

**22-16689**

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IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

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ARIZONA ALLIANCE FOR RETIRED AMERICANS;  
VOTO LATINO,  
*Plaintiffs-Appellants,*

v.

CLEAN ELECTIONS USA; MELODY JENNINGS;  
UNKNOWN PARTIES, named as Doe Defendants 110,  
*Defendants-Appellees.*

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR ARIZONA, PHOENIX

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**BRIEF OF AMICUS CURIAE  
THE HONEST ELECTIONS PROJECT,  
AND RESTORING INTEGRITY AND TRUST  
IN ELECTIONS INC., IN SUPPORT OF NEITHER  
PARTY AND TAKING NO POSITION ON  
AFFIRMANCE OR REVERSAL**

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### **Circuit Rule 26.1 Disclosure Statement**

**1. The full name of every party that the attorneys represent in this case:**

The Honest Elections Project

Restoring Integrity and Trust in Elections, Inc.

**2. The names of all law firms whose partners or associates have appeared for the party in this case or are expected to appear:**

Jason B. Torchinsky and Brennan A.R. Bowen are attorneys with  
Holtzman Vogel Baran Torchinsky & Josefiak, PLLC.

**3. For all amici curiae that are corporations:**

a. Identify all parent corporations for all amicus parties:

None.

b. List any publicly held company that owns 10% or more of any amicus party's stock:

None.

/s/ Jason B. Torchinsky

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## INTEREST OF AMICUS CURIAE<sup>1</sup>

The Honest Elections Project (the “Project”) is an independent, nonpartisan organization devoted to supporting the right of every lawful voter to participate in free and honest elections. Through public engagement, advocacy, and public-interest litigation, the Project defends the fair, reasonable measures that voters and their elected representatives put in place to protect the integrity of the voting process. The Project supports commonsense voting rules and opposes efforts to reshape elections for partisan gain. It also stands firmly against harassment, intimidation, or coercion of voters in in every way.

Restoring Integrity and Trust in Elections, Inc. (“RITE”) is a 501(c)(4) non-profit organization with the mission of protecting the rule of law in the qualifications for, process and administration of, and tabulation of voting throughout the United States. See <https://riteusa.org/>. RITE also supports laws and policies that promote secure elections and enhance voter confidence in the electoral process. Its expertise and national perspective on voting rights, election law, and election administration will assist the Court in reaching a decision consistent with the Constitution and the rule of law.

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<sup>1</sup> Pursuant to Fed. R. App. P. 29(a), no party or party’s counsel authored this brief in whole or in part; no party or party’s counsel contributed money to fund the preparation or submission of this brief; and no other person except amicus curiae, their members, or their counsel contributed money intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

Consequently, both the Project and RITE (collectively, “Amicus Filers”) have a significant interest in this important case, as well as expertise that may assist the Court in reaching its decision.

## **INTRODUCTION & SUMMARY OF ARGUMENT**

The Parties ably defend their respective positions on the appropriateness of the district court’s challenged order. Amicus Filers take no position on the merits of the Parties’ arguments regarding the requested temporary restraining order and preliminary injunction or the district court’s denial of that request.

Instead, this brief emphasizes the sacred nature of the right to vote; highlights how voter intimidation and harassment, in all forms, desecrate that right; and explains how mail-in voting is more susceptible to intimidation and fraud than in-person voting and, consequently, requires greater efforts by the States who use or expand such method of access to voting. In short, this brief makes clear that it should be easy to vote and hard to cheat. It also illustrates how best to achieve those two goals—which is directly relevant to the Court’s decision here.

Moreover, although Amicus Filers do not advocate for either the Appellant or Appellee, should the Court hold for the Appellants, the Court should craft a rule that does not preclude States from taking strong measures to secure the absentee process, including drop boxes, which is a well-recognized interest of the States—even if it is not an interest of Appellees.

## ARGUMENT

President Lincoln once pronounced that “[t]he ballot is stronger than the bullet.” Tom Huizenga and Ashalen Sims, *Sing Out Mr. President: Honest Abe, Bullets and Voting Booths*, NPR (Feb. 11, 2011, 10:09 AM) <https://www.npr.org/sections/deceptivecadence/2011/02/20/133594257/sing-out-mr-president-honest-abe-bullets-and-voting-booths>. True as this is, voters should not have to brave intimidation or harassment to cast their ballots, and States must take action to make ballots secure and inspire public confidence in voting.

The troubling situation in Arizona—where some citizens feel threatened casting their ballots and other citizens believe democracy is threatened by lack of ballot security—is the result of Arizona’s failure to adequately secure ballot drop-box locations and instill confidence in the integrity of Arizona’s mail-in voting process.

It is incumbent upon Arizona, as it is for every State, to make voting easy and cheating difficult so that the right to vote, and people’s trust in the electoral process, are not diminished. This responsibility lies, always in the end, with the State, and not with the private parties. Appellants should not need to engage in private litigation to prevent harassment or intimidation, and Appellees should not have such little

confidence in the security of elections that they feel the need to step into what are traditionally the ballot security functions of government.

**I. It Should Be Easy to Vote.**

**A. Citizens Have a Hallowed Right to Participate in Elections.**

Amicus Filers' belief that it should be easy to vote is well-founded in American history and jurisprudence. *See Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.").

As Alexander Hamilton once opined, "[t]he true principle of a republic is, that the people should choose whom they please to govern them. Representation is imperfect in proportion as the current of popular favor is checked. This great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed." *Powell v. McCormack*, 395 U.S. 486, 540–41 (1969) (quoting 2 Debates on the Federal Constitution 257 (J. Elliot ed. 1876)).

Accordingly, the Supreme Court has reiterated that "[t]hat the right of the electors to be represented by men of their own choice, was so essential for the preservation of all their other rights, that it ought to be considered as one of the most sacred parts of our constitution." *United States Term Limits v. Thornton*, 514 U.S. 779, 795 (1995) (quoting *Powell*, 395 U.S. at 534 n.65). Indeed, the Court has often

remarked that “[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.” *See Wesberry v. Sanders*, 376 U.S. 1, 17 (1964); *see also Burdick v. Takushi*, 504 U.S. 428, 441 (1992) (quoting *Wesberry*); *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (same).

Thus, many an American statesman has waxed poetic about the right to vote. For example, at the signing of the Voting Rights Act (“VRA”), President Lyndon B. Johnson remarked that the “right to vote is the basic right without which all others are meaningless. It gives people, people as individuals, control over their own destinies.” *Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act*, The American Presidency Project (last visited Oct. 28, 2022) <https://www.presidency.ucsb.edu/documents/remarks-the-capitol-rotunda-the-signing-the-voting-rights-act>. But the people cannot exercise this control over their destinies, nor can they protect their other constitutional rights, if they are denied access to the ballot box by intimidation or force. *See Reynolds*, 377 U.S. at 562 (“[T]he franchise in a free and unimpaired manner is preservative of other basic civil and political rights.”).

B. Intimidation, Coercion, and Harassment Violate the Sacred Right of Voting.

The U.S. Supreme Court has made clear that there is no Constitutional right to vote absentee. *McDonald v. Bd. of Elections*, 394 U.S. 802, 807 (1969). When the

States permit or allow absentee voting, it is incumbent upon these States to recognize the unique vulnerabilities of mail voting and take appropriate steps to make the process both accessible and secure. This case illustrates the tension that can occur between these two goals. When these tensions go unresolved, a frustrated populous might—in an attempt to resolve its security concerns—impose on voters’ right to freely access the ballot, resulting in intimidation and harassment that the law rightly prohibits. *See United States v. Madden*, 403 F.3d 347, 352 (6th Cir. 2005) (Boggs, C.J., concurring in part and dissenting in part) (“[V]oter intimidation and coercion [are] . . . obvious harm[s] that federal law strongly and properly prohibits.”).

Consequently, conduct that legitimately puts voters “in fear of harassment and interference with their right to vote[.]” *LULAC v. Pub. Interest Legal Found.*, No. 1:18-cv-00423, 2018 U.S. Dist. LEXIS 136524, at \*10 (E.D. Va. Aug. 13, 2018), should not be tolerated because it infringes upon one of the most sacred parts of our Constitution, *see, e.g., Cardona v. Oakland Unified Sch. Dist., California*, 785 F. Supp. 837, 840 (N.D. Cal. 1992) (“Abridgement or dilution of a right so fundamental as the right to vote constitutes irreparable injury.”); *Ariz. Democratic Party v. Ariz. Republican Party*, No. CV-16-03752-PHX-JJT, 2016 U.S. Dist. LEXIS 154086, at \*38 (D. Ariz. Nov. 4, 2016) (explaining that, if voters suffer “intimidation,

threatening conduct, or coercion such that their right to vote freely is abridged, or altogether extinguished, [voters] would be irreparably harmed.”).

All forms of voter intimidation are reprehensible, and courts have judged them accordingly. *See, e.g., United States v. Nguyen*, 673 F.3d 1259, 1264 (9th Cir. 2012) (holding that the wide distribution of a letter among immigrants—warning “that if they voted in the upcoming election their personal information would be collected” and could be provided to anti-immigration organizations—constituted sufficient evidence to find unlawful intimidation under California law); *U.S. v. McLeod*, 385 F.2d 734, 740–41 (5th Cir. 1967) (holding that a pattern of baseless arrests of Black individuals attending a voter-registration meeting was intimidating and coercive conduct); *U.S. v. Beaty*, 288 F.2d 653, 654–57 (6th Cir. 1961) (holding that the eviction of sharecroppers as punishment for voter registration was unlawful intimidation).

As the above examples illustrate, voter intimidation can take many forms and have many flavors. *See, e.g., A Sampling of Recent Election Fraud Cases from Across the United States*, The Heritage Foundation (last visited Oct. 30, 2022) <https://www.heritage.org/voterfraud> (cataloging nearly 1,400 “proven instances of voter fraud,” where each instance was one “in which a public official, usually a prosecutor, thought it serious enough to act upon it,” and each “one ended in a finding that the individual had engaged in wrongdoing in connection with an election

hoping to affect its outcome—or that the results of an election were sufficiently in question and had to be overturned”).

Relevant here, mail-in and no-excuse absentee voting multiply the opportunities for voter intimidation and fraud. This type of voting takes place, for the most part, in private, beyond the salutary effects of both watchful public officials—and a watchful public. For instance, no one is allowed to watch a person vote in person. They may be coerced to the polls, but no one can know how they voted—or if they voted at all. This assumption does not hold for mail-in and no excuse absentee balloting, where there are no protections against such coercion and ballots may, in many cases, be harvested without limitation. As a result, voters have legitimate concerns about the security of mail-in and no-excuse absentee voting, especially with its rapid expansion in recent years.

For example, the former Mayor of Martin, Kentucky, Ruth Thomasine Robinson, was sentenced to 90 months in federal prison for intimidating poor and disabled citizens to gain their votes during her 2012 re-election campaign. *Former Mayor of Martin Sentenced To 90 Months for Civil Rights Offenses, Fraud, Vote Buying and Identity Theft*, Department of Justice (Dec. 16, 2014) <https://www.justice.gov/usao-edky/pr/former-mayor-martin-sentenced-90-months-civil-rights-offenses-fraud-vote-buying-and>. Specifically, Robinson and “members of the conspiracy directed residents of public housing to vote by absentee ballot

under the supervision of Thomasine Robinson or another member of the conspiracy.” *Id.* What is more, “[t]rial testimony established that the conspirators completed absentee ballots, marking their choice of candidates, and instructing the voters to sign the pre-marked ballots.” *Id.* “Voters who complied by voting for Thomasine Robinson received promises of better living arrangements and other considerations,” but voters who did not “faced eviction or the loss of priority for public housing.” *Id.*

And, even more recently, a mayoral election was overturned because of absentee ballot issues. See Troy Closson, *New Local Election Ordered in N.J. After Mail-In Voter Fraud Charges*, New York Times (Aug. 19, 2020) <https://www.nytimes.com/2020/08/19/nyregion/nj-election-mail-voting-fraud.html>.

## **II. It Should Be Hard to Cheat.**

### **A. Mail-In Voting Presents More Opportunities for Fraud and Intimidation than does In-Person Voting.**

Simply put, mail-in voting creates more links in the chain between a ballot being created and a ballot being cast. The increased number of links creates increased opportunities for political chicanery, and partisan actors of all political stripes use this increased opportunity to engage in fraud and intimidation to gain an electoral advantage.

For example, in the 2018 race for the North Carolina’s ninth congressional district, a “Republican political operative” was accused of ballot tampering. Richard

Gonzales, *North Carolina GOP Operative Faces New Felony Charges That Allege Ballot Fraud*, NPR (July 30, 2019, 10:29 PM), <https://www.npr.org/2019/07/30/746800630/north-carolina-gop-operative-faces-new-felony-charges-that-allege-ballot-fraud>. There, “the election results were overturned by the state after an investigation into an absentee ballot operation on [the Republican candidate’s] behalf suggested that” ballots had been “improperly collected and possibly tampered with” by the political operative. *Id.* This resulted in the operative, along with seven alleged co-conspirators, being indicted and a new election being held. *Id.*

In an example closer to home, the former Democrat Mayor of San Luis, Arizona, Guillermina Fuentes, pleaded guilty to ballot harvesting charges earlier this year. Bob Christie, *Former San Luis Mayor Pleads Guilty to Illegally Collecting Early Ballots in 2020 Primary*, AZCentral (June 2, 2022, 5:13 PM), <https://www.azcentral.com/story/news/local/arizona/2022/06/02/former-san-luis-mayor-pleads-guilty-illegally-collecting-early-ballots/7491766001/>. Fuentes was a well-known political figure in her community and worked as a political consultant. *Guillermina Fuentes*, Voter Fraud Report, The Heritage Foundation (last visited Oct. 31, 2022) <https://www.heritage.org/voterfraud/10167>. Using that influence, Fuentes persuaded voters to allow her to collect their ballots and, in some instances, fill out ballots on behalf of the voters. *Id.* Such activity is clearly prohibited under Arizona

law, *see* Ariz. Rev. Stat. § 16-1005, and it was possible only because of the opportunities presented by mail-in and no-excuse absentee balloting.

As is evident from the above examples, voting and election fraud—especially with respect to absentee ballots—remains a bipartisan problem that States have a duty to prevent.

B. States Have a Duty to Enact Precautions That Reduce Incidents of Intimidation and Fraud in Elections Generally and in Mail-In Voting Specifically.

The Supreme Court “has recognized that a State has a compelling interest in ensuring that an individual’s right to vote is not undermined by fraud in the election process.” *Burson v. Freeman*, 504 U.S. 191, 199 (1992). Thus, the Court has “upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself.” *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983) (collecting cases). Notably, a State has a compelling interest in “maintaining fairness, honesty, and order” in an election, *Green v. Mortham*, 155 F.3d 1332, 1335 (11th Cir. 1998) (citing *Burdick*, 504 U.S. at 433); “avoiding confusion, deception, and even frustration of the democratic process,” *Jenness v. Fortson*, 403 U.S. 431, 442 (1971); and preventing voter fraud and preserving the integrity of its election process, *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006).

This is equally true in the areas of mail-in voting. As the Supreme Court recently explained,

[P]revention of fraud is not the only legitimate interest served by restrictions on ballot collection. As the Carter-Baker Commission recognized, third-party ballot collection can lead to pressure and intimidation. And it should go without saying that a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders.

*Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2348 (2021).

Therefore, States should act on their “interest in protecting the integrity, fairness, and efficiency of their ballots and election processes,” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997), by passing common-sense ballot security measures that would increase the confidence of American voters in the security of their elections—rendering vigilant poll-monitors a bygone relic.

*Amicus* HEP has created a list of proposed reforms that, if adopted, will help secure the vote and help to rebuild voter confidence. *Safeguarding Future Elections: Critical Reforms to Secure Voter Integrity and Rebuild Confidence in American Elections*, Honest Elections Project (Feb. 2021)

<https://www.honestelections.org/wp-content/uploads/2021/02/HEP-Election-Reform-Report.pdf>. Those proposed reforms specifically address mail-in voting and the need for voters having “confidence that their ballots will not be stolen, tampered with, or destroyed.” *Id.* at 4. The proposed reforms around mail-in voting include the following, and we note below examples of where provisions similar to these are already in place:

A. Ban “ballot trafficking” (also known as “ballot harvesting”) by third parties. No one other than a voter’s caregiver, an immediate family member, or fellow household resident should be permitted to handle his or her ballot. *See* Ariz. Rev. Stat. § 16-1005(I)(2).

B. Prohibit all forms of compensation for ballot collection. *See* N.D. Cent. Code § 16.1-07-08; Fla. Stat. Ann. § 97.0291.

C. Individuals should be permitted to “assist” no more than three voters with filling out or casting a ballot in a given election. *See* Ark. Code § 7-5-310(b)(4)(B) (six-voter limit), held preempted by the VRA in *Ark. United v. Thurston*, No. 5:20-cv-5193, 2022 U.S. Dist. LEXIS 149490 (W.D. Ark. Aug. 19, 2022), appeal pending *Ark. United et al. v. Thurston et al.*, No. 22-2918 (8th Cir. 2022).

D. Each absentee ballot should be signed by a witness, and there should be reasonable limits on the number of ballots an individual may witness.

E. Candidates for public office should be barred from collecting, returning, or assisting with the completion of absentee ballots.

F. Each absentee vote must have a clear and auditable chain of custody, including the identities of anyone who assists a voter in completing or returning a ballot. *See* N.D. Cent. Code § 16.1-07-08.

G. Drop boxes should be subject to clear and uniform rules that govern deployment, that mandate adequate security (e.g., through security cameras viewable by the public), require placement inside of a government building, and that limit drop box availability to regular business hours.

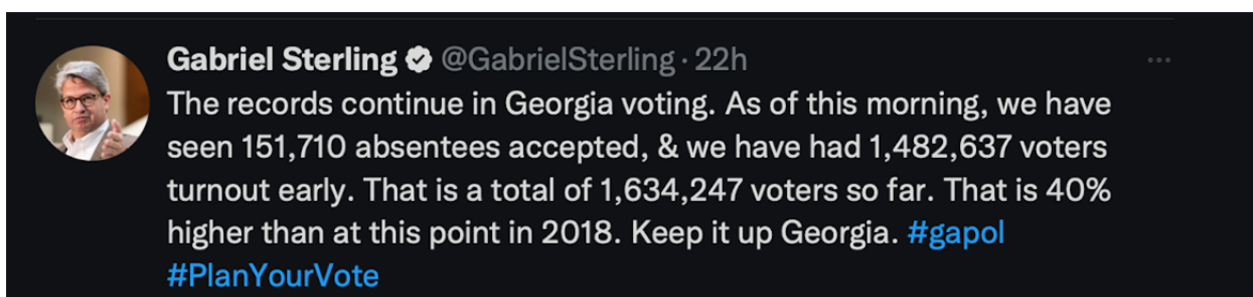
H. Secrecy envelopes including a signature and date should be required for all absentee ballots. *See* 25 Pa. Stat. § 3146.4.

*Id.* (internal citations omitted).

States have already begun to implement some of these measures. *See, e.g.*, ORC Ann. §§ 3509.05, 3509.08 (limiting, in Ohio, ballot delivery to family members

of a voter and establishing an alternate approach in cases of disability or confinement); N.D. Cent. Code § 16.1-07-08 (barring all compensation for “acting as an agent” for a voter in North Dakota); Ark. Code Ann. § 7-5-403 (requiring “designated bearers” to sign an oath and show photographic ID when collecting or returning an absentee ballot in the State of Arkansas). Notably, Arizona has implemented some of these measures. *See, e.g.*, Ariz. Rev. Stat. § 16-1005(I)(2) (permitting only a “family member, household member or caregiver of the voter” to return an individual’s mail-in ballot); *see also Brnovich*, 141 S. Ct. at 2348 (upholding Arizona’s anti-ballot harvesting law against a challenge under the VRA).

However, as in nearly all things, there is no perfect system; Arizona and other states should continue to review their systems and processes to improve and adopt measures necessary to bolster voter confidence in the security of its elections. Empirical evidence strongly demonstrates that, when States do so, voter participation increases. In Georgia, for example, after passing a series of reforms related to early and absentee voting and the security of drop boxes, the Chief Operating Officer of the Georgia Secretary of State posted the following update:



Gabriel Sterling (@GabrielSterling), Twitter (Oct. 30, 2022, 10:09 AM), <https://twitter.com/gabrielsterling/status/1586721952571473921?s=61&t=4WGi5gcPFbzh7r6g3sVvew>.

Appellants in this matter are not without remedy through traditional federal and state law enforcement mechanisms. On October 24, 2022, the Secretary of State in Arizona sent referrals to the United States Department of Justice and the Arizona Attorney General's office. *See* Press Release, Katie Hobbs, Arizona Secretary of State, *Sec. Hobbs Refers Additional Reports of Voter Intimidation, Election Worker Harassment in Arizona to Law Enforcement* (Oct. 24, 2022), <https://azsos.gov/about-office/media-center/press-releases/1474>. And news reports indicate that the U.S. Department of Justice has received and is reviewing those referrals. David Gilbert, *The DOJ is Already Investigating Reports of Midterm Voter Intimidation*, Vice (Oct. 21, 2022, 8:23 AM), <https://www.vice.com/en/article/wxn7zb/midterms-voter-intimidation>. Should the Appellants here have more information or evidence, providing that information and evidence to law enforcement should be of highest priority.

Until Arizona, and other States, take the necessary steps to rebuild confidence in the integrity of the mail-in vote process by implementing common-sense voting reforms and securing the voting process, citizens may feel a civic duty to take it upon themselves to step into a traditional state role and participate in private efforts to

secure ballot-drop boxes and other aspects of elections. Simply put, States' inaction invites citizens' action. Because it is a compelling interest of States to secure their respective elections, *Burson*, 504 U.S. at 199, they should act on those compelling interests—by securing the ballot box—so that situations like the one here do not become commonplace.

## CONCLUSION

The current situation is an unfortunate result of Arizona's lack confidence in the State's voting system. People in Arizona are not alone in this perception of lack of security and integrity in the absentee voting process. Indeed, until States adopt better safeguards for their mail-in votes and ballot drop-boxes, public confidence will remain shaken, citizens will be tempted to take private actions, opportunities for ballot harvesting and other forms of intimidation and coercion behind closed doors will persist, and law enforcement officials and courts will be left with handling complaints and the unenviable task of deciding last-minute remedies to issues that have long been known to legislative bodies and election officials.

Amicus Filers do not advocate for either the Appellant or Appellee. However, should the Court hold for the Appellants, the Court should craft a rule that does not preclude States from taking strong measures to secure the absentee process, including drop boxes, which is a well-recognized interest of States—even if it is not an interest of Appellees.

Respectfully submitted,

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