No. 22-16689

In the United States Court of Appeals
for the Ninth Circuit

ARIZONA ALLIANCE FOR RETIRED AMERICANS, et al.,
Plaintiffs - Appellants,

v.

CLEAN ELECTIONS USA, et al.,
Defendants - Appellees.

On Appeal from the United States District Court
for the District of Arizona
Case No. 2:22-cv-01823-PHX-MTL

PLAINTIFFS-APPELLANTS' EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR IMMEDIATE INJUNCTION PENDING APPEAL

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 16. Circuit Rule 27-3 Certificate for Emergency Motion

Instructions for this form: http://www.ca9.uscourts.gov/forms/form16instructions.pdf

9th Cir. Case Number(s) 22-16689

Case Name Arizona Alliance for Retired Amers., et al., v. Clean Elections USA

I certify the following:

The relief I request in the emergency motion that accompanies this certificate is:

An injunction pending appeal prohibiting Defendants and those acting in concert with them from engaging in voter intimidation at ballot drop boxes in Arizona or inciting others to do so, in the form filed on the district court docket at ECF No. 20-1 in Case No. 2:22-cv-01823 (D. Ariz.).

Relief is needed no later than *(date)*: 10/31/22 or as soon as possible

The following will happen if relief is not granted within the requested time:

Absent emergency relief, Defendants' ongoing campaign of voter intimidation at ballot drop boxes in Arizona will continue and likely get worse, irreparably depriving Arizona voters of their right to vote freely and without intimidation through the means that Arizona law provides, and irreparably harming Plaintiffs and their members. Defendants' intimidation campaign has already produced more than a half-dozen voter intimidation complaints and multiple law enforcement responses to drop boxes. Defendants paused much of their incitement when this case was filed, but now that the district court has denied Plaintiffs' motion, they are likely to resume their activities unless this Court takes immediate action.

I could not have filed this motion earlier because:

The pattern of voter intimidation at issue began only last week, and its severity and Defendants' central role in it became clear only late last week. Plaintiffs filed this case and their TRO and preliminary motion on Monday October 24. The Court held a hearing on Wednesday and issued a ruling today. Plaintiffs appealed and filed this motion as soon as possible thereafter.

I requested this relief in the district court or other lower court: ◉ Yes ○ No

If not, why not:

Plaintiffs filed a motion for an injunction pending appeal in the district court shortly after the district court's denial of the TRO and preliminary injunction motion. Because intimidation is ongoing and Election Day is fast approaching, Plaintiffs advised the district court that they would file in this Court today even if the district court had not yet ruled.

I notified 9th Circuit court staff via voicemail or email about the filing of this motion: ◉ Yes ○ No

If not, why not:

I have notified all counsel and any unrepresented party of the filing of this motion:

On *(date)*: 10/28/2022

By *(method)*: Voicemail and electronic mail

Position of other parties: Counsel for Defendants oppose the motion

Name and best contact information for each counsel/party notified:

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Counsel for Defendants Clean Elections USA and Melody Jennings

I declare under penalty of perjury that the foregoing is true.

Signature s/ Daniel Arellano **Date** 10/28/2022

*(use "*s/[typed name]*" to sign electronically-filed documents)*

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

FEDERAL RULE OF APPELLATE PROCEDURE 26.1 CORPORATE DISCLOSURE STATEMENT

Corporate Plaintiffs-Appellants Arizona Alliance for Retired Americans and Voto Latino, respectively, hereby certify that there is no parent corporation nor any publicly held corporation that owns 10% or more of the stock in any of the above-mentioned corporations. A supplemental disclosure statement will be filed upon any change in the information provided herein.

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INTRODUCTION

For the past two weeks, Defendants have incited and engaged in a campaign of voter intimidation at ballot drop boxes in Arizona, with the express purpose of keeping people from using them to return their ballots. The result has been at least seven voter intimidation complaints filed with Arizona's Secretary of State and multiple reports by voters describing armed individuals, sometimes masked and in tactical gear, surveilling drop boxes in the dark of night. State officials have sought help from federal law enforcement, ER097, 135, described Defendants' intimidation teams as "vigilantes," ER094, and expressed "deep[] concern[] about the safety of individuals who are exercising their constitutional right to vote and who are lawfully taking their early ballots to a drop box," *id.*

Defendants' campaign slowed only after Plaintiffs sued and sought emergency relief. But earlier today, the district court denied Plaintiffs' request, concluding that Defendants' incitement and intimidation are constitutionally protected. Defendants say that they have recruited thousands of supporters and will soon expand their campaign to seventeen more states. ER083 (5:30-6:00). If this Court does not grant emergency relief, things are going to get much worse.

Plaintiffs are likely to succeed on the merits of their claims. Defendants' efforts to surveil and intimidate voters are a quintessential violation of Section 11(b) of the Voting Rights Act, 52 U.S.C. § 10307(b), and the Ku Klux Klan Act of 1871,

42 U.S.C. § 1985(3). The First Amendment offers Defendants no safe harbor. Defendants offered no evidence that they intend to express a message through their presence at drop boxes nor that any such message is understood; they seek instead to scare voters through their mere presence. Nor do Defendants have a First Amendment right to incite criminal voter intimidation and to issue true threats. And to the extent any protected expression is at issue, restrictions on it are narrowly tailored to serve the compelling state interest of preventing voter intimidation. *Burson v. Freeman*, 504 U.S. 191, 198 (1992).

As the district court found, the Alliance, its members, and voters across Arizona face irreparable harm absent emergency relief—an infringement of their fundamental right to vote.[1] And contrary to the district court's ruling, the public interest and the balancing of the equities weigh strongly in favor of protecting voters, which does not lie on an equal footing with Defendants' desire to engage in vigilante law enforcement against an imagined threat of "ballot mules."

Plaintiffs therefore respectfully request that the Court grant their emergency injunction pending appeal prohibiting Defendants from gathering within sight of drop boxes; from following, taking photos of, or otherwise recording voters or prospective voters, those assisting voters or prospective voters, or their vehicles at

[1] The district court held that Plaintiff Voto Latino lacks standing. Because the Alliance's standing is sufficient to support this emergency motion, Plaintiffs do not further address that issue here.

or around a drop box; and from training, organizing, or directing others to do those activities.

PROCEDURAL BACKGROUND

Plaintiffs filed their complaint and motion for a temporary restraining order and preliminary injunction this Monday, October 24. ER039-078. At a status conference Tuesday morning, the district court set Plaintiffs' Motion for an evidentiary hearing at 1:00 p.m. Wednesday and ordered Defendants to file any opposition by 11:00 a.m. Wednesday. Defendants' counsel entered an appearance at 3:00 p.m. Tuesday, and Plaintiffs completed formal service on Defendants a few hours later. ER177-178. Defendants did not file an opposition to Plaintiffs' Motion.

At a three-hour evidentiary hearing on Wednesday, four witnesses testified for Plaintiffs: three Plaintiff representatives who described how Defendants' conduct affected their organizations and members, and one voter who filed a voter intimidation complaint the previous day. The Court also accepted without objection Plaintiffs' 36 exhibits, including numerous social media posts and recorded statements from Defendant Jennings. Defendants presented no witnesses or exhibits. The district court, however, raised numerous First Amendment concerns, which were the subject of extensive legal argument.

The district court denied the Motion earlier today. The court held that Defendants had not violated VRA § 11(b), finding their conduct protected by the

First Amendment. *Id.* at 5-10. The court also held that Plaintiffs were not likely to succeed under the Klan Act because Defendants did not intend to intimidate lawful voters, apparently crediting their assertion that they target only "ballot mules." *Id.* at 10-11. And the court determined that while Plaintiffs showed irreparable harm, the balance of the equities and the public interest factors favored neither party, *id.* at 11-13, because voters' rights to vote free of intimidation stood on an equal footing with Defendants' efforts to intimidate them while trying to privately enforce election law. Plaintiffs filed a Notice of Appeal and an emergency motion for injunction pending appeal this afternoon. The latter remains pending before the District Court.

FACTUAL BACKGROUND

Earlier this year, Defendant Melody Jennings began to organize and advertise a network of vigilante drop box watchers. She formed Defendant Clean Elections USA ("CEUSA") in response to a baseless and thoroughly discredited theory that "ballot mules" had "stuffed" drop boxes with fraudulent ballots to sway the results of the 2020 election. ER083 (1:00-2:03). In August, Jennings took to social media to urge others to "completely doxx[] and put on blast" voters using drop boxes. ER134. Days later, Jennings went on a podcast and again urged others to join her campaign to intimidate voters by photographing and doxing them. ER088 (13:13-14:38; 17:56-19:10).

When voting began in Arizona about two weeks ago, Jennings urged individuals to start monitoring certain drop boxes. ER086, 090. Jennings provided a roadmap of how to organize in large groups with the intent of having the best "deterrent" effect, ER084 ("No less than 8 people"), ER085 ("10 people in groups around every drop box! Not 2 people. That's not a deterrent"), and proposed mechanisms to be used to scare voters away from using the drop boxes, ER084-85, 092. She encouraged drop box watchers to collect and send photos back to CEUSA so the information could be passed along to third parties, ER092, and voters could be "geotrack[ed]." ER089 (00:40-1:40). Jennings urged her followers to participate in voter intimidation at specific times and places. ER086, 092-93. Groups monitoring drop boxes, some armed and many openly affiliated with CEUSA, then stationed themselves at Maricopa County's only outdoor drop box locations and began filming voters they suspected of being "ballot mules." ER115-116, 120. And Defendants also began publicly exposing the personal information of voters using drop boxes. ER121, 101 (43:25-45:02). On October 21, Jennings bragged in an interview that a voter "was upset his picture went out there." ER101 (42:25-44:02). On October 22, Jennings posted photos of an elderly voter including a close-up of their license plate. ER121.

The effect of Defendants' actions was immediate: Across a one-week period, more than half a dozen voters submitted reports to the Secretary of State describing

their fears of intimidation due to the presence and conduct of drop box watchers in Maricopa County. ER135, 162. One voter felt intimidated when a group of individuals near a ballot drop box filmed and photographed the voter, took photographs of the voter's license plates, and followed the voter into the parking lot while continuing to film, accusing the voter of being a mule. ER098. Other voters, who identified themselves as elderly, also reported being intimidated by individuals who were filming and taking photos of cars and license plates. ER111. This conduct quickly drew concern and condemnation from state and local election officials. ER094, 135. Voters across Arizona are now broadly fearful because of Defendants' conduct. As a voter testified at the hearing, she considered the threats by Defendants when selecting where to drop off her ballot, and became very concerned when she saw someone who appeared to be filming her from a car parked near a drop box, afraid her images would be used to identify and harm her. As Plaintiffs repeatedly testified, these incidents are new, and have directly coincided with Jennings' mobilization campaign.[2]

STANDARD FOR INTERIM RELIEF

To obtain an injunction pending appeal, Plaintiffs must demonstrate "*either* a combination of probable success on the merits and the possibility of irreparable

[2] A transcript of the hearing is not yet available due to the extraordinarily expedited nature of these proceedings.

injury or that serious questions are raised and the balance of hardships tips sharply [their] favor." *Se. Ala. Conservation Council v. U.S. Army Corps of Eng'rs*, 472 F.3d 1097, 1100 (9th Cir. 2006). Those "formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." *Id.*

ARGUMENT

I. Plaintiffs are likely to succeed on the merits of their appeal.

Plaintiffs are likely to succeed in showing that the district court erred in denying their Motion because Defendants' actions violate VRA § 11(b) and the Klan Act, and they are not protected by the First Amendment.

A. Defendants' actions violate VRA § 11(b) and the Klan Act.

1. Section 11(b)

Section 11(b) provides that no one, "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." 52 U.S.C. § 10307(b). This "provision applies to private conduct and can be enforced through suit by a private individual." *Nat'l Coal. on Black Civic Participation v. Wohl*, 512 F. Supp. 3d 500, 509 (S.D.N.Y. 2021) ("*Wohl II*"). It prohibits all actual and attempted voter intimidation, whether or not racially motivated, so a plaintiff need not "allege discrimination or racial targeting to prevail." *Id.* The district court correctly

concluded that Section 11(b) is a broad prohibition that covers any conduct that "puts individuals 'in fear of harassment and interference with their right to vote,'" regardless of defendants' specific intent. ER006. And Plaintiffs' evidence showed a range of problematic conduct perpetrated against voters directly by Defendants: harassment, photographing, videotaping, trailing, doxxing, and intimidation through the presence of large groups and, in some instances, armed individuals, gathered around drop boxes. *See, e.g.*, ER098, 109, 111, 113, 115, 116, 120-121. This more than met the standard for a Section 11(b) violation. The district court does not seem to have concluded otherwise; rather it denied relief due to First Amendment concerns.

2. The Klan Act

Plaintiffs are also likely to succeed on their claim under the Support or Advocacy clause of the Klan Act, 42 U.S.C. § 1985(3), which bars "conspirac[ies] to interfere with federal elections," *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.3 (9th Cir. 1985). It requires proof of "(1) a conspiracy; (2) the purpose of which is to force, intimidate, or threaten; (3) an individual legally entitled to vote who is engaging in lawful activity related to voting in federal elections." *Nat'l Coal. on Black Civic Participation v. Wohl*, 498 F. Supp. 3d 457, 486-87 (S.D.N.Y. 2020) ("*Wohl I*").

The district court concluded that Plaintiffs had not shown purposeful interference with lawful voters, apparently crediting Defendants' assertions that they

target only "ballot mules." But as the district court recognized, Defendants justify their activities based on thoroughly debunked conspiracy theories. ER011. It cannot possibly be that individuals may harass and intimidate voters with impunity based on objectively unreasonable, baseless beliefs that the voter is not legally permitted to vote; rather, the Klan Act's intent requirement is tied to the intent to use "force, intimidation, or threat," which is clearly present in this case.

Regardless, Jennings herself has acknowledged surveilling an ordinary voter submitting a single ballot. ER092. And Defendants could not possibly identify "ballot mules" even if they exist, because Arizona law allows individuals to return ballots on behalf of more than one person if they are doing so on behalf of a family member or household member, or as a caregiver. *See* A.R.S. § 16-1005. Any effort to surveil and deter "ballot mules" will necessarily intimidate and threaten ordinary voters, and that is exactly what Defendants are doing.

B. Defendants' actions are not protected by the First Amendment.

The district court's main reason for denying relief was its conclusion that Defendants' challenged conduct is protected by the First Amendment. But much of Defendants' challenged conduct is not expressive at all; any expression consists of unprotected incitement and true threats; and any restriction on protected expression is narrowly tailored to serve a compelling interest in preventing voter intimidation and therefore satisfies strict scrutiny.

1. Defendants' monitoring of drop boxes is not expressive.

Most of Defendants' challenged conduct is not expressive at all. Unlike pure speech such as social media posts (addressed below), conduct like gathering near drop boxes is expressive only if there is "[a]n intent to convey a particularized message" and "the likelihood [is] great that the message w[ill] be understood by those who view [] it." *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1058-59 (9th Cir. 2010) (quoting *Spence v. State of Washington*, 418 U.S. 405, 409-11 (2010)) (alterations in original). "[I]ndividuals claiming the protection of the First Amendment must carry the burden of demonstrating that their nonverbal conduct meets the applicable standard." *Knox v. Brnovich*, 907 F.3d 1167, 1181 (9th Cir. 2018). Defendants, who offered no evidence, have not carried that burden here.

First, Defendants offered no evidence that their drop box watchers intend to express any message, much less a particularized one, when they gather at drop boxes. Defendants, fearful of electioneering restrictions, repeatedly urged watchers at drop boxes to avoid doing anything that might possibly express a message. Defendant Jennings told her followers: "Just stand around" the boxes, ER083 (1:00-2:03); "Don't wear MAGA or other clothing that may be seen as electioneering," ER084; "[N]o music . . . . Don't talk to them," ER085; "DO NOT ENGAGE THEM," ER086; "No talking to them. . . . They are trying to get us to engage them. Do not do it!" ER093. When a TV reporter interviewed two individuals associated with

Clean Elections USA while they were watching drop boxes, they would not say what they were doing or why, aside from "watching boxes" and "getting a suntan, getting some Vitamin D." ER115. There is no basis for concluding that Defendants sought to express a message with their conduct where they eschewed so many obvious avenues for doing so.

To be sure, the evidence shows that Defendants' conduct has an "objective," ER007: to stop people from using drop boxes. But the First Amendment protects only expression; Defendants have no First Amendment right "to succeed in their ultimate goal" through non-expressive means. *Voting for Am. v. Steen*, 732 F.3d 382, 391 (5th Cir. 2013) (quotation omitted). And unlike the "sidewalk counselors" or even the "protestors" in *McCullen v. Coakley*, 573 U.S. 464, 472-73 (2014), Defendants attempt to achieve their goal not through expression or persuasion but simply through the fear and discomfort that their physical presence, their conspicuous recording equipment, and, in some cases, their firearms and tactical gear engender. "Just your presence alone & the mule knowing they will be caught on [yo]ur multiple cameras is enough deterrent to make them shrink back into the darkness," Defendant Jennings explained. ER084. Their conduct thus "has no connection to the marketplace of ideas and opinions, whether political, scientific, aesthetic, or even commercial." *King v. Fed. Bureau of Prisons*, 415 F.3d 634, 637 (7th Cir. 2005).

Moreover, Defendants offered no evidence that they "would reasonably be understood by viewers as conveying any of these messages or conveying a symbolic message of any sort." *Knox*, 907 F.3d at 1181. Defendants' watchers wear no political clothing, ER084, they have no banners or literature, they refuse even to tell reporters why they are doing what they are doing, ER115, and Defendants have instructed them not to engage with voters, even if the voters try to engage with them, ER086, 093. If anyone understands that the watchers are there because they are worried about "ballot mules," it is only because Defendants "accompan[y] their conduct with speech explaining it," such as Jennings' social media posts, which itself shows that the conduct is not expressive. *Rumsfeld v. FAIR, Inc.*, 547 U.S. 47, 66 (2006).

Defendants' use of photography and video recording does nothing to change this, because photography and videography are protected only where they exist to communicate some idea, such as an artistic expression or the need for good government. *See Porat v. Lincoln Towers Cmty. Ass'n*, No. 04 Civ. 3199 (LAP), 2005 WL 646093, at *4-5 (S.D.N.Y. Mar. 21, 2005), *aff'd*, 464 F.3d 274 (2d Cir. 2006); *Askins v. U.S. Dep't of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018). Here, Defendants and their supporters use cameras *simply to make persons uncomfortable using drop boxes*. And as explained below, the use they make of the

resulting photos is not protected expression either—it consists of unprotected incitement and true threats.

2. Any relevant expression involves categorically unprotected incitement or true threats.

Some actual expression is at issue, including Defending Jennings' social media postings, press interviews, and activities recruiting, organizing, training, and encouraging others to become drop box watchers. But none of this expression is *protected* expression, because it falls within the "categories of communication . . . to which the majestic protection of the First Amendment does not extend." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 504 (1984) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). It is a combination of incitement of imminent lawless action and true threats. *United States v. Alvarez*, 567 U.S. 709, 718 (2012). The same is true of Defendants' conduct watching drop boxes, to the extent that conduct is expressive at all.

i. Defendants' urging others to engage in voter intimidation is unprotected incitement.

Defendants' urging, organization, training, and encouragement of others to go to drop boxes to engage in voter intimidation is categorically unprotected under the First Amendment because it is intentional incitement of voter intimidation, which, in addition to violating VRA § 11(b) and the Klan Act, is a federal crime. 18 U.S.C. § 594. The First Amendment does not protect speech that incites "imminent lawless

action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). As a result, "where speech is so close in time and substance to ultimate criminal conduct, [] no free speech defense is appropriate." *United States v. Freeman*, 761 F.2d 549, 551 (9th Cir. 1985); *see also Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949). The Constitution "lends no protection to speech which urges the listeners to commit violations of current law." *United States v. Kelley*, 769 F.2d 215, 217 (4th Cir. 1985) (citing *Brandenburg*, 395 U.S. 444).

Freeman is particularly instructive. The defendant, a "tax protester of sorts," counseled others in how to manipulate tax filings to avoid paying income tax. 761 F.2d at 551. Freeman argued that his words were protected speech, but the Court held that the First Amendment did not bar Freeman's prosecution where his "use of words of incitement [were] quite proximate to the crime of filing false returns," and his "words both intended and [were] likely to produce an imminent criminal act," tax fraud. *Id.* at 551-552. The First Amendment was "quite irrelevant [where] the intent of the actor and the objective meaning of the words used are so close in time and purpose to a substantive evil as to become part of the ultimate crime itself." *Id.* at 552. And it made no difference that Freeman was motivated by a political objection to the tax code, because "[w]ords may constitute a criminal offense, even if they spring from the anterior motive to effect political or social change." *Id.* at 551; *see also Kelley*, 769 F.2d at 217 (rejecting a First Amendment defense as

"frivolous" where the defendant made "no abstract criticism of income tax laws" but instead "urged [his listeners] to file false returns, with every expectation that the advice would be heeded").

If Defendants were simply using their social media and public platforms to express frustration with Arizona's election laws, such activity would be protected speech. But that is *not* what Defendants are doing. Rather, Defendants are directly inciting others to engage in illegal activity by encouraging and outlining the means and strategy by which to commit the crime, and those individuals are in fact going on to engage in precisely the voter intimidation that Defendants urged. "It [is] no theoretical discussion of non-compliance with laws; action [is] urged; the advice [is] heeded, and" voter intimidation occurs. *Kelley*, 769 F.2d at 217. "[W]here speech becomes an integral part of the crime, a First Amendment defense is foreclosed." *Freeman*, 761 F.2d at 552. Thus, an injunction of Defendants' organizational, training, and recruiting activities would not run afoul of the First Amendment.

ii. Defendants' posting of voter information and conduct at drop boxes are unprotected "true threats."

The remainder of Defendants' challenged conduct—Defendant Jennings' posting of photographs and personal information about voters, and the actual activities of drop box watchers, to the extent expressive—also are not protected expression because they are "true threats." The First Amendment does not protect against "true threats," which reflect "an intention to inflict evil, injury, or damage

on another." *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1075 (9th Cir. 2002), *as amended* (July 10, 2002); *see also Virginia v. Black*, 538 U.S. 343, 359 (2003). This exception to the First Amendment is intended to "protect individuals . . . from the fear of violence" and "from the disruption that fear engenders," as well as "from the possibility that the threatened violence will occur." *Virginia*, 538 U.S. at 359-60.

Whether a statement constitutes a threat is considered "in light of [its] entire factual context, including the surrounding events and reaction of the listeners." *Planned Parenthood*, 290 F.3d at 1075 (quoting *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990)). The exception's purpose "is not served by hinging constitutionality on the speaker's subjective intent or capacity to do (or not to do) harm," but rather depends on whether it is "reasonably foreseeable" that the recipient of a message will take seriously the threat of harm. *Planned Parenthood*, 290 F.3d at 1076; *see also Wohl I*, 498 F. Supp. 3d at 478 (the "test for whether conduct amounts to a true threat is . . . whether an ordinary, reasonable recipient who is familiar with the context of the [communication] would interpret it as a threat of injury.") (quoting *United States v. Turner*, 720 F.3d 411, 420 (2d Cir. 2013) (alteration in original)). Applying this test, *Wohl I* held that robocalls which threatened voters with negative consequences for voting by mail were unprotected "true threats" in addition to violating the VRA. 498 F. Supp. 3d at 478.

The Court is likely to reject the district court's contrary conclusion and reach a similar conclusion here. Voters and local and state election officials have perceived Defendants' conduct as harassment and intimidation, to such an extent that at least half a dozen voters across a one-week period filed intimidation complaints. Their apprehension is reasonable, because Defendants say they will "completely doxx[] and put on blast" voters using drop boxes who Defendants suspect may be "ballot trafficking mules." ER134. And they have already begun to follow through: Jennings posted photos taken at a drop box of an elderly voter and released images of the make of their car and their license plate, ER121. Defendants clearly appreciate the fear that being doxed engenders. *See* ER088 (13:13-14:38) (voters "don't want to be doxxed," they "don't want to be seen" and "don't want to be found out"); ER101 (45:25-45:02) ("he's upset that his picture went out there"). Yet they have promised to collect and transmit voters' photographs and personal information to law enforcement and unknown other individuals and entities. ER088 (17:56-19:10); ER123 (13:30); ER092 ("Everything goes to True the Vote. Just sayin'").

The effects of these activities are already being felt. A voter testified she was afraid someone who appeared to be taking photos at a drop box would use those photos to identify and cause harm to her. And the Alliance's President Saundra Cole testified that she and other members of the Alliance have felt afraid to vote at drop box locations for similar reasons. Jennings has publicly threatened to dox persons

caught on camera by her "beautiful box watchers." *See* ER091. And she has personally posted photos of persons who have been spotted using drop boxes in Arizona, as well as photos of individuals' license plates. ER093, 121. Election officials similarly targeted in 2020 have been subject to death threats, with many quitting their jobs out of fears for their personal safety. ER042 ¶ 6. This cycle, Secretary Hobbs has received similar threats. ER141.

Thus, an injunction against Defendants' monitoring, photographing, recording, and posting of personal information and photographs of voters does not implicate Defendants' First Amendment rights, because that expression constitutes unprotected true threats.

C. The requested injunction satisfies strict scrutiny.

Finally, even if any of Defendants' challenged actions constituted protected expression, Plaintiffs' requested injunction should still issue because it is narrowly tailored to serve a compelling state interest in preventing voter intimidation.[3] The state "obviously" has a compelling interest in "protecting the right of its citizens to vote freely for the candidates of their choice." *Burson*, 504 U.S. at 199-200; *see also id.* at 206 (discussing "the States' compelling interest[] in preventing voter

[3] At least portions of the requested injunction are content-neutral and should be subject to a less rigorous degree of scrutiny. *See Madsen v. Women's Health Ctr.*, 512 U.S. 753, 759 & n.1, 762 (1994). Because the requested injunction also satisfies strict scrutiny, Plaintiffs focus their arguments on the more rigorous standard.

intimidation"). And "the state's compelling interest" in preventing voter intimidation "is called to greater heights" where there is "evidence of widespread voter harassment or intimidation," as there is here. *Schirmer v. Edwards*, 2 F.3d 117, 122 (5th Cir. 1993).

Plaintiffs' requested injunction is directly tailored to Defendants' conduct, which the record establishes has in fact been intimidating Arizona voters. *See McCullen*, 573 U.S. at 492-93 (describing "the First Amendment virtues of targeted injunctions"). It prohibits Defendants from "training, organizing, encouraging, or directing others" to monitor drop boxes, record voters, disseminate images or personal information of voters, or harass or verbally engage with individuals returning a ballot, ER165-167, because Defendants have in fact done so to disastrous effect, *see* ER094, 098, 106-113, 116, 120-121, 135, 137, 139, 142, 162. And it prohibits Defendants "and all persons in active concert or participation with them" from gathering in groups of more than 2 within 250 feet of drop boxes; from following, photographing, or otherwise recording voters; from disseminating voters' images or personal information; and from harassing voters, ER165-167, because Defendants have already urged their members and supporters to do so, and the effect of that urging must be reversed, ER084-86, 092-93, 134. Courts have entered similar injunctions for analogous violations of Section 11(b), without raising any First Amendment concerns. *See, e.g.*, *CAIR v. Atlas Aegis*, 497 F. Supp. 3d 371, 381 (D.

Minn. 2020) (enjoining a private security company and its chairman from "deploying armed agents within 2,500 feet of Minnesota polling places or otherwise monitoring Minnesota polling places," threatening to deploy such agents, or "otherwise intimidating, threatening, or coercing voters in connection with voting activities in Minnesota").

The requested injunction also requires CEUSA to post the order on its website and requires Jennings to post the order to her Truth Social page daily until the election. ER165-167. This type of curative message is a permissible remedy for violations of Section 11(b) and the Support or Advocacy Clause. *See Wohl I*, 498 F. Supp. 3d at 489-90 (prohibiting political organization and its founders from "engaging in, or causing anyone else to engage in, robocalls or similar forms of communications" without consent or court approval, and also ordering defendants to send a curative robocall message to all recipients of the intimidating call).

Accordingly, Plaintiffs' requested injunction satisfies strict scrutiny. It advances the compelling state interest of preventing voter intimidation and is narrowly tailored because it "focuses on the precise individuals and the precise conduct causing a particular problem." *McCullen*, 573 U.S. at 493.

II. Plaintiffs will suffer irreparable harm absent an injunction.

As the district court acknowledged, immediate injunctive relief is necessary to protect Plaintiffs' members and countless other Arizona voters from severe and

irreparable harm. Defendants' actions threaten the rights of voters across the state, including Plaintiff Arizona Alliance's 50,000 members. "It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). "If potential members of the electorate suffer intimidation, threatening conduct, or coercion such that their right to vote freely is abridged, or altogether extinguished," that harm is irreparable. *Ariz. Democratic Party v. Ariz. Republican Party*, No. CV-16-03752-PHX-JJT, 2016 WL 8669978, at *11 (D. Ariz. Nov. 4, 2016).

III. The balance of the equities and public interest support an injunction.

Finally, the balance of the equities and the public interest weigh strongly in favor of Plaintiffs. "It is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres*, 695 F.3d at 1002 (quotation omitted). At stake in this litigation is the voters' "most precious" "right . . . , regardless of their political persuasion, to cast their votes effectively" and free of intimidation. *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968). The interest in "protecting voters from confusion and undue influence" is "compelling," *Burson*, 504 U.S. at 199, and the public has a "strong interest in exercising the fundamental political right to vote," *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (quotation omitted).

The district court acknowledged the importance of this interest but erred in thinking that Defendants had equally weighty interests at stake. ER012-13. There is no constitutional interest in private law enforcement and vigilante justice. *See, e.g.*, *United States v. Fraser*, 647 F.3d 1242, 1246 (10th Cir. 2011) ("Ours is not the rule of vigilante justice but the rule of law."). The drop boxes in question are already under video surveillance. *See* ER101 (43:25-45:02; 45:59-46:17). The existence of a substantial number of "ballot mules" is a widely debunked conspiracy theory. ER082 (Attorney General Bill Barr laughing about the claims in in the film 2000 Mules because the cellphone data it relies on is "singularly unimpressive" and the claim that it shows the existence of mules is "just indefensible"). And as explained above, Defendants' challenged conduct and expression are not constitutionally protected, and any restriction on protected expression satisfies strict scrutiny.

CONCLUSION

The Court should grant this Motion and enter the injunction pending appeal that Plaintiffs sought below. ER165-167.

Respectfully submitted this 28th day of October, 2022.

/s Daniel A. Arellano

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the attached document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 28, 2022. In addition, given the expedited nature of this motion, I will immediately serve a copy on Defendants' counsel via email.

s/ Daniel A. Arellano

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because it contains 5,120 words. This motion complies with the typeface and the type style requirements of Fed. R. App. P. 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

Dated: October 28, 2022 *s/* Daniel A. Arellano