

1 KRISTEN CLARKE
Assistant Attorney General
2 Civil Rights Division

GARY M. RESTAINO
United States Attorney
District of Arizona

3 ELISE C. BODDIE
Principal Deputy Assistant Attorney General
4 Civil Rights Division

5 T. CHRISTIAN HERREN, JR. (AL Bar No. ASB6671R63T)
RICHARD A. DELLHEIM (NY Bar No. 2564177)
6 DANA PAIKOWSKY (CA Bar No. 329562)
MICHAEL E. STEWART (DC Bar No. 144926)
7 JENNIFER J. YUN (DC Bar No. 1600953)
Attorneys, Voting Section
8 Civil Rights Division
U.S. Department of Justice
9 950 Pennsylvania Avenue, NW
Washington, DC 20530
10 Tel.: (202) 307-2767 / Fax: (202) 307-3961
Email: Chris.Herren@usdoj.gov
11 Richard.Dellheim@usdoj.gov
Dana.Paikowsky@usdoj.gov
12 Michael.Stewart3@usdoj.gov
Jennifer.Yun@usdoj.gov
13 *Attorneys for the United States*

14 **IN THE UNITED STATES DISTRICT COURT**
15 **FOR THE DISTRICT OF ARIZONA**

16 League of Women Voters of Arizona,
17
Plaintiff,
18 v.
19 Lions of Liberty LLC, et al.,
20 Defendants.

No. CV-22-08196-MTL
**Statement of Interest of the
United States**

21
22

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

TABLE OF CONTENTS

INTEREST OF THE UNITED STATES..... 1

INTRODUCTION..... 1

FACTUAL BACKGROUND 2

PROCEDURAL BACKGROUND 3

STATUTORY BACKGROUND..... 3

ARGUMENT 4

 I. Section 11(b) of the Voting Rights Act Prohibits Intimidation and Attempted
Intimidation of Voters Attempting to Vote at Ballot Drop Boxes. 4

 A. Section 11(b) Broadly Prohibits Intimidation, Threats, and Coercion 4

 B. Section 11(b)’s Protections Cover Voters Who Vote Using Mail Ballots and
Ballot Drop Boxes 9

 II. This Court May Grant Relief Against Violations of Section 11(b) Consistent with
the First Amendment. 11

CONCLUSION 18

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

TABLE OF AUTHORITIES

CASES

ACLU of Ill. v. Alvarez, 679 F.3d 583 (7th Cir. 2012)..... 13

Allen v. City of Graham, No. 1:20-CV-997, 2021 WL 2223772 (M.D.N.C. June 2, 2021)
..... 17

Animal Legal Def. Fund v. Wasden, 878 F.3d 1184 (9th Cir. 2018) 14

Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett, 564 U.S. 721 (2011) 13

Askins v. Dep’t of Homeland Sec., 899 F.3d 1035 (9th Cir. 2018)..... 13

Bartlett v. Strickland, 556 U.S. 1 (2009)..... 12

Brnovich v. Democratic Nat’l Comm., 141 S. Ct. 2321 (2021) 10

Burson v. Freeman, 504 U.S. 191 (1992) (plurality op.) 12

Council on Am.-Islamic Rels.-Minn. v. Atlas Aegis, LLC, 497 F. Supp. 3d 371 (D. Minn.
2020).....*passim*

Daschle v. Thune, No. 4:04-cv-4177, ECF No. 6 (D.S.D. Nov. 1, 2004)..... 6, 12

Democracy N.C. v. N.C. State Bd. of Elections, No. 20-cv-457, 2022 WL 715973
(M.D.N.C. Mar. 10, 2022)..... 10

Democratic Nat. Comm. v. Republican Nat. Comm., 671 F. Supp. 2d 575 (D.N.J. 2009)
..... 6, 7

Doe v. Reed, 561 U.S. 186 (2010)..... 16

Elonis v. United States, 575 U.S. 723 (2015)..... 17

First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765 (1978)..... 14

1 | *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011)..... 13

2 | *Hill v. Colorado*, 530 U.S. 703 (2000)..... 12

3 | *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995) 15

4 | *Irizarry v. Yehia*, 38 F.4th 1282 (10th Cir. 2022) 13

5 | *Jackson v. Riddell*, 476 F. Supp. 849 (N.D. Miss. 1979)..... 4

6 | *League of United Latin Am. Citizens v. Pub. Int. Legal Found.*, No. 1:18-CV-00423, 2018

7 | WL 3848404 (E.D. Va. Aug. 13, 2018) 8, 17

8 | *Nat’l Coal. on Black Civic Participation v. Wohl*, 498 F. Supp. 3d 457 (S.D.N.Y. 2020)

9 | (“*Wohl I*”)..... 5, 9, 10, 16

10 | *Nat’l Coal. on Black Civic Participation v. Wohl*, 512 F. Supp. 3d 500, 516 (S.D.N.Y.

11 | 2021) (“*Wohl II*”) 4, 8, 16

12 | *Obama for Am. v. Husted*, 697 F.3d 423 (6th Cir. 2012)..... 16

13 | *Orozco-Lopez v. Garland*, 11 F.4th 764 (9th Cir. 2021)..... 10

14 | *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d

15 | 1058 (9th Cir. 2002) 16

16 | *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)..... 11, 14

17 | *Rumsfeld v. Forum for Acad. & Inst’l Rights, Inc.*, 547 U.S. 47 (2006)..... 14, 15

18 | *Sanchez v. Cegavske*, 214 F. Supp. 3d 961 (D. Nev. 2016)..... 16

19 | *Stanley v. Georgia*, 394 U.S. 557 (1969) 14

20 | *United States v. Bachmeier*, 8 F.4th 1059 (9th Cir. 2021) 17

21 | *United States v. Bagdasarian*, 652 F.3d 1113 (9th Cir. 2011)..... 17

22 | *United States v. Barnett*, 667 F.2d 835 (9th Cir. 1982)..... 14

1 *United States v. Buttorff*, 572 F.2d 619 (8th Cir. 1978) 14

2 *United States v. Clark*, 249 F. Supp. 720 (S.D. Ala. 1965)..... 5

3 *United States v. Gonzales*, 520 U.S. 1 (1997)..... 10

4 *United States v. McLeod*, 385 F.2d 734 (5th Cir. 1967) 9, 18

5 *United States v. Nguyen*, 673 F.3d 1259 (9th Cir. 2012) 8

6 *United States v. Stewart*, 420 F.3d 1007 (9th Cir. 2005) 16

7 *United States v. The New Black Panther Party for Self-Defense*, 2:09-cv-00065, ECF No.

8 21 (E.D. Pa. May 18, 2009)..... 12

9 *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (Kennedy, J., concurring) 16

10 *Virginia v. Black*, 538 U.S. 343 (2003)..... 17

11 *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) 11

12 *Whatley v. City of Vidalia*, 399 F.2d 521 (5th Cir. 1968) 5

13 **STATUTES**

14 28 U.S.C. § 517 1

15 42 U.S.C. § 1985(3)..... 3

16 52 U.S.C. § 10307(b)..... 1, 3, 4

17 52 U.S.C. § 10308(d)..... 1

18 52 U.S.C. § 10310(c)(1) 4, 10

19 **OTHER AUTHORITIES**

20 Complaint, *United States v. N.C. Republican. Party*, 92-161-CIV-5-F (E.D.N.C. Feb. 26,

21 1992)..... 8

22

1 Consent Decree, *United States v. N.C. Republican Party*, 92-161-CIV-5-F (E.D.N.C. Feb.
2 27, 1992)..... 8

3 H.R. Rep. No. 89-439, at 30 (1965), *as reprinted in* 1965 U.S.C.C.A.N. 2437, 2462
4 4, 17

5 Letter from Anita S. Hodgkiss, Deputy Assistant Att’y Gen., Civil Rights Div., Dep’t of
6 Justice to the Honorable Martin Frost, Member of Congress (Oct. 30, 1998)..... 6

7 Letter from John Tanner, Acting Chief, Voting Section, Civil Rights Div., Dep’t of
8 Justice to Edward S. Allen Esq. (Nov. 2, 1994)..... 5, 6

9 Press Release of U.S. Attorney’s Office for the District of Arizona, October 19, 2020 6

10 Press Release of U.S. Attorney’s Office for the District of Arizona, October 24, 2016 7

11 Press Release of U.S. Attorney’s Office for the District of Arizona, October 29, 2018 7

12 Press Release of U.S. Attorney’s Office for the District of Arizona, October 31, 2014 7

13 *Voting Rights Act of 1965: Hearing Before the H. Comm. on the Judiciary*, 89th Cong. 12
14 (1965) (statement of Nicholas deB. Katzenbach, Att’y Gen. of the United States) 5

15

16

17

18

19

20

21

22

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

INTEREST OF THE UNITED STATES

The United States respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517, which authorizes the Attorney General “to attend to the interests of the United States in a suit pending in a court of the United States” This case presents an important question regarding the interpretation of Section 11(b) of the Voting Rights Act, 52 U.S.C. § 10307(b). Congress has vested the Attorney General with authority to enforce Section 11(b) on behalf of the United States. *See* 52 U.S.C. § 10308(d). Accordingly, the United States has a substantial interest in ensuring proper interpretation of Section 11(b).

The United States expresses no view on any factual dispute before the Court, nor on any legal question presented other than the interpretation of Section 11(b).

INTRODUCTION

This case alleges that organized and sometimes armed groups of individuals have engaged in campaigns to surveil, video record, and harass voters as they exercise their most fundamental right, the right to vote. These allegations raise serious concerns of voter intimidation, which is proscribed under Section 11(b) of the Voting Rights Act. The United States files this Statement of Interest for the limited purpose of aiding the Court’s interpretation of Section 11(b) and to provide illustrative, but by no means exhaustive, examples of Section 11(b)’s appropriate application to protect voters from threats, intimidation, and coercion.

Section 11(b), 52 U.S.C. § 10307(b), broadly prohibits threats and acts of intimidation and coercion at all stages of the voting process, including voters’ depositing

1 of ballots in a drop box where provided for by state or local law. By the statute's plain
2 terms, Congress brought within Section 11(b)'s wide ambit both violent and nonviolent
3 conduct that has the prohibited effect of intimidating, threatening, or coercing voters, or
4 attempting to do so. Polling-place conduct, such as private surveillance or investigation,
5 that would ordinarily tend to intimidate voters and has little salutary purpose has long
6 been considered to implicate Section 11(b). And while balancing any prohibition on
7 conduct or potential remedy against an individual's First Amendment rights can present a
8 fact-intensive inquiry, protecting voters' right to cast their ballot without the specter of
9 threats, intimidation, or coercion is fully consistent with appropriately crafted limitations
10 on private actors' conduct.

11 **FACTUAL BACKGROUND**

12 According to allegations in Plaintiff League of Women Voters of Arizona's
13 Complaint, Defendants Lions of Liberty LLC, Yavapai County Preparedness Team, and
14 their members "have commenced a widespread campaign to surveil all drop boxes in
15 Yavapai County, film voters, and then report to law enforcement any voters who deposit
16 multiple ballots," despite Arizona law permitting individuals to deposit multiple voters'
17 ballots in certain circumstances. Compl. ¶¶ 5, 31-42, ECF No. 1 (emphasis omitted).
18 The Complaint also alleges that Defendant Clean Elections USA (CEUSA) and its
19 founder, Defendant Melody Jennings, intend to "publicly reveal [voters'] personal
20 information online" and have "peddled images of innocent voters who have used drop
21 boxes and baselessly claimed" those voters are participating in election fraud in order to
22 deter use of drop boxes. Compl. ¶¶ 6, 43-44, 49-53. According to the Complaint,

1 individuals affiliated with CEUSA have also “guard[ed] drop boxes while armed and in
2 tactical gear,” and Defendant Jennings has stated “these tactics are already deterring
3 voters from using drop boxes.” Compl. ¶¶ 6, 45, 55-56, 58.

4 **PROCEDURAL BACKGROUND**

5 On October 25, 2022, Plaintiff filed a Complaint seeking declaratory and
6 injunctive relief under Section 11(b) of the Voting Rights Act, 52 U.S.C. § 10307(b), and
7 under Section 2 of the Ku Klux Klan Act of 1871, 42 U.S.C. § 1985(3). *See* Compl.,
8 ECF No. 1. On October 27, 2022, Plaintiff moved to transfer this case to this Court as
9 related to *Arizona Alliance for Retired Americans v. Clean Elections USA*, No. 2:22-cv-
10 1823, based on common allegations and defendants. ECF No. 8.¹ This Court granted the
11 motion to transfer. ECF No. 10. On October 28, Plaintiff filed a motion for a temporary
12 restraining order and preliminary injunction, and a number of supporting declarations
13 from voters. ECF No. 11.

14 **STATUTORY BACKGROUND**

15 Section 11(b) of the Voting Rights Act, 52 U.S.C. § 10307(b), holds that “[n]o
16 person, whether acting under color of law or otherwise, shall intimidate, threaten, or
17 coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to
18 vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any

19
20 ¹ On October 28, 2022, this Court denied a temporary restraining order and preliminary
21 injunction in *Arizona Alliance for Retired Americans*, finding on the facts presented in
22 that case that preliminary injunctive relief was not appropriate. *See* Order, *Ariz. Alliance
for Retired Americans v. Clean Elections USA*, No. 2:22-cv-1823, ECF No. 32 (Oct. 28,
2022).

1 person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten,
2 or coerce any person for exercising any powers or duties” under specific provisions of the
3 Voting Rights Act. Section 11(b) does not require proof of racial motivation or
4 “subjective purpose or intent.” H.R. Rep. No. 89-439, at 30 (1965), *as reprinted in* 1965
5 U.S.C.C.A.N. 2437, 2462. Section 11(b) “is to be given an expansive meaning,” *Jackson*
6 *v. Riddell*, 476 F. Supp. 849, 859 (N.D. Miss. 1979), and incorporates the comprehensive
7 definition of “vote” and “voting” in Section 14 of the Voting Rights Act, 52 U.S.C.
8 § 10310(c)(1).

9 ARGUMENT

10 I. Section 11(b) of the Voting Rights Act Prohibits Intimidation and Attempted 11 Intimidation of Voters Attempting to Vote at Ballot Drop Boxes.

12 A. Section 11(b) Broadly Prohibits Intimidation, Threats, and Coercion

13 Section 11(b) of the Voting Rights Act broadly prohibits any person from
14 intimidating, threatening, or coercing any other person for voting or attempting to vote or
15 for urging or aiding another person in voting or attempting to vote. *See* 52 U.S.C.
16 § 10307(b). Section 11(b) does not require proof that a defendant caused a voter to
17 refrain from casting a ballot or to vote contrary to their preferences: Section 11(b) applies
18 equally to prohibit an “*attempt* to intimidate, threaten, or coerce” as it does to the
19 completed act. 52 U.S.C. § 10307(b) (emphasis added); *see Nat’l Coal. on Black Civic*
20 *Participation v. Wohl*, 512 F. Supp. 3d 500, 516 (S.D.N.Y. 2021) (“*Wohl II*”). In other
21 words, the statute constrains successful, unsuccessful, and in-progress attempts to coerce,
22

1 intimidate, or threaten alike. *See United States v. Clark*, 249 F. Supp. 720, 728 (S.D. Ala.
2 1965).

3 “[T]hreats, intimidation or coercion may take on many forms.” *Nat’l Coal. on*
4 *Black Civic Participation v. Wohl*, 498 F. Supp. 3d 457 (S.D.N.Y. 2020) (“*Wohl I*”)
5 (quoting *United States v. Beaty*, 288 F.2d 653, 656 (6th Cir. 1961)). Under Section 11(b),
6 “[t]he threatened injury need not be one of violence or bodily harm,” and “threats of
7 economic harm, legal action, dissemination of personal information, and surveillance can
8 qualify depending on the circumstances.” *Id.* at 477; *see also Voting Rights Act of 1965:*
9 *Hearing Before the H. Comm. on the Judiciary*, 89th Cong. 12 (1965) (statement of
10 Nicholas deB. Katzenbach, Att’y Gen. of the United States) (explaining that Section
11 11(b) was designed to proscribe violent intimidation as well as more “subtle forms of
12 pressure”), <https://perma.cc/N9S4-KH2P>. In this context, courts are often called on to
13 determine when ordinarily lawful activities are being used for unlawful ends. *See, e.g.,*
14 *Whatley v. City of Vidalia*, 399 F.2d 521, 526 (5th Cir. 1968) (holding that “spurious
15 prosecutions” of those aiding voter registration fell within the scope of Section 11(b));
16 *Wohl I*, 498 F. Supp. 3d at 477 (finding a Section 11(b) violation for sending robocalls
17 containing false information intended to scare recipients from voting by mail).

18 Although lawful poll-watching activities can support democratic transparency and
19 accountability, when private citizens form “ballot security forces” and attempt to take
20 over the State’s legitimate role of overseeing and policing elections, the risk of voter
21 intimidation—and violating federal law—is significant. Letter from John Tanner, Acting
22 Chief, Voting Section, Civil Rights Div., Dep’t of Justice to Edward S. Allen Esq. (Nov.

1 2, 1994) (Exhibit 1); *see also Democratic Nat. Comm. v. Republican Nat. Comm.*, 671 F.
2 Supp. 2d 575, 610 (D.N.J. 2009), *aff'd*, 673 F.3d 192 (3d Cir. 2012) (finding that the
3 “prevalence of voter intimidation” has rendered “[private] ballot security initiatives . . . a
4 far greater threat to the integrity of modern elections than in-person voter fraud”);
5 *Council on Am.-Islamic Rels.-Minn. v. Atlas Aegis, LLC*, 497 F. Supp. 3d 371, 379 (D.
6 Minn. 2020) (finding “[t]he presence of armed ‘guards’ at the polls with no connection to
7 state government is certainly likely to intimidate voters”).

8 While Section 11(b) does not define any specifically prohibited activities, certain
9 kinds of citizen-led election monitoring activities are more likely to put voters in
10 reasonable fear of harassment, intimidation, coercion, or interference with their voting
11 rights, and therefore run afoul of Section 11(b). Video recording or photographing voters
12 during the voting process, for example, has long been recognized to raise particularly
13 acute concerns under Section 11(b).² *See Daschle v. Thune*, No. 4:04-cv-4177, ECF No.

14
15 ² The United States has routinely warned both the public and state officials that private
16 campaigns to video record voters risks voter intimidation in violation of federal law. In a
17 1994 letter on the subject, the Department informed officials that such activity could
18 violate the Voting Rights Act, noting that “[w]hile this type of action often is proffered in
19 the guise of helping law enforcement officials, the filming at and near the polls achieves
20 nothing of the kind. Instead, we have found that such action intimidates lawful voters
21 and interjects an element of fear into the process by which our republican form of
22 government is guaranteed to our citizens.” Letter from John Tanner, Acting Chief,
Voting Section, Civil Rights Div., Dep’t of Justice to Edward S. Allen Esq. (Nov. 2,
1994) (Exhibit 1); *see also, e.g.*, Letter from Anita S. Hodgkiss, Deputy Assistant Att’y
Gen., Civil Rights Div., Dep’t of Justice to the Honorable Martin Frost, Member of
Congress (Oct. 30, 1998) (“It is our position that all parties and organizations must avoid
intimidating minority voters at the polls by filming at polling places on election day.”)
(Exhibit 3); Press Release of U.S. Attorney’s Office for the District of Arizona, October
19, 2020 (“Actions designed to interrupt or intimidate a voter at a polling place by

1 6 (D.S.D. Nov. 1, 2004) (issuing a temporary restraining order because recording license
2 plate numbers of Native American voters and those who drove them to the polls likely
3 violated Section 11(b)) (Exhibit 2). Courts have identified similar issues with efforts to
4 track or follow voters; ascertain and record voters' personal information; obstruct, accost,
5 question, or challenge voters; target discrete groups of voters based on identity or
6 political affiliation; or monitor voting sites while armed or outfitted in military- or police-
7 style uniforms. *See id.*; *Council on Am.-Islamic Rels.-Minn.*, 497 F. Supp. 3d at 381
8 (enjoining under Section 11(b) a private security force's poll monitoring activities);
9 *Democratic Nat. Comm.*, 671 F. Supp. 2d at 579 (discussing various private ballot
10 security initiatives that raised intimidation concerns, including those involving baseless
11 voter challenges, armed and uniformed poll monitoring, and private investigations of
12 voters). Although none of these activities is pre-requisite to finding a Section 11(b)
13 violation, their use by private actors, singly or in combination, may nonetheless suffice to
14 make such a finding.

15 Other vigilante ballot security efforts that threaten to subject voters to adverse
16 consequences, including harassment, "public opprobrium," and baseless allegations of
17 felonious conduct for voting or attempting to vote can run afoul of Section 11(b). *See*

18
19 _____
20 questioning, challenging, filming, or photographing the voter under the pretext of trying
21 to uncover illegal voting may violate federal voting rights law."), <https://perma.cc/5UN3-ZCRX>;
22 Press Release of U.S. Attorney's Office for the District of Arizona, October 29,
2018 (similar), <https://perma.cc/PXN7-9BB4>; Press Release of U.S. Attorney's Office for
the District of Arizona, October 24, 2016 (similar), <https://perma.cc/EQY5-E3YY>; Press
Release of U.S. Attorney's Office for the District of Arizona, October 31, 2014 (similar),
<https://perma.cc/V3QL-WHGV>.

1 *League of United Latin Am. Citizens v. Pub. Int. Legal Found.*, No. 1:18-CV-00423, 2018
2 WL 3848404, at *4 (E.D. Va. Aug. 13, 2018) (finding plaintiffs stated a claim for a
3 violation of Section 11(b) alleging that defendants had published voters’ names and
4 personal information in “a report condemning felonious voter registration in a clear effort
5 to subject the named individuals to public opprobrium”); *Wohl II*, 512 F. Supp. 3d at 511
6 (noting that “the threat of dissemination of personal information alone could plausibly
7 support a Section 11(b) claim”); *see also United States v. Nguyen*, 673 F.3d 1259, 1265
8 (9th Cir. 2012) (finding that a letter sent to Latino voters that warned “if they voted in the
9 upcoming election their personal information would be collected . . . [and] provided to
10 organizations who are ‘against immigration’” constituted voter intimidation under
11 California law).³

14 ³ In another case, the United States challenged under Section 11(b) a political campaign’s
15 mailing of over 100,000 postcards targeting Black voters and falsely claiming that voters
16 must have lived in their current precinct for more than 30 days to vote and that they
17 would be asked at the polling place to state the length of their current residence.
18 Complaint ¶¶ 21–30, *United States v. N.C. Republican Party*, 92-161-CIV-5-F (E.D.N.C.
19 Feb. 26, 1992). The postcard message ended with a warning that “[i]t is a Federal Crime,
20 punishable up to five years in jail, to knowingly give false information about your name,
21 residence, or period of residence to an Election Official.” *Id.* ¶ 21. The case was
22 resolved through a consent decree that enjoined the defendants from engaging in “any
activity or program which is designed, in whole or in part, to intimidate, threaten, coerce,
deter, or otherwise interfere with a qualified voter’s lawful exercise of the franchise or
which, based on objective factors, would reasonably be expected to have that effect” or
“any ballot security program directed at qualified voters in which the racial minority
status of some or all of such voters is a factor in the decision to target those voters.”
Consent Decree, *United States v. N.C. Republican Party*, 92-161-CIV-5-F (E.D.N.C. Feb.
27, 1992).

1 To determine if unlawful intimidation or attempted intimidation has occurred,
2 context matters: the challenged activities “cannot be viewed in isolation” but instead
3 “must be considered against the background of contemporaneous events . . . and the
4 general climate prevailing [] at the time.” *United States v. McLeod*, 385 F.2d 734, 740
5 (5th Cir. 1967). Although voters need not actually be intimidated or threatened in order
6 to give rise to liability under Section 11(b), *see* 52 U.S.C. § 10307(b), whether challenged
7 activities have created an environment of fear or fostered concerns about threats and
8 intimidation in the community may be probative, *see also Council on Am.-Islamic Rels.-*
9 *Minn.*, 497 F. Supp. 3d at 379, 381 (issuing injunction under Section 11(b), noting that
10 voters had “substantial concerns about voting in person on Election Day,” government
11 officials had expressed “serious concerns” about defendants’ conduct, and election judges
12 left their posts because of defendants’ activities). Similarly, although the statute requires
13 no specific intent to interfere with voting rights to prove a violation, expressions of intent
14 to intimidate voters or otherwise dissuade voting with threats or coercion can be
15 dispositive. *See id.*; *Wohl I*, 498 F. Supp. 3d at 485, 488 (issuing a temporary restraining
16 order after finding that defendants have “intentionally . . . raised the specter of arrest,
17 financial distress, infirmity, and compulsory medical procedures” and “intended the
18 robocall to harm Democrats by suppressing turnout among Black voters”).

19 *B. Section 11(b)’s Protections Cover Voters Who Vote Using Mail Ballots and*
20 *Ballot Drop Boxes*

21 Section 11(b) protects voters from intimidation, threats, and coercion at all stages
22 of the voting process, including during mail and drop-box voting. The statutory term

1 “voting” incorporates the Voting Rights Act’s broad definition of “vote” to include “all
2 action necessary to make a vote effective in any primary, special, or general election,
3 including, but not limited to,” taking any “action required by law prerequisite to voting,
4 casting a ballot, and having such ballot counted properly.” 52 U.S.C. § 10310(c)(1);
5 *cf. Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2346 (2021) (explaining
6 Arizonans may vote using “an early ballot drop box” and describing travel to a drop box
7 as “squarely within the heartland of the usual burdens of voting”). Wherever a voter
8 votes absentee as provided for by state law, returning one’s completed ballot by an
9 acceptable means is plainly an “action necessary” for “having such ballot counted
10 properly.” 52 U.S.C. § 10310(c)(1).

11 Courts have routinely affirmed this plain reading when applying provisions of the
12 Voting Rights Act that incorporate this same definition of “vote.” *See, e.g., Wohl I*, 498
13 F. Supp. 3d at 463 (finding that Section 11(b) prohibited threatening robocalls intended to
14 dissuade voters from voting by mail); *Democracy N.C. v. N.C. State Bd. of Elections*, No.
15 20-cv-457, 2022 WL 715973, at *13 (M.D.N.C. Mar. 10, 2022) (finding that the Voting
16 Rights Act’s voter assistance provisions cover “delivery of an absentee ballot to a county
17 board of elections as an action ‘necessary to make a vote effective’—an absentee ballot
18 must be delivered in order to be counted.”). And it is further underscored by Section
19 11(b)’s protection of “*any* person” who is voting, attempting to vote, or urging or aiding
20 another person to vote. *See United States v. Gonzales*, 520 U.S. 1, 5 (1997) (“Read
21 naturally, the word ‘any’ has an expansive meaning, that is, ‘one or some
22 indiscriminately of whatever kind.’”); *Orozco-Lopez v. Garland*, 11 F.4th 764, 766 (9th

1 Cir. 2021) (quoting *Gonzales*, 520 U.S. at 5). In short, just as Section 11(b) prohibits
2 intimidation, threats, or coercion of voters seeking to cast ballots at polling places, *see*
3 *Council on Am.-Islamic Rels.-Minn.*, 497 F. Supp. 3d at 379, it also prohibits such
4 activities directed at voters using officially designated drop boxes, as alleged here.

5 **II. This Court May Grant Relief Against Violations of Section 11(b) Consistent**
6 **with the First Amendment.**

7 While the First Amendment protects expressive conduct and peaceable assembly
8 generally, it affords no protection for threats of harm directed at voters.

9 First, the First Amendment’s guarantee of the right to assemble peaceably is not a
10 *per se* bar preventing this Court from issuing a narrowly tailored injunction that furthers
11 the significant governmental interest of protecting voters from unlawful intimidation,
12 threats, and coercion. As a threshold matter, the right to assemble peaceably protects
13 individuals’ right to “‘assembl[e] for any lawful purpose.’” *Richmond Newspapers, Inc.*
14 *v. Virginia*, 448 U.S. 555, 578 (1980) (emphasis added) (quoting *Hague v. CIO*, 307 U.S.
15 496, 519 (1939) (opinion of Stone, J.)). Intimidating voters or coercing them from
16 exercising their right to vote is not a lawful purpose. Thus, the First Amendment does
17 not protect individuals’ right to assemble to engage in voter intimidation or coercion, nor
18 does it transform an unlawful activity for one individual—voter intimidation—into a
19 permissible activity simply because multiple individuals have assembled to engage in it.
20 Even if those engaging in voter intimidation were protected by their right to assemble, an
21 injunction that is narrowly tailored to further a significant or compelling interest would
22 not run afoul of the First Amendment. *See Ward v. Rock Against Racism*, 491 U.S. 781,

1 791 (1989). Protecting “one of the most fundamental rights of our citizens: the right to
2 vote,” *Bartlett v. Strickland*, 556 U.S. 1, 10 (2009), against intimidation, threat, or
3 coercion is a compelling governmental interest, *Burson v. Freeman*, 504 U.S. 191, 206-
4 07 (1992) (plurality op.). Courts have accordingly provided injunctive relief that bars
5 individuals from taking certain intimidating actions—such as following voters, taking
6 pictures of license plates outside polling locations, or accusing voters of engaging in
7 illegal activities—in order to protect voting rights, based on the particular factual
8 circumstances of each case. *See, e.g., Daschle v. Thune*, No. 4:04-cv-4177, ECF No. 6
9 (D.S.D. Nov. 1, 2004) (enjoining defendants and their agents from recording license plate
10 numbers of Native American voters); *Council on Am.-Islamic Rels.-Minn.*, 497 F. Supp.
11 3d at 381 (enjoining defendants from deploying armed agents within 2,500 feet of polling
12 places or otherwise monitoring polling places); *United States v. The New Black Panther*
13 *Party for Self-Defense*, 2:09-cv-00065, ECF No. 21 (E.D. Pa. May 18, 2009) (issuing a
14 default judgment and an injunction barring the defendant from displaying a weapon
15 within 100 feet of any polling location on any election day in Philadelphia) (Exhibit 4);
16 *cf. Hill v. Colorado*, 530 U.S. 703, 730 (2000) (holding a criminal statute prohibiting any
17 person from knowingly approaching within eight feet of another person near reproductive
18 health facilities without that person’s consent to be “reasonable and narrowly tailored”).

19 The United States is aware of questions that have arisen in a parallel proceeding
20 regarding the differences between recording the activities of voters and those of law
21 enforcement. *See Order, Ariz. Alliance for Retired Americans v. Clean Elections USA*
22 No. 22-cv-1823, ECF No. 32 (D. Ariz. Oct. 28, 2022). Critical differences exist. Video

1 recording, accosting, threatening, or accusing voters of engaging in criminal activities at
2 ballot drop box locations is manifestly distinct from the public’s clearly established right
3 to “record *law enforcement officers* engaged in the exercise of their *official duties* in
4 public places” under the First Amendment. *Askins v. Dep’t of Homeland Sec.*, 899 F.3d
5 1035, 1044 (9th Cir. 2018) (emphasis added); *see also ACLU of Ill. v. Alvarez*, 679 F.3d
6 583, 597 (7th Cir. 2012) (finding that an anti-eavesdropping statute, as applied to a police
7 accountability program, likely violated the First Amendment); *Glik v. Cunniffe*, 655 F.3d
8 78, 82 (1st Cir. 2011) (recognizing “that the First Amendment protects the filming of
9 government officials in public spaces”). The public’s right to record law enforcement
10 officers in the course of their official duties stems from the premise that “a major purpose
11 of the First Amendment was to protect the free discussion of governmental affairs,” *i.e.*,
12 how governmental agents are conducting themselves. *Ariz. Free Enter. Club’s Freedom*
13 *Club PAC v. Bennett*, 564 U.S. 721, 755 (2011) (internal quotation marks omitted); *see*
14 *also Irizarry v. Yehia*, 38 F.4th 1282, 1289 (10th Cir. 2022) (“Filming the police and
15 other public officials as they perform their official duties acts as a watchdog of
16 government activity” (internal quotation marks omitted)). Just as private citizens are not
17 governmental agents, exercising the fundamental right to vote by depositing a ballot into
18 a drop box is not a governmental activity. First Amendment jurisprudence on recording

19

20

21

22

1 public officials therefore does not bear on this Court’s authority to remedy violations of
2 the right to vote freely without intimidation or coercion under the Voting Rights Act.⁴

3 With respect to the First Amendment right to expression, the question whether
4 certain conduct around a polling place or drop box is constitutionally protected
5 expressive conduct can be context- and fact-dependent. The First Amendment protects
6 only conduct that is “inherently expressive,” rather than any conduct engaged in by a
7 person “intend[ing] . . . to express an idea.” *Rumsfeld v. Forum for Acad. & Inst’l Rights,*
8 *Inc.*, 547 U.S. 47, 65-66 (2006). While expressive conduct is not required to have “a

9
10 ⁴ Further, although the First Amendment generally protects the right to film “matters of
11 public interest,” see *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1203 (9th Cir.
12 2018), the mere existence of concerns with drop-box voting does not automatically
13 transform individual acts of voting into “matters of public interest” under the First
14 Amendment. Likewise, cases that discuss the First Amendment right to “receive
15 information and ideas” are inapposite here: those cases decided that the First Amendment
16 protected the right of public access to criminal trials, *Richmond Newspapers*, 448 U.S. at
17 576; the right of corporations to make campaign contributions, *First Nat’l Bank of Boston*
18 *v. Bellotti*, 435 U.S. 765, 791 (1978); and the right to possess obscene materials at home,
19 *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). In none of these case did the “right to
20 receive information” involve surveillance of or interference with other individuals’
21 conduct, much less did the Supreme Court authorize assertion of First Amendment rights
22 to infringe upon another individual’s fundamental rights, such as the right to vote. The
Supreme Court has made clear that the application of a First Amendment right to “receive
information and ideas” is context-dependent. See *Richmond Newspapers*, 448 U.S. at
576 (referring to “a variety of contexts” in which the Court had recognized “a First
Amendment right to receive information and ideas” to conclude that the First
Amendment prohibits closing courtroom doors to the public); see also *United States v.*
Barnett, 667 F.2d 835, 842-43 (9th Cir. 1982) (finding no First Amendment protection
for selling printed instructions for the manufacture of Phencyclidine (PCP), because the
First Amendment does not provide defense “simply because the actor uses words to carry
out his illegal purpose”); *United States v. Buttorff*, 572 F.2d 619, 624 (8th Cir. 1978)
(finding no First Amendment protection for aiding filing of fraudulent tax forms by
giving speeches before large groups encouraging and advising others to evade income
taxes).

1 narrow, succinctly articulable message” to be protected, *Hurley v. Irish-Am. Gay, Lesbian*
2 *& Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995), it must still be recognizable as
3 inherently expressive by reference to “the conduct itself” rather than “the speech that
4 accompanies it,” *Rumsfeld*, 547 U.S. at 66 (explaining that message expressed by
5 requiring military interviews to be held outside of law school campuses was not
6 “overwhelmingly apparent”). Here, much like a citizen’s refusal to pay taxes does not
7 become protected speech because she is attempting to express disapproval of the IRS, *id.*,
8 photographing a voter’s license plate does not become protected speech whenever the
9 photographer seeks to express disapproval of drop-box voting or those using it. And like
10 the observer who witnesses military recruiters conducting interviews off-campus would
11 “ha[ve] no way of knowing” what, if any, message the law school sought to send, *id.*, the
12 voter who is approached or recorded at a ballot drop box would have no way of knowing
13 whether, for example, the person approaching them disapproves of drop boxes, has
14 specifically targeted the voter for another reason, is expressing disapproval of the United
15 States or of electoral democracy in general, or is attempting to express some other
16 message entirely. Fact-sensitive and narrowly-tailored relief under Section 11(b) to
17 address such potentially intimidating conduct therefore does not categorically infringe on

18

19

20

21

22

1 First Amendment rights.⁵ Such relief can appropriately account for the fundamental
2 interests at stake.⁶

3 Nor does the First Amendment protect any speech that constitutes “true threats.”
4 *See United States v. Stewart*, 420 F.3d 1007, 1016 (9th Cir. 2005) (analyzing whether a
5 statute criminalizing speech is consistent with the First Amendment under the true threat
6 exception). What amounts to a true threat is a context-dependent inquiry that must
7 consider “all of the circumstances.” *Planned Parenthood of Columbia/Willamette, Inc. v.*
8 *Am. Coal. of Life Activists*, 290 F.3d 1058, 1078 (9th Cir. 2002). Although case law
9 analyzing the contours of the true threat exception in the context of Section 11(b), a civil
10 enforcement statute, is limited, robocalls warning of legal and financial consequences for
11 mail voting were found to likely constitute a true threat and a violation of Section 11(b).
12 *Wohl I*, 498 F. Supp. 3d at 485–86.⁷ Enforcement of Section 11(b) against expressions of

13
14 ⁵ In *Wohl II*, First Amendment issues arose because the intimidation at issue occurred
15 based on the content of speech itself—robocalls that threatened nonviolent consequences
16 to attempt to intimidate voters. 512 F. Supp. 3d at 505-06, 512-15. No consideration of
17 expressive conduct was involved, and the court ultimately found the speech unprotected
18 as a true threat. *Id.* at 513-14.

17 ⁶ In this regard, any potential burden on expression must be weighed against not only the
18 burden on voters’ fundamental and irreparable right to vote, *see, e.g., Obama for Am. v.*
19 *Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *Sanchez v. Cegavske*, 214 F. Supp. 3d 961,
20 976 (D. Nev. 2016), but also any expressive rights of the voter, *cf. Doe v. Reed*, 561 U.S.
21 186, 195-96 (2010) (electoral activities may still be expressive even when they have
22 “legal effect in the electoral process.”); *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004)
(Kennedy, J., concurring) (describing a “First Amendment interest of not burdening or
penalizing citizens because of their participation in the electoral process”).”

21 ⁷ In the context of criminal statutes, the Ninth Circuit has found “a serious expression of
22 intent to harm” to constitute a true threat. *United States v. Stewart*, 420 F.3d 1007, 1018
(9th Cir. 2005). The Ninth Circuit has also required a finding of subjective intent to

1 threats, intimidation, or coercion based on physical or nonphysical harm is therefore
2 consistent with the First Amendment.

3 Notably, a “true threat” is unprotected even when the speaker does not carry it out,
4 and indeed even when the speaker has no intention of carrying it out. *Virginia v. Black*,
5 538 U.S. 343, 359-60 (2003) (“The speaker need not actually intend to carry out the
6 threat.”); *see also United States v. Bachmeier*, 8 F.4th 1059, 1064 (9th Cir. 2021). A true
7 threat is unprotected because of its effect on the *subject of intimidation*, rather than the
8 threatener’s intent to carry out the the threat. *Black*, 538 U.S. at 360 (“[A] prohibition on
9 true threats protects individuals from the fear of violence and from the disruption that fear
10 engenders, in addition to protecting people from the possibility that the threatened
11 violence will occur.”) (alterations and internal quotation marks omitted). Accordingly,
12 behavior such as photographing license plates or video recording voters attempting to
13 vote must be evaluated based on whether it creates or attempts to create a *fear* of
14 retribution or violence for the affected voters (such as through publicly posting of these
15 voters’ information or pictures), as opposed to whether the individuals taking
16 photographs or recordings actually plan to publicly post or otherwise use the photographs

17
18 sustain a criminal conviction for making threats. *United States v. Bagdasarian*, 652 F.3d
19 1113, 1118 (9th Cir. 2011); *see also Elonis v. United States*, 575 U.S. 723, 737-38 (2015)
20 (overturning a criminal conviction for making threatening communications because
subjective “awareness of some wrongdoing” was required for a criminal conviction).
21 Section 11(b), however, is a civil voter-protection statute that does not result in a criminal
conviction and has been applied without proof of subjective purpose, as Congress
22 intended. *See, e.g., Allen v. City of Graham*, No. 1:20-CV-997, 2021 WL 2223772, at *8
(M.D.N.C. June 2, 2021); *League of United Latin Am. Citizens*, WL 3848404, at *4; *see*
also H.R. Rep. No. 89-439, at 30 (1965), *as reprinted in* 1965 U.S.C.C.A.N. 2437, 2462.

1 or recordings, much less whether they follow through on that plan. Context may further
2 elucidate this analysis, including by clarifying how voters are likely to understand and
3 react to such activities. *Cf. McLeod*, 385 F.2d at 740-41 (analyzing the impact of
4 intimidation activities on voters under Section 11(b)'s predecessor statute). And relief
5 can be tailored to those aspects of an individual's conduct that are unprotected under an
6 appropriate "true threats" analysis.

7 **CONCLUSION**

8 The United States respectfully submits the foregoing Statement of Interest to assist
9 the Court's evaluation of Plaintiff's claim under Section 11(b) of the Voting Rights Act.

10
11 Date: October 31, 2022

12 Respectfully submitted,

13 GARY M. RESTAINO
14 United States Attorney
District of Arizona

KRISTEN CLARKE
Assistant Attorney General
Civil Rights Division

15 ELISE C. BODDIE
16 Principal Deputy Assistant Attorney General
Civil Rights Division

17 /s/ Michael E. Stewart
18 T. CHRISTIAN HERREN, JR.
19 RICHARD A. DELLHEIM
20 DANA PAIKOWSKY
21 MICHAEL E. STEWART
22 JENNIFER J. YUN
Attorneys, Voting Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to counsel of record.

/s/ Michael E. Stewart
Michael E. Stewart
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Ave, NW
Washington, DC 20530
(202) 307-2767
Michael.Stewart3@usdoj.gov

Exhibit 1



U.S. Department of Justice

Civil Rights Division

DLP:JKT:DHH:svw
DJ 166-1-0

Voting Section
P.O. Box 66128
Washington, D.C. 20035-6128

November 2, 1994

Edward S. Allen, Esq.
Balch & Bingham
P.O. Box 308
Birmingham, Alabama 35201

BY TELEFACSIMILE

Dear Mr. Allen:

This is in response to your October 21, 1994, letter concerning the role of poll watchers in elections in the State of Alabama. You sent the letter following a telephone conversation with Voting Section Attorney David H. Hunter in which you indicated that the Alabama Republican Party, on its own, may employ "ballot security" procedures during the November 8, 1994, general election, and that such measures would involve filming at polling places on election day.

We have found that no useful information is obtained, and federal law is likely to be violated, when private citizens form "ballot security" forces and attempt to take over the role of policing polling places. While this type of action often is proffered in the guise of helping law enforcement officials, the filming at and near the polls achieves nothing of the kind. Instead, we have found that such action intimidates lawful voters and interjects an element of fear into the process by which our republican form of government is guaranteed to our citizens.

More specifically, such an attempt to videotape areas where black voters are present at their polling places could constitute a violation of Section 11(b) of the Voting Rights Act, 42 U.S.C. 1973i(b). We therefore would urge that you and all other parties and organizations avoid filming at polling places on election day, and take steps to avoid measures by poll watchers that would run any risk of intimidating or harassing voters. Any specific information that you or your poll watchers may have regarding violations of law should be provided to the appropriate law enforcement authorities.


- 2 -

For your information, please find enclosed our June 14, 1994, letter to Constance Slaughter-Harvey, Assistant Secretary of State for Elections and General Counsel, State of Mississippi, concerning this same topic.

Sincerely,

Deval L. Patrick
Assistant Attorney General
Civil Rights Division

By:


John K. Tanner
Acting Chief, Voting Section

Enclosure

cc: Hon. Jim Bennett
Secretary of State, State of Alabama



U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20035

June 14, 1994

The Honorable Constance Slaughter-Harvey
Assistant Secretary of State
for Elections and General Counsel
P. O. Box 136
Jackson, Mississippi 39205-0138

Dear Ms. Slaughter-Harvey:

This is in reference to your recent letter regarding the use of video cameras at the polls in Mississippi.

Your letter describes this usage as occurring under circumstances that make black voters feel uncomfortable and apprehensive about voting, highlights the levels this sort of activity has reached, and states that it is not permitted by Mississippi law. Your letter also notes that those who promote the videotaping of black voters claim that such activity is a useful tool in documenting or preventing voter fraud.

Our Voting Section lawyers have spoken with you and with the Mississippi Attorney General's office about this matter during recent elections. At those times we expressed our view that the actions of white people in videotaping black voters at or near the polls could constitute a violation of Section 11(b) of the Voting Rights Act, 42 U.S.C. 1973i(b), and, under the circumstances you described, would constitute a change subject to the preclearance requirement of Section 5 of the Voting Rights Act, 42 U.S.C. 1973c.

Your letter asks whether we still maintain this view. I can assure you that we do, and that we will not countenance any thinly veiled attempts to intimidate black voters at the polls. In fact, such activity also could constitute violations of 42 U.S.C. 1971, and 18 U.S.C. 594.

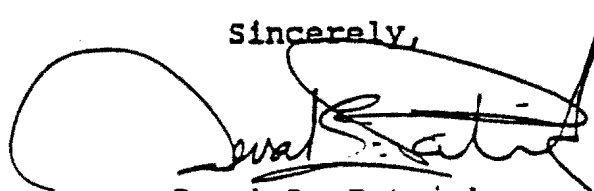
I am particularly aware that many black voters travel to the polls in cars that are made available for that purpose on election day, and that some of those voters who need assistance in casting their ballot are helped by the person who drove them to the polls. This activity has its roots in blacks' long lack of access to the polls and to quality education in the south, and in no way bears an assumption of fraudulent activity.

- 2 -

Moreover, Section 208 of the Voting Rights Act, 42 U.S.C. 1973aa-6, requires that, with narrow exceptions, voters who need assistance in casting their ballot be allowed to choose the person who will help them. Any attempt to prevent those voters from being helped by the person they choose would present a likely violation of federal law.

If you have any further questions regarding this matter you may contact Barry H. Weinberg, Deputy Chief of our Voting Section, (202) 307-3266.


Sincerely,

A handwritten signature in black ink, appearing to read "Deval Patrick", with a large, sweeping flourish on the left side.

Deval L. Patrick
Assistant Attorney General
Civil Rights Division

Exhibit 2

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

FILED
NOV 02 2004

CLERK

THOMAS A DASCHLE,	*	CIV 04-4177
	*	
Plaintiff,	*	
	*	
vs.	*	TEMPORARY
	*	RESTRAINING ORDER
JOHN THUNE;	*	
SOUTH DAKOTA REPUBLICAN	*	
PARTY; and JOHN DOES 1-200,	*	
	*	
Defendants.	*	
	*	

Under the principles of *Bush v. Gore*, 531 U.S. 98 (2000), the Court finds that the Plaintiff Thomas A. Daschle has standing to bring the present action. The action shows that Plaintiff Daschle is suing on his behalf as well as on behalf of persons who are unable to protect their own rights, that being Native Americans, to vote in this South Dakota General Election. See also *Oti Kaga, Inc. v. South Dakota Housing Authority*, 342 F.3d 871, 881-82 (8th Cir. 2003), and cases cited therein.

Oral testimony, photographs, and arguments were presented by the Plaintiff and the Defendants concerning today's events in a hearing from 8:00 P.M. until 11:30 P.M. this evening. Due to the fact that the General Election voting commences at 7:00 A.M. tomorrow morning, the Court cannot prepare a more detailed opinion.

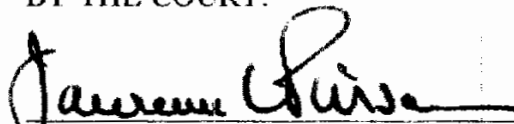
After receiving evidence on behalf of Plaintiff and Defendants in the form of oral testimony as well as photographs, the Court applies the four factor tests from *Dataphase Systems, Inc. v. CL Systems, Inc.*, 540 F.2d 109 (8th Cir. 1981), and concludes that there clearly is the threat of irreparable harm to the Movant in that if Native Americans are improperly dissuaded from voting, those voters normally simply disappear and there is no identifying most of them and even if

identified, they can't vote later. The harm that will be inflicted upon the Movant is far greater than any injury granting the temporary restraining order will cause Defendants. The Movant and the Native American voters whose rights are asserted by the Movant will suffer the irreparable harm described above while Defendants are only being required to follow the law. The Court does find that the Movant is more likely to succeed on the merits of the equal protection claim and the claims under 42 U.S.C. § 1973i(b) and 42 U.S.C. § 1985(3), as the Court finds that there was intimidation particularly targeted at Native American voters in Charles Mix County by persons who were acting on behalf of John Thune. The Eighth Circuit has ruled that injunctive relief is available under § 1985(3). *See Brewer v. Hoxie School District*, 238 F.2d 91 (8th Cir. 1956). Whether the intimidation was intended or simply the result of excessive zeal is not the issue, as the result was the intimidation of prospective Native American voters in Charles Mix County. This is a small Native American population within which word travels quickly. Finally, the public interest is served by having no minority denied an opportunity to vote. Accordingly,

IT IS ORDERED that a Temporary Restraining Order is entered against Joel C. Mandelman and all other Defendant John Does acting on behalf of John Thune in Charles Mix County prohibiting them from following Native Americans from the polling places and directing that they not copy the license plates of Native Americans driving to the polling places, or being driven to the polling places, and further directing that the license plates of Native Americans driving away from the polling places also not be recorded.

Dated this 2nd day of November, 2004.

BY THE COURT:



Lawrence L. Piersol
Chief Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: DeB Petersen
DEPUTY

Exhibit 3



Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

October 30, 1998

The Honorable Martin Frost
Member of Congress
United States House of Representatives
Washington, D.C. 20515

Dear Congressman Frost:

Thank you for your letter of October 26, 1998, which expresses your serious concern that minority voters will be harassed, intimidated and denied the right to vote on election day because of stepped-up poll watching activities, including videotaping of voters. You indicated that plans have been announced to target minority precincts and "problem areas" of southeast Fort Worth.

Please know that we take very seriously allegations of efforts to unlawfully harass, intimidate or otherwise interfere with racial and ethnic minority voters at the polls. In recognition of the preciousness of the right threatened, the Civil Rights Division is taking vigorous steps to prevent discriminatory voting practices on election day, November 3, 1998.

It is our view that videotaping minority voters at or near the polls could constitute a violation of Section 11(b) of the Voting Rights Act, 42 U.S.C. 1973i(b). We will not countenance any thinly veiled attempts to intimidate racial and ethnic minorities at the polls. It is our position that all parties and organizations must avoid intimidating minority voters at the polls by filming at polling places on election day. Further, steps must be taken to avoid any measures by poll watchers that would run any risk of intimidating or harassing voters.

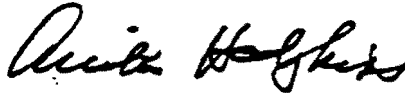
The Voting Section has discussed these matters with the Tarrant County Republican and Democratic Parties and with the Tarrant County Board of Elections. We have been assured that the Board of Elections will not allow video recorders to be taken inside polling places or within 100 feet of the polls. We have also been assured that if efforts are made to video tape minority voters outside the 100 foot limit, Tarrant County election officials will ask those people video taping outside the 100 foot limit to stop such activity on the grounds that it might have the effect of intimidating minority voters. The Board of Elections is prepared to respond and will have the assistance of the local sheriff's department if necessary.

We have asked to be notified of any specific information of unlawful activity. The Civil Rights Division, also, is coordinating with United States Attorney's offices in Texas, and throughout the country, to prevent and address any efforts to harass, intimidate or otherwise

interfere with racial and ethnic minority voters at the polls on election day.

In order to perform our obligations effectively, it is essential that we have notice of allegations of discriminatory practices. Thank you for contacting us. Please keep us informed of any further developments and do not hesitate to contact us if you should have additional questions or comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Anita Hodgkiss". The signature is written in a cursive style with a large initial 'A'.

Anita S. Hodgkiss
Deputy Assistant Attorney General

Exhibit 4

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CIVIL ACTION
 :
 v. :
 :
 THE NEW BLACK PANTHER PARTY :
 FOR SELF-DEFENSE, et al. : NO. 09-65

ORDER

AND NOW, this 18th day of May, 2009, upon consideration of the Government's motion for default judgment against defendant Minister King Samir Shabazz a/k/a Maurice Heath¹ (docket entry #18), and the Court finding that:

(a) The Government alleged that the defendant stood in front of the polling location at 1221 Fairmount Street in Philadelphia, wearing a military-style uniform, wielding a nightstick, and making intimidating statements and gestures to various individuals, all in violation of 42 U.S.C. § 1973i(b)²;

(b) The Government properly served a copy of the

¹The Government has voluntarily dismissed all of the other defendants in this case pursuant to Fed. R. Civ. P. 41(a)(1)(A)(i).

²No 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, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 1973a(a), 1973d, 1973f, 1973g, 1973h, or 1973j(e) of this title.

complaint on the defendant; the Clerk of Court entered default against the defendant;

(c) Default judgment is appropriate if (1) there is prejudice to the plaintiff if default is denied, (2) the defendant does not appear to have any litigable defense, and (3) the delay is due to defendant's culpable conduct, Chamberlain v. Giampapa, 210 F.3d 154, 164 (3d Cir. 2000);

(d) The Government satisfies all three of these requirements: (1) without an injunction against such behavior the defendant escapes all consequences of his acts and is free to act in this manner during the next election; (2) no defense to the claim that the defendant intimidated people in and around a polling center is apparent from the facts alleged; and (3) the defendant was personally served with the complaint, provided a notice by the Government that it would seek default, and sent a copy of the entry of default; and thus any delay is due to the defendant's informed lack of action;

(e) Here, the Government seeks an injunction; in order for an injunction to be warranted, the moving party must show (1) a likelihood of success on the merits, (2) irreparable harm to the movant if the injunction is not granted, (3) that the injunction would not cause greater harm to the other party than

that which the movant seeks to avoid, and (4) the injunction serves the public interest, Shields v. Zuccarini, 254 F.3d 476, 482 (3d Cir. 2001);

(f) We cannot properly address the likelihood of success on the merits because by definition a defaulted defendant means the adversarial process is absent, but when a defendant defaults we accept the allegations of the plaintiff when we shape relief, see Broadcast Music, Inc. v. Spring Mount Area Bavarian Resort, 555 F. Supp. 2d 537, 543 (E.D. Pa. 2008), and so the Government has sufficiently alleged a violation of 42 U.S.C. § 1973i(b);

(g) The Government seeks to prevent potential future violations of 42 U.S.C. § 1973i(b) by preventing the defendant from displaying a weapon within 100 feet of a polling location;³ without such an injunction nothing other than the promise of future litigation prevents the defendant from repeating his conduct, and such repeated behavior would palpably constitute

³Preventing such future statutory violations can justify issuance of an injunction. See, e.g., United States v. Berks County, 277 F. Supp. 2d 570, 578 (E.D. Pa. 2003); United States v. Metro. Dade County, 815 F. Supp. 1475, 1478 (S.D. Fla. 1993); Dillard v. Crenshaw County, 640 F. Supp. 1347, 1363 (M.D. Ala. 1986); PROPA v. Kusper, 350 F. Supp. 606, 611 (D.C. Ill. 1973).

irreparable harm;

(h) The scope of the injunction sought -- i.e., prohibiting the defendant from displaying a weapon within 100 feet of a polling location -- provides the Government with the appropriate, prophylactic protection against another violation of 42 U.S.C. § 1973i(b), and only prohibits the defendant from displaying a specific type of object at a focused area, and thus the defendant suffers no material harm if we grant the Government the injunction it seeks;

(i) Finally, preventing people from intimidating others at the polls always serves the public interest, and there is no reason we can find to distinguish the present injunction from any other issued for the purpose of preserving the order and dignity of a polling location;

It is hereby ORDERED that:

1. The Government's motion is GRANTED;
2. The defendant Minister King Samir Shabazz is ENJOINED from displaying a weapon within 100 feet of any open polling location on any election day in the City of Philadelphia, or from otherwise violating 42 U.S.C. § 1973i(b);
3. This Court shall maintain jurisdiction over this matter until November 15, 2012 to enforce this Order as

necessary; and

4. The Clerk of Court shall CLOSE this case statistically.

BY THE COURT:

/s/ Stewart Dalzell, J.