC § 10101(e)), which includes "all action necessary to make a vote effective." Plaintiffs' audits addressed pre- and post-election irregularities affecting vote efficacy. According to Defendants, a voter who casts a vote and then fails to accept Defendants' word that it was fairly counted is peddling "misinformation," and worthy of public scorn, humiliating public character attacks, and threats of racially charged criminal investigation. Citizens perusing the "Election Deniers" story on the front pages of newspapers statewide (clearly the result of defendant BOE's press release) would immediately understand the risk of social stigma and criminal punishment for attempting to verify the efficacy of their votes with OAG or BOE, or for daring to question them at all.

37. Further, this was not the first time Defendant James publicly leveled such exaggerated

rhetoric. For example her press release on November 13, 2020 stated, "*The president and Attorney General Barr's attempts to divide Americans and instill doubt in our elections is un-American and will not go unchallenged,*"[3] and in her press released of January 13, 2021 she said, "*we will not allow those fueled by lies and unhinged conspiracy theories to run wild as they violently seek to overthrow the government through sedition and insurrection.*"[4]

38. The widely featured story about NYCA "Election Deniers" stigmatized not only the right to question the government, but the right of canvass, a form of "censorship" "for those many who are poorly financed and rely extensively upon this method of communication." *Watchtower Bible Tract Society v. Village of Stratton*, 536 U.S. 150, 151 (2002) Defendants conspired to shut down protected, poorly financed discussions of lawfully obtained public election records, by abusing their official titles under color of law to intimidate plaintiffs and all New Yorkers against questioning their votes.

39. Defendants deny that a private right exists under § 10101(b). The statute reads, "No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote." In 2024 this individual right was upheld in the third circuit: "§ 10101 embodies a right, which the parties do not dispute, as the first subsection of the statute provides that all qualified citizens "shall be entitled and allowed to vote." 52 U.S.C. 10101(a)(1) …Moreover, the right embodied in the statute is not "vague and amorphous," and the statute "is couched in mandatory terms," *Blessing*, 520 U.S. at 340, in that it provides that no State actor"

[3] https://ag.ny.gov/press-release/2020/attorney-general-james-calls-attorney-general-barr-reverse-new-policy-eroding

[4] https://ag.ny.gov/press-release/2021/attorney-general-james-ready-take-legal-action-against-insurrectionists-or

"shall . . . intimidate… any other person for the purpose of interfering with the right of such other person to vote." 52 U.S.C. § 10101(b); "cf *Wisniewski v. Rodale. Inc.*. 510 F.3d 294, 302 (3d Cir. 2007) ("[A]n explicit reference to a right and a focus on the individual protected . . . suffices to demonstrate Congress's intent to create a personal right."). Therefore, § 10101 creates a personal right." Pa. State Conference of NAACP Branches v. Sec'y Commonwealth of Pa., 97 F.4th 120, 46 (Mar 27, 2024)

40. Regarding the absurd idea that Plaintiffs depend on the Attorney General to enforce their right to vote, "the 1957 Civil Rights Act specifically added the aggrieved person/no exhaustion provision at the same time it gave the Attorney General civil enforcement authority. It would be inconsistent to read the statute to remove one roadblock to private suits…and simultaneously erect another. *See Schwier*, 340 F.3d at 1295-96; see *also Morse v. Republican Party of Virginia*, 517 U.S. 186, 213, 230-34 (1996) (holding the Voting Rights Act "only authorizes enforcement proceedings brought by the Attorney General and does not expressly mention private actions," but nevertheless "Congress must have intended [] to provide private remedies"); *United States v. Mississippi*, 380 U.S. 128, 137 (1965) (acknowledging "private persons might file suits under § [10101]"). Thus, because § 10101 does not provide a comprehensive enforcement scheme that is inconsistent with a plaintiffs ability to seek relief under § 1983, Plaintiffs have a private of right action and can sue under § 1983." Pa. State Conference 97 F.4th 120, 46 (Mar 27, 2024)

41. Plaintiffs have requested injunctive relief against the ongoing voter intimidation of individual plaintiffs, and New York voters generally, as outlined in the Complaint "Prayer for Relief, II(g)"

IV. Plaintiffs Have Sufficiently Pled A Procedural Due Process Claim

42. Regarding plaintiffs' due process claims, Defendants contend "there is no interference with that right [to petition] when one petitions the government and receives no response because "the right to petition confers no attendant right to a response from the government." *Trentadue v. Integrity Comm.*, 501 F.3d 1215, 1236-37 (10th Cir. 2007)" (MOL p. 11)

43. Defendants' application of *Trentadue* does not apply here. Overlooked in Defendants' MOL between *Trentadue* and the case at hand is that while "the Due Process Clause guarantees due process only when a person is to be deprived of life, liberty, or property," *Chambers v. Colo. Dep't of Corrs.*, 205 F.3d 1237, 1242 (10th Cir.2000)" Trentadue had not demonstrated such. Here, the lack of response by Defendants resulted in deprivation of multiple liberty interests:

a. The right to choose representatives in elections restricted to legally qualified voters, Article I, § 2 of the US Constitution;
b. The right to vote free from intimidation under color of law, 52 U.S.C. § 10101(b);
c. The right to question government without retaliation;
d. The right to petition the government for redress of grievance without retaliation;
e. The right to republican government, the goal of the entire constitutional scheme:
    i. "The regular distribution of power into distinct departments; the introduction of legislative balances and checks; the institution of courts composed of judges holding their offices during good behavior; **the representation of the people in the legislature by deputies of their own election…are means, and powerful means, by which the excellences of republican government may be retained and its imperfections lessened or avoided**." A. Hamilton, *Federalist 9* (emphasis added)

ii. "A guarantee by the national authority would be as much levelled against the usurpations of rulers, as against the ferments and outrages of faction and sedition in the community." A. Hamilton, *Federalist 21*

44. Defendant BOE's silence, in and of itself, deprived these specific liberty rights by perpetuating fraud (e.g., unaddressed excess IDs enabling "fraudulent votes"; Complaint ¶ 7). This makes votes "ineffective" under 52 U.S.C. § 10101(e) (defining "vote" to include actions making it count), which is directly tied to due process under Bush v. Gore, 531 U.S. at 105: Unequal treatment in recounts *violates due process by devaluing votes*.

45. Further, Defendants did not merely ignore the petition efforts of Plaintiffs, they retaliated. ""To state a First Amendment retaliation claim, a plaintiff must establish that: (1) his speech or conduct was protected by the First Amendment; (2) the defendant took an adverse action against him; and (3) there was a causal connection between this adverse action and the protected speech." *Puglisi v. Town of Hempstead, Dep't of Sanitation, Sanitary Dist. No. 2,* **545 Fed.Appx. 23, 26** (2d Cir.2013) (quoting *Cox v. Warwick Valley Cent. Sch. Dist.*, 654 F.3d 267, 272 (2d Cir.2011)); *see also Adams v. Ellis,* **536 Fed.Appx. 144, 144** (2d Cir.2013); *Wrobel v. Cnty. of Erie,* 692 F.3d 22, 27 (2d Cir.2012); *Singh v. City of New York,* 524 F.3d 361, 372 (2d Cir.2008)." Bowen-Hooks v. City of N.Y., 13 F.Supp.3d 179, 239 (Mar 31, 2014)…Plaintiffs' speech…"is a matter of public concern and therefore a protected activity "if it relates 'to any matter of political, social, or other concern to the community.'" *Johnson,* 342 F.3d at 112 (quoting *Connick v. Myers,* 461 U.S. 138, 146, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983))" Murray v. Town of N. Hempstead, 853 F. Supp. 2d 247, 263 (Jan 6, 2012). There can be no question that reporting to representatives on potential election misconduct is a matter of public concern, therefore the speech was protected.

46. As can clearly be seen from the attached exhibit, "Orange Co Resolution Timeline for 2023," the April 2023 BOE letter had a palpable effect. Prior to the letter being received by town boards, NYCA volunteer Karen Ambrosetti describes NYCA presentations and meetings as "positive." From May 3, 2023 onward, Ambrosetti describes being followed by detractors, called names, and stonewalled. The sudden shift in experience led the Orange County NYCA volunteers to abandon their efforts, demonstrating that the letter's effect ""would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights." *Zelnik* , 464 F.3d at 225" Rivers v. N.Y.C. Hous. Auth., 176 F. Supp. 3d 229, 234 (Mar 31, 2016). Similarly, Plaintiff NYCA volunteer Joseph Atkinson reported in "Town Resolutions Tracking" for Chemung County that the last time a NYCA Resolution passed was on April 12, 2023. Despite the problems in NYSVoter persisting to the present, something Mr. Atkinson and the other former NYCA volunteers from Chemung County are well aware of, the last NYCA Resolution presentation to a town board in Chemung County was August 10, 2023, after the April NYSBOE letter and just prior to the "Election Deniers" voter intimidation campaign. Finally, there is causation: but for Plaintiffs reporting on their audit discoveries and attempting to verify them through canvass, Defendants would never have sent the letters they sent nor opened the publicly announced pretextual investigation of Plaintiffs under the Ku Klux Klan Act.

47. Since a fundamental liberty interest was impaired (unlike *Trentadue*), process was required—e.g., notice, review, or a hearing before announcing that NYCA's claims were "unequivocally false," interfering with Plaintiffs' sacrosanct representative relationships, or seeking statewide media recognition of their defamatory campaign painting NYCA as conspiracy advocates and racist, anti-election radicals (Mathews, 424 U.S. 319, 332 (1976), "Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or

"property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment."). Defendants provided none (Complaint ¶ 100), admitting themselves that they had conducted no review of the data in question (records maintained by themselves as officers of Congress) before declaring the petition and subsequent actions "unequivocally false" and maliciously labeling Plaintiffs as "bad actors," etc. (Complaint ¶ 11- April 5, 2023 BOE)

48. The stigma plus requirements for Fifth Amendment due process violation under § 1983 are met: "A § 1983 liberty interest claim of this sort — commonly referred to as a "stigma plus" claim, *see, e.g., Sadallah v. City of Utica,* 383 F.3d 34, 38 (2d Cir. 2004) — requires a plaintiff to allege (1) the utterance of a statement about her that is injurious to her reputation, "that is capable of being proved false, and that he or she claims is false," and (2) "some tangible and material state-imposed burden . . . in addition to the stigmatizing statement." *Doe v. Dep't of Pub. Safety ex rel. Lee,* 271 F.3d 38, 47 (2d Cir. 2001), *rev'd on other grounds, Connecticut Dept. of Public Safety v. Doe,* 538 U.S. 1, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003). The defamatory statement must be sufficiently public to create or threaten a stigma;… *See, e.g., Donato v. Plainview-Old Bethpage Cent. School Dist.,* 96 F.3d 623, 631-32 (2d Cir. 1996). Similarly, because "[a] free-standing defamatory statement . . . is not a constitutional deprivation," but is instead "properly viewed as a state tort of defamation," *id.,* the "plus" imposed by the defendant must be a specific and adverse action clearly restricting the plaintiff's liberty,… *see, e.g., Siegert v. Gilley,* 500 U.S. 226, 233, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991) (noting that "[d]efamation, by itself, is a tort actionable under the laws of most States, but not a constitutional deprivation," and that absent a "plus," stigmatizing statements do not give rise to constitutional claims) *Neu v. Corcoran,* 869 F.2d 662, 667 (2d Cir. 1989)." VELEZ v. LEVY, No. 03-7875., 88 (Mar 11, 2005)

49. Here, the "plus" is the usurpation of the right to choose representatives, the "primary

right by which all other rights are protected."[5] When Defendant NYSBOE administered uncontrolled elections in 2020, 2022 and 2024, as documented by Plaintiffs from the official records of Defendants, maintained as "officers of Congress" on behalf of the federal government, defended these acts and attacked citizen auditors who were using the tools Nature's God gave them to address those egregious acts—their minds, pens, voices, and feet—they deprived Plaintiffs and all United States citizens residing in New York of the right "of being ruled by laws, which they themselves approve, not by edicts of men over whom they have no control."[6]

V. Plaintiffs Have Sufficiently Pled A Substantive Due Process Claim

50. Plaintiffs' substantive due process claims under the Fourteenth Amendment similarly fall well within established standards for prospective injunctive relief against government actions under color of law, performed by officials in their official capacity. "As in any action under § 1983, the first step is to identify the exact contours of the underlying right said to have been violated. See *Graham* v. *Connor*, 490 U.S. 386, 394 (1989)." (*County of Sacramento v. Lewis*, 523 U.S. 833, 842 (May 26, 1998))

51. Plaintiffs clearly identify several fundamental rights they claim were violated by Defendants (see 5th amendment due process section above). The question of whether Defendants' behavior warrants Fourteenth Amendment relief turns on a "cognizable level of executive abuse of power…which shocks the conscience." (*Id.* at 848) Although "[l]iability for negligently inflicted harm is categorically beneath the constitutional due process threshold, see, *e.g.*, *Daniels* v. *Williams*, 474 U.S., at 328,…conduct deliberately intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to

[5] Paine, Thomas. *Common Sense* (1776)

[6] *A letter to the inhabitants of the Province of Quebec. Extract from the Minutes of the Congress. Philadelphia, Oct. 1774*

the conscience-shocking level, see *id.*, at 331." (*Id.* at 850; *See, e.g.,* Goe v. Zucker, 43 F.4th 19, 20 (Jul 29, 2022); *See, e.g.*, *Velez v. Levy*, 401 F.3d 75, 93-94 (2d Cir. 2005) (explaining that the plaintiff must "allege governmental conduct that 'is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.'" (quoting *Lewis*, 523 U.S. at 847 n.8)))

52. Plaintiffs have plausibly alleged and documented conduct reaching the standard requiring "strict scrutiny," (Goe v. Zucker, 43 F.4th 19, 21 (Jul 29, 2022) and a jury trial, "Whether substantive due process has been denied "is to be tested by an appraisal of the totality of facts in a given case." *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998) (quoting *Betts v. Brady*, 316 U.S. 455, 462 (1942))" Votta ex rel. His Minor Sons R.V. v. Castellani, 600 F. App'x 16, 3 (Jan 23, 2015)

53. The complaint and supporting evidence create triable issues of deliberate intent to injure or retaliate rather than mere error or mistake — conduct which Second Circuit law treats as conscience shocking. Defendants sought at every stage, starting with defamatory letters and extending to retaliatory investigation, to overreach into an action constitutionally granted to the individual Plaintiffs, all NYCA volunteers, and all legally qualified voters, and was therefore "an intentional effort, born of political animus." (*Velez v. Levy,* No. 03-7875., 99 (Mar 11, 2005))

54. "However useful jealousy may be in republics,"[7] "whenever any one of the departments may commit encroachments on the chartered authorities of the others,"[8] the "breach"[9] must be corrected.

55. Political motivations are implicit in the actions of Defendant James, who ran for office to

[7] John Jay, Federalist 64
[8] James Madison, Federalist 49
[9] *Supra*

"get" President Trump, and has made herself a national media figure, grabbing front page media exposure for her partisanship. One would have to be living an impossibly secluded life to not know that President Trump has continually and prominently raised allegations of election fraud, and that defendant James hates him and seeks his legal downfall, and Governor Hochul even called for those who share his views to, "Get out of town. Because you do not represent our values. You are not New Yorkers."[10] "[W]e can glean from *County of Sacramento* this important principle: whether executive action shocks the conscience depends on the state of mind of the government actor and the context in which the action was taken." (O'CONNOR v. PIERSON, 426 F.3d 187, 202 (Oct 11, 2005))

56. Viewed in this highly-publicized context, there is significant triable evidence that "bad actors" spreading "misinformation" *See* Complaint, Exhibit 19, or "reports that NYCA volunteers were confronting voters at their homes," *See* Defendants' MOL at p. 16, did not honestly comprise the rationale underlying either the letters or the investigation. Although, "the burden of establishing outrageous investigatory conduct is very heavy, *see United States v. Schmidt*, 105 F.3d 82, 91 (2d Cir. 1997)" (*U.S. v. Rahman*, 189 F.3d 88, 102 (Aug 16, 1999)), the outcome that Defendants successfully dispersed an effective citizen advocacy effort, as well as maintained absolute authority over elections and increased their personal and national political leverage, cannot be ignored as a motive establishing "conscience-shocking conduct," meeting the bar of "egregious invasions of individual rights. *See, e.g.*, *Rochon*, 342 U.S. at 172" (*Ibid.)*

57. Plaintiffs have documented reasonable likelihood that "the force was "maliciously or

[10] Public statement by Governor Kathy Hochul on August 22, 2022, retrieved on January 10, 2026 from https://www.youtube.com/watch?v=dscyPia-oUY

sadistically [employed] for the very purpose of causing harm" in the absence of any legitimate government objective," making "the conduct…presumptively unconstitutional." *Johnson v. Newburgh Enlarged School Dist.*, 239 F.3d 246, 252 (Jan 31, 2001).

58. Plaintiffs have identified multiple protected interests, and plead facts and evidence from which a reasonable jury could infer an improper state of mind and absence of any legitimate governmental objective on the part of Defendants. Dismissal of Fourteenth Amendment substantive due process claims and the prospective, injunctive relief requested by Plaintiffs is inappropriate where intent is plausibly pleaded. *See* *Collins* v. *Harker Heights*, 503 U.S. 115, 126 (1992) (noting that the Due Process Clause was intended to prevent government officials "from abusing [their] power, or employing it as an instrument of oppression,"); and *See* *Rochin* v. *California*, 342 U.S. 165, 172 (1952) and *Palko* v. *Connecticut*, 302 U.S. 319, 325-326 (1937) ("`substantive due process' prevents the government from engaging in conduct that `shocks the conscience,' . . . or interferes with rights `implicit in the concept of ordered liberty.'")

VI. Defendants Composition Clause Argument Dodges the Question

59. The Composition Clause of the US Constitution, Article I, § 2, defines the scheme by which Congressional representatives are to be chosen. Qualified voters may vote, from which we may infer that ballots from qualified voters who vote shall be counted, and counts shall only include qualified voters' votes. This is the scheme as ratified by the people at their conventions. Because the stakes could not be higher in protecting the natural rights of the people, this is the second sentence of the Constitution. "Those who seek to protect individual liberty ignore threats to this constitutional structure at their peril."[11]

60. The facile excuse presented by Defendants, that no injury to the "right to choose" secured

[11] Antonin Scalia, *Foreword: The Importance of Structure in Constitutional Interpretation*, 83 Notre Dame L. Rev. 1417 (2008). Available at: http://scholarship.law.nd.edu/ndlr/vol83/iss4/1

by the Composition Clause can exist because Plaintiffs cannot and will not claim knowledge of which election outcomes were *wrong*, due to their audits only proving that *all of the certifications were false and therefore illegal*, is not sustainable. "[L]oss of political power through vote dilution is distinct from the mere inability to win a particular election." Thornburg v. Gingles, 478 U.S. 30 (1986) Further, the Supreme Court has ruled that, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes…As we indicated in *Rosario,* **the Constitution does not require the State to choose ineffectual means to achieve its aims**. To conclude otherwise might sacrifice the political stability of the system of the State, with profound consequences for the entire citizenry." Storer v. Brown, 415 U.S. 724 (1974) (emphasis added)

61. According to Defendant NYSBOE's official federal election records regarding the qualifications of voters who both registered and voted, the votes counted, and the participation histories, it is not an exaggeration to say that "chaos" chooses representatives in New York State, Defendant NYSBOE certifies the chaos as legitimate, and BOE acting with Defendant OAG politically and publicly retaliate against citizens who dare question them. If Defendants had any intention of addressing the chaos uncovered and reported by Plaintiffs, they could have done so as early as May, 2022, when the first NYCA petition was submitted to NYSBOE. Instead, they chose to attack, interfere, suppress and investigate the messengers.

62. The plain fact that neither Defendants, nor any other honest observer of these reports and proceedings, *have any idea who legally won any election in New York in 2020, 2022, and 2024,* violates the right of the people to choose. "[T]he state may not legitimately take action in service of an end that flatly contravenes the Court's contemporary understanding of constitutional

values."[12] This modern view upholds the contemporaneous argument of J. Marshall,[13] "Let the end be legitimate, let it let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." Plaintiffs' audits, combined with defendants' vicious retaliation, show that defendants have usurped the right to choose representatives from the people.

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Respectfully Submitted.

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[12] https://harvardlawreview.org/print/vol-129/let-the-end-be-legitimate-questioning-the-value-of-heightened-scrutinys-compelling-and-important-interest-inquiries/#footnote-45

[13] From Myers v. United States, 272 U.S. 52 (1926):

"This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long-term of years, fixes the construction to be given its provisions. *Stuart v. Laird*, 1 Cranch 299, 5 U. S. 309; *Martin v. Hunter's Lessee*, 1 Wheat. 304, 14 U. S. 351; *Cohens v. Virginia*, 6 Wheat. 264, 19 U. S. 420; *Prigg v. Pennsylvania*, 16 Pet. 544, 41 U. S. 621; *Cooley v. Board of Wardens, etc.*, 12 How. 299, 53 U. S. 315; *Burroughs-Giles Lithographing Company v. Sarony*, 111 U. S. 53, 111 U. S. 57; *Ames v. Kansas*, 111 U. S. 449, 111 U. S. 463-469; *The Laura*, 114 U. S. 411, 114 U. S. 416; *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 127 U. S. 297; *McPherson v. Blacker*, 146 U. S. 1, 146 U. S. 28, 146 U. S. 33, 146 U. S. 35; *Knowlton v. Moore*, 178 U. S. 41, 178 U. S. 56; *Fairbank v. United States*, 181 U. S. 283, 181 U. S. 308; *Ex parte Grossman*, 267 U. S. 87, 267 U. S. 118.