



November 6, 2018

Via e-mail and certified mail

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U.S. Department of Justice
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Re: Request to investigate Potential Violation of Section 11(b) of the Voting Rights Act, 52 U.S.C. § 10307(b), by U.S. Border Patrol

To Chief Herren:

The ACLU and the ACLU of Texas request that the Department of Justice investigate a potential violation of Section 11(b) of the Voting Rights Act, 52 U.S.C. § 10307(b), by the U.S. Border Patrol. On Monday, November 5, 2018, Border Patrol announced that it would be “conducting a crowd control exercise” on November 6, 2018¹—the same day as Election Day—in El Paso, Texas. The exercise, described as a “mobile field force demonstration” that would “include participants and assets from the United States Border Patrol,” would take place near the Paso Del Norte Port of Entry, in a neighborhood that is almost exclusively Hispanic, and less than a mile from the polling location for Precinct 37, the Armijo Recreation Center. News reports indicate that individuals who reside in the immediate vicinity would have had to travel through the area in which the exercise was being conducted in order to reach this polling location.² That same day, on November 5, 2018, in response to this announcement, the ACLU, community groups, elected officials, and others expressed concerns that this exercise on Election Day would result in voter

¹ See Robert Moore & Carlos Sanchez, *Border Patrol Postpones Plans to Conduct ‘Crowd Control’ Exercise on Election Day*, Texas Monthly, Nov. 6, 2018, <https://www.texasmonthly.com/politics/border-patrol-conduct-crowd-control-exercise-election-day/>; see also <https://pbs.twimg.com/media/DrR8YU3VAAAjBAJ.jpg>.

² Andrew Litton, *CBP Abruptly Cancels Election Day Border ‘Crowd Control Exercise’*, El Paso Herald-Post, Nov. 6, 2018, https://elpasoheraldpost.com/videogallery-cbp-abruptly-cancels-election-day-border-crowd-control-exercise/?fbclid=IwAR3oDLwrTwkCHiTidpiSgF1Nv7SGYzSo_7qzwUSOAUio4Q5Im3yRn9vgYX4.

intimidation among Latinx voters. Despite these concerns, Border Patrol indicated that it would proceed with the exercise on November 6, 2018 as planned.³

On the morning of November 6, Border Patrol vehicles and armored units were observed driving within this area.⁴ After mounting concerns and complaints, shortly before the exercise was set to begin, Border Patrol employees informally told media and community organizations, including the ACLU, that the exercise had been cancelled, but did not immediately issue a formal statement to that effect. Though cancelled at the last minute, the announcement of this exercise itself appears to be an attempt to intimidate voters in the Latinx community, and the delay in issuing a formal announcement of the cancellation demonstrates that the Border Patrol did not intend for voters to be relieved of the fears caused by the initial announcement.

While the exercise was ultimately cancelled at the eleventh hour, the Border Patrol's decision to "conduct[] a crowd control exercise" and the related announcement, which was not rescinded until several hours into voting, should be investigated under Section 11(b) of the Voting Rights Act, which provides in part:

No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote[.]

52 U.S.C. § 10307(b).

Congress adopted Section 11(b) of the Voting Rights Act to provide broad protections against all forms of voter intimidation. A violation of Section 11(b) may be established without any showing that the perpetrator had a subjective purpose of intimidating voters through its words or actions. As the House report accompanying the legislation states: "[N]o subjective purpose or intent need be shown" under Section 11(b) of the VRA. H.R. Rep. No. 89-439, at 30 (1965); *see also League of United Latin Am. Citizens – Richmond Region Council v. Public Interest Legal Found.*, No. 18-cv-423, 2018 WL 3848404, at *3-4 (E.D. Va. August 13, 2018) (holding that Section 11(b) does not require specific intent to intimidate).⁵

The Border Patrol's decision to "conduct[] a crowd control exercise" and its related announcement, therefore, appears to violate Section 11(b) because of its potential to deter eligible persons from voting. Moreover, the threatening nature of the actions of Border Patrol, a

³ *See Moore & Sanchez, supra* note 1.

⁴ *See Litton, supra* note 2.

⁵ Even though in the circumstances here, we have grave concerns that Border Patrol's actions may be racially motivated, Section 11(b) prohibits voter intimidation whether or not it is targeted at specific racial groups or motivated by racial animus. *See League of United Latin Am. Citizens*, 2018 WL 3848404, at *3-4; *see also* H.R. Rep. No. 89-439, at 30 ("acts of intimidation need not be racially motivated"). Certainly, if such actions were racially motivated, this would give rise to additional constitutional and statutory violations.

federal law enforcement agency, is heightened here in light of President Trump’s November 5, 2018 tweet threatening to station law enforcement officials to aggressively monitor polling places for alleged illegal voting,⁶ and the Trump Administration’s repeated threats and targeted actions against immigrant communities, including by Border Patrol specifically.⁷ As Attorney General Nicholas Katzenbach, who drafted much of the Voting Rights Act, explained, defendants charged with violating Section 11(b) are “deemed to intend the natural consequences of their acts.” Voting Rights, Part 1: Hearings on S. 1564 Before the S. Comm. on the Judiciary, 89th Cong. 16 (1965).

For these reasons, the ACLU and the ACLU of Texas request that you investigate whether the Border Patrol’s decision to “conduct[] a crowd control exercise” and its related announcement is in violation of Section 11(b) of the Voting Rights Act, and any other applicable provision of law.

Sincerely,

/s/ Sophia Lin Lakin

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⁶ Trump’s tweet states in full that:

Law Enforcement has been strongly notified to watch closely for any ILLEGAL VOTING which may take place in Tuesday’s Election (or Early Voting). Anyone caught will be subject to the Maximum Criminal Penalties allowed by law. Thank you!

Donald J. Trump (@realDonaldTrump), Twitter (Nov. 5, 2018, 7:41AM), <https://twitter.com/realDonaldTrump/status/1059470847751131138>. That tweet is the subject of a separate 11(b) complaint filed by Demos on November 5, 2018. *See* Demos, Complaint to U.S. Department of Justice Concerning Voter Intimidation, Nov. 5, 2018, *available at* <https://www.demos.org/publication/complaint-us-department-justice-concerning-voter-intimidation-president> (last visited Nov. 6, 2018).

⁷ *See, e.g., See, e.g.,* Brandon Carter, *Immigration agents release 10-year-old girl with cerebral palsy after ACLU lawsuit*, The Hill, Nov. 3, 2017, <https://thehill.com/homenews/news/358732-immigration-agents-release-10-year-old-girl-with-cerebral-palsy-after-aclu>; Amy B. Wang, *Two Americans were detained by a Border Patrol agent after he heard them speaking Spanish*, Wash. Post, May 21, 2018, <https://www.washingtonpost.com/news/post-nation/wp/2018/05/20/a-border-patrol-agent-detained-two-u-s-citizens-at-a-gas-station-after-hearing-them-speak-spanish/>; Daniel Borunda, *Agent won’t face perjury charge in controversial El Paso courthouse arrest*, El Paso Times, Sept. 22, 2017, <https://www.elpasotimes.com/story/news/immigration/2017/09/22/agent-wont-face-perjury-charge-controversial-el-paso-courthouse-arrest-group-says/695087001/>.