

No. 24-1328

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

COLORADO MONTANA WYOMING STATE AREA CONFERENCE OF THE
NAACP; LEAGUE OF WOMEN VOTERS OF COLORADO; MI FAMILIA
VOTA,

Plaintiffs–Appellants,

v.

SHAWN SMITH; ASHLEY EPP; HOLLY KASUN,

Defendants–Appellees,

and

UNITED STATES ELECTION INTEGRITY PLAN,

Defendant.

UNITED STATES OF AMERICA,

Amicus Curiae.

On Appeal from the United States District Court for the District of Colorado
No. 1:22-cv-00581-CNS-NRN (Hon. Charlotte N. Sweeney)

**PETITION OF APPELLEES HOLLY KASUN AND SHAWN SMITH
FOR PANEL REHEARING AND REHEARING EN BANC**

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STATEMENT OF COUNSEL IN SUPPORT OF PANEL REHEARING AND REHEARING EN BANC

Kasun and Smith petition for panel rehearing under Fed. R. App. P. 40(b)(1) because the panel overlooked or misapprehended the points of law and fact set out below, and for rehearing en banc under Fed. R. App. P. 40(b)(2). As to en banc consideration, counsel state their belief, based on reasoned and studied professional judgment, that the panel decision conflicts with decisions of the Supreme Court of the United States on Article III standing — *FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367 (2024); *Murthy v. Missouri*, 603 U.S. 43 (2024); *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021); and *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013) — and that this proceeding involves two questions of exceptional importance. (1) whether an organization may establish injury in fact by diverting resources in response to media reports it never verified about a political actor’s speech; and (2) whether the First Amendment recklessness requirement of *Counterman v. Colorado*, 600 U.S. 66 (2023), governs civil voter-intimidation liability predicated on political speech.

INTRODUCTION

The panel reversed a judgment entered after Plaintiffs rested their case at trial, and it did so on a harmless-error holding the Opinion itself calls “a close call.” Op. 35. What tipped the call was a category of evidence the Opinion says the district court should have considered: posts on USEIP’s *internal* message board, written by

unidentified authors never connected to the Individual Defendants. But the Opinion never engages the answer Kasun and Smith briefed to exactly this argument: no voter was shown to have received or encountered those messages. Resp. Br. 44–47. A voter cannot be intimidated by words she never heard. If that is right — and Plaintiffs identified no contrary authority — the excluded evidence could not have changed the outcome of a trial about whether voters were intimidated, and the error in dismissing USEIP was harmless. The district court said as much itself: its findings reached “any defendant *or even an agent of USEIP,*” and it held in the alternative that even the broader theory Plaintiffs pressed midstream — one the district court found outside the pretrial order — “would not have commanded a different result.” *See* Trial Tr., ECF No. 190, at 833:24–836:7 (emphasis added).

As we show below, the Opinion decided that close call by asking whether Plaintiffs would have presented a “stronger case” rather than whether the result would have been different, and without holding Plaintiffs to their burden of showing prejudice. It then compounded the error at the remedy stage: it reversed the judgments for Kasun and Smith even though, by its own account, the issue on which Plaintiffs were not fully heard concerned “whether USEIP took any actions,” not whether the Individual Defendants did. Op. 40–41. Its prospective evidentiary guidance on the Smith video overlooks the text of Rule 26(a)(3)(B) and includes no prejudice analysis. And it leaves unresolved the fully briefed question whether

Counterman v. Colorado’s recklessness requirement governs speech-predicated intimidation liability — a question the district court will need answered before any retrial of a case built almost entirely on political speech.

Finally, the standing holding warrants *en banc* review. The panel held that organizations suffered Article III injury because they diverted resources in response to media reports they admittedly never verified — and it ordered a new trial against every defendant without identifying any injury traceable to Kasun or to Smith specifically. That approach conflicts with the direct-injury showing required by *Alliance for Hippocratic Medicine* and the individualized, defendant-specific standing required by *Murthy*, rests in part on authority that has since been vacated, and licenses any advocacy organization to manufacture federal jurisdiction over any political speaker whom members of the press (or even openly political actors, bloggers, or influencers) happen to write about.

ARGUMENT

I. The Panel Decided a Conceded “Close Call” Without Holding Plaintiffs to Their Burden of Showing Prejudice.

A. The private posts could not, without attribution or implementation, establish completed or attempted intimidation.

Section 11(b) makes it unlawful to “intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote.” 52 U.S.C. § 10307(b). Section 1985(3) reaches conspiracies “to prevent by force,

intimidation, or threat” lawful support or advocacy. 42 U.S.C. § 1985(3). The inquiry is objective — it asks what a reasonable voter confronted with the conduct would perceive — but it does not dispense with conduct capable of bringing the alleged intimidation to bear on a voter. Words exchanged in private, among colleagues, do not intimidate a voter who never encounters them.

That was one of Kasun and Smith’s briefed answers to Plaintiffs’ prejudice argument. The message board was “internal” — Plaintiffs’ own brief describes it as “USEIP’s internal message board.” Aplt. Br. 38. And Plaintiffs’ reply raised grave issues for any precedent: they “didn’t have to prove that the messages weren’t written by ‘bots’ or that the public was aware of the messages,” because the messages are “probative of USEIP’s intimidation or attempted intimidation all by themselves.” Reply Br. 8. No voter was shown to have received or encountered the posts, and Plaintiffs have never contended otherwise.

The Opinion does not mention this argument. It holds the dismissal of USEIP prejudicial because dismissal “narrowed the scope of the evidence the district court considered,” identifying as the lost evidence “USEIP members’ message board discussions” involving unnamed volunteers, never identified or proven to have been USEIP agents, (1) discussing whether to carry weapons for protection while canvassing, *see* App. 287 (message-board post); SA 119, 268 (unrebutted testimony that the chatroom “security” discussion concerned the canvassers’ own safety); App.

256 (Voter Verification “Safety” slide); Resp. Br. 29, and (2) photographing voters’ residences, Op. 35–36, of which the district court found no evidence, Op. 13. No evidence showed that the posts were communicated, disseminated, or implemented in a manner capable of bringing the alleged intimidation to bear on a voter. Nor did the panel identify any attributable act directed toward communicating or implementing intimidation against voters. At most, the posts might bear circumstantially on intent, agreement, or authorization if linked through a proper evidentiary foundation to voter-facing conduct; the Opinion identifies no such link. Evidence that cannot establish the elements without a link the record lacks cannot have had a “substantial influence” on the judgment. The prejudice holding thus rests entirely on a premise the briefing squarely contested and the Opinion never examined. That is what Rule 40 asks a petition to identify: a significant point of law or fact the court overlooked or misapprehended. Fed. R. App. P. 40; 10th Cir. R. 40.1(A).

B. The Opinion Substituted a “Stronger Case” for the Required “Different Result” and Did Not Hold Plaintiffs to Their Burden.

The Opinion correctly recites the governing standard: error warrants reversal only where a “practical likelihood” exists “that the result in the district court would have been different had the error not occurred.” Op. 34–35 (quoting *Bridges v. Wilson*, 996 F.3d 1094, 1099 (10th Cir. 2021)). It then decides the question under a different one. While acknowledging that any forecast of how a trial with USEIP

“would have proceeded” is “somewhat unclear and predictive,” the Opinion declares “it is certain that the Voter Organizations would have presented a stronger case.” Op. 35. But a “stronger case” is not at all a “different result.” And on this record the gap between the two is unbridgeable: (1) the Opinion affirms as “permissible” the district court’s finding that the only canvassed voter who testified encountered nothing objectively intimidating, Op. 39–40; (2) the district court found no evidence that USEIP ever canvassed in Mesa County, where that voter lived, Op. 12; and (3) the additional evidence a retained USEIP would have contributed is the private message board no voter was shown to have encountered, featuring messages by people Plaintiffs never identified or proved to be agents of USEIP. The Opinion is silent regarding what evidence remained that could, in a second trial, amount to intimidation of voters.

Moreover, the record contains findings the Opinion does not mention that put the question beyond dispute. The district court’s Rule 52(c) findings were not confined to the three Individual Defendants: the court found that “[t]here’s no evidence that any defendant *or even an agent of USEIP* engaged in canvassing that objectively could rise to the level of voter intimidation.” Trial Tr., ECF No. 190, at 834:1-4 (emphasis added). The court found “no real evidence” that photographs of residences were ever taken and “no evidence presented in this case that any voter had such actions taken against them or that they found that action to be intimidating.”

Id. It found that Ms. Roberts “had no basis or reason to conclude” that the canvassers at her door “were from USEIP,” having “adopted that position” “upon suggestion apparently from plaintiffs’ counsel.” Trial Tr. at 832:21–833:6. And it entered an alternative holding: after observing that Plaintiffs, “[s]ensing a lack of evidence to support their claims,” had “attempted to broaden the theory of the case midstream,” the court ruled that “[t]he pretrial order controls the claims brought in a case” — and that “[e]ven if” the broader theory had been preserved, it “would not have commanded a different result, as there was simply no evidence of sufficient voter intimidation here.” Trial Tr. at 835:1-8. That ruling was not a product of USEIP’s absence: the final pretrial order — entered months after USEIP’s dismissal — expressly preserved Plaintiffs’ theory that the Individual Defendants acted “individually and by and through USEIP” in a “coordinated campaign of voter intimidation,” ECF No. 95 at 2, and the district court heard that theory through trial. A judgment resting on findings that already encompassed USEIP’s agents, fortified by an express alternative holding, cannot have had a “substantial influence” on the outcome, nor leave “grave doubt” that it did. *Bridges*, 996 F.3d at 1099.

The allocation of the burden compounds the error. The party seeking reversal bears the burden of demonstrating that an error affected its substantial rights. *Shinseki v. Sanders*, 556 U.S. 396, 409–10 (2009); Fed. R. Civ. P. 61; 28 U.S.C. § 2111. The Opinion’s formulation — prejudice merely *inferred* from the certainty of

a “stronger case,” weighed against *conceded* uncertainty about the result — relieves Plaintiffs of that burden at the very moment the Opinion describes the question as “a close call.” Op. 35. A close call decided by that substitution, without holding the appealing parties to their burden, on an unexamined premise and unexamined findings, is the paradigm case for panel rehearing.

C. The panel assumed admissibility without the predicate showing Rule 801(d)(2) requires.

The Opinion suggests the message-board evidence might have been admissible against a retained USEIP as statements of a party opponent. Op. 36 (citing Fed. R. Evid. 801(d)(2)). In theory, that rule could implicate statements by USEIP’s agents, Fed. R. Evid. 801(d)(2)(F), or by co-conspirators, Fed. R. Evid. 801(d)(2)(E) — the provision Plaintiffs’ § 1985(3) conspiracy theory would invoke. But neither path was available on this record. Plaintiffs never identified the posts’ authors, so no foundation established that any declarant was USEIP’s agent speaking on a matter within the scope of an agency relationship. And the co-conspirator pathway requires predicate findings, by a preponderance, that a conspiracy existed, that the declarant and the party were members of it, and that the statement was made during and in furtherance of it — findings never made, and which the statements alone cannot supply. Fed. R. Evid. 801(d)(2) (the statement “does not by itself establish ... the existence of the conspiracy or participation in it”). The exclusion of

evidence lacking any foundation for admission on the record as it stood cannot affect substantial rights.

II. The Opinion’s Own Rule 52(c) Reasoning Does Not Support Reversing the Judgments for Kasun and Smith.

The Opinion holds that Plaintiffs were “not fully heard on the issue of whether USEIP took any actions that constituted voter intimidation, rather than whether Smith, Kasun, or Epp acted individually to intimidate voters.” Op. 40–41. The final clause of that sentence resolves this appeal as to the Individual Defendants. Plaintiffs were indisputably fully heard on the individuals’ liability: they presented their case, rested, and received findings on a complete record. Evidence potentially admissible against USEIP is not automatically admissible against the Individual Defendants, and correcting the erroneous dismissal of one defendant does not erase judgments for defendants who were tried to conclusion. A defect in the hearing afforded on USEIP’s liability can justify, at most, further proceedings on USEIP’s liability.

The First Amendment independently limits any broader remedy. “Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence.” *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982). Liability for association-related conduct requires proof of the individual’s own unlawful conduct, or of authorization, ratification, or a specific intent to further unlawful aims. *Id.* at 920. Here, no evidence connected Kasun or Smith, by agency or conspiracy, to any canvasser who ever reached a voter,

Resp. Br. 21–28, 34–36, and the district court found none. Retrying the individuals so that Plaintiffs may introduce more evidence about the *organization* inverts *Claiborne’s* rule.

The only authority the Opinion identifies for extending the retrial to the Individual Defendants is an unpublished negligence case. Op. 36 & n.4 (citing *Perkins v. Chris Hunt Water Hauling Contractor, Inc.*, 46 F. App’x 903, 910 (10th Cir. 2002) (unpublished)). And the centerpiece of any retrial would be an empty chair: when this Court *sua sponte* invited USEIP to state whether it wished to participate in this appeal, No. 24-1328, Doc. 88 (Sept. 19, 2025), no appearance followed. *See* Op. 15 n.2 (“USEIP did not participate in this appeal.”). If any retrial is to occur, it should be limited to the claims against USEIP, with the judgments for the Individual Defendants affirmed.

III. The Video Holding Overlooks Rule 26(a)(3)(B) and Includes No Prejudice Analysis; It Should Be Withdrawn or Narrowed.

The Opinion reaches the video issue expressly because it is remanding, as guidance for retrial. Op. 37. Kasun and Smith therefore request correction of that guidance, not a second merits disposition. Two points were overlooked.

First, the waiver holding — that the Individual Defendants waived their trial objections (foundation, authenticity, and hearsay) by failing to object to Plaintiffs’ pretrial disclosure of the video, Op. 38 — does not dispose of the issue. Rule 26(a)(3)(B)’s waiver provision expressly excepts objections “under Federal Rule of

Evidence 402 or 403.” Relevance and cumulativeness objections were therefore not waived by their omission from the pretrial exhibit objections — and Kasun and Smith fully presented both grounds on appeal as alternative bases for affirmance: the February 2022 remarks came months after canvassing ended and were directed at election officials, not voters (relevance), and Smith testified to the substance of every statement on the recording, rendering the video cumulative. Resp. Br. 29–33. An evidentiary ruling may be affirmed on any basis the record supports — an appellee may urge, without a cross-appeal, any ground the record supports in defense of the judgment below. *United States v. American Railway Express Co.*, 265 U.S. 425, 435 (1924). And the district court’s directive — “[a]sk the witness what he said,” Op. 10 — was in substance a ruling on cumulativeness and mode of proof. The Opinion addresses neither ground.

Second, the Opinion makes no finding that excluding the video affected anyone’s substantial rights — the same Rule 61 inquiry it elsewhere applied. Because Smith’s own testimony placed every material statement in the video before the factfinder, exclusion of the recording could not supply a practical likelihood of a different result. A supporting defect warrants mention: the Opinion treats the video as admissible against Smith’s co-defendants as a statement of “alleged co-conspirators,” Op. 39, but Rule 801(d)(2)(E) requires predicate findings that a conspiracy existed, that each defendant participated, and that the statement was

made during and in furtherance of it — findings the district court never made. Because Plaintiffs asserted a nonhearsay effect-on-listener purpose for the video, Reply Br. 13–14, this defect is supporting rather than dispositive; it nonetheless illustrates that the guidance assumed answers to questions never litigated. The panel should withdraw or narrow its abuse-of-discretion holding and leave admissibility for reconsideration under all applicable rules.

IV. The Standing Holding Conflicts with *Alliance for Hippocratic Medicine* and *Murthy* and Warrants En Banc Review.

The Opinion holds that the Voter Organizations suffered injury in fact because their “perception” that USEIP’s canvassing was intimidating voters “caused each organization to divert resources” — new outreach materials, a white paper, revised volunteer scripts. Op. 17–18. The trial evidence establishing that perception was media coverage. As the Opinion itself recounts, the League’s executive director “had no personal knowledge of any voter intimidated by USEIP or of USEIP’s canvassing efforts”; “her organization had filed this case based on media reports.” Op. 8.

Alliance for Hippocratic Medicine cannot be reconciled with the standing holding absent evidence that the defendants’ conduct — not the organizations’ reaction to press coverage — directly interfered with their core activities. An organization “cannot spend its way into standing simply by expending money to gather information and advocate against the defendant’s action,” 602 U.S. at 394; injury requires, as the Opinion itself stated the standard, that the defendant’s actions

have “directly affected and interfered with” the plaintiff’s “core business activities.” Op. 17 (quoting 602 U.S. at 395); see *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (defendant fed false information to the plaintiff’s own testers). Standing must also be established claim by claim and defendant by defendant: plaintiffs must demonstrate “standing for each claim that they press” against each defendant, and for each form of relief sought. *Murthy*, 603 U.S. at 61. The Opinion attributes the organizations’ diversion to “USEIP’s actions” at wholesale and then orders a retrial against every defendant; it identifies no injury traceable to Kasun or to Smith specifically. *TransUnion* requires that standing be “supported adequately by the evidence adduced at trial,” 594 U.S. at 431 — and the trial evidence established only unverified, secondhand belief, the self-inflicted expenditure *Clapper* condemns. 568 U.S. at 416-18. On the Opinion’s logic, the organizations’ own responsive diversion is itself treated as the required interference. That collapses the two steps *Alliance for Hippocratic Medicine* separates, reads the key word “directly” out of the decision, and credits the very self-inflicted expenditure the Supreme Court rejected.

The Opinion’s supporting authority underscores the need for review. It aligns itself principally with *Nairne v. Landry*, 151 F.4th 666, 682 (5th Cir. 2025), *vacated and remanded on other grounds*, No. 24-30115, 2026 WL 1255781 (5th Cir. May 7, 2026); see Op. 19 (noting vacatur), and with a Fourth Circuit decision that accepted

allegations at the pleading stage rather than testing trial proof, Op. 19. Neither can carry a jurisdictional holding rendered after a full trial.

Plaintiffs' own briefing shows how far the theory reaches. Their reply asserts that "the accuracy of the media reports is immaterial since the reports themselves were actual and not hypothetical." Reply Br. 25 n.3. On that view, the existence of press coverage *about* a person — *true or false* — is itself a basis for alleging Article III injury *by* that person. The question is exceptionally important: if reacting to news coverage of a political actor, accurate or not, confers standing to sue that actor under the voting laws, then every advocacy organization — of any persuasion — can generate federal jurisdiction over its ideological adversaries at will. Standing doctrine exists to prevent precisely that conversion of the federal courts into a forum for policing political opponents' speech.

V. If *Counterman*'s Recklessness Requirement Extends to Speech-Based Intimidation Liability, It Supplies an Alternative Ground to Affirm.

The Individual Defendants argued that every predicate act that survived the district court's findings is speech — canvassing questions, an organizing playbook, blog posts, and one public remark — and that the First Amendment conditions liability on proof that each defendant was at least reckless — under *Counterman*, that the speaker be "aware 'that others could regard his statements as' threatening violence and 'deliver[] them anyway.'" *Counterman*, 600 U.S. at 79; Resp. Br. 42. Because the acts charged against Appellees are speech, they contended that the same

subjective-awareness requirement governs speech that Plaintiffs seek to punish as voter intimidation. *Counterman* controls where liability rests on speech alleged to be a true threat, and it drew its recklessness rule from defamation law — a rule “applicable in both civil and criminal contexts.” *Id.* at 81; *see id.* at 106–18 (Barrett, J., dissenting). Whether its recklessness requirement also governs other speech-based intimidation is an acknowledged open question: Plaintiffs’ reply conceded that “no court of which the plaintiffs are aware has ever extended *Counterman* beyond the true-threat context.” Reply Br. at 21. If the requirement applies, the absence of defendant-specific proof of recklessness supplies an alternative ground for affirming the individual judgments. Defendants’ constitutional defense was preserved from the outset, ECF No. 95 at 6 (claims “barred to the extent that they violate Defendants’ Constitutional rights”), and an appellee may urge any record-supported ground in defense of the judgment below, without taking a cross-appeal. *American Railway Express*, 265 U.S. at 435.

The parties squarely disputed this question, and the Opinion resolved the appeal without answering it. Leaving it unanswered invites further appellate proceedings and requires the district court to retry a speech case without knowing the governing *mens rea*. Because the question concerns a constitutional limit on two federal statutes as applied to core political speech — open in every circuit, by

Plaintiffs' own account — it also merits en banc consideration if the panel declines to supply the answer.

VI. The Companion Fee Appeal, No. 25-1111.

The Opinion dismissed the Individual Defendants' fee appeal, No. 25-1111, as moot for a single reason: the vacatur of the final judgment on which their prevailing-party status rested. Op. 42. The dismissal of the prevailing-party branch is derivative of the merits disposition this petition challenges. A separate petition for panel rehearing is filed today in No. 25-1111; if rehearing is granted here and the judgments for the Individual Defendants are affirmed in whole or in part, the premise of the mootness dismissal disappears, as set out in the petition filed there. That petition also demonstrates that the branch of the fee appeal seeking sanctions under 28 U.S.C. § 1927 is collateral to the merits and was not moot in any event.

CONCLUSION

The petition should be granted. The Court should: (1) affirm the judgments for Kasun and Smith, because Plaintiffs did not carry their burden of showing prejudicial error; (2) alternatively, affirm as to Kasun and Smith and confine any new trial to the claims against USEIP; (3) withdraw or narrow the video holding and leave admissibility for reconsideration under all applicable rules; and (4) alternatively, rehear the standing and *Counterman* questions en banc.

Dated: July 20, 2026

Respectfully submitted,

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*Attachment: Opinion of the panel filed July 6, 2026 (No. 24-1328, Doc. 91-1),
attached pursuant to 10th Cir. R. 40.2(B).*

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CERTIFICATE OF COMPLIANCE

This petition complies with the type-volume limitation of Fed. R. App. P. 40(d)(3)(A) because it contains 3805 words, excluding the parts exempted by Fed. R. App. P. 32(f), as counted by Microsoft Word. It complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5)–(6) because it was prepared in a proportionally spaced typeface, 14-point Times New Roman.

/s/ Cameron Powell

CERTIFICATE OF DIGITAL SUBMISSION

I certify that all required privacy redactions have been made; that any hard copies required to be submitted are exact copies of the version filed via ECF; and that the digital submission has been scanned for viruses with the most recent version of a commercial virus-scanning program and is free of viruses.

/s/ Cameron Powell

CERTIFICATE OF SERVICE

I certify that on July 20, 2026, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will serve all counsel of record and registered *pro se* parties.

/s/ Cameron Powell