Timothy J. Eckstein, 018321
Brandon T. Delgado, 035924
OSBORN MALEDON, P.A.
2929 North Central Ave., Suite 2100
Phoenix, Arizona 85012-2793
(602) 640-9000
teckstein@omlaw.com
bdelgado@omlaw.com

Orion Danjuma (*pro hac vice*)
NY Reg No. 4942249
PROTECT DEMOCRACY PROJECT
82 Nassau St. #601
New York, NY 10038
Tel: (202) 579-4582
orion.danjuma@protectdemocracy.org

Rachel F. Homer (*pro hac vice*)
DC Bar No. 1045077
PROTECT DEMOCRACY PROJECT
2020 Pennsylvania Avenue NW, #163
Washington, DC 20006
Tel: (202) 579-4582
rachel.homer@protectdemocracy.org

Benjamin L. Berwick (*pro hac vice*)
MA Bar No. 679207
PROTECT DEMOCRACY PROJECT
15 Main Street, Suite 312
Watertown, MA 02472
Tel: (202) 579-4582
ben.berwick@protectdemocracy.org

Jared Davidson (*pro hac vice*)
LA Bar No. 37093
PROTECT DEMOCRACY PROJECT
3014 Dauphine Street, Suite J
New Orleans, LA 70117
Tel: (202) 579-4582
jared.davidson@protectdemocracy.org

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Arizona Alliance for Retired Americans, et al,

Plaintiff,

vs.

Clean Elections USA, et al,

Defendants.

League of Women Voters of Arizona,

Plaintiff,

vs.

Lions of Liberty LLC, et al.,

Defendants.

No. CV-22-01823-PHX-MTL

(Consolidated with CV-22-08196-PCT-MTL)

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

This case concerns a dangerous and harmful effort orchestrated by Defendant Melody Jennings in conjunction with her corporation (formerly styled Clean Elections USA) (collectively, "Defendants") to surveil and harass voters at drop box locations in Arizona. Defendants spent months coordinating efforts to recruit and deploy volunteers at drop boxes in Arizona, encouraging them to record voters, and threatening to release the personal information of individuals who vote at drop boxes.

Defendants turned their plans into action during the 2022 midterms, causing immediate damage to the integrity of the election system, to voters, and to the mission and members of Plaintiff League of Women Voters of Arizona ("the League"). As soon as early voting began, people reported harassment by individuals staking out drop boxes, and photographing, following, and otherwise intimidating voters. This harassment culminated in an incident where vigilantes carrying guns, masked and dressed in tactical gear, emerged to patrol drop boxes. Following a November 1, 2022 hearing featuring testimony from seven witnesses, this Court concluded that Defendants' conduct likely violated both the Ku Klux Klan Act, 42 U.S.C. § 1985(3), and Section 11(b) of the Voting Rights Act of 1965, 52 U.S.C. § 10307(b). Accordingly, the Court entered a temporary restraining order barring Defendants and those in concert with them from engaging in conduct that had repeatedly intimidated voters.

Defendants now seek to dismiss Plaintiff's complaint for lack of standing and failure to state a claim. But Defendants' quarrel is not with the legal sufficiency of the League's claims—less than three pages of the motion even references the text of the Complaint. Defendants instead try to relitigate the November 1 TRO hearing, urging the Court to re-weigh the evidence and reach different conclusions. In so doing, Defendants highlight the basic flaw underlying their motion: the League has not only stated a claim on which relief can be granted—this Court has already granted preliminary relief. Defendants now attempt to contradict witness testimony, propose alternative interpretations of record evidence, and ignore the actual claims in the Complaint. But

these evidentiary contentions only highlight factual disputes precluding dismissal of Plaintiff's claims. A motion to dismiss is not a proper mechanism to reevaluate the Court's evidentiary findings in issuing its TRO.

Defendants likewise suggests that the Court should reverse its ruling that Plaintiff has standing, but offer nothing to undermine the well-pled allegations or contest the evidence already submitted in support of subject matter jurisdiction. And as the Court observed at the January 27, 2023 status conference, Plaintiff retains claims for damages and other relief, and therefore this case is not moot. *See* Tr. of Jan. 27, 2023 Status Conf. at 13:10-12. Defendants' motion should be denied.

STANDARD OF REVIEW

Defendants have moved to dismiss under both Rules 12(b)(1) and (b)(6). A 12(b)(1) motion that does not rely on "extrinsic evidence"[1] to challenge standing is deemed a facial challenge "assert[ing] that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). When "a defendant mounts a 'facial' challenge to the legal sufficiency of the plaintiff's jurisdictional allegations, the court must accept as true the allegations in the complaint and consider the factual allegations of the complaint in the light most favorable to the non-moving party." *Erby v. United States*, 424 F. Supp. 2d 180, 182 (D.D.C. 2006) (collecting cases).

A Rule 12(b)(6) motion may be granted only if the allegations in the Complaint fail to provide "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotations omitted). A claim is facially plausible "when the plaintiff pleads factual content that

[1] Defendants have not attempted to introduce any "extrinsic evidence" challenging subject matter jurisdiction. *See Safe Air*, 373 F.3d at 1039; *cf. Morrison v. Amway Corp.*, 323 F.3d 920, 924 n. 5 (11th Cir. 2003) (jurisdictional challenge was a factual attack where it "relied on extrinsic evidence"). Defendants briefly critique witness testimony at the TRO hearing but in the same breath assert that any testimony beyond the complaint should not be considered. Defs.' Mot. to Dismiss ("MTD"), ECF No. 66, at 14. Therefore, Plaintiff treats Defendants' 12(b)(1) motion as a facial challenge.

allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* In reviewing a Rule 12(b)(6) motion, a court "must accept as true all factual allegations in the complaint and draw all reasonable inferences in favor of the nonmoving party." *Retail Prop. Tr. v. United Bhd. of Carpenters & Joiners of Am.*, 768 F.3d 938, 945 (9th Cir. 2014).

ARGUMENT

I. Plaintiff has Organizational and Representational Standing

Defendants erroneously contend that the League has not alleged any injury traceable to Defendants Jennings and Clean Elections USA ("CE-USA"). They also assert that "any injury the Court may infer from Defendants' actions" is restricted to "individuals who experienced actual intimidation." Defs.' Mot. to Dismiss ("MTD"), ECF No. 66, at 14. Not so.

It is well settled that an organization has standing where it alleges "the defendant's behavior has frustrated its mission and caused it to divert resources in response to that frustration of purpose." *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 663 (9th Cir. 2021). An organization is "not required to demonstrate some threshold magnitude of their injuries . . . [H]arms that amount to pennies are still entitled to relief." *Id.* at 664.

Defendants incorrectly contend that there are "no well-plead allegations that Ms. Jennings and her organization . . . are responsible for . . . the League having to divert resources to educate voters on intimidation." MTD at 14. The Complaint states plainly that the League's mission of educating voters and encouraging them to vote "has been directly frustrated by Defendants' actions" and that "Defendants' conduct has caused and will continue to cause the League to divert resources away from its core mission of registering voters and encouraging voter participation" toward "preparing and communicating 'know your rights' materials" focused on voter intimidation. Compl., ECF No. 1, at ¶¶ 68-69. The Complaint provides further detail and examples about the nature of this frustration of mission and diversion of resources, including how the League has had to develop protocols for tracking voter intimidation, dedicate staff time to

advising voters of their rights, and provide information about how to report voter intimidation. *Id.* Among other things, the League had to divert roughly $2,000 to send text messages to its list of more than 200,000 women voters advising them of their rights related to voter intimidation. *Id.*

These allegations are more than sufficient to establish standing. *El Rescate Legal Servs., Inc. v. Exec. Off. of Immigr. Rev.*, 959 F.2d 742, 748 (9th Cir. 1991) ("The allegation that the [defendant's] policy frustrates these goals and requires the organizations to expend resources . . . they otherwise would spend in other ways is enough to establish standing."); *see also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (finding that the plaintiff adequately pleaded standing by alleging that "Plaintiff[] has been frustrated by defendants' [actions]"); *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 764 (9th Cir. 2018) (noting that a plaintiff "need only establish a *risk* or *threat* of injury to satisfy the actual injury requirement").

Furthermore, the relief requested in the Complaint would directly redress the League's injuries. Money damages would redress the resources the League has had to divert and expend in response to Defendants' actions. A permanent injunction would redress the League's need to continue allocating and diverting resources in response to Defendants' stated desire to engage in similar continue coordinating drop box monitoring campaigns. *See Arizona Alliance for Retired Americans v. Clean Elections USA*, No. 22-16689 (9th Cir. Dec. 5, 2022) ("*AARA*"), ECF. No. 23 at 8, 10 (Defendants stating that "this issue may reoccur in the future" and that they hope to engage in similar conduct "in future elections"); *Renee v. Duncan*, 686 F.3d 1002, 1013 (9th Cir. 2012) (burden to show redressability is "relatively modest" without need to demonstrate a "'guarantee' that [plaintiffs'] injuries will be redressed by a favorable decision").

Plaintiff has also pleaded an independent basis for subject matter jurisdiction that Defendants have not addressed: representational standing through the League's members. "An organization may bring an action on behalf of its members if: (1) the individual members would have standing to sue; (2) the organization's purpose relates to the

interests being vindicated; and (3) the claims asserted do not require the participation of individual members." *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1119 (9th Cir. 2005).

Individual League members have standing because many "members rely on drop box voting throughout Arizona," but those who have voted using drop boxes in the past have stopped using that method "due to surveillance, intimidation, and harassment by Defendants and their agents." Compl. at ¶ 70.[2] Next, the interest in preventing the voter intimidation experienced by members at drop boxes coincides with the League's mission in encouraging voter participation. *Id*. at ¶¶ 11, 68-69. Lastly, the claims asserted do not require individualized determinations of members' injuries because the League is not seeking damages on behalf of its members, but only generalized injunctive and declaratory relief (as well as damages on behalf of itself). *See Associated Gen. Contractors of Am. v. Metro. Water Dist. of S. California*, 159 F.3d 1178, 1181 (9th Cir. 1998); *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 601 (7th Cir. 1993) (organization "may be an appropriate representative of its members" as long as "individual participation of *each* injured party" is not required) (quoting *Warth v. Seldin*, 422 U.S. 490, 511 (1975)).

Rather than accepting these well-pleaded allegations as true, as required at this stage, Defendants attempt to evade responsibility by claiming that the League has not pleaded injuries traceable to them. But the Complaint repeatedly and explicitly charges *Defendants* with unlawful conduct that injures the League. Defendants' direct responsibility for the challenged conduct is discussed further in Section II below. The Complaint provides a summary of the elements of the unlawful scheme traceable to Defendants: they (1) "organized a state-wide campaign . . . to surveil and harass voters at Arizona drop boxes"; (2) explicitly "admitted that [Defendants' agents] are guarding drop

[2] Furthermore, testimony at the TRO hearing by League members that they had stopped using drop boxes due to fears about Defendants' ongoing surveillance has substantiated representational standing. *See* Tr. of Nov. 1, 2022 Hearing at 104:7–105:9; 106:10-16; 114:5–116:19; 118:1-6; 121:18–123:23; 125:21–127:2.

boxes while armed and in tactical gear, and that the purpose of these tactics is to intimidate voters," (3) promulgated disinformation about voter eligibility by "baselessly claiming" that "voters who have used drop boxes" are breaking the law, and (4) promised to "dox"—*i.e.*, publicly release the private information—of individuals who vote at drop boxes. Compl. at ¶ 6. The Complaint further makes clear that "Defendants' actions" and "Defendants' conduct has caused and will continue to cause" frustration of mission and diversion of resources by the League. *Id*. at ¶¶ 68-69. This is not a case where Defendants' alleged culpability is particularly remote or attenuated. They executed a public and admitted operation that had immediate and palpable impact on the League's animating mission to ensure that voters can participate in the political process without fear.

Defendants suggest that the actual culprit is the news media, which they infer may have "perhaps" alarmed voters by reporting on Defendants' intimidating conduct. MTD at 14. In addition to being a highly questionable theory of causation, that is a quarrel over the facts and an inference Defendants would prefer to draw in their favor—something they may not do. The Complaint squarely charges Defendants as the responsible party for orchestrating the unlawful scheme—not the media which merely reported on harms caused by Defendants. And in any event, an injury need only be "fairly traceable" to the defendant's actions—it need not be the "very last step in the chain of causation." *Bennett v. Spear*, 520 U.S. 154, 168–69 (1997).

Moreover, at this stage of proceedings, these allegations are not merely plausible—they've been substantiated by testimony at the TRO hearing, leading the Court to rule that Plaintiff has standing. *See* Tr. of Nov. 1, 2022 Hearing ("Nov. 1 Tr."), at 184:24–185:4. Defendants have not only disregarded the well-pled allegations; they have offered nothing to challenge this Court's holding.

II. Plaintiff Has Stated a Claim under Section 11(b) of the Voting Rights Act

The Complaint plausibly alleges that Defendants have engaged in unlawful voter intimidation in violation of Section 11(b) of the Voting Rights Act of 1965, 52 U.S.C. § 10307(b). Section 11(b) provides in relevant 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." 52 U.S.C. § 10307(b) (emphasis added) (formerly 42 U.S.C. § 1973i(b)). As detailed in its TRO Motion, the League need not allege that Defendants acted with any subjective intent to intimidate in order to state a claim under Section 11(b). *See League of Women Voters of Arizona v. Lions of Liberty LLC*, No. 3:22-cv-8196, Pl.'s Mot. for TRO, ECF No. 11 at 17-18 (collecting cases); *see also Nat'l Coal. on Black Civic Participation v. Wohl*, No. 20 CIV. 8668 (VM), 2023 WL 2403012, at *23 (S.D.N.Y. Mar. 8, 2023) ("*Wohl III*"); *Fair Fight, Inc. v. True the Vote*, No. 2:20-cv-302 (N.D. Ga. Mar. 9, 2023), ECF. No. 222, slip op. at 15-17.[3] Rather, the Complaint must contain plausible allegations that, taken as true and viewed in the light most favorable to Plaintiff, show that Defendants have intimidated, threatened, or coerced (or so attempted) a voter or someone assisting a voter. *See Nat'l Coal. on Black Civic Participation v. Wohl*, 498 F. Supp. 3d 457, 477 (S.D.N.Y. 2020) ("*Wohl I*"). The League's Complaint plainly meets that standard.

The bulk of Defendants' Motion focuses on critiquing witness testimony, which is immaterial to a motion to dismiss. The only challenge Defendants raise to the Complaint itself is their assertion that the League has not pleaded facts connecting Ms. Jennings and Clean Elections USA to the challenged conduct. But the Complaint contains a multitude of specific and detailed allegations directly charging Defendants with unlawful conduct arising from their orchestration of "a state-wide campaign" to "surveil and harass voters at Arizona drop boxes." Compl. at ¶ 6. The Complaint charges Defendants, *inter alia*, with:

- "[C]onspiring to organize and execute [a] large-scale campaign" to surveil voters at drop boxes and "actively recruiting volunteer[s]" and agents with the goal of stationing "at least ten monitors at each drop box." *Id.* at ¶ 43.

[3] Although a showing of subjective intent is *not* required for Plaintiff's 11(b) claim, the Complaint nevertheless plausibly alleges that Defendants did, in fact, act with intent to intimidate voters engaging in lawful voting activity. *See infra* § III.

- Coordinating volunteers and agents to "in Defendants' words, 'gather video (and live witness evidence)'" of drop box voters by recording voters' faces and license plates numbers. *Id.*
- Taking credit for the surveillance of drop box voters by "confirm[ing] that the individuals who intimidated" voters by recording their faces and license plate numbers "were volunteers working with [Jennings] and Defendant CE-USA." *Id.* at ¶ 55; *see also id.* at ¶¶ 56-57.
- Explicitly threatening "to 'dox' voters that Defendants and their volunteers determine are 'mules.'" *Id.* at ¶ 44.
- Actively disseminating images of drop box voters' license plates or faces alongside baseless accusations that "the voter was engaged in illegal activity." *Id.* at ¶ 50; *see also id.* at ¶¶ 49, 55.
- "[S]pread[ing] disinformation about the legality of drop box voting." *Id.* at ¶ 22; s*ee also id.* at ¶¶ 30, 84.
- "Claim[ing] responsibility" when Defendants' agents monitored drop boxes while "armed" and "dressed in tactical gear[.]" *Id.* at ¶ 58.

These allegations greatly exceed assertions that would "merely [be] consistent with a defendant's liability." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). Defendants' role in this case is far from remote or abstract. They are charged with organizing the unlawful surveillance campaign, stationing agents at drop box locations, urging volunteers to record voters' faces and license plates, threatening to dox voters, actively disseminating images of supposed "mules" while baselessly accusing them of voter fraud, and spreading disinformation about lawful means of voting. Any subcomponent of this scheme would likely be sufficient to state a claim for voter intimidation. Here, Defendants' alleged conduct covers the field.[4]

[4] Defendants likewise are mistaken in suggesting that Plaintiff asserts "vicarious[]" or "indirect" injury on behalf of Complainant 240. MTD at 10. The League claims damages on behalf of *itself* for frustration of mission and diversion of resources directly caused by Defendant. Complainant 240's testimony is an illustrative example of the severity of

Moreover, Defendant Jennings has expressly claimed credit for the challenged conduct—precluding any argument that it is not traceable to Defendants. For example, after an October 17, 2022 incident where a voter was followed, filmed, and accused of being a "mule," the Complaint identifies "[a] subsequent Truth Social post by Defendant Jennings confirm[ing] that the individuals who intimidated the voter were volunteers working with her and Defendant CE-USA." Compl. at ¶ 55. Two days later, another voter reported intimidation by a group following and photographing him. The Complaint alleges that "[t]hese individuals also separately confirmed to a reporter that they were volunteers with Defendant CE-USA." *Id.* at ¶ 56. Likewise, the Complaint details an October 21, 2022 incident involving armed individuals dressed in tactical gear patrolling a Mesa drop box. Again, Jennings explicitly claimed responsibility for these individuals, stating on a Truth Social post that "[s]omeone called in seeing 2 of ***our people*** in tactical gear and armed. They will always gear up for a call like that." *Id.* at ¶ 58 (emphasis added).[5] At the TRO hearing, the Court rejected Defendants' attempt to disclaim responsibility. Nov. 1 Tr. at 189:2-12. It should do so again in the context of the instant motion where all inferences must be drawn in Plaintiff's favor.

The legal sufficiency of Plaintiff's claims is bolstered by the fact that they closely parallel conduct courts have previously deemed illegal voter intimidation. For example, in *Daschle v. Thune*, the district court found that supporters of Senator Thune had violated Section 11(b) by "[f]ollowing Native American voters at [a] polling place . . . [continuing to follow them] out to their cars after they have voted, walking up to their vehicles, and writing down their license plate numbers." *Daschle v. Thune*, No. 4:04-cv-4177 (D.S.D.

Defendants' intimidation scheme that required the League to shift resources in response to "the evolving crisis over drop box surveillance." Compl. at ¶ 69. Defendants' proffered authority is clearly inapposite because it involved alleged antitrust violations arising from complex market dynamics and a "vaguely defined" "chain of causation[.]" *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 540 (1983).

[5] These allegations are more than plausible as they cite publicly accessible statements by Jennings and her agents.

Nov. 1, 2004), Compl. at 5-6; *id.*, Temporary Restraining Order, ECF No. 6. Similarly, numerous courts have held that baselessly accusing voters of violating the law, or warning of legal or other consequences for voting, is a well-recognized form of unlawful voter intimidation. *See, e.g.*, *United States v. Tan Duc Nguyen*, 673 F.3d 1259, 1264–66 (9th Cir. 2012) (letters sent to Hispanic voters warning of incarceration or deportation could have "constituted a tactic of intimidation" under state voter intimidation law); *Nat'l Coal. on Black Civic Participation v. Wohl*, 512 F. Supp. 3d 500, 509–11 (S.D.N.Y. 2021) 509-11 ("*Wohl II*") (collecting cases); *League of United Latin Am. Citizens – Richmond Region Council 4614 v. Pub. Int. Legal Found.*, No. 1:18-CV-00423, 2018 WL 3848404, at *4 (E.D. Va. Aug. 13, 2018) (*"LULAC")* (publishing voters' names and personal information with allegations of felonious voter registration "in a clear effort to subject the named individuals to public opprobrium."); *see also* Pl.'s Mot. for TRO, ECF No. 11, at 15-16 (collecting cases). And as this Court has recognized, spreading disinformation about lawful voting practices likewise has an "intimidating impact on individuals who are lawfully exercising their right to vote." Nov 1 Tr. at 188:9-14; *accord Wohl III*, 2023 WL 2403012, at *25 ("proscription of Defendants' false speech" about voter eligibility is "permissible"); *LULAC*, 2018 WL 3848404, at *4 (false information about registration status).

Rather than advancing meaningful legal challenges to the sufficiency of the Complaint, Defendants instead single out specific paragraphs and then summarily declare (without citation to authority) that each paragraph—read in isolation—does not independently allege illegal voter intimidation. MTD at 5-7. As noted *supra*, Defendants have ignored the clear and detailed allegations describing Defendant's unlawful conduct. But more broadly, "[a] complaint should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009); *see also Fair Fight* slip op at 16-17 (merits of 11(b) claims should be evaluated under "totality of relevant circumstances").

Defendants also ignore the governing standard on a 12(b)(6) motion, requiring the Court to "presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party." *Usher v. City of Los Angeles*, 828 F.2d at 561 (9th Cir. 1987). Instead, Defendants do precisely the opposite. They highlight purported factual disputes or alternative ways to construe the allegations in their favor, then attempt to mount a direct assault on the evidence submitted at the TRO hearing. *See* MTD at 6-13. Defendants are free to advance their interpretation of the evidence at trial. But "factual disputes are not resolved in a motion to dismiss." *Am. Bank of the N. v. Mouilso*, No. CV-16-08207-PCT-GMS, 2018 WL 2065066, at *1 (D. Ariz. May 3, 2018).

III. Plaintiff Has Stated a Claim under the Support-or-Advocacy Clauses of the Ku Klux Klan Act

Plaintiff has also properly alleged a claim under the "support or advocacy" clauses of 42 U.S.C. § 1985(3), which makes it unlawful for "two or more persons" to "conspire" *either* to (1) prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy" in a federal election, *or* to (2) "injure any citizen in person or property on account of such support or advocacy." In addition, there must be an act in furtherance of the conspiracy by one or more conspirators where the plaintiff is injured in person or property. 42 U.S.C. § 1985(3); *see also Wohl I*, 498 F. Supp. 3d at 487; *Ariz. Democratic Party v. Ariz. Republican Party*, No. CV-16-03752-PHX-JJT, 2016 WL 8669978, at *5 (D. Ariz. Nov. 4, 2016).

The Complaint alleges those elements—specifically, that Defendants conspired and coordinated with others to intimidate and injure voters during the 2022 election using the range of tactics discussed above in Section II. *See, e.g.*, Compl. at ¶¶ 43-53, 55-56, 58. The Complaint also plausibly alleges that Defendants and their co-conspirators had a common "purpose" in deploying these tactics: to intimidate voters from utilizing drop boxes and to dox voters who used that method. *See, e.g., Id.* at ¶¶ 6, 44-45, 50, 55.

In their motion to dismiss, Defendants offer only a single argument[6] in support of dismissal of Plaintiff's Klan Act claim: that Plaintiff has "not provided the Court with evidence" that the object of Defendants' conspiracy was to intimidate lawful voters. *See* MTD at 13. Here again, Defendants do not use the proper standard for this stage of the proceedings. To survive a 12(b)(6) motion, Plaintiff need only provide plausible allegations, not evidence, that Defendants conspired to intimidate voters. *See Diaz v. Int'l Longshore & Warehouse Union, Loc. 13*, 474 F.3d 1202, 1205 (9th Cir. 2007) (on motion to dismiss "issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims"). And for the reasons explained above, Plaintiff has plausibly alleged that Defendants' purpose was unlawful. Even if evidence were required—and it is not—this Court already concluded at the TRO hearing that the Klan Act's "intent element . . . has been satisfied." Nov. 1 Tr. at 189:13-24 (distinguishing League's evidence from that presented by AARA).

IV. The First Amendment Does Not Bar Plaintiff's Voter Intimidation Claims

In its November 1 TRO, this Court held that the First Amendment did not bar the emergency relief sought by the League. Nov 1 Tr. at 185:12-18, 190:14-23. In the instant motion, Defendants make vague reference to the need for a "free speech analysis," and recite this Court's discussion of the First Amendment in denying the American Alliance for Retired American's ("AARA") requested TRO. MTD at 11. But Defendants entirely ignore the Court's granting of the League's TRO and err in attempting to import the Court's fact-bound analysis into the instant motion. The Court's TRO in this case makes clear that the application of the First Amendment to Defendants' conduct is a question of fact that cannot be resolved on the instant motion.

[6] Defendants have therefore waived any other argument in support of dismissal of Plaintiff's Klan Act claim. *See Vicente v. City of Prescott, Ariz.*, No. CV-11-8204-PCT-DGC, 2012 WL 1438695, at *7 (D. Ariz. Apr. 26, 2012) ("Arguments not raised in an opening brief typically are waived." (citing *Delgadillo v. Woodford*, 527 F.3d 919, 930 n.4 (9th Cir. 2008))).

As a threshold matter, "whether [a party's] First Amendment free speech rights have been infringed is a mixed question of law and fact since it requires . . . apply[ing] principles of First Amendment jurisprudence to the specific facts of [a] case." *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1227 (9th Cir. 1990). For this reason, "courts typically do not reach the *merits* of a First Amendment challenge at the motion-to-dismiss stage." *Brown v. Gov't of D.C.*, 390 F. Supp. 3d 114, 123 (D.D.C. 2019) (collecting cases); *see also Fair Fight* slip op. at 81 (finding factual "disputes therefore preclude summary judgment on Defendants' First Amendment" defenses).

Perhaps recognizing the impropriety of a facial challenge to the sufficiency of Plaintiff's claims, Defendants do not even reference the Complaint in invoking the First Amendment. They have therefore waived First Amendment defenses to the Complaint under 12(b)(6). Instead, they openly "urge the Court to reexamine the testimony by the various witnesses" at the November 1 hearing and reach different conclusions favoring Defendants. MTD at 12. A motion to dismiss is not a proper vehicle to request that the Court reexamine testimony from an evidentiary hearing. Quite the contrary, Defendants contentions highlight factual disputes that preclude dismissal under 12(b)(6). *See, e.g.*, *Mecinas v. Hobbs*, 30 F.4th 890, 903 (9th Cir. 2022) ("Because the existence of such [a factual question] is unquestionably an issue intertwined with the merits, the district court was not permitted to resolve this question of fact on a motion to dismiss."). To the extent Defendants disagreed with the Court's findings connected to the TRO, they could have appealed. The reexamination that Defendants propose now is immaterial to their proffered motion.

Voter intimidation schemes have repeatedly survived challenge on First Amendment grounds. *See, e.g.*, *Wohl II*, 512 F. Supp. 3d at 512-15; *Fair Fight* slip op. at 63-76. Furthermore, the Complaint challenges conduct that falls outside the First Amendment, including (1) carrying of firearms and wearing of body armor outside of voting locations, (2) promulgation of falsehoods regarding voter eligibility, (3) doxxing individuals who choose to vote at drop boxes, and (4) engaging in a conspiracy to deprive

voters of their civil rights. Therefore, even if it were true that some component of Defendant's conduct constituted protected expression, it would not support dismissal of the Complaint.

First, carrying firearms at voting locations is not protected by the First Amendment. *See New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2133 (2022) (finding that "polling places" were historically considered "sensitive places" at which "weapons were altogether prohibited"). *Second*, "messages intended to mislead voters about voting requirements and procedures" are also not protected by the First Amendment. *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1889 n.4 (2018). *Third*, threatening to distribute voters' personal information can constitute unlawful voter intimidation. *See Nguyen*, 673 F.3d at 1265. *Fourth*, a conspiracy to engage in unlawful conduct is not shielded by the First Amendment simply because speech is involved. Making a course of conduct illegal "has never been deemed an abridgment of freedom of speech . . . merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Cox v. State of Louisiana*, 379 U.S. 559, 563 (1965); *see also* Pl.'s Mot. for TRO at 25-26 (collecting authority). Thus, the First Amendment is not a valid basis to dismiss Plaintiff's claims.

V. Plaintiff's Claims are Not Moot

The League has pending claims for which it is seeking monetary damages, permanent injunctive relief, and declaratory relief. Compl. at 28. There are no longer pending motions for a temporary restraining order or preliminary injunction.

The League's claims for non-emergency relief are not moot, as this Court observed at its January 27, 2023 Status Conference. Jan. 27 Tr. at 13:9-14 ("I think plaintiffs are right that [] the case is [] not moot, because there are still the claims for damages and other claims."). As the League has noted, a "live claim" for even "nominal damages will prevent dismissal for mootness." *Bernhardt v. Cnty. of Los Angeles*, 279 F.3d 862, 872 (9th Cir. 2002); *see also Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 (2021) (even a claim for "one dollar in compensation" precludes finding of mootness).

Because these claims remain live, that ends the inquiry, and the Court does not need to reach any further issue with respect to mootness. "A case becomes moot only when it is impossible for a court to grant 'any effectual relief whatever to the prevailing party.'" *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 307 (2012) (quoting *Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000)). "'[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.'" *Id.* at 307–308 (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 442 (1984)). Here, the League has an undisputed concrete interest; its claims are not moot. Any further dispute is not argument about standing, but instead about the scope of proper relief—which this Court should decide after hearing all the evidence. *See Zukerman v. U.S. Postal Serv.*, 961 F.3d 431, 444 (D.C. Cir. 2020) (Enjoining conduct the defendant has ceased is "ultimately '[a] matter relating to the exercise rather than the existence of judicial power,' and should be taken up after [the plaintiff] proves that he is entitled to relief.").

Defendants mistakenly suggest that "any request for further injunctive relief is certainly moot," MTD at 15, but they have confused the standards for mootness with irreparable harm for a preliminary injunction. Applying the correct standard, *Wohl II* held (consistent with *Knox* and *Zuckerman*) that where "Plaintiffs bring causes of action for both injunctive relief and monetary damages, as long as Plaintiffs can properly recover monetary damages," that ends the inquiry—"this action is not moot." 512 F. Supp. 3d at 517. Precisely the same scenario is presented here. Defendants try to distinguish the case by arguing that the Wohl plaintiffs had a live damages claim, whereas here Defendants contend the League has not properly pleaded damages. MTD at 16. But this is not a valid basis for distinction since, as detailed above, Defendants have simply ignored or misconstrued the Complaint's well-pleaded allegations of damages and organizational injury. Defendants have waived all other argument.

But even presuming, *arguendo*, that the League had never pleaded damages, two separate exceptions to mootness would apply: voluntary cessation and capable of repetition yet evading review.

First, the League's claims would not be moot under the voluntary cessation doctrine. "[A]s a general rule, 'voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot.'" *Los Angeles Cnty. v. Davis*, 440 U.S. 625, 631 (1979). "A party 'cannot automatically moot a case simply by ending its unlawful conduct once sued,' else it 'could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where [it] left off, repeating this cycle until [it] achieves all [its] unlawful ends.'" *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 n.2 (2018) (alterations original). The standard "for determining whether a case has been mooted by the defendant's voluntary conduct is stringent" and "[t]he 'heavy burden'" of persuasion "lies with the party asserting mootness." *Friends of the Earth, Inc. v. Laidlaw Env't. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). A defendant asserting mootness by voluntary cessation must make it "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* One indication that the requisite "absolute [clarity]" that the wrongful behavior will not resume has *not* been met is if the defendants continue to defend their behavior as lawful. *See Knox*, 567 U.S. at 307 ("since the union continues to defend the legality" of its conduct, "is not clear why the union would necessarily refrain from [resuming that conduct] in the future").

Defendants' conduct here exactly mirrors the concern that the Supreme Court articulated in *Sanchez-Gomez* and *Knox*. Defendants ceased their conduct in response to the Court's TRO, but they refuse to make any representations to this Court that they will not engage in similar conduct in the future—leaving them poised to "pick up where [they] left off," precisely as the Supreme Court warned.[7] *See Sanchez-Gomez*, 138 S. Ct. at 1537. Far from making it "absolutely clear" that the challenged behavior cannot be expected to recur, Defendants have stated in briefing to the Ninth Circuit that "the events spawning

[7] Plaintiff requested first in open court and then subsequently in writing that Defendants agree that they will abide by the terms of the TRO for upcoming elections. They have declined to do so.

the case at bar" may "reoccur" and that they intend to engage in similar conduct "in future elections . . . to deter illegal voting." *See AARA*, ECF. No. 23 at 8, 10. Just as in *Knox*, Defendants continue to contend that their conduct is lawful. This is the opposite of "the heavy burden" of persuasion that Defendants bear. *Laidlaw*, 528 U.S. at 189. The Complaint explicitly contemplates that ongoing harm from Defendants' conduct "will continue." Compl. at ¶¶ 69, 79, 90-91. The League has therefore sought permanent injunctive relief to "enjoin Defendants . . . from further intimidating voters or otherwise violating the law." *Id.* at 28. The need for prospective relief is hardly "speculative" when Defendants have flatly stated they seek to resume such conduct in the future.

Second, the League's claims for injunctive relief also are not moot under the "capable-of-repetition-yet-evading-review" doctrine. This is because "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *FEC v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 462 (2007). The history of this case shows that is exactly what happened here: the challenged conduct could be challenged in an emergency proceeding, but could not "be fully litigated prior to cessation or expiration," and "there is a reasonable expectation" that Defendant will engage in the same conduct (indeed, they have stated that they intend to continue), and the League "will be subject to the same action," because of the nature of its ongoing work. *See id.* To the extent that Defendants present a factual argument that it is *unlikely*—as opposed to "absolutely clear"—that this conduct will recur, that is a factual matter to be resolved after discovery.

CONCLUSION

For these reasons, the Court should deny Defendants' motion to dismiss.

DATED this 13th day of March, 2023.

OSBORN MALEDON, P.A.

By s/Brandon T. Delgado
Timothy J. Eckstein

Brandon T. Delgado
2929 North Central Avenue, Suite 2100
Phoenix, Arizona 85012-2793

Orion Danjuma (*pro hac vice*)
PROTECT DEMOCRACY PROJECT
82 Nassau St. #601
New York, NY 10038

Rachel F. Homer (*pro hac vice*)
PROTECT DEMOCRACY PROJECT
2020 Pennsylvania Avenue NW, #163
Washington, DC 20006

Benjamin L. Berwick (*pro hac vice*)
PROTECT DEMOCRACY PROJECT
15 Main Street, Suite 312
Watertown, MA 02472

Jared Davidson (*pro hac vice*)
PROTECT DEMOCRACY PROJECT
3014 Dauphine Street, Suite J
New Orleans, LA 70117

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

A copy of the foregoing was electronically transmitted using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all CM/ECF registrants this 13th day of March, 2023.

/s/ J. Rial