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' REPLY IN SUPPORT OF EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR IMMEDIATE INJUNCTION PENDING APPEAL

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INTRODUCTION

For months, Defendants have organized individuals to surveil and record voters using Arizona's drop boxes with the express purposes of deterring people from using drop boxes and "doxxing"—revealing personal information about—those who do. The predictable result was a slew of voter intimidation complaints. Defendants now try to disown the campaign they started, claiming no responsibility for actions by individuals Defendant Jennings repeatedly claimed responsibility for, some of whom openly said they were affiliated with Defendant CEUSA. The district court rejected that factual argument, and this Court should do the same.

As for the First Amendment, Defendants have no substantial answer to Plaintiffs' arguments that their voter intimidation activities are largely not expressive and otherwise constitute unprotected incitement or true threats, and that any abridgment of their First Amendment rights is justified by the compelling state interest in preventing voter intimidation. Defendants are free to express strongly felt objections to drop boxes and concerns about voter fraud. But they are not free to intimidate voters to try to deter them from using drop boxes, as they are doing.

ARGUMENT

I. Plaintiffs complied with FRAP 8(a) and Circuit Rule 27-3.

Plaintiffs complied with Rule 8(a) when they filed this motion while their motion for an injunction pending appeal was pending in the district court. The voter

intimidation Plaintiffs seek to address is serious and ongoing, and there are few days remaining for voters to return their ballots. It was therefore impracticable for Plaintiffs to await a ruling from the district court on their motion for an injunction pending appeal before filing here. *See Commonwealth v. Beshear*, 981 F.3d 505, 508 (6th Cir. 2020); *Gonzalez ex rel. Gonzalez v. Reno*, No. 00-11424-D, 2000 WL 381901, at *1 n.4 (11th Cir. April 19, 2000). Regardless, the district court denied Plaintiffs' motion yesterday, so Rule 8(a)(2)(A)(ii) is now satisfied.

II. Plaintiffs are likely to succeed on the merits.

A. Defendants engaged in unlawful voter intimidation.

Defendants' conduct violates Section 11(b) of the Voting Rights Act and the Support or Advocacy clause of the Klan Act. These statutes prohibit even "subtle, nonviolent forms of intimidation." *Nat'l Coal. on Black Civic Participation v. Wohl*, 512 F. Supp. 3d 500, 509 (S.D.N.Y. 2021) ("*Wohl II*"); *see also id.* at 512. Accordingly, "actions or communications that inspire fear of economic harm, legal repercussions, privacy violations, and even surveillance can constitute unlawful threats or intimidation." *Id.* Defendants' organized harassment, photographing, videotaping, trailing, and "doxxing" of voters is quintessential voter intimidation under these statutes.

Defendants respond by listing a few non-violent confrontations between their followers and Arizona voters as evidence that their efforts are not intimidating. Resp.

7-9. But again, violence is not the touchstone of Section 11(b). Defendants' examples, such as whether a voter confronted or approached the drop box watchers, or whether it is legal to carry guns, are all therefore irrelevant. Resp. 8-9. And the record demonstrates that Defendants' conduct is intended to and has intimidated voters. *See*, *e.g.*, ER084 ("[J]ust 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"); FER51-52; ER098, 137.

Defendants also argue that they are not responsible for the actions of drop box watchers in Arizona. But Defendant Jennings has consistently claimed credit for the groups gathered at Arizona drop boxes, calling them (1) "my people," ER093; (2) "my crew," ER086; (3) "our people," ER120; (4) "our beautiful box watchers," ER091; and (4) "us," ER092. She has also directed followers to participate in intimidation at the Mesa and Phoenix drop boxes at specific times. ER086, 092-93. These statements are opposing party admissions, so it makes no difference whether they were "made under oath." Resp. 9; *see* Fed. R. Evid. 801(d)(2). And many of the individuals who have been featured in Jennings' posts have been the subject of intimidation complaints filed by voters. *Compare* ER091 (photos of drop box watchers), ER109 (pictures taken by voter complainant that match Jennings's posted picture of drop box monitors), *with* ER114, 115 (videos of same individuals stating they are with "Clean Elections USA"); *compare* ER086 (Jennings referencing

surveillance of Mesa and Phoenix drop boxes), *with* ER111, 113, 137, 139 (voter complaints about intimidation at Mesa and Phoenix drop boxes).

Jennings also claimed responsibility for the individuals who staked out the Mesa drop box while armed and dressed in tactical gear, promoting law enforcement concern and a police response. *See, e.g.*, ER094; ER116; ER120 (post from Jennings claiming the armed individuals were "our people"). And Jennings herself urged others to join her in "completely doxx[ing] and put[ting] on blast" voters using drop boxes. ER134; *see also* ER088 at 13:34-14:38; 17:56-19:10. Once voting began in Arizona, Jennings began publicly posting photos and personal information of specific voters, including one of the voters who submitted a voter intimidation complaint. ER093; ER101 at 44:40-44:58 ("we caught a picture of him and we blew it up, we blasted it viral," and this led to the voter being "upset his picture went out there"). Jennings posted a photo of an elderly voter, along with the make and color of his car and a close up of his license plate on social media. ER121.

Based on this evidence and more, the district court found that Defendants "organized" watchers in Maricopa County whose activity, "which includes surveillance, photography, video recording, and social media activity, has alarmed voters, elected officials, and elections personnel." ER001. The court remarked at the evidentiary hearing that Plaintiffs were on "solid ground" when it came to connecting Defendants to the actions of those monitoring drop boxes. *See* FER089

And the district court characterized the incidents at issue as "Defendants' drop box surveillance activities" and "Defendants' challenged conduct." ER006. Defendants provide no basis for setting aside these findings as clearly erroneous.

B. The First Amendment does not protect Defendants' conduct.

1. Most of Defendants' challenged conduct is not expressive.

As Plaintiffs have explained, most of Defendants' challenged conduct—their gathering in large groups at drop boxes—is not expressive, because Defendants have not carried their burden of showing that they, and the drop box watchers associated with them, intend to "convey a particularized message" when they gather near drop boxes, nor that there is a great likelihood that the message will be understood by viewers. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1058-59 (9th Cir. 2010); *see also Knox v. Brnovich*, 907 F.3d 1167, 1181 (9th Cir. 2018).[1]

Defendants respond by quoting the district court's contrary holding, Resp. 12-13, but they offer no defense of it and point to nothing in the record demonstrating either that they intend to convey a particularized message when they gather near drop boxes or that there is a likelihood of their message being understood. *See id.*

[1] For this same reason, Defendants' right to assemble or associate are not at issue, because "to come within [the] ambit" of such rights, "a group must engage in some form of expression." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000); *see also Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984) (explaining that the right to assemble is a subpart of the freedom of association). And regardless, there is a right to assembly only "for any lawful purpose," *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 578 (1980), which does not include voter intimidation.

Defendants do not even say what their supposed message is. The district court's ruling conflated Defendants' *objective* of deterring drop box use with an expressive *message* that simply is not present. ER007; *see Voting for Am. v. Steen*, 732 F.3d 382, 391 (5th Cir. 2013). But Defendants scrupulously avoid any activity that might convey a message: no political clothing, no signs, no speaking to voters, no speaking with the press about their goals. *See* Mot. 10-11 (citing record evidence). And Defendants' own statements show that they seek not to communicate or persuade but simply to intimidate, through their "presence alone" and their "multiple cameras." ER084. Defendants have therefore not met their burden to show that their conduct—gathering in groups near drop boxes—is expressive at all.

The same is true of Defendants' use of cameras for the purpose of scaring voters. Photography is protected where it involves "creating pure speech" that is itself entitled to First Amendment protection. *Askins v. U.S. Dep't of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018). Using a conspicuously displayed camera to deter voters from using a drop box does not involve "creating pure speech" at all—no photograph is even taken if the deterrence succeeds. *See* ER084. And any photographs and recordings Defendants do take are used either to encourage more people to engage in the same intimidating conduct or as part of their plan to "dox" voters by revealing personal information online, which involve true threats and incitement, not protected speech. ER093, 121.

2. Defendants' challenged expression consists of unprotected incitement and true threats.

That leaves Defendants' actual expression at issue, which is categorically unprotected. Defendants' actions encouraging others to go to drop boxes to "deter" people from using them are unprotected incitement. The First Amendment does not protect "words both intended and likely to produce an imminent criminal act," "even if they spring from the anterior motive to effect political or social change." *United States v. Freeman*, 761 F.2d 549, 551-552 (9th Cir. 1985); *see also United States v. Kelley*, 769 F.2d 215, 217 (4th Cir. 1985). Defendants' successful organizing of others to go to drop boxes to engage in voter intimidation falls firmly into that category, because voter intimidation is a federal crime. 18 U.S.C. § 594. Defendants have no answer to this; they baldly assert that Plaintiffs "have failed to prove actual intimidation, much less any incitement," Resp. 13, but they offer no argument distinguishing *Freeman* or otherwise explaining why their speech directly causing ongoing violations of criminal law would be protected under the First Amendment.

Defendants' threats to "dox" voters who use drop boxes, and any expressive content of Defendants' gathering at drop boxes themselves, are unprotected true threats. Defendants point to *United States v. Bagdasarian*, 652 F.3d 1113, 1124 (9th Cir. 2011), but that case held only that the vile statements made by the defendant on an internet message board while drunk would not objectively be seen as a threat and were not intended as a threat. Here, in contrast, there is ample evidence that

Defendants intend to threaten voters who use drop boxes. The purpose of Defendants' conduct is to deter drop box use, which can be achieved only by threatening voters. ER084. Voters understand the threat and are scared. *See* FER51-52; ER098, 137. In at least one case, Defendants have done what they threaten: posted personal information—a license plate—of a voter online. ER121.

3. The injunction Plaintiffs seek satisfies strict scrutiny.

Finally, any effect of Plaintiffs' requested injunction on protected expression satisfies strict scrutiny because it is "necessary to serve [the] compelling state interest" in preventing voter intimidation and is "narrowly drawn to achieve that end." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *see also Burson v. Freeman*, 504 U.S. 191, 206-07 (1992) (plurality op.).

Defendants claim Arizona statutes regarding voter intimidation and the 75-foot area surrounding polling places "already provide[] a narrowly tailored solution to address the state's compelling interest in preventing voter [intimidation]." Resp. 17. But the record demonstrates that the existence of those Arizona laws has not prevented Defendants from intimidating voters. ER98, 101 111, 135, 162. A federal court may enter a tailored injunction to address the actions of individuals whose activities violate federal law and implicate the compelling state interest in preventing voter intimidation, especially where those activities are not covered by or have not been prosecuted under state law. *See* Mot. 19-20 (listing injunctions entered by

federal courts for Section 11(b) or Klan Act violations); Doc. 7-1 at 12 (DOJ statement of interest submitted in consolidated case) (same).

Defendants also suggest the requested injunction is too broad because news outlets have taken pictures of voters delivering ballots to drop boxes. Resp. 17. Plaintiffs' requested injunction would not affect such activity, as it would bind only Defendants and those "in active concert or participation with them." ER165-66. The injunction is tailored in this manner precisely because Defendants have photographed individuals in order to "deter[]" persons from voting. ER084-85, 92. Even if photography is generally a lawful activity protected by the First Amendment, it can be circumscribed when used for unlawful ends.

Similarly, the requested injunction would not chill lawful activities protected by the First Amendment, *see* Resp. 18, as it specifically enjoins Defendants from only those activities demonstrated by the record to have constituted the violations of Section 11(b) and the Support or Advocacy clause. *Compare with Ariz. Democratic Party v. Ariz. Republican Party*, No. CV-16-03752-PHX-JJT, 2016 WL 8669978, at *8, 10-12 (D. Ariz. Nov. 4, 2016) (declining to enter injunction because record did not show that challenged activities or statements were likely to intimidate, threaten, or coerce, such that injunction might have chilling effect). The First Amendment does not bar Plaintiffs' requested injunction, which is narrowly tailored to address Defendants' methods of unlawful voter intimidation.

III. Plaintiffs face irreparable harm absent relief.

Defendants admit Plaintiffs have suffered irreparable harm but attempt to turn the question into a balancing test in which they assert a counter-harm. Resp. 19. The only question, though, is whether the Plaintiff can "demonstrate a significant threat of irreparable injury." *Arcamuzi v. Cont'l Air Lines, Inc.*, 819 F.2d 935, 937 (9th Cir. 1987). And "[i]t 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)).

IV. The balance of equities and the public interest favor relief.

Defendants argue the equities and public interest weigh against relief because Defendants are not intimidating voters and an injunction would violate their constitutional rights. As explained above, both arguments are wrong. *Supra* Parts II.A-B. To the extent the Court must balance "compelling interests in preventing voter intimidation" against First Amendment concerns in this context, the voter's right to cast a ballot free of intimidation prevails. *Burson*, 504 U.S. at 206 (1992). And the fact that there are also *other* legal prohibitions on voter intimidation does nothing to eliminate the need for relief, as those other prohibitions have been inadequate to protect voters from Defendants' ongoing conduct.

CONCLUSION

The Court should grant Plaintiffs-Appellants' motion.

Respectfully submitted this 1st day of November, 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 November 1, 2022.

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 2,421 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: November 1, 2022 *s/* Daniel A. Arellano