Voter Intimidation: Forging a Judicial Standard

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Abstract: *In the last few years, federal courts have seen a notable increase in voter intimidation cases. Empirically, instances of voter intimidation, whether litigated or not, may be increasing as well.*

After briefly offering explanations for this trend, this Article reviews federal laws aimed at voter intimidation, especially Section 11(b) of the Voting Rights Act. It then considers how courts can reconcile First Amendment speech protections with the need to regulate conduct that interferes with voting, drawing lessons from two recent lawsuits in the 2022 midterm elections in Arizona.

Rather than solely balancing competing individual rights, courts should embrace a more expansive conception of the governmental interests at stake in voter intimidation cases. In particular, courts should recognize that voting is a separate sphere of civic life—a unique method of public decision-making distinct from day-to-day public discourse. As such, the act of voting merits stricter levels of protection than the laissez-faire system governing public discourse.

This Article also suggests that in our post-pandemic era of extended voting, a regime requiring narrowly tailored speech restrictions may be inadequate to safeguard voters from intimidation and interference. Given voting's essential role in democratic self-governance, courts should not hesitate to enjoin intimidating conduct under Section 11(b), even absent a showing of subjective intent or threatened physical violence. Furthermore, courts should evaluate alleged intimidation not in isolation, but in light of its broader historical and social context and its actual impact on voters.

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I. INTRODUCTION

In an expansive parking lot in Mesa, Arizona on an October night, two figures in tactical gear, carrying guns, stand guard by a white truck.[1] They have taken the law into their hands, on the lookout for voter fraud.[2] Another night, there appears to be a tailgate in the same lot. A group of seven or so middle-aged men and women sit in camping chairs.[3] They scroll social media and post about hunting for mules.[4]

How did we arrive at these scenes? Prompted by Dinesh D'Souza's 2022 documentary film *2000 Mules*, about which D'Souza recently repented,[5] Melody Jennings, a Tulsa-based pastor and counselor,[6] organized a private election-monitoring group called Clean Elections USA ("CEUSA") in the lead-up to the 2022 midterm elections.[7] Jennings seized on a conspiracy theory that *2000 Mules* propagated, regarding a "shadowy network of 'ballot mules'" who gathered fraudulent absentee ballots and stuffed them in early-voting drop boxes in battleground states during the 2020 election.[8] Dubbed #DropboxInitiative2022, CEUSA's goal was to deter "ballot mules" from committing voter fraud using drop boxes in the midterm elections.[9] Jennings used social media to mobilize Arizonans, encouraging them to assemble in groups near drop boxes in Maricopa County and to monitor and photograph

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[1] See, e.g., Ken Bensinger, Federal Judge Allows Activists to Stake Out Ballot Boxes in Arizona, N.Y. Times (Nov. 3, 2022), https://www.nytimes.com/2022/10/28/us/politics/federal-judge-allows-activists-to-stake-out-ballot-boxes.html; Maricopa County Elections Department (@MaricopaVote), Twitter (Oct. 22, 2022, 5:21 PM), https://twitter.com/MaricopaVote/status/1583976792062185472.

[2] Bensinger, supra note 1.

[3] See, e.g., Tiffany Hsu & Stuart A. Thompson, Hunting for Voter Fraud, Conspiracy Theorists Organize 'Stakeouts', N.Y. Times (Aug. 10, 2022), https://www.nytimes.com/2022/08/10/technology/voter-drop-box-conspiracy-theory.html; Vaughn Hillyard & Ben Collins, How 'Mule Watchers' Evolved from a Truth Social Meme into a Ballot Drop Box Patrol, NBC News (Oct. 28, 2022, 8:14 AM), https://www.nbcnews.com/tech/internet/mule-watchers-evolved-truth-social-meme-ballot-drop-box-patrol-rcna54406.

[4] Hsu & Thompson, supra note 3.

[5] Nick Corasaniti & Ken Bensinger, Director of '2000 Mules' Acknowledges the Conspiratorial Film Was Flawed, N.Y. Times (Dec. 2, 2024), https://www.nytimes.com/2024/12/02/us/politics/dinesh-dsouza-2000-mules-apology-trump.html.

[6] See, e.g., Ken Bensinger, Judge Curbs Actions of Election-Monitoring Group in Arizona, N.Y. Times (Nov. 1, 2022), https://www.nytimes.com/2022/11/01/us/politics/election-monitors-arizona-judge.html.

[7] See Ariz. All. for Retired Ams. v. Clean Elections USA, 638 F. Supp. 3d 1033, 1039 (D. Ariz. 2022) [hereinafter Clean Elections USA I] (denying a preliminary injunction), *vacated and dismissed as moot*, Ariz. All. for Retired Ams. v. Clean Elections USA, No. 22-16689, 2023 WL 1097766 (9th Cir. Jan. 26, 2023); see also Ariz. All. for Retired Ams. v. Clean Elections USA, No. CV-22-01823-PHX-MTL, 2022 WL 17088041 (D. Ariz. Nov. 1, 2022) [hereinafter Clean Elections USA II] (granting a preliminary injunction).

[8] *Clean Elections USA I*, 638 F. Supp. 3d at 1039.

[9] Id.

voters dropping off their ballots.[10] Answering the call, self-appointed ballot security watchers surveilled, followed, photographed, and filmed voters, posting their work on social media[11] in an attempt to dox[12] voters they suspected of dropping off multiple ballots.[13] Voters and election officials responded to this activity with alarm.[14]

During this period, Jennings made repeated false statements online about who, under Arizona voting law, could legally return a third party's ballot to a drop box.[15] Three weeks before the 2022 midterms, Jennings appeared on Steve Bannon's podcast to share a progress report:

> We are actually seeing mules be intimidated from doing their thievery. We're not intimidating voters. But the mules do not want to be caught on film, and that's what we're doing. We're catching them on telescopic film. We can zoom right in. We can get your face. So we've got you.[16]

Voter intimidation like this is nothing new, but unlike in this case, it often goes undetected. As the Supreme Court has observed, one reason why voter intimidation is a successful tactic in suppressing the vote is because it is difficult to expose.[17] Often, intimidation leaves no trace at the scene of the

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[10] See, e.g., Yvonne Wingett Sanchez & Adriana Usero, Video Offers Rare Glimpse of Police Enforcing Arizona's Election Laws, Wash. Post (March 9, 2023), https://www.washingtonpost.com/politics/2023/03/09/video-arizona-ballot-drop-box-observers/ (referring to Maricopa County an "an epicenter of the election denialism movement that fueled efforts to reverse the 2020 election results"); *Clean Elections USA I*, 638 F. Supp. 3d at 1039.

[11] It seems that Jennings did not create the concept of "drop box tailgates" or "mule parties," though she capitalized on a movement circulating on right-wing social media channels. See, e.g., Hillyard & Collins, supra note 3.

[12] Merriam-Webster defines "dox" as "to publicly identify or publish private information about (someone) especially as a form of punishment or revenge." Merriam-Webster.com, https://www.merriam-webster.com/dictionary/dox (last visited May 13, 2023). While there is no statistical consensus on how many Americans have been doxed, a report by the Anti-Defamation League in 2021 estimates nine percent of Americans have experienced doxing. Anti-Defamation League, Online Hate and Harassment: The American Experience 2021, at 34 (Mar. 2021), https://www.adl.org/sites/default/files/pdfs/2022-05/Online%20Hate%20and%20Harassment%202021_042821_V17%282%29.pdf.

[13] *Clean Elections USA I*, 638 F. Supp. 3d at 1038.

[14] Id.

[15] Arizona law prohibits a person from collecting voted or unvoted early ballots from another person, with exceptions for family members, household members, and caregivers. Ariz. Rev. Stat. Ann. § 16-1005(i) (2023). This provision under Arizona law also formed the partial basis for the Supreme Court's ruling in *Brnovich v. Democratic National Committee*. 594 U.S. 547, 685–87 (2021).

[16] Bannon's War Room, Melody Jennings: Clean Elections USA Is Fighting to Secure the Left's Vulnerable Dropboxes, at 00:44, Rumble (Oct. 17, 2022), https://rumble.com/v1oenkz-melody-jennings-clean-elections-usa-is-fighting-to-secure- the-lefts-vulnera.html.

[17] Burson v. Freeman, 504 U.S. 191, 208 (1992).

crime.[18] This presents challenges for talking about voter intimidation and its scope. Historical voter registration rates tell part of the story—for example, three percent of Black voting-age southerners were registered to vote in 1940[19]—but we have no tally of the votes *never cast* due to intimidation. Physical violence and economic retaliation kept millions of Black Americans away from the polls for most of American history, though intimidation worked in tandem with powerful legal barriers to the ballot box until relatively recently.[20]

Documentary evidence of voter intimidation has emerged, throughout history, in fragments. Take the eviction notice and accompanying words from a landlord to a Black sharecropper in retaliation for registering to vote in 1959 in Haywood County, Tennessee, where less than four percent of the county's eligible Black population was registered:[21]

> Well, you registered. You are going to have to go. I don't think you will be able to get a home any place in Haywood County. I hate to see you go. You are one of my best hands. I would recommend you to anybody. I wish you lots of success this year and in the years ahead.[22]

By the end of 1960, every Black American in Haywood County who had registered to vote, totaling 300, received an eviction notice in retaliation for registering.[23]

Other documentary evidence of voter intimidation in the Civil Rights Era has been preserved in judicial opinions. One court described intimidating handbills distributed by the Ku Klux Klan in Bogalusa, Louisiana in 1965, which identified local supporters of civil rights by name and accused them of immoral behavior.[24] A few years later, a court found that the publication of the names and addresses of voter registration applicants in a local

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[18] The intimidation described in the opening example in Arizona was, of course, conspicuous. But many forms of intimidation (especially historically) leave no lasting evidence, rendering them difficult to measure.

[19] Susan Cianci Salvatore, Neil Foley, Peter Iverson, & Steven F. Lawson, Civil Rights in America: Racial Voting Rights 21 (2009).

[20] See, e.g., Alexander Keyssar, The Right to Vote 207 (2d ed. 2009) ("Those who were adamant about registering [in the 1950s] could lose their jobs, have loans called due, or face physical harm. More than a few were killed.").

[21] See U.S. Comm. On Civ. Rts., Voting: 1961 Commission on Civil Rights Report 92 (1961).

[22] Id. at 93.

[23] See id. at 93; see also United States v. Beaty, 288 F.2d 653, 657 (6th Cir. 1961) (enjoining white landlords from evicting and refusing to deal in good faith with Black sharecropper tenants to interfere with their right to vote).

[24] See United States v. Original Knights of the Ku Klux Klan, 250 F. Supp. 330, 342 (E.D. La. 1965).

newspaper in Quitman County, Mississippi had deterred Black citizens from registering.[25]

The internet eases the evidentiary difficulty of proving intimidation to a degree. Evidence of intimidation and related methods of voter interference, like deception, now lives eternally in the cloud. In 2023, social media influencer Douglass Mackey was convicted of conspiring to interfere with voting rights through a disinformation campaign in the 2016 election.[26] In 2016, Mackey disseminated fake online ads purportedly from Hillary Clinton's campaign that falsely stated: "Avoid the Line. Vote from Home" and "Text [Hillary] to 59925"; at least 4,900 people texted the number.[27]

In the 2020 election, conservative conspiracy theorists Jacob Wohl and Jack Burkman sent robocalls to 85,000 phone numbers across the United States containing false information about voting in an attempt to scare and deter recipients from voting by mail.[28] In Florida and Alaska, voters received emails, allegedly from members of the Proud Boys, threatening them if they did not vote for President Trump.[29] Federal intelligence officials later attributed the emails to Iranian operatives merely posing as Proud Boys.[30] Elsewhere, a Tennessee private security company posted on a jobs website in an attempt to recruit former Special Operations veterans to "protect" polling places in Minnesota "from looting and destruction."[31] The public online nature of the job posting led to a settlement agreement before defendants could station armed personnel near polling places.[32]

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[25] See King v. Cook, 298 F. Supp. 584, 587 (N.D. Miss. 1969).

[26] See, e.g., Colin Moynihan, Trump Supporter Convicted in 2016 Scheme to Suppress Votes for Clinton, N.Y. Times (March 31, 2023), https://www.nytimes.com/2023/03/31/nyregion/douglass-mackey-trial-twitter-misinformation.html.

[27] See United States v. Mackey, 652 F. Supp. 3d 309, 321 (E.D.N.Y. 2023); Recent Case, Eastern District of New York Convicts Internet Meme Creator for Publishing False Voting Information, United States v. Mackey, No. 21-CR-80, 2023 U.S. Dist. LEXIS 40796 (E.D.N.Y. Mar. 10, 2023), 137 Harv. L. Rev. 1509, 1510 (2024).

[28] See Nat'l Coal. on Black Civic Participation v. Wohl, 661 F. Supp. 3d 78, 123 (S.D.N.Y. 2023) [hereinafter Wohl III].

[29] Sam Gringlas, Voters in Florida and Alaska Receive Emails Warning 'Vote For Trump Or Else!', NPR (Oct. 21, 2020, 12:07 PM), https://www.npr.org/2020/10/21/926139270/voters-in-florida-and-alaska-receive-emails-warning-vote-for-trump-or-else.

[30] Philip Ewing, U.S. Blames Iran for Threatening Election Emails, Says Russia May Interfere Too, NPR (Oct. 21, 2020, 8:09 PM) https://www.npr.org/2020/10/21/926445682/u-s-blames-iran-for-threatening-election-emails-says-russia-may-interfere-too.

[31] Derek Hawkins, Security Company that Sought ex-Special Forces to Guard Minnesota Polls Agrees to Stay Out of State, Attorney General Says, Wash. Post (Oct. 26, 2020), https://www.washingtonpost.com/politics/2020/10/24/security-company-that-sought-special-forces-guard-minnesota-polls-agrees-stay-out-state-ag-says/.

[32] See Council on Am.-Islamic Rels.-Minn. v. Atlas Aegis, LLC, No. 20-CV-2195 (NEB/BRT), 2021 WL 3435010, at *1 (D. Minn. Feb. 16, 2021).

Notably, voter intimidation affects fewer American voters today than the state voting regulations passed after the Supreme Court's 2013 decision in *Shelby County v. Holder*,[33] regulations which have only grown more numerous since the 2020 election.[34] But voter intimidation, a phenomenon as old as the country itself,[35] continues to cause serious harms to individual voters,[36] and it creates risks to the legitimacy and accuracy of elections. Unlike technical and administrative rules that regulate the voting process, which legislatures pass months or years in advance of elections (and therefore appear more legitimate or in the normal course of events[37]), intimidation and other forms of interference with voting and vote counting operate more openly to deter voting and sow distrust in election outcomes. As we saw in the 2000 presidential election in Florida and in the electoral vote-counting process leading up to the January 6, 2021 insurrection, irregularities in voting and interference with vote counting generate real suspicions among the public and undermine confidence in elections.[38]

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[33] Shelby Cnty. v. Holder, 570 U.S. 529 (2013) (effectively nullifying the Voting Rights Act's preclearance requirement by striking down its coverage formula, which contributed to a surge in voting laws that exclude voters).

[34] See Brennan Ctr. for Just., Voting Laws Roundup: February 2023 (Feb. 27, 2023), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-february-2023?_ga=2.146326896.590050499.1680975715-334873725.1666305570.

[35] See, e.g., Burson v. Freeman, 504 U.S. 191, 200–07 (1992).

[36] According to a Reuters/Ipsos poll in the lead up to the 2022 midterm elections, forty-three percent of registered U.S. voters surveyed were concerned about intimidation or threats of violence when voting in person. Moira Warburton & Jason Lange, Exclusive: Two in Five U.S. Voters Worry About Intimidation at Polls -Reuters/Ipsos, Reuters (Oct. 26, 2022, 7:13 AM), https://www.reuters.com/world/us/exclusive-two-five-us-voters-worry-about-intimidation-polls-reutersipsos-2022-10-26/.

[37] See, e.g., Brad Epperly, Christopher Witko, Ryan Strickler, & Paul White, Rule by Violence, Rule by Law: Lynching, Jim Crow, and the Continuing Evolution of Voter Suppression in the U.S., 18 Persp. on Pol. 756, 758 (2020). But see Steve Eder, David D. Kirkpatrick, & Mike McIntire, They Legitimized the Myth of a Stolen Election — and Reaped the Reward, N.Y. Times (Oct. 23, 2022), https://www.nytimes.com/2022/10/03/us/politics/republican-election-objectors.html (describing Republican arguments, such as those by Representative Mike Johnson, that pandemic-induced changes to state election laws in advance of the 2020 presidential election violated the Constitution and compromised the legitimacy of Biden's victory).

[38] The Supreme Court has observed that "to refuse to count and return the vote as cast was as much an infringement of that personal right [to vote] as to exclude the voter from the polling place." United States v. Saylor, 322 U.S. 385, 387–88 (1944) (citing United States v. Mosley, 238 U.S. 383, 385 (1915)). In Michigan Welfare Rights Organization v. Trump, 600 F. Supp. 3d 85, 107–10 (D.D.C. 2022), plaintiffs sued President Donald Trump and the Trump campaign, alleging that Trump's efforts to intimidate election officials and prevent the counting of legally cast ballots, including targeting cities with large Black populations, amounted to a violation of federal voter intimidation law. The court dismissed plaintiff's claim under Section 11(b) of the Voting Rights Act due to lack of standing without ruling on the merits of a § 1985(3) claim under the Ku Klux Klan Act.

In the last few years, federal courts have seen a notable increase in voter intimidation cases.[39] Media reports also suggest that instances of voter intimidation, whether litigated or not, are increasing as well.[40]

After briefly offering explanations for this trend, this Article will discuss various historical attempts to address voter intimidation through federal law, with a particular focus on the ongoing development of a judicial interpretation of the foremost federal voter intimidation law, Section 11(b) of the Voting Rights Act of 1965 ("VRA").[41] It then considers how courts can reconcile First Amendment speech protections with the need to regulate conduct that interferes with voting, drawing lessons from two recent lawsuits against Clean Elections USA.

Rather than solely balancing competing individual rights, courts should embrace a more expansive conception of the governmental interests at stake in voter intimidation cases. In particular, courts should recognize that voting is a separate sphere of civic life—a unique method of public decision-making distinct from day-to-day public deliberation. As such, the act of voting merits stricter levels of protection than the laissez-faire system that governs public discourse.

This Article also suggests that in our post-pandemic era of extended voting, a regime requiring narrowly tailored speech restrictions may fail to ensure that voters remain free of intimidation and interference. Given voting's essential role in democratic self-governance, courts should not hesitate to

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[39] See, e.g., League of United Latin Am. Citizens - Richmond Region Council 4614 v. Pub. Int. Legal Found., No. 1:18-CV-00423, 2018 WL 3848404 (E.D. Va. Aug. 13, 2018) [hereinafter LULAC] (publishing voters' names, addresses, and telephone numbers in a report identifying them as felons); Council on Am.-Islamic Rels.-Minn. v. Atlas Aegis, LLC, 497 F. Supp. 3d 371 (D. Minn. 2020) (trying to recruit private security force of ex-Special Operations veterans to "protect" polling places in Minnesota from "looting and destruction"); Allen v. City of Graham, No. 1:20-CV-997, 2021 WL 2223772, *1 (M.D.N.C. June 2, 2021) (alleging law enforcement "used pepper spray and overly violent crowd-control tactics to disrupt a peaceful protest and prevent" plaintiffs from voting); Schilling v. Washburne, 592 F. Supp. 3d 492 (W.D. Va. 2022) (alleging defendants used pretext of a non-existent mask mandate to temporarily block access to voting machines); Clean Elections USA II, No. CV-22-01823-PHX-MTL, 2022 WL 17088041 (D. Ariz. Nov. 1, 2022) (alleging private ballot watchers photographed, harassed, followed, and attempted to dox plaintiffs for using ballot drop boxes); Colo. Mont. Wyo. State Area Conf. of the NAACP v. U.S. Election Integrity Plan, 653 F. Supp. 3d. 861 (D. Colo. Jan. 31, 2023) (alleging defendants deployed agents to knock on doors throughout the state of Colorado to intimidate voters).

[40] See, e.g., Will Wilder, Voter Suppression in 2020, Brennan Ctr. for Just., 3, 13–14, (Aug. 20, 2021) https://www.brennancenter.org/our-work/research-reports/voter-suppression-2020 (stating that media reports of voter intimidation were on the rise and providing a non-exhaustive list of examples of voter intimidation in the 2020 election, with a particular focus on intimidation that seemed aimed at voters of color).

[41] 52 U.S.C.A. § 10307(b) (providing in relevant part that "[n]o 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 . . . .").

enjoin intimidating conduct under Section 11(b), even absent a showing of subjective intent or threatened physical violence. Furthermore, courts should evaluate alleged intimidation not in isolation, but in light of its broader historical and social context and its actual impact on voters.

II. WHY IS VOTER INTIMIDATION A PRESSING ISSUE NOW?

Voter intimidation has a long-documented history in the United States. While violence and economic retaliation were commonplace during elections until the mid-twentieth century,[42] widespread voter intimidation has lessened considerably since the adoption of the VRA.[43] But intimidation cases once again are on the rise. In addition to the increase in voter intimidation litigation in federal courts in the last few years,[44] reports also suggest that individual instances of voter intimidation are mounting.[45] In the 2022 midterm elections, the Lawyers' Committee for Civil Rights' Election Protection group observed a slight proportional increase in reports of voter intimidation, compared to 2018.[46]

At the same time, methods of voter intimidation have shifted away from direct threats of physical violence and economic retaliation, and have taken on subtler forms to appear to fit within the bounds of the law.[47] Common contemporary intimidation tactics include "aggressive poll-watching, offsite threats of prosecution or harm, frivolous and excessive challenges to voter registration, and employer coercion."[48] Whereas law enforcement and white supremacist groups were historically the main culprits of intimidation,

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[42] See, e.g., American Violence: A Documentary History 133–38 (Richard Hofstadter & Michael Wallace eds., 1971); Minn. Voters All. v. Mansky, 585 U.S. 1, 5–7 (2018); Epperly, Witko, Strickler, & White, supra note 37, at 760–61.

[43] See Ben Cady & Tom Glazer, Voters Strike Back: Litigating Against Modern Voter Intimidation, 39 N.Y.U. Rev. L. & Soc. Change 173, 177 (2015).

[44] See supra Part I.

[45] See, e.g., Wilder supra note 40, at 13–14 (stating that media reports of voter intimidation were on the rise).

[46] 2022 Midterms Look Back Series: Successes in the 2022 Midterm Elections: Hearing Before the Subcomm. on Elections of the H. Comm. on Admin., 118th Cong. 9 (2023) (statement of Damon T. Hewitt, President and Executive Director, Lawyers' Committee for Civil Rights Under Law). Relatedly, intimidation of election workers has spiked in recent years, with over half of election workers in a 2022 survey fearing for the safety of their colleagues. See Brennan Ctr. for Just., Local Election Officials Survey, at 5 (March 10, 2022), https://www.brennancenter.org/our-work/research-reports/local-election-officials-survey-march-2022.

[47] Cady & Glazer, supra note 43, at 215.

[48] See id. at 216.

conservative ballot security groups are now frequently responsible, often acting under the guise of anti-voter fraud efforts.[49]

This increase in intimidation can be explained by four factors: a pervasive belief in widespread voter fraud, the Supreme Court's recent Second Amendment cases, increased collective action by militias, and the COVID-19 pandemic.

A. A Pervasive Belief System in Voter Fraud:

Without evidence, mainstream Republican politicians have decried voter fraud as a widespread issue in the United States throughout the twenty-first century, with a major spike in concern since Trump's 2016 presidential campaign.[50] Even the Supreme Court in *Crawford v. Marion County Election Board* validated this fear, when Justice Stevens accepted reducing the risk of voter fraud as a valid justification for an Indiana voter ID law without strong empirical support.[51] The Court reaffirmed its same concern about voter fraud in 2021 in *Brnovich v. Democratic National Committee*, a challenge to two Arizona laws restricting both voting out-of-precinct and third-party "ballot harvesting."[52] Both Justice Stevens and Judge Posner, who wrote the Seventh Circuit's panel opinion, later expressed regret over *Crawford*'s perpetuation of voter fraud concerns.[53] The decision paved the way for states to impose stricter voter ID laws,[54] frequently without having to show evidence of fraud or some rational balance between, on the one hand, reducing fraud and, on the other, not reducing the franchise (i.e., some

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[49] See id. at 215; see also, e.g., Wendy Weiser & Adam Gitlin, Dangers of "Ballot Security" Operations: Preventing Intimidation, Discrimination, and Disruption, at 4–6, Brennan Ctr. for Just. (Aug. 31, 2016), https://www.brennancenter.org/sites/default/files/analysis/Briefing_Memo_Ballot_Security_Voter_Intimidation.pdf (describing poll watchers taking photos of voters' license plates, following vans that were transporting voters to polling places, and directing voters to incorrect polling centers, as well as candidates ordering false robocalls).

[50] The earliest twenty-first century governmental focus on voter fraud came when Attorney General John Ashcroft under President George W. Bush decided that prosecuting voter fraud would be a priority. See Atiba R. Ellis, Voter Fraud as an Epistemic Crisis, 71 Mercer L. Rev. 757, 764–65 (2020).

[51] Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 194–97 (2008).

[52] Brnovich v. Democratic Nat'l Comm., 594 U.S. 637, 672–73, 685–90 (2021).

[53] See Robert Barnes, Stevens says Supreme Court Decision on Voter ID was Correct, But Maybe Not Right, Wash. Post (May 15, 2016), https://www.washingtonpost.com/politics/courts_law/stevens-says-supreme-court-decision-on-voter-id-was-correct-but-maybe-not-right/2016/05/15/9683c51c-193f-11e6-9e16-2e5a123aac62_story.html?utm_term=.4c92ef515545; see also Andrew Cohen, Regrets, He Had a Few: The Legacy of John Paul Stevens, Brennan Ctr. for Just. (July 18, 2019), https://www.brennancenter.org/our-work/analysis-opinion/regrets-he-had-few-legacy-john-paul-stevens.

[54] Cody S. Barnett & Joshua A. Douglas, A Voice in the Wilderness: John Paul Stevens, Election Law, and a Theory of Impartial Governance, 60 Wm. & Mary L. Rev. 335, 344 (2018).

balance between Type 1 and Type 2 errors).[55] Evidence suggests such voter ID laws hardly ferret out fraud, while disenfranchising a nontrivial segment of the electorate.[56] Yet when courts scrutinize voter ID laws (and other facially neutral election laws) under the flexible *Anderson-Burdick* framework,[57] they generally do not require states to proffer empirical evidence to justify their voter fraud prevention rationale.[58]

In response to voter fraud concerns, the 2010 midterm elections saw the formation of new "ballot security" groups such as True the Vote, a group initially associated with the Tea Party movement.[59] Ballot security efforts have since gone mainstream following the 2017 expiration of the 1982 consent decree,[60] which previously barred the Republican Party from engaging in any "ballot security activities" in election districts with a significant minority population or where such activities might intimidate voters.[61] For context, the Republican National Committee ("RNC") became subject to the consent decree after it allegedly tried to intimidate minority voters in New Jersey in the 1981 gubernatorial election by recruiting off-duty armed police officers to patrol polling places in minority neighborhoods.[62]

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[55] See Andrew Vazquez, Updating Anderson-Burdick to Evaluate Partisan Election Manipulation, 1 Fordham L. Voting Rts. & Democracy F. 44, 47 (2022). For an analysis that implicitly invokes Type 1 and Type 2 errors in a different context, see Bush v. Gore, 531 U.S. 98, 143 (2000) (Ginsburg, J., dissenting) ("Ideally, perfection would be the appropriate standard for judging the recount. But we live in an imperfect world, one in which thousands of votes have not been counted [*Type I*]. I cannot agree that the recount adopted by the Florida court, flawed as it may be, would yield a result any less fair or precise than the certification that preceded that recount [*Type 2*]."). While Justice Ginsburg did not explicitly use the language of "Type 1" and "Type 2" errors, she acknowledged that courts ought to determine a rational balance between two imperfect data subsets.

[56] See, e.g., Shelley de Alth, ID at the Polls: Assessing the Impact of Recent State Voter ID Laws on Voter Turnout, 3 Harv. L. & Pol'y Rev. 185, 186 (2009).

[57] The Anderson-Burdick test balances the burden a voting regulation imposes on an individual's constitutional right to vote against the state's justifications for the law, applying more stringent scrutiny as the burden increases. See Anderson v. Celebrezze, 460 U.S. 780, 789 (1983); Burdick v. Takushi, 504 U.S. 428, 434 (1992).

[58] See Vazquez, supra note 55, at 47; Keeley Gogul, Reifying Anderson-Burdick: Voter Protection in the Time of Pandemic and Beyond, 90 U. Cin. L. Rev. 259, 277 (2021).

[59] See Cady & Glazer, supra note 43, at 177; see also, e.g., Shaila Dewan, Armed Observers, Chants of '4 More Years' at Polls: Is That Legal?, N.Y. Times (Oct. 30, 2020), https://www.nytimes.com/2020/10/30/us/poll-watching-intimidation.html ("In 2010, there were numerous accounts in Houston of voters in predominantly Black and Latino precincts feeling intimidated by a Tea Party group called the King Street Patriots, which started an initiative called True the Vote.").

[60] Democratic Nat'l Comm. v. Republican Nat'l Comm., No. 18-1215, 2019 WL 117555, at *3–4 (3d Cir. Jan. 7, 2019).

[61] Democratic Nat'l Comm. v. Republican Nat'l Comm., No. 81-03876, 2016 WL 6584915, at *3–4 (D.N.J. Nov. 5, 2016).

[62] Id. at *4. GOP "ballot security" efforts that purportedly intimidated minority voters long predate the 1980s. In fact, Republican ballot security efforts drew national headlines in 1971 after William Rehnquist was nominated to the Supreme Court due to his alleged participation in such programs. See Chandler Davidson, Tanya Dunlap, Gale Kenny, & Benjamin Wise, Vote Caging as a Republican Ballot Security Technique, 34 Wm. Mitchell L. Rev. 533, 543–44 (2008). Fifteen years later, these allegations

The confluence of the 2017 expiration of the RNC's consent decree and the 2016 election of President Trump has fostered an environment ripe for in-person and online voter intimidation under the guise of "ballot security" and "election integrity."[63] While the *Crawford* Court loosened the evidentiary standard needed to justify voter ID laws and other voting regulations based on state interests in avoiding voter fraud, Trump's rhetoric about voter fraud untethered the evidentiary standard from reality altogether.[64] Trump has openly said elections are "rigged," called mail ballots "fraudulent in many cases" [65] and has railed against alleged voter fraud more broadly, especially in urban metropolises with large minority populations.[66] In 2016, Trump encouraged his supporters to become poll watchers because of "all the thieving and stealing and robbing [his opponents] do."[67]

While voter fraud does exist in small numbers, evidence suggests it is (1) minimal, (2) insufficient in numbers to trigger a state's standard for a recount, (3) insufficient to change the outcome of an election, and (4) clearly nowhere near as widespread as Trump claims it to be—i.e., "in the millions"[68]—or as systematically committed by one candidate or one party.[69] Both mainstream news organizations and prominent conservative political and legal elites have closely studied the 2020

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resurfaced when a former federal prosecutor accused Chief Justice Rehnquist of participating in a Republican ballot security initiative allegedly "designed to reduce the number of black and Hispanic voters by confrontation and intimidation" in 1962 in Phoenix, Arizona. See Robert M. Andrews, Former Prosecutor Says He Saw Rehnquist in Voter Confrontation Effort, Associated Press (Aug. 1, 1986), https://web.archive.org/web/20221027021722/https://apnews.com/article/499f8c78d1235e4720aacaa008491969.

[63] See, e.g., Jim Rutenberg and Nick Corasaniti, Behind Trump's Yearslong Effort to Turn Losing Into Winning, N.Y. Times (Nov. 23, 2020), https://www.nytimes.com/2020/11/15/us/politics/trump-voter-fraud-claims.html.

[64] See, e.g., Richard L. Hasen, Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States, 135 Harv. L. Rev. F. 265, 266–70 (2022).

[65] Steve Inskeep, Timeline: What Trump Told Supporters For Months Before They Attacked, NPR (Feb. 8, 2021, 2:32 PM), https://www.npr.org/2021/02/08/965342252/timeline-what-trump-told-supporters-for-months-before-they-attacked.

[66] See Mich. Welfare Rts. Org. v. Trump, 600 F. Supp. 3d 85, 110 (D.D.C. 2022) (alleging that Trump targeted cities with large Black populations in his efforts to intimidate election officials and prevent the counting of legally cast ballots, under the pretext of voter fraud).

[67] See Rutenberg & Corasaniti, supra note 63.

[68] Andrew Restuccia, Trump's Baseless Assertions of Voter Fraud Called 'Stunning,' Politico (Nov. 27, 2016, 8:51 PM), https://www.politico.com/story/2016/11/trump-illegal-voting-clinton-231860.

[69] See, e.g., Samuel Issacharoff, Pamela S. Karlan, Richard H. Pildes, Nathaniel Persily, & Franita Tolson, The Law of Democracy 151 (6th ed. 2022); see generally Justin Levitt, The Truth About Voter Fraud, Brennan Ctr. for Just. (2007), https://www.brennancenter.org/sites/default/files/2019-08/Report_Truth-About-Voter-Fraud.pdf; Andrew C. Eggers, Haritz Garro, & Justin Grimmer, No Evidence for Systematic Voter Fraud: A Guide to Statistical Claims About the 2020 Election, 118 Proc. Nat'l Acad. Scis. (2021), https://www.pnas.org/doi/10.1073/pnas.2103619118#.

presidential election, which Trump claims was "stolen," and concluded there was no evidence of widespread fraud in the election.[70] Yet, after the 2020 presidential election, the Republican Party began recruiting an "army" of poll watchers in the name of "election integrity," in part, they claim, to try to match the Democrats' own poll-watching operations.[71] Election watchdog groups have noted that many recent recruits are not neutral observers but believe that the 2020 election was marred by fraud.[72] Such groups have also expressed concerns that strongly partisan poll watchers and poll workers who approach their roles primed to see fraud could instead disrupt normal voting procedures.[73]

On top of this, since 2020, several states have expanded legal protections for partisan poll watchers.[74] While partisan poll watching is not new and the bipartisan presence of well-trained poll watchers can increase transparency, expanding partisan poll watchers' power risks creating new opportunities for intimidation and the spread of misinformation.[75] As of 2021, at least forty bills expanding poll watchers' powers had been introduced in twenty state legislatures.[76] Among the bills that passed is Florida's S.B. 90, which requires that election officials grant partisan poll watchers "reasonable access" to examine ballot materials, such as mail ballot envelopes and voters' signatures.[77] S.B. 90 thus increases the possibility of intimidation and disruption by allowing poll watchers to stand close to election workers during the counting process.[78]

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[70] See, e.g., John Danforth et al., Lost, Not Stolen: The Conservative Case that Trump Lost and Biden Won the 2020 Presidential Election (2022), https://lostnotstolen.org//wp-content/uploads/2022/07/Lost-Not-Stolen-The-Conservative-Case-that-Trump-Lost-and-Biden-Won-the-2020-Presidential-Election-July-2022.pdf.

[71] See, e.g., Heidi Przybyła, 'It's Going to Be an Army': Tapes Reveal GOP Plan to Contest Elections, Politico (June 1, 2022, 6:30 AM), https://www.politico.com/news/2022/06/01/gop-contest-elections-tapes-00035758; Ned Parker, Linda So, & Moira Warburton, Insight: 'Stop the Steal' Supporters Train Thousands of U.S. Poll Observers, Reuters (Oct. 13, 2022, 6:07 AM), https://www.reuters.com/world/us/stop-steal-supporters-train-thousands-us-poll-observers-2022-10-13/.

[72] Przybyła, supra note 71.

[73] Id.

[74] See Eliza Sweren-Becker, Who Watches the Poll Watchers, Brennan Ctr. for Just. (2021), https://www.brennancenter.org/our-work/research-reports/who-watches-poll-watchers.

[75] Nick Corasaniti, G.O.P. Seeks to Empower Poll Watchers, Raising Intimidation Worries, N.Y. Times (May 1, 2021), https://www.nytimes.com/2021/05/01/us/politics/republican-pollwatchers.html; see also Mekela Panditharatne, Misinformation Risks from Partisan Poll Watchers, Brennan Ctr. for Just. (Nov. 8, 2022), https://www.brennancenter.org/our-work/analysis-opinion/misinformation-risks-partisan-poll-watchers.

[76] See Sweren-Becker, supra note 74.

[77] Panditharatne, supra note 75.

[78] Will Wilder, Derek Tisler, & Wendy R. Weiser, The Election Sabotage Scheme and How Congress Can Stop It, at 5, Brennan Ctr. for Just. (Nov. 8, 2021), https://www.brennancenter.org/our-work/research-reports/election-sabotage-scheme-and-how-congress-can-stop-it.

Texas also recently enacted legislation that diminishes poll workers' authority to constrain poll watchers' intimidating behavior.[79] The Texas bill, S.B. 1, prohibits election officials from removing poll watchers for certain election law violations unless the official personally witnessed the behavior in question.[80] S.B. 1 also grants poll watchers "free movement" throughout an entire voting location and imposes criminal penalties on poll workers who obstruct partisan poll watchers' view of voting or who "distance" the watcher from the voting process.[81] This provision effectively limits poll workers' ability to address instances of partisan poll watchers' intimidation of voters.

Another recent state law, Georgia's S.B. 202, allows any voter to challenge the eligibility of an unlimited number of voters in their county and threatens county election officials with sanctions for failure to address mass voter roll challenges.[82] Since the enactment of S.B. 202, one Georgia man challenged the eligibility of more than 13,000 voters registered in his county.[83] But in 2024, a court ruled that True the Vote's recent challenge of 364,000 Georgia voters did not amount to voter intimidation in violation of Section 11(b) of the VRA, despite harboring concerns over such challenges.[84]

After the 2020 presidential election, "election deniers" (i.e., those who falsely believe that the 2020 election was stolen) at the state and local level established election police units and task forces dedicated to combating voter fraud.[85] Some of their efforts to crack down on voter fraud have deterred eligible voters from voting.[86] For example, in August 2020, Florida's new Office of Election Crimes and Security arrested nineteen voters with felony convictions, many of whom were previously informed by government actors that they could vote.[87] According to news reporting, the high-

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[79] Id. at 5.

[80] Id.

[81] S.B. 1, 87th Leg., 1st Spec. Sess. (Tex. 2021).

[82] Wilder, Tisler, & Weiser, supra note 78, at 6.

[83] Maya King & Nick Corasaniti, Early Voting Surges as Georgia Watches for Impact of Election Law, N.Y. Times (May 23, 2022), https://www.nytimes.com/2022/05/23/us/politics/georgia-voter-turnout.html.

[84] Fair Fight Inc. v. True the Vote, 710 F. Supp. 3d 1237, 1242 (N.D. Ga. 2024).

[85] See, e.g., Jessica Pishko, Right-Wing Task Force Will Police Elections in the Texas GOP's Last Urban Stronghold, Bolts (March 9, 2023), https://boltsmag.org/tarrant-county-election-fraud-task-force/.

[86] See, e.g., Nicole Lewis & Alexandra Arriaga, Florida's Voter Fraud Arrests Are Scaring Away Formerly Incarcerated Voters, Marshall Project (Nov. 4, 2022), https://www.themarshallproject.org/2022/11/04/florida-s-voter-fraud-arrests-are-scaring-away-formerly-incarcerated-voters.

[87] Matt Dixon, Defendants Targeted in DeSantis' Voter Fraud Crackdown Were Told They Could Vote, Politico (Aug. 26, 2022, 11:03 AM), https://www.politico.com/news/2022/08/26/desantis-voter-fraud-defendants-florida-00053788.

profile arrests, captured on law enforcement body cameras,[88] intimidated eligible, disproportionately Black, formerly incarcerated voters in Florida and across the South.[89] As a result, some voters—despite being eligible under state law—decided to skip voting in the 2022 midterm elections due to fear and confusion over their eligibility.[90]

B. The Second Amendment Cases:

The Supreme Court's Second Amendment cases, particularly *District of Columbia v. Heller*[91] and *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*,[92] appear to have allowed for more intimidation via firearms than in the recent decades before those cases.[93] While *Heller* and *Bruen* both permit the prohibition of firearms in "sensitive places," including polling places, the parading of firearms in public spaces near polling places and drop boxes still has the potential to intimidate and deter voters.[94] The specter of violence is in the streets when voters head to the polls, a threat taken especially seriously by many Black Americans because of the history of violence against them in the South.[95] This concern is not limited to rural or more conservative areas. According to a Reuters/Ipsos poll in the lead-up to the 2022 midterm elections, forty-three percent of registered U.S. voters surveyed were

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[88] Michael Wines & Neil Vigdor, Videos Show Confusion as Florida Police Arrest People on Voter Fraud Charges, N.Y. Times (Oct. 19, 2022), https://www.nytimes.com/2022/10/19/us/florida-voter-fraud-arrests-video.html.

[89] Lewis & Arriaga, supra note 86.

[90] Id.

[91] 554 U.S. 570, 626 (2008).

[92] 597 U.S. 1, 29-30 (2022); see also Antonyuk v. Hochul, 635 F. Supp. 3d 111 (N.D.N.Y. Oct. 6, 2022).

[93] See, e.g., Sean Morales-Doyle, Robyn Sanders, Allison Anderman, & Jessica Ojeda, Guns and Voting, at 12, Brennan Ctr. for Just. (Sept. 28, 2023), https://www.brennancenter.org/media/11701/download/Guns%20and%20Voting%20Report%20April%202024.pdf (stating that "[w]eakened gun laws in dozens of states, increases in firearm purchases, and spikes in gun deaths have coincided with a disturbing rise in armed political violence and intimidation").

[94] See *Bruen*, 597 U.S. at 30 ("Although the historical record yields relatively few 18th- and 19th-century 'sensitive places' where weapons were altogether prohibited—*e.g.,* legislative assemblies, polling places, and courthouses—we are also aware of no disputes regarding the lawfulness of such prohibitions.").

[95] See Andrew I. Thompson et al., Anti-Black Political Violence and the Historical Legacy of the Great Replacement Conspiracy, 23 Persp. on Pol. 195, 197, 207 (2025) (describing the history of anti-Black political violence in response to Black enfranchisement and stating that current anti-Black racism fuels violence); Rayna Young, Amplifying Black Perspectives Part 1: Insights from the 2024 Pre-Election Survey, Cong. Black Caucus Found. (2024), https://www.cbcfinc.org/policy-research/amplifying-black-perspectives-insights-from-the-2024-pre-election-survey/ (finding that Black voters voiced significant concern about voter suppression and political violence prior to the 2024 election).

concerned about intimidation or threats of violence when voting in person.[96] Evidence also indicates that the American public's acceptance of political violence grew from 2017 to 2022, in terms of both recorded incidents and beliefs,[97] supporting concerned voters' perception that violence might arise anywhere at any time. In a recent example, discussed in Part V, law enforcement body camera footage captured incidents of armed private actors engaging in "election integrity" activities during the 2022 midterm elections next to a ballot drop box in Maricopa County, Arizona.[98]

Even before judges began striking down gun laws post-*Bruen*,[99] Americans grew accustomed to televised images of armed protesters, some with semiautomatic rifles, gathering daily outside of vote tabulation centers as election workers counted votes in the 2020 presidential election.[100] In October 2018, tweets calling for Republicans to arm themselves at the polls trended after a National Rifle Association spokesperson stated on NRATV that gunowners should bring guns to the polls to protect themselves from out-of-control progressives.[101] During the 2016 presidential election, eighty-five voters in twenty-eight states reported to the gun violence prevention advocacy group Guns Down America that they saw private individuals with guns at their polling places.[102]

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[96] Warburton & Lange, supra note 36. ("The fear was more pronounced among Democratic voters, 51% of whom said they worried about violence, although a still-significant share of Republicans - 38% - harbored the same concerns.").

[97] The Rise in Political Violence in the United States and Damage to Our Democracy: Hearing Before the Select Comm. to Investigate the Jan. 6th Attack on the U.S. Capitol, 117th Cong. 2 (2022) (statement of Rachel Kleinfeld, Senior Fellow, Carnegie Endowment for International Peace).

[98] See Sanchez & Usero, supra note 10 (showing body-camera footage revealing armed observers at a drop box in Maricopa County, Arizona during the 2022 midterm elections, as law enforcement explain and enforce laws).

[99] See, e.g., Tracey Tully, Judge Blocks Much of New Jersey Law Limiting Guns in Public, N.Y. Times (Jan. 9, 2023), https://www.nytimes.com/2023/01/09/nyregion/nj-handgun-law.html.

[100] See, e.g., Tim Sullivan & Adam Geller, Increasingly Normal: Guns Seen Outside Vote-Counting Centers, Associated Press (Nov. 7, 2020), https://apnews.com/article/protests-vote-count-safety-concerns-653dc8f0787c9258524078548d518992.

[101] Young Mie Kim, Voter Suppression Has Gone Digital, Brennan Ctr. for Just. (Nov. 20, 2018, 8:16 AM), https://www.brennancenter.org/our-work/analysis-opinion/voter-suppression-has-gone-digital.

[102] See Robert J. Spitzer, Guns Don't Belong Near Polling Places. Right Wingers Want Them There Anyway, Wash. Post (Sept. 30, 2020), https://www.washingtonpost.com/outlook/2020/09/30/guns-polling-places-intimidation/; Guns Down America, Guns Down America Applauds Bill to Tackle Armed Voter Intimidation and Protect the Right to Vote (July 29, 2021), https://www.gunsdownamerica.org/guns-down-america-applauds-bill-to-tackle-armed-voter-intimidation-and-protect-the-right-to-vote/.

C. Militias:

While private militias have been a phenomenon throughout American history,[103] the development of the internet has recently fostered greater collective action and more visible public patrolling by private right-wing militias.[104] Private right-wing militias, and their members, have also joined vigilante-style ballot security groups responsible for voter intimidation.[105] Notably, two groups affiliated with the Oath Keepers, the Yavapai County Preparedness Team (Arizona's local chapter of the Oath Keepers) and an offshoot organization called the Lions of Liberty, were named defendants[106] in a voter intimidation lawsuit brought by the League of Women Voters of Arizona in October 2022, a case examined in more detail in Part V. After agreeing to stop their ballot drop box surveillance activities, both groups were dismissed from the litigation, which then continued against other non-militia defendants.[107]

D. The Pandemic:

Following the COVID-19 pandemic, more states have longer periods of voting due to the increase in voting by mail and early voting.[108] According to Republicans,[109] mail-in voting raises the specter of voter fraud and thus provides further grounds for intimidating behavior. At the same time, longer

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[103] For example, white supremacist militias engaged in voter intimidation throughout the Reconstruction era. In South Carolina, paramilitary groups like the Red Shirts intimidated anyone other than white Democrats from serving as poll watchers and physically prevented Black voters from reaching voting booths. Melissa DeVelvis & DJ Polite, The Attempted Insurrection was Only Part of the Right's Anti-Democratic Playbook, Wash. Post (Jan. 10, 2021), https://www.washingtonpost.com/outlook/2021/01/10/attempted-insurrection-was-only-part-rights-anti-democratic-playbook/.

[104] In fact, it has never been easier to join a militia thanks to sites like mymilitia.com, which served "as a base for paramilitary coordination in the months leading up to Jan. 6." See Jacob Glick, The Long Descent to Insurrection, Lawfare (Feb. 14, 2023, 2:26 PM), https://www.lawfaremedia.org/article/long-descent-insurrection.

[105] See, e.g., Rocio Fabbro, Election Officials Combat Voter Intimidation Across U.S. as Extremist Groups Post Armed Militia at Some Polls, CNBC (Nov. 8, 2022, 7:57 AM), https://www.cnbc.com/2022/11/06/election-officials-facing-armed-militia-presence-at-some-polls.html.

[106] Bensinger, supra note 1.

[107] Oct. 31, 2022 Status Conference Transcript, at 8, Clean Elections USA II, No. CV-22-01823-PHX-MTL, 2022 WL 17088041 (D. Ariz. Nov. 1, 2022).

[108] See Hansi Lo Wang, Stop Thinking Just about Election Day. We're in Voting Season Now, NPR (Sept. 23, 2022, 5:00 AM), https://www.npr.org/2022/09/23/1124517014/election-day-early-voting-vote-by-mail.

[109] Amy Mitchell, Mark Jurkowitz, J. Baxter Oliphant & Elisa Shearer, Legitimacy of Voting by Mail Politicized, Leaving Americans Divided, Pew Research Center (Sept. 16, 2020), https://www. pewresearch.org/journalism/2020/09/16/legitimacy-of-voting-by-mail-politicized-leaving-americans-divided/.

voting periods permit longer periods of intimidation and provide a greater incentive to strongly enforce federal anti-intimidation voting laws. This is especially true of Section 11(b) of the VRA, which unlike § 1985(3) of the Ku Klux Klan Act,[110] offers injunctive relief but not compensatory damages.[111] When voting periods were shorter (e.g., a single day), voters facing intimidation on election day had less of an incentive to sue under Section 11(b) because any possibility of injunctive relief would come too late, after the polls had closed. This has not been the case since 2020, as expanded early voting and mail-in voting have diminished the need for immediate relief.[112]

One might suggest that voting by mail makes voter intimidation more difficult, as voters need not appear in public with their ballot. But many voters' concerns about the reliability of the U.S. postal service have led them to deposit their mail ballots at ballot drop boxes,[113] which have become a significant site of intimidation,[114] as well as political flashpoints.[115]

In 2020, conspiracy claims about the pandemic coalesced with conspiracy claims about voter fraud to drive a new baseless narrative about the government's use of the pandemic to weaken election integrity laws with mail-in voting and extensions to ballot deadlines.[116] This conspiracy-fueled narrative contributed to a swell of legally framed suspicions of judicial

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[110] See infra Part III.

[111] See Cady & Glazer, supra note 43, at 207.

[112] See, e.g., *Clean Elections USA II*, 2022 WL 17088041 (alleging violations under Section 11(b) of the Voting Rights Act and § 1985(3) of the KKK Act after private ballot watchers photographed, harassed, followed, and attempted to dox plaintiffs for using ballot drop boxes during early voting); Beaumont Chapter of the NAACP v. Jefferson Cnty., Tex., 685 F. Supp. 3d 414, 417–18 (E.D. Tex., 2023) (alleging a Section 11(b) violation after election officials turned away duly eligible voters, requested voters to publicly recite their addresses, and hovered over voters during early voting).

[113] See, e.g., Luke Broadwater & Hailey Fuchs, Lingering Mail Problems Worry Voters in Final Week of Election, N.Y. Times (Oct. 29, 2020), https://www.nytimes.com/2020/10/29/us/politics/post-office-mail-voting-2020-election.html.

[114] See, e.g., Yvonne Wingett Sanchez, Alleged Voter Intimidation at Arizona Drop Box Puts Officials on Watch, Wash. Post (Oct. 20, 2022), https://www.washingtonpost.com/politics/2022/10/20/arizona-ballot-drop-boxes/.

[115] Andy Sullivan & Jarrett Renshaw, Ballot Drop Boxes are Latest Battleground in U.S. Election Fight, Reuters (Aug. 20, 2020, 7:30 AM), https://www.reuters.com/article/legal/ballot-drop-boxes-are-latest-battleground-in-us-election-fight-idUSKBN25G14H/.

[116] See, e.g., Reuters, Fact Check: False Claims About the Coronavirus and the 2020 U.S. Presidential Election, (Dec. 7, 2020), https://www.reuters.com/article/uk-factcheck-coronavirus-election-claims/fact-check-false-claims-about-the-coronavirus-and-the-2020-u-s-presidential-election-idUSKBN28H25T; Javier A. Granados Samayoa et al., A Gateway Conspiracy? Belief in COVID-19 Conspiracy Theories Prospectively Predicts Greater Conspiracist Ideation, 17 PLoS ONE (2022); Richard L. Hasen, Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States, 135 Harv. L. Rev. F. 265, 269 (2022).

interventions in the months and days before elections, ostensibly strengthening some arguments for state legislative dominance of election procedures.[117]

At the same time, misinformation and deceptive practices designed to suppress the vote (sometimes in intimidating ways) flourished in the digital realm during the pandemic. For example, right-wing conspiracy theorists Jacob Wohl and Jack Burkman sent threatening robocalls containing misinformation about voting to 85,000 phone numbers across the United States.[118] Targeting zip codes with large Black populations, the robocalls threatened voters who voted by mail with the possibility of mandatory vaccines, unpaid debts being called due, and police departments tracking down old arrest warrants.[119]

III. VOTER INTIMIDATION LAWS

Because voter intimidation is such a pressing issue now, it is valuable to examine some of the legal tools – federal and state, both civil and criminal – that have developed over time to combat it. In particular, Congress passed three principal statutes with civil remedies in response to the widespread intimidation of Black voters during Reconstruction and under Jim Crow: the Enforcement Act of 1871 (also known as the Ku Klux Klan Act), the Civil Rights Act of 1957, and the Voting Rights Act of 1965 (also known as the VRA).[120] All three federal statutes permit private parties to bring claims against voter intimidation in a federal election, but notably, unlike the KKK Act of 1871 and the Civil Rights Act of 1957, the Voting Rights Act of 1965

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[117] In particular, such legal arguments have focused on the independent state legislature theory and the *Purcell* doctrine. See, e.g., Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 30 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay) (citing the logic of Purcell v. Gonzalez, 549 U.S. 1 (2006) (*per curiam*), as grounds for not permitting a district court in Wisconsin to extend an absentee ballot deadline during the pandemic on the eve of an election). The most extreme version of the independent state legislature theory holds that the only entity in a state with authority to make rules for federal elections is its legislature, unconstrained by state courts. See Leah M. Litman & Katherine Shaw, Textualism, Judicial Supremacy, and the Independent State Legislature Theory, 2022 Wis. L. Rev. 1235, 1240–43 (2022). The Supreme Court recently rejected this maximalist version of the theory without fully rejecting the independent state legislature theory altogether. Moore v. Harper, 600 U.S. 1, 34 (2023).

[118] See Wohl III, 661 F. Supp. 3d 78, 92 (S.D.N.Y. 2023).

[119] Id.

[120] A number of articles have reviewed the history of these provisions, which this Article will not reproduce. See, e.g., Cady & Glazer, supra note 43; Carly E. Zipper, Comment, Let Us Not Be Intimidated: Past and Present Applications of Section 11(b) of The Voting Rights Act, 97 Wash. L. Rev. 301, 308–10 (2022); Note, The Support or Advocacy Clause of § 1985(3), 133 Harv. L. Rev. 1382 (2020); Michael Weingartner, Remedying Intimidating Voter Disinformation Through § 1985(3)'s Support-or-Advocacy Clauses, 110 Geo. L.J. Online 83, 92–103 (2021).

also applies to state and local elections.[121] Finding a violation of any of the three statutes does not require that the intimidation *actually succeed* in preventing people from voting.[122]

To understand why Section 11(b) of the VRA marks such a crucial doctrinal advance, it is necessary to compare the three principal statutes and the availability of common law remedies.

A. The Ku Klux Klan Act:

Following the Civil War, Congress sought to remedy the scourge of racial political violence and intimidation by paramilitary organizations with the Enforcement Act of 1870,[123] and, after little success, with the KKK Act of 1871.[124] Section 2 of the KKK Act, later codified as 42 U.S.C. § 1985(3), creates civil and criminal liability for private actors who conspire to interfere with federal governance.[125] Among its provisions are the "support-or-advocacy clauses," which together create a private right of action against persons who "conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward" candidates in federal elections.[126]

For most of their history, § 1985(3)'s support-or-advocacy clauses were relatively "obscure"[127] and "mostly forgotten."[128] But in recent years, the provision has received a moderate increase in attention from scholars[129] and voting rights litigators.[130] Such attention is well-deserved, as the support-or-

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[121] Cady & Glazer, supra note 43, at 212.

[122] *Wohl III*, 661 F. Supp. 3d at 110.

[123] Enforcement Act of 1870, 16 Stat. 140 (1870). As many others have documented, paramilitary organizations like the Ku Klux Klan engaged in widespread racial terror and political violence against Black Americans—and some white Republicans—after the Civil War. See, e.g., Cady & Glazer, supra note 43, at 184–85 ("The Ku Klux Klan attacked one-tenth of the black members of the 1867-68 constitutional conventions. Even the simple act of voting could provoke violence.").

[124] Enforcement Act of 1871, Pub. L. No. 42-22, Ch. 22, 17 Stat. 13 (1871). At the time of its enactment, the KKK Act was seen as an expansion of federal power meant to quell southern violence and secure the equality of rights of U.S. citizenship, including federal voting rights. Cady & Glazer, supra note 43, at 185–86.

[125] See Richard Primus & Cameron O. Kistler, The Support-or-Advocacy Clauses, 89 Fordham L. Rev. 145, 152 (2020). Section 1 of the KKK Act contained its most famous provision, now codified as 42 U.S.C. § 1983, which created a private right of action against anyone acting under color of state law to abridge a person's constitutional rights. § 1, 17 Stat. at 13 (codified as amended at 42 U.S.C. § 1983).

[126] 42 U.S.C. § 1985(3).

[127] Cady & Glazer, supra note 43, at 186.

[128] Primus & Kistler, supra note 125, at 146.

[129] See, e.g., id. at 145; Note, supra note 120; Weingartner, supra note 120, 92–103.

[130] See, e.g., LULAC, No. 1:18-CV-00423, 2018 WL 3848404 (E.D. Va. Aug. 13, 2018) (stating that allegations of publishing voters' personal information in a report identifying them as felons stated a claim under the KKK Act's support-or-advocacy clauses and Section 11(b) of the Voting Rights Act); Colo.

advocacy clauses may offer victims of voter intimidation considerable recourse. First, in addition to injunctive relief, the clauses provide for compensatory and punitive damages[131] and attorney's fees, creating a meaningful deterrent against voter intimidation that vindicates plaintiffs' political rights.[132] Second, plaintiffs need not show that conspiracies were motivated by racial animus or any other protected class-based discrimination.[133]

The Supreme Court has never directly interpreted § 1985(3)'s civil support-or-advocacy clauses,[134] though § 1985(3)'s criminal counterpart, which contains nearly identical language,[135] was upheld in *Ex parte Yarbrough.*[136] The *Yarbrough* Court held that § 1985(3)'s criminal provision was constitutional based on the Constitution's Elections Clause (Article I, Section 4) and Necessary and Proper Clause (Article I, Section 8). Crucial doctrinal issues remain unresolved in interpreting the KKK Act, particularly regarding whether the support-or-advocacy clauses create a substantive right or instead are only remedial.[137]

Mont. Wyo. State Area Conf. of NAACP v. U.S. Election Integrity Plan, 653 F. Supp. 3d 861, 870 (D. Colo. 2023) (denying defendants' motion for summary judgment under the support-or-advocacy clauses of the KKK Act in case involving armed agents knocking on doors); Clean Elections USA II, No. CV-22-01823-PHX-MTL, 2022 WL 17088041, at *1 (D. Ariz. Nov. 1, 2022) (issuing temporary restraining order following plaintiffs' claims under the support-or-advocacy clauses of the KKK Act and under Section 11(b) of the VRA in ballot drop box monitoring case).

[131] See Forsberg v. Pefanis, 634 F. App'x 676, 680 (11th Cir. 2015) (holding that § 1985 claims permit punitive damages even in the absence of compensatory damages).

[132] See Cady & Glazer, supra note 43, at 207.

[133] 42 U.S.C. § 1985(3). While the Supreme Court has not squarely addressed the issue, it has appeared to confirm this reading, suggesting that support-or-advocacy claims do not require a showing of racial animus. See Kush v. Rutledge, 460 U.S. 719, 726 (1983) (observing that "[t]here is no suggestion" that a discriminatory animus requirement in the separate § 1985(3) "equal protection clauses" should apply "to any other portion of § 1985" and that the legislative history supporting the equal protection provision of § 1985(3) "does not apply to the portions of the statute that prohibit interference with federal officers, federal courts, or federal elections").

[134] Weingartner, supra note 120, at 99.

[135] See Note, supra note 120, at 1393. In the 1874 revision of the U.S. Code, Congress placed the criminal penalties corresponding with the civil support-or-advocacy clauses in a separate statute, Section 5520 of the Revised Statutes.

[136] 110 U.S. 651, 657–58 (1884). The criminal enforcement provision of the support-or-advocacy clauses was later repealed after *Yarbrough.*

[137] If the clauses are merely remedial, then voter intimidation victims bringing § 1985(3) claims would also have to show that the challenged conspiracy violated some other preexisting right under federal law, such as the right to vote under the First, Fourteenth, or Fifteenth Amendments, or a speech and advocacy right under the First Amendment. Compare Primus & Kistler, supra note 125 (describing one court's view that the support-or-advocacy clauses are remedial, in contrast to the authors' view that the clauses are substantive), with Nat'l Coal. on Black Civic Participation v. Wohl, 498 F. Supp. 3d 457, 486 n.30 (S.D.N.Y. 2020) [hereinafter Wohl I] (finding that the support-or-advocacy clauses give rise to an independent substantive right—the right to vote and participate in voting-related activities—and therefore proscribing intimidation by private actors).

B. The Voting Rights Act:

The Voting Rights Act of 1965, the most powerful piece of federal voting rights legislation, was born of the earlier failures of the 1957 Civil Rights Act. While Congress had taken some steps to address voter intimidation in the 1957 Act,[138] both that statute's inadequacies and national outrage over the brutal state violence of the "Bloody Sunday" march in Selma led civil rights leaders and the Johnson administration to call for a more aggressive response to an intolerable situation: continued Black disenfranchisement 100 years after the Civil War.[139] In response, Congress enacted the monumental Voting Rights Act of 1965. Congressional debate over the VRA focused on the failings of existing federal voting law, ongoing obstacles to registration (e.g., tests and devices), fraud (e.g., ballot destruction), and the intimidation, threats and coercion of minority voters.[140] The statute's anti-intimidation provision, Section 11(b), was by no means the centerpiece of the VRA; that designation belonged to Sections 2 and 5. Section 2 prohibited voting practices or procedures that discriminated on the basis of race, color, or membership in a language minority group.[141] Section 5 required jurisdictions covered by Section 4(b)'s formula (i.e., jurisdictions with a history of discriminatory voting practices) to seek preclearance from the Department of Justice ("DOJ") before implementing any changes to voting laws.[142] In 2013, Section 5 was effectively gutted when the Supreme Court struck down Section 4(b)'s formula as unconstitutional in *Shelby County*.[143]

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[138] Despite Congress's attempt to prevent voter intimidation with the KKK Act during Reconstruction, Black Americans faced continued violence and intimidation under Jim Crow on top of a host of restrictive voting laws, including literacy tests, poll taxes, grandfather clauses, and the "white primary." See Cady & Glazer, supra note 43, at 188. In response, Congress intervened once again with the passage of the Civil Rights Act of 1957, a compromise bill. See id. The Act's anti-intimidation provision, Section 131(b), provides that no private or public actor shall "intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote" in federal elections and primaries. 52 U.S.C. § 10101(b) (originally codified as 42 U.S.C. § 1971(b)). The provision provides for injunctive relief and attorney's fees, but unlike § 1985(3) of the KKK Act, no compensatory damages. See Cady & Glazer, supra note 43, at 234. Soon after its enactment, it became apparent that Section 131(b) was largely ineffective due to the onerous burden plaintiffs faced in proving Section 131(b)'s "purpose" and racial motivation requirements, as well as the lower courts' split over whether the law contained a private right of action and the DOJ's weak enforcement of the provision. See id. at 189, 202.

[139] See Cady & Glazer, supra note 43, at 189.

[140] See Frederick G. Slabach, Equal Justice: Applying the Voting Rights Act to Judicial Elections, 62 U. Cin. L. Rev. 823, 827 n.16 (1994) (citing H.R. REP. No. 439, 89th Cong., 1st Sess. 6 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2471).

[141] Voting Rights Act of 1965, Section 2, 52 U.S.C. § 10301.

[142] Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2620 (2013).

[143] Id. at 2612.

In comparison, Section 11(b) was less ambitious, though it was intended to offer stronger and broader protections against voter intimidation than existing laws.[144] Specifically, Section 11(b) eliminated the purpose and racial animus requirements found in Section 131(b) of the Civil Rights Act of 1957 in order to make bringing voter intimidation claims easier.[145] Attorney General Nicholas Katzenbach, who drafted portions of the VRA,[146] testified in a Senate Judiciary Committee hearing that Section 11(b) was a "substantial improvement" over Section 131(b) of the 1957 Act.[147] Unlike under Section 131(b), "no subjective 'purpose' need be shown . . . in order to prove intimidation" under Section 11(b).[148] As such, Katzenbach said that "defendants would be deemed to intend the natural consequences of their acts"—a shift designed "to avoid the imposition on the government of the very onerous burden of proof of 'purpose' which some district courts have required under the present law."[149] Similarly, the House Report for the VRA emphasized that Section 11(b) requires no proof of racial motivation or subjective intent, unlike Section 131(b)'s more demanding intent requirement.[150] Accordingly, plaintiffs do not need to show that defendants possessed a certain state of mind, and need only show that their conduct was objectively intimidating.[151]

The Fifteenth Amendment provided most of the constitutional authority for passing the VRA, but the House Report for Section 11(b) also invoked "[A]rticle I, [S]ection 4 [the Elections Clause] and the implied power of Congress to protect Federal elections against corrupt influences, neither of which requires a nexus with race."[152] As the Supreme Court has observed, the "protection of voters" falls within Congress's authority to regulate the "time, place, and manner" of federal elections under the Elections Clause.[153]

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[144] See Cady & Glazer, supra note 43, at 190.

[145] H.R. REP. No. 89-439, at 2473–74 (1965), *as reprinted in* 1965 U.S.C.C.A.N. 2437.

[146] See Cady & Glazer, supra note 43, at 190.

[147] Voting Rights, Part 1: Hearings on S. 1564 Before the S. Comm. on the Judiciary, 89th Cong. 16 (1965).

[148] Id.

[149] Id.

[150] Cady & Glazer, supra note 43, at 231 n.390 (citing Statutory History of the United States: Civil Rights, 1502 (Bernard Schwarz ed. 1970) (discussing 52 U.S.C.A. § 10101(b) (West 2014))).

[151] Id. at 191. As discussed in Part VI.B, *Counterman v. Colorado*'s subjective recklessness requirement stands in tension with Section 11(b)'s lack of intent requirement. 600 U.S. 66 (2023).

[152] H.R. REP. No. 89-439, at 2473–74 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437.

[153] See Smiley v. Holm, 285 U.S. 355, 366 (1932).

C. Voting Rights at Common Law:

Before further discussing Section 11(b) of the VRA, it is worth noting that federal and state statutes (and the federal constitution) do not offer the only recourse to victims of voter intimidation. There is also an infrequently litigated, but centuries-old common law cause of action for what Professor Samuel Issacharoff has referred to as "tortious interference with the franchise."[154] Voting rights suits for money damages were more frequent in the United States in the early twentieth century than they are now.[155] This was due in part to the then-existing amount in controversy requirement of $2,000 for federal question jurisdiction, which made damages a practical necessity for accessing federal courts.[156] In such cases, not only were damages a substantive element of a tortious interference claim, but they were also a threshold requirement for establishing federal question jurisdiction.[157] Notably, tortious interference cases did not require physical obstruction, threats or intimidation; merely turning someone away at the polling place and denial of their right to cast a ballot sufficed to bring a claim for money damages.[158] Even if voting rights cases based on tortious interference have fallen out of favor, Professor Issacharoff, who had some success bringing a voter intimidation and suppression suit for damages,[159] has suggested that voting rights litigators might consider bringing more claims at common law for a simple

[154] See Samuel Issacharoff, Voting Rights at 50, 67 Ala. L. Rev. 387, 407 (2015). As the Supreme Court has noted, tortious interference with the franchise dates back to Lord Holt's decision in *Ashby v. White*, 2 Raym. Ld. 938, 92 Eng. Rep. 126 (K. B. 1703), in which a constable of Aylesbury prevented a burgess from voting in a parliamentary election. Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 312 n.14 (1986).

[155] See, e.g., Nixon v. Herndon, 273 U.S. 536, 540 (1927) (holding that a plaintiff who was illegally prevented from voting in a state primary election suffered compensable injury); Lane v. Wilson, 307 U.S. 268, 269 (1939) (bringing an action for damages against state officials who had denied Black plaintiff's right to vote under § 1983, formerly codified at that time as 8 U.S.C. § 43).

[156] See Issacharoff, supra note 154, at 408.

[157] See, e.g., Wiley v. Sinkler, 179 U.S. 58, 64–65 (1900) (recognizing that a plaintiff may bring an action against election officers to recover monetary damages for the deprivation of the right to vote); Swafford v. Templeton, 185 U.S. 487, 492 (1902) (permitting a suit to recover damages for vote denial claim under federal question jurisdiction).

[158] See, e.g., id.

[159] Vargas v. Calabrese, 634 F. Supp. 910 (D.N.J. 1986), *aff'd sub nom*. Vargas v. Hudson Cnty. Bd. of Elections, 949 F.2d 665 (3d Cir. 1991). *Vargas* included a litany of official and extralegal intimidating and suppressive actions by incumbent mayor of Jersey City Gerald McCann against minority voters in a mayoral election. Issacharoff, supra note 154, at 406; see also Jean C. Love, Presumed General Compensatory Damages in Constitutional Tort Litigation: A Corrective Justice Perspective, 49 Wash. & Lee L. Rev. 80–84 (1992).

reason: the prospect of having to pay ex post can deter potential intimidators ex ante.[160]

IV. CASE LAW INTERPRETING SECTION 11(B) OF THE VRA

While Section 11(b) of the VRA has been a tool against voter intimidation since 1965, the provision was rarely used in litigation for much of its history.[161] According to one comprehensive study of the provision,[162] there may have been as few as fourteen cases bringing Section 11(b) claims from 1965 to 2012.[163] For the reasons discussed in Part II, circumstances have changed. Courts have seen a rise in Section 11(b) claims in the last few years,[164] with at least eight significant Section 11(b) cases from 2020 to 2024, and many more that did not survive a motion to dismiss.[165] Some of

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[160] Issacharoff, supra note 154, at 405–409. Suits for tortious interference with the franchise raise two issues. First, a suit for tortious interference with the franchise treats the deprivation of the right to vote in a particular election as a concrete injury, compensated with presumed actual damages. Id. at 407; see also Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 312 n.14 (1986). Second, a suit for tortious interference with the franchise is likely to be most effective when intimidating conduct has actually deprived someone of the right to vote. Still, it is possible that plaintiffs suing at common law against voter intimidation could also recover for emotional suffering and other traditionally compensable tort injuries, even if they managed to cast their vote in the face of intimidation. See Weingartner, supra note 120, at 114–16 (elaborating on the tort-influenced theory underlying a voter intimidation action for damages under § 1985(3)).

[161] See Cady & Glazer, supra note 43, at 191.

[162] See id. at 238–43.

[163] See Zipper, supra note 120, at 303 (arguing that Section 11(b) has been underutilized because modern forms of voter intimidation are difficult to identify, plaintiffs often lack sufficient incentives to bring claims for injunctive relief during tight election windows, and plaintiffs face unpredictable constitutional issues, namely the true threat doctrine).

[164] See, e.g., LULAC, No. 1:18-CV-00423, 2018 WL 3848404 (E.D. Va. Aug. 13, 2018) (denying a motion to dismiss Section 11(b) and § 1985(3) claims concerning publishing voters' personal information in a report identifying them as felons); Allen v. City of Graham, No. 1:20-CV-997, 2021 WL 2223772, at *8 (M.D.N.C. June 2, 2021) (denying city's motion to dismiss a claim under 11(b) and finding no reason to demonstrate 11(b) claim was racially motivated); Clean Elections USA II, No. CV-22-01823-PHX-MTL, 2022 WL 17088041 (D. Ariz. Nov. 1, 2022) (enjoining ballot watchers from intimidating voters near ballot drop boxes under Sections 11(b) and 1985(3)); Colo. Mont. Wyo. State Area Conf. of NAACP v. U.S. Election Integrity Plan, 653 F. Supp. 3d 861, 864–65 (D. Colo. 2023) (denying defendants' motion for summary judgment against plaintiffs' claims under 11(b) and § 1985(3), after allegations of private armed agents knocking on doors); Wohl III, 661 F. Supp. 3d 78, 90 (S.D.N.Y. 2023) (finding violation of Sections 11(b) and 1985(3) for robocall voter intimidation scheme).

[165] See, e.g., Allen v. City of Graham, 2021 WL 2223772, at *7 (denying city's motion to dismiss an 11(b) claim based on alleged excessive force by law enforcement during a voting-related protest); *Clean Elections USA II*, 2022 WL 17088041 (enjoining ballot watchers from intimidating voters near ballot drop boxes under Sections 11(b) and 1985(3)); Colo. Mont. Wyo. State Area Conf. of NAACP v. U.S. Election Integrity Plan, 653 F. Supp. 3d 861 (denying defendants' motion for summary judgment against plaintiffs' claims under 11(b) and § 1985(3), after allegations of private armed agents knocking on doors); Wohl III, 661 F. Supp. 3d at 90 (finding violation of Sections 11(b) and 1985(3) for robocall voter intimidation scheme); Krabach v. King Cnty., No. 2:22-CV-1252-BJR, 2023 WL 7018431, at *6 (W.D. Wash.

these suits, where conspiracies are alleged, are paired with claims under § 1985(3) of the KKK Act for damages.

While the federal government has done little to enforce Section 11(b) since its enactment,[166] the DOJ appeared to increase its enforcement during the Biden administration under Attorney General Merrick Garland. Since 2022, the DOJ issued four statements of interest defending Section 11(b) in cases brought by private litigants and intervened in a fifth case to defend the constitutionality of Section 11(b).[167]

Case law interpreting Section 11(b) is somewhat limited, partly because there are so few cases and partly because cases are settled in civil litigation.[168] Civil actions settled with consent decrees, unlike convictions, do not require a court to articulate an interpretation of a statute. Analyzing the limited federal voter intimidation case law from 1965 to roughly 2015, attorneys Ben Cady and Tom Glazer identify a basic doctrinal pattern: "[A]ll a section 11(b) claim requires is a nexus between the defendant's conduct and a voting-related activity and a showing that the defendant's conduct was objectively intimidating, threatening, or coercive."[169] No showing of intent is required.[170]

The recent increase in Section 11(b) claims has permitted courts to further interpret the statute and to begin defining impermissible "intimidat[ion], threat[s], or coerc[ion]" under Section 11(b). At least one court noted that finding a legal test for Section 11(b) claims is "not a clear or easy" task.[171] Another district court simply asked whether the challenged conduct put the plaintiff "in fear of harassment and interference with their right to vote."[172] For that court, an affirmative answer would be sufficient, but perhaps not necessary, to stating a Section 11(b) claim, given that "*attempt*[*s*] to

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Oct. 25, 2023) (denying a motion to dismiss Section 11(b) and § 1985(3) claims, after allegations of posting intimidating signs and social media posts).

[166] Prior to 2022, it appears that the DOJ had only enforced Section 11(b) in two instances, both alleging voter intimidation by Black defendants against white plaintiffs during President George W. Bush's presidency. See United States v. Brown, 494 F. Supp. 2d 440 (S.D. Miss. 2007), *aff'd*, 561 F.3d 420 (5th Cir. 2009); United States v. New Black Panther Party for Self-Defense, No. 09-cv-00065 (E.D. Pa. May 18, 2009); see also Zipper, supra note 120, at 325–36 (summarizing DOJ's Section 11(b) enforcement).

[167] See U.S. Dep't of Just., Recent Activities of the Voting Section, https://www.justice.gov/crt/recent-activities-voting-section (last visited October 22, 2024).

[168] See, e.g., Dewan, supra note 59. For a description of one consequential settlement, see Democratic Nat'l Comm. v. Republican Nat'l Comm., No. 81-03876, 2016 WL 6584915, at *2 (D.N.J. Nov. 5, 2016).

[169] Cady & Glazer, supra note 43, at 193.

[170] See id. at 191.

[171] Fair Fight v. True the Vote, No. 2:20-cv-0302-SCJ, 2023 WL 11909799, at *4 (N.D. Ga. March 9, 2023).

[172] LULAC, No. 1:18-CV-00423, 2018 WL 3848404, at *4 (E.D. Va. Aug. 13, 2018) (citing Damon v. Hukowicz, 964 F. Supp. 2d 120, 149 (D. Mass. 2013)).

intimidate, threaten, or coerce any person for voting or attempting to vote" are also unlawful under Section 11(b).[173]

Citing this "puts in fear of harassment" standard in dicta, another recent opinion from *National Coalition on Black Civic Participation v. Wohl (Wohl II)* states that Section 11(b) "sweeps broadly," prohibiting both violent and nonviolent forms of intimidation.[174] According to the *Wohl II* court, such nonviolent intimidation may include "actions or communications that inspire fear of economic harm, legal repercussions, privacy violations, and even surveillance."[175] After examining dictionary definitions of each term, analyzing the statutory text, peering into the legislative history briefly, and surveying relevant case law involving Section 11(b), similar voting rights statutes, and analogous civil rights statutes, the critical question for the *Wohl II* court was whether a "reasonable recipient, familiar with the context of [defendant's challenged communication], would interpret [it] as a threat of injury – whether physical or nonviolent – intended to deter individuals from exercising their voting rights."[176]

As previously indicated, the DOJ has also contributed to several recent cases, intervening in *Fair Fight v. True the Vote* and stating that Section 11(b) "applies to conduct that constitutes intimidation, threats, or coercion based on a context-dependent, totality-of-circumstances inquiry, rather than via mechanical application of formulas."[177] In that same litigation, the district court in Georgia offered its own variation of a totality-of-the-circumstances analysis for Section 11(b) claims, adding both a causation and reasonableness requirement: Plaintiffs must show "(1) that Defendants' actions directly or through means of a third-party in which they directed, (2) caused, or could have caused, (3) any person to be reasonably intimidated, threatened, or coerced from voting or attempting to vote."[178]

As a result of recent interpretations of Section 11(b), courts have proscribed certain intimidating tactics, such as: sending robocalls with false

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[173] 52 U.S.C.A. § 10307(b) (emphasis added).

[174] Nat'l Coal. on Black Civic Participation v. Wohl, 512 F. Supp. 3d 500, 509 (S.D.N.Y. 2021) [hereinafter Wohl II].

[175] Id.

[176] Id.; see also Wohl III, 661 F. Supp. 3d 78, 118 (S.D.N.Y 2023) (restating the "reasonable recipient" standard to determine whether a communication was intimidating under Section 11(b)).

[177] Amended Brief of the United States at 38, Fair Fight v. True the Vote, No. 2:20-cv-0302-SCJ (N.D. Ga. March 9, 2023). Informing the DOJ's totality-of-the-circumstances standard for Section 11(b) is *United States v. McLeod*, 385 F.2d 734, 740 (5th Cir. 1967), which states that under Section 131(b) of the Civil Rights Act of 1957, challenged acts of intimidation "cannot be viewed in isolation," but must be considered as a whole and "against the background of contemporaneous events." In *McLeod*, the Fifth Circuit considered Selma's history of systemic racial discrimination to conclude that the baseless prosecution of a person aiding voter registration constituted voter intimidation. 385 F.2d at 744–46.

[178] Fair Fight v. True the Vote, 710 F. Supp 3d 1237, 1283 (N.D. Ga. 2024).

information about voting meant to scare and deter recipients from voting by mail;[179] deploying armed agents to monitor polling locations;[180] following Native American voters and recording their license plate numbers;[181] and publishing personal information and names of voters in a report concerning illegal voter registration in order to subject voters to public condemnation.[182] Less recently, under Section 131(b) of the 1957 Act's similar language, a court proscribed the baseless arrests and prosecutions of those who attended voter registration meetings.[183]

Part V analyzes a recent voter intimidation case in pursuit of answers to outstanding questions about voter intimidation, and Part VI considers the First Amendment concerns related to voter intimidation that remain.

V. VOTER INTIMIDATION IN 2022: ARIZONA CASE STUDY

In evaluating intimidating tactics, a court must distinguish intimidation from the exercise of protected speech and associational rights, and in some cases, the exercise of Second Amendment rights. For example, a court will consider how the location of challenged speech or conduct and its proximity to the polling place affect its determination. In light of recent technological and social changes, some key legal issues remain relatively untested before the courts. Should the law treat the streets and sidewalks surrounding COVID-era ballot drop boxes any differently than before? When does filming someone in a public parking lot near a ballot drop box become intimidating? If taking a video of a voter is fair game, does posting it on social media (and the attendant threat of doxing) affect the legal analysis? At what point, if at all, do armed demonstrators, parading a few blocks from a polling place, become threatening? *Arizona Alliance for Retired Americans v. Clean Elections USA* is a recent case that has yet to be reviewed in the literature but may begin to provide answers to some of these questions.[184]

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[179] Wohl III, 661 F. Supp. 3d 78, 110 (S.D.N.Y 2023).

[180] Council on Am.-Islamic Rels. v. Atlas Aegis, 497 F. Supp. 3d 371, 379 (D. Minn. 2020).

[181] Daschle v. Thune, No. 04-CV-4177, ECF No. 6 (D.S.D. Nov. 2, 2004).

[182] LULAC, No. 1:18-CV-00423, 2018 WL 3848404, at *4 (E.D. Va. Aug. 13, 2018) (alleging an 11(b) violation based on allegedly false claims made in reports that plaintiffs committed voter fraud, resulting in settlement).

[183] United States v. McLeod, 385 F.2d 734, 744–45 (5th Cir. 1967) (finding that baseless arrests and prosecutions of voter registration workers violates Section 131(b) of the Civil Rights Act of 1957).

[184] Clean Elections USA I, 638 F. Supp. 1033, 1038 (D. Ariz. 2022), *vacated and dismissed as moot*, No. 22-16689, 2023 WL 1097766 (9th Cir. Jan. 26, 2023); see also Clean Elections USA II, No. CV-22-01823-PHX-MTL, 2022 WL 17088041, at *2 (D. Ariz. Nov. 1, 2022) (granting a preliminary injunction).

A. Case Summary: Operation Drop Box:

As discussed in Part I, ahead of the 2022 midterm elections, Melody Jennings, a pastor and QAnon supporter,[185] organized a private election-monitoring group, Clean Elections USA. Inspired by the conspiratorial 2022 documentary *2000 Mules*, CEUSA's principal aim was to deter so-called "ballot mules" (i.e., people paid to cast fake absentee ballots) from using drop boxes.[186] Jennings used social media and podcast appearances to encourage citizens to police voting, calling on people to gather near drop boxes and photograph and dox voters they suspected of fraud.[187] Self-appointed ballot watchers eagerly responded, organizing "stakeouts" and watch parties near drop boxes in Maricopa County.[188] They surveilled, followed, filmed, and attempted to dox voters they suspected of dropping off multiple ballots.[189]

Although Jennings warned ballot watchers to comply with certain parts of the law,[190] she repeated the falsehood online that returning a third party's ballot to a drop box was outright illegal, despite statutory exceptions under Arizona law.[191] All of this activity occurred against the backdrop of increased threats of political violence across the United States.[192]

In the days before Election Day 2022 with voting already underway, voting rights advocacy groups brought two federal lawsuits against CEUSA and Jennings. Both lawsuits alleged violations of Sections 11(b) of the VRA and 1985(3) of the KKK Act under the support-or-advocacy clauses.[193]

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[185] Bensinger, supra note 1; see also Bensinger, supra note 6.

[186] *Clean Elections USA I*, 638 F. Supp. 3d at 1039.

[187] Id.

[188] It seems that Jennings did not create the concept of "drop box tailgates" or "mule parties," though she capitalized on a movement circulating on right-wing social media channels. See Hillyard & Collins, supra note 3.

[189] *Clean Elections USA I*, 638 F. Supp. 3d at 1039.

[190] Jennings warned ballot watchers to remain outside the statutorily prescribed seventy-five-foot voting location radius. Id. at 1043. Arizona law provides that "a person shall not be allowed to remain inside the seventy-five-foot limit while the polls are open, except for the purpose of voting . . . and no electioneering may occur within the seventy-five foot limit." Ariz. Rev. Stat. Ann. § 16-515(A) (2023).

[191] Arizona law prohibits a person from collecting voted or unvoted early ballots from another person, with exceptions for family members, household members, and caregivers. Ariz. Rev. Stat. Ann. § 16-1005(I) (2023).

[192] Though no major acts of political violence ultimately transpired on Election Day itself, days before, on October 28, 2022, a joint statement from the Department of Homeland Security, the FBI and the National Counterterrorism Center warned of the possibility of "domestic violent extremism" in the lead up to and after the 2022 midterm elections on November 8. Kevin Collier & Jonathan Dienst, Law Enforcement Warns of Conspiracy-Driven Violence Ahead of Midterms, NBC News (Oct. 31, 2022, 12:31 PM), https://www.nbcnews.com/tech/security/law-enforcement-warns-conspiracy-driven-violence-ahead-midterms-rcna54812.

[193] *Clean Elections USA I*, 638 F. Supp. 3d at 1041; Clean Elections USA II, No. CV-22-01823-PHX-MTL, 2022 WL 17088041 (D. Ariz. Nov. 1, 2022).

Arizona Alliance for Retired Americans ("Arizona Alliance") and Voto Latino brought the first suit on October 24, 2022, and the League of Women Voters of Arizona brought a second suit against the same defendants, as well as additional named defendants, on October 25, 2022.[194]

1. The Unsuccessful Arizona Alliance and Voto Latino Lawsuit:

At issue in the first suit by Arizona Alliance and Voto Latino were two drop boxes in parking lots (including one in Mesa, Arizona)[195] where at least three voters had filed official complaints of voter intimidation.[196] These voter complaints collectively alleged that at least one group of individuals near drop boxes photographed voters and their cars' license plates, accused a voter and his wife of being mules, and briefly followed the couple out of the parking lot to photograph their license plate. In addition to these allegations, the Maricopa County Sheriff's Office investigated the Mesa drop box location following reports of armed and masked ballot watchers wearing body armor.[197]

The U.S. District Court in Phoenix initially denied Arizona Alliance's motion for a temporary restraining order and preliminary injunction on October 28, 2022.[198] In its order, the court found that defendants' conduct enjoyed presumptive First Amendment protections.[199] The court acknowledged that not all of defendants' challenged conduct involved traditional speech[200] and the mere act of poll watching has no distinct First Amendment

[194] Among the defendants (who were later dismissed from the lawsuit) were the Lions of Liberty and Yavapai County Preparedness Team, an Arizona "spinoff" of the Oath Keepers, the militia group that attacked the U.S. Capitol on January 6, 2021. See, e.g., Anita Snow, Group Can Monitor Arizona Ballot Drop Boxes, US Judge Rules, Associated Press (Oct. 29, 2022, 6:06 AM), https://apnews.com/article/2022-midterm-elections-arizona-voting-phoenix-44809c62794456afee434672da6ef115.

[195] *Clean Elections USA I*, 638 F. Supp. 3d at 1039.

[196] Id. In total, at least eighteen intimidation complaints were filed with law enforcement in Arizona during early voting in the 2022 midterms. See Ali Dukakis, Cases of Alleged Intimidation at Arizona Ballot Boxes Continue to Rise, ABC News (Nov. 7, 2022, 5:10 PM), https://abcnews.go.com/US/cases-alleged-intimidation-arizona-ballot-boxes-continue-rise/story?id=92811526. As a result of reports of voter intimidation, the Maricopa County Sheriff dedicated more resources than anticipated to ensuring ballot watchers complied with the law in the 2022 midterm elections. See Sanchez & Usero, supra note 10.

[197] *Clean Elections USA I*, 638 F. Supp. 3d at 1039; see also Bensinger, supra note 1.

[198] *Clean Elections USA I*, 638 F. Supp. 3d at 1046. The court also dismissed Voto Latino for lack of Article III standing. Voto Latino's requested injunction would have prohibited (1) gathering within sight of drop boxes, (2) surveilling or recording voters, those assisting them, or their vehicles near drop boxes, and (3) training or directing others to do the same. Complaint at 38, *Clean Elections USA I*, 638 F. Supp. 3d at 1046.

[199] *Clean Elections USA I*, 638 F. Supp. 3d at 1042.

[200] Id.

protection.[201] But the "critical question" for the court was "whether a reasonable observer would interpret the conduct as conveying *some* sort of message" such that it was protected as "expressive conduct."[202] The court found that a reasonable observer could interpret defendants' conduct as conveying the message (regardless of whether the message had merit) that "persons who attempt to break Arizona's anti-ballot harvesting law will be exposed."[203]

The court further held that defendants' conduct in filming matters of public interest[204] and gathering news[205] was protected by the First Amendment, as was the public's right to receive information and ideas.[206] The right to receive information exists regardless of that information's social worth.[207]

The court next analyzed whether the "true threat" exception precluded a First Amendment defense of defendants' acts. The court found that plaintiffs failed to offer evidence that defendants' conduct constituted a true threat, as the record contained no evidence of doxing or acts of violence.[208] In the court's view, a reasonable listener could not interpret Jennings' social media posts (stating, for example, that "mules" would "shrink back into the darkness" following #DropboxInitiative2022) as true threats.[209]

The court also noted that defendants' conduct did not fall into any traditionally recognized category of voter intimidation.[210] It made this finding without any in-depth analysis of whether nonviolent forms of intimidation may qualify as unprotected true threats, or alternatively, be subject to restrictions consistent with the history and tradition of regulating voting. The court contrasted this case with others in which voters were, for example, threatened with baseless arrests, eviction, or exposure of personal

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[201] Id. (citing Ariz. Democratic Party v. Ariz. Republican Party, No. CV-16-03752-PHX-JJT, 2016 WL 8669978, at *11 (D. Ariz. Nov. 4, 2016)).

[202] Id. (citing Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. Of Bos., 515 U.S. 557, 569 (1995)).

[203] Id.

[204] Id. (citing Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995)).

[205] Id. (citing Branzburg v. Hayes, 408 U.S. 665, 681 (1972)).

[206] Id. (citing both Richmond Newspapers v. Virginia, 448 U.S. 555, 576 (1980) and First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978)).

[207] Id. (citing Stanley v. Georgia, 394 U.S 557, 564 (1969)). The DOJ challenged these points in its statement of interest in the subsequent related lawsuit brought by the League of Women Voters. Statement of Interest of the United States at 6, 13–14, Clean Elections USA II, No. CV-22-01823-PHX-MTL, 2022 WL 17088041 (D. Ariz. Nov. 1, 2022).

[208] *Clean Elections USA I*, 638 F. Supp. 3d at 1043.

[209] Id.

[210] Id. at 1044.

information to anti-immigration organizations.[211] The fact that defendants did not target minority voters further supported their case, according to the court.[212]

In evaluating the plaintiffs' motion for a preliminary injunction, the court highlighted states' "compelling interest in maintaining the integrity of the voting place and preventing voter intimidation and confusion,"[213] and it acknowledged that plaintiffs were "legitimately alarmed by the observers filming at the county's early voting drop boxes."[214] But although the balancing of interests was close, it denied the request for the preliminary injunction,[215] because "[d]efendants' conduct did not establish a likelihood of success on the merits."[216] In particular, the court "struggled," but ultimately could not "craft a meaningful form of injunctive relief that did not violate defendants' First Amendment rights and those of the drop box observers"[217] and their fundamental right to "engage in political speech, assemble peacefully, and associate with others."[218] The court expressed concern that injunctive relief "would likely have a chilling effect on others' constitutionally protected activity."[219] The court found that both parties' concerns "implicate[d] rights equally crucial to the functioning of our Republic" and that the balance of the equities and the public interests factors were "neutral."[220] The court also denied a preliminary injunction under § 1985(3) of the KKK Act, because plaintiffs did not provide evidence that defendants intended to prevent lawful voting.[221] Defendants "stridently maintain[ed]" that they only sought to "prevent what they perceive to be widespread illegal voting and ballot harvesting."[222]

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[211] Id.

[212] Though the court did not acknowledge this, it is worth noting that while targeting minorities may serve as evidence of a Section 11(b) violation, see, e.g., Daschle v. Thune, No. 04-CV-4177 (D.S.D. Nov. 2, 2004), neither Section 11(b) nor § 1985(3) of the KKK Act requires a racial motivation. See Cady & Glazer, supra note 43, at 234.

[213] *Clean Elections USA I*, 638 F. Supp. 3d at 1045 (citing Burson v. Freeman*,* 504 U.S. 191, 198 (1992)).

[214] Id. at 1044.

[215] Id. at 1038.

[216] Id. at 1044.

[217] Id.

[218] Id. at 1045–46 (citing Mills v. Alabama*,* 384 U.S. 214, 218–19 (1966)).

[219] Id. at 1046. This concern stands in marked contrast to the *Wohl II* court's concern that voter intimidation (rather than enforcement of the VRA) would have a chilling effect on voting-related activity. Wohl II, 512 F. Supp. 3d 500, 511 (S.D.N.Y. 2021).

[220] *Clean Elections USA I*, 638 F. Supp. 3d at 1046.

[221] Id. at 1045. Though the statutory text is silent as to intent, § 1985(3) of the KKK Act likely requires some showing of intent, given that it only applies to conspiracies.

[222] Id. at 1045.

Though plaintiffs appealed this ruling to the Ninth Circuit, which later vacated it,[223] the same U.S. District Court in Phoenix consolidated this lawsuit in the interim with the second suit brought by the League of Women Voters of Arizona.[224]

2. The League of Women Voters' Successful Lawsuit:

Though the two suits brought similar claims, the latter League of Women Voters' suit involved different evidence,[225] a more narrowly tailored requested injunction,[226] and different arguments.[227] First, the League of Women Voters presented additional witnesses and evidence of voter intimidation. Second, the League of Women Voters' requested injunction was narrower: seeking to ban defendants from making false statements about voter eligibility; carrying firearms and tactical gear within 250 feet of drop boxes; photographing and filming individuals within seventy-five feet of a drop box; posting online about specific individuals returning ballots; and seeking other "narrower" forms of relief than those requested in the Arizona Alliance and Voto Latino suit.[228] Third, the League of Women Voters made different and more effective legal arguments addressing the court's First Amendment concerns, as discussed below.

The Court's Opinion:

After consolidating the two lawsuits, the court ruled from the bench on November 1, 2022, that the First Amendment did not bar emergency relief.[229] The court issued a temporary restraining order, finding that the

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[223] Ariz. All. for Retired Ams. v. Clean Elections USA, No. 22-16689, 2023 WL 1097766, at *1 (9th Cir. Jan. 26, 2023) [hereinafter Clean Elections USA III].

[224] Clean Elections USA II, No. CV-22-01823-PHX-MTL, 2022 WL 17088041, at *1 (D. Ariz. Nov. 1, 2022) (granting a temporary restraining order).

[225] Nov. 1 Transcript, at 48, Clean Elections USA II, No. CV-22-01823-PHX-MTL, 2022 WL 17088041 (D. Ariz. Nov. 1, 2022) [hereinafter Nov. 1 Tr.]. Witness 240, a voter whose identity was sealed out of fear of being doxed, described intimidating behavior by a group of "mule-hunters," including following him in his car out of the parking lot. Id. at 76. Evidence also included Jennings' appearance on Steve Bannon's podcast, in which she said, "[W]e blew . . . up" Witness 240's image and "blasted it viral." Bensinger, supra note 6. Other witnesses described not voting by drop box for fear of being doxed or harassed by "militia-type people." Nov. 1 Tr., at 117, 122. Other evidence in the record included Jennings' posting on social media about "our people in tactical gear and armed" as being a "win/win," as well as reports from the Maricopa County Recorder's Office staff that "observers had brandished guns at the drop box location." Supplemental Brief for Plaintiff at 4–5, Clean Elections USA II, 2022 WL 17088041.

[226] Oct. 31, 2022 Status Conference Transcript, at 10, Clean Elections USA II, No. CV-22-01823-PHX-MTL, 2022 WL 17088041 (D. Ariz. Nov. 1, 2022) [hereinafter Oct. 31 Tr.].

[227] Additionally, the DOJ filed a statement of interest in this case aiding the court's interpretation of Section 11(b). Statement of Interest of the United States, *Clean Elections USA II*, 2022 WL 17088041.

[228] Oct. 31 Tr., at 14.

[229] Nov. 1 Tr., at 185–90.

Arizona League of Women Voters was likely to succeed on its claims under Sections 11(b) of the VRA and 1985(3) of the KKK Act.[230] The court found that plaintiffs were likely to suffer irreparable harm in the absence of the injunction, because the League of Women Voters had to divert financial resources to help voters effectively deal with drop box observers.[231] The court appeared to accept plaintiffs' argument that defendants engaged in a "well-recognized traditional form of voter intimidation"[232] and rejected several of defendants' First Amendment arguments.[233]

The temporary restraining order included several elements agreed upon by the parties (e.g., banning following individuals within seventy-five feet of a drop box, as well as forbidding openly carrying firearms and wearing visible body armor within 250 feet of a drop box).[234] As for the remaining disputed issues, the court entered plaintiffs' requested language, reasoning that it struck the right balance between respecting defendants' First Amendment rights and respecting voters' right to vote without legitimate fear of intimidation or harassment.[235]

The court held that "providing voters with incorrect or misleading information about voting and voting rules is not protected by the First Amendment."[236] The court pointed specifically to defendants' statements on social media that misstated Arizona law concerning who may lawfully return a

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[230] *Clean Elections USA II*, 2022 WL 17088041 (issuing a TRO).

[231] Nov. 1 Tr., at 190.

[232] Nov. 1 Tr., at 150; see also id. at 185–86. Plaintiffs argued that defendants were engaged not in mere surveillance or peaceful monitoring, but instead in traditional and effective forms of voter intimidation and therefore were not entitled to First Amendment protection. Supplemental Brief for Plaintiff at 3, *Clean Elections USA II*, 2022 WL 17088041. Second, Plaintiffs also argued that defendants' behavior would intimidate a reasonable voter, and did in fact intimidate innocent voters, citing testimonial evidence of voters who felt intimidated and decided not to vote by drop box as a result of drop-box monitoring. Nov. 1 Tr., at 153. Third, defendants' subjective intent was to intimidate anyone dropping off multiple ballots, as well as anyone using a drop box at all. Id. at 154.

[233] Nov. 1 Tr., at 155–59 (rejecting various First Amendment arguments, including that the defendants had a First Amendment right to mischaracterize voting regulations in ways that misled the public). Defendants also argued that the First Amendment protected their right to peaceably assemble seventy-five feet away from ballot drop boxes (even in order to monitor drop boxes), and to publicly express their concerns that election integrity is undermined when bad actors violate Arizona's ballot harvesting law. Defendants' Response to Plaintiffs' Emergency Motion at 5, *Clean Elections USA II*, 2022 WL 17088041. Further, the court should "read in" a subjective intent requirement into Section 11(b), and that without a subjective intent requirement, even media outlets could be held liable for voter intimidation by reporting on, or at least exaggerating, instances of voter intimidation. Nov. 1 Tr., at 169–70.

[234] *Clean Elections USA II*, 2022 WL 17088041, at *1–2.

[235] Nov. 1 Tr., at 186.

[236] Id. at 185 (citing Wohl I, 498 F. Supp. 3d 457, 478 (S.D.N.Y. 2020); United States v. Tan Duc Nguyen, 673 F.3d 1259, 1266 (9th Cir. 2012)).

ballot on behalf of another voter.[237] For those exercising First Amendment rights by engaging with voters near drop boxes—such as ballot security groups or individual observers—the court "read the prior cases to require that there be a showing of a true threat in order for the law to bar such behavior."[238] But the League of Women Voters' case involved "much stronger" evidence of "individuals being harassed and intimidated."[239]

Finally, the court distinguished the proposed overbroad injunction in the earlier lawsuit from the League of Women Voters' narrower proposed injunction that took "into account the defendants' constitutional rights . . . to gather on a public sidewalk and, at a distance that may be well beyond seventy-five feet of the actual ballot drop box, for them to conduct legitimate nonthreatening monitoring activity."[240]

The court also stated that plaintiffs established defendants' "intent element," as defendants used video footage of a voter to harass and wrongfully suggest on social media and in public pronouncements that the lawful voter was a mule.[241]

Takeaways from the Court:

Apart from a stipulation concerning other matters, the issues the court decided can guide other courts as to what sorts of conduct and speech can be barred under Sections 11(b) and 1985(3). First, courts may enjoin defendants from posting baseless, online allegations of voter fraud that identify specific individuals by name or likeness.[242] Courts may also enjoin defendants from taking photos of or otherwise recording individuals *within* seventy-five feet of a ballot drop box, even if defendants are standing outside of the seventy-five-foot radius prescribed by state law.[243] Privacy rights, and the interest in ensuring voters can vote without fear, are heightened within this radius. This prohibition should logically extend beyond the facts of *Clean Elections USA*[244] to any private ballot security groups or individuals

[237] Id. at 188–89 (The court observed that "[t]his does not prohibit Ms. Jennings from correctly stating what the law is. I just have a problem with her stating it incorrectly in a way that is intimidating or coercive to voting behavior.").

[238] Id. at 185–86.

[239] Id. at 187.

[240] Id. at 186–87.

[241] Id. at 189.

[242] See Clean Elections USA II, No. CV-22-01823-PHX-MTL, 2022 WL 17088041, at *2 (D. Ariz. Nov. 1, 2022).

[243] Id.

[244] Hereinafter, when referring to either of the two lawsuits in the body of this Article, I will simply use "*Clean Elections USA*" and "the *Clean Elections USA* court" without distinguishing between *Clean Elections USA I* and *Clean Elections USA II*, because the lawsuits were related and the judge in both cases was the same.

attempting to photograph voters within a state's legally prescribed reasonable radius. Finally, courts may order defendants to cease and desist making false statements about a state voting law in the days prior to and through the close of voting on Election Day.[245]

Nonetheless, in reaching its decision, the *Clean Elections USA* court's balancing of competing individual rights failed to recognize the full range of governmental interests at stake in protecting voting. Further, because of the parties' stipulations, the *Clean Elections USA* court left several First Amendment issues unresolved, which this Article will address in Part VI.

VI. FUTURE DEVELOPMENTS AND THE FIRST AMENDMENT

Going forward, litigators and courts must engage with the several First Amendment concerns that arose in *Clean Elections USA* but were insufficiently examined. First, not all voter intimidation cases implicate the First Amendment because defendants have not always engaged in speech or expressive conduct. Even when they have (e.g., by conveying a message about ballot security or fraud), Section 11(b) of the VRA and § 1985(3) of the KKK Act regulate the non-expressive aspects of their conduct.

Second, where intimidating speech is at issue, courts must assess whether such speech falls into an unprotected categorical exception, such as "true threats." In addition, the Supreme Court's recent doctrinal shift in *Counterman v. Colorado* requires further analysis for purposes of Section 11(b) and § 1985(3).[246]

Third, even where intimidating speech remains protected, courts should grant relief pursuant to Section 11(b) and § 1985(3) under strict scrutiny. Unlike in *Clean Elections USA*, courts should not merely "balance" individual voting rights against defendants' free speech rights (or in the preliminary injunction context, rely only on the balance of the equities). Instead, courts should embrace a fuller conception of the compelling governmental interests at stake in voter intimidation cases. In doing so, courts should conceptualize the voting process as a separate democratic sphere from "public discourse," justifying the prohibition of a broader range of intimidating conduct that may deter registered voters from voting.

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[245] Id. at *2. While a narrowly tailored injunction in *Clean Elections USA II* preserved ballot watchers' First Amendment rights, the court did not answer whether Defendants' intimidation scheme would be legal if it was exclusively targeted at unlawful voters and never intercepted a single lawful voter.

[246] Counterman v. Colorado, 600 U.S. 66 (2023).

Fourth, courts must apply strict scrutiny's narrow tailoring requirement in light of *Burson v. Freeman*'s deference to the legislature,[247] given recent changes in election administration. In our post-pandemic era of extended voting over the course of days and weeks (including with drop boxes), a regime of narrow tailoring that tolerates certain prophylactic limits on otherwise protected speech is necessary to protect voters from interference and intimidation.

Such deference is especially appropriate because Sections 11(b) and 1985(3) reflect Congress' careful efforts applied to a narrow field with little risk of chilling protected speech or arbitrary enforcement. That is certainly the case, as the *Clean Elections USA* court observed, when these statutes are applied to traditionally recognized categories of voter intimidation—a test that is consistent with the Supreme Court's developing "history and tradition" standard, recognized recently in the First Amendment context in *Vidal v. Elster*.[248]

A. Regulation of Non-Expressive Voter Intimidation:

In the first *Clean Elections USA* suit, the court pitted the expressive interests of voters against those of intimidating defendants who patrolled drop boxes to expose voting fraud.[249] But just because an idea motivated a defendant's action does not create a cognizable First Amendment claim. Conduct must be undertaken to send a particularized message that the intended audience is likely to understand.[250] Accordingly, when conduct such as armed patrolling at drop boxes or stalking voters near polling places lacks expressive content (though it is motivated by an idea), constitutional speech protections are not triggered.[251]

Even if the evidence in *Clean Elections USA* had shown that defendants' purpose in patrolling was not only to prevent unlawful voting but also to educate voters about fraud, the *O'Brien* intermediate scrutiny test would

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[247] Burson v. Freeman, 504 U.S. 191, 211 (1992) (upholding a Tennessee polling-place speech regulation under strict scrutiny and deferring to legislative judgments concerning the scope of such regulations).

[248] 602 U.S. 286 (2024).

[249] Clean Elections USA I, 638 F. Supp. 1033, 1045-46 (D. Ariz. 2022), *vacated and dismissed as moot*, No. 22-16689, 2023 WL 1097766 (9th Cir. Jan. 26, 2023).

[250] See Texas v. Johnson, 491 U.S. 397, 404 (1989); *cf.* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995) (rejecting requirement that protected expression must have a "narrow, succinctly articulable message" when occurring in a traditional expressive activity, such as a parade or stage performance).

[251] In such instances, courts review challenges to suits under Section 11(b) and § 1985(3) under rational basis review.

govern.[252] Thus, an injunction aimed at preventing defendants' conduct would survive *O'Brien*'s intermediate scrutiny test, because it is a content-neutral regulation of conduct that only incidentally burdens expression.[253] Just as the protestor in *O'Brien* could have marched with signs instead of burning his draft card,[254] those advocating ballot security have alternative avenues and locales for expression aside from forcing voters away from ballot boxes.

B. True Threats and Constitutional Conceptions of Intimidation:

Where content-based rules regulate intimidating speech or expressive conduct, courts must assess whether such expression falls into an unprotected categorical exception. For speech to be barred by Section 11(b), the *Clean Elections USA* court required such speech to be a "true threat," unless it was instead unprotected false speech.[255]

The First Amendment does not protect "true threats."[256] According to the court in *Clean Elections USA*, a true threat is a statement "where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," though the speaker "need not actually intend to carry out the threat."[257] When evaluating what constitutes a true threat, context matters. Courts look both at the specific statement and "the surrounding events and reaction of the listeners."[258] Thus, the fact that defendants' actions in *Clean Elections USA* occurred against the backdrop of an uptick in political violence and threats of

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[252] In *O'Brien*, the Court held that a Vietnam War protestor could not legally burn his draft card, no matter how potent a symbol it was, pursuant to a statute that targeted his conduct (not his expression) and furthered state interests unrelated to suppressing speech. United States v. O'Brien, 391 U.S. 367, 385 (1968). The *O'Brien* test establishes that "a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression, and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." Id. at 377.

[253] O'Brien, 391 U.S. at 376–77.

[254] Indeed, O'Brien could have even burned a photo of his draft card. See Texas v. Johnson, 491 U.S. 397, 420 (1989).

[255] Nov. 1 Transcript, at 185–86, Clean Elections USA II, No. CV-22-01823-PHX-MTL, 2022 WL 17088041 (D. Ariz. Nov. 1, 2022).

[256] See, e.g., Virginia v. Black, 538 U.S. 343, 360 (2003); Watts v. United States, 394 U.S. 705, 708 (1969); United States v. Tan Duc Nguyen, 673 F.3d 1259, 1266 (9th Cir. 2012).

[257] *Clean Elections USA I*, 638 F. Supp. at 1043 (quoting *Black*, 538 U.S. at 359–60), *vacated and dismissed as moot*, No. 22-16689, 2023 WL 1097766 (9th Cir. 2023).

[258] Thunder Studios, Inc. v. Kazal, 13 F.4th 736, 746 (9th Cir. 2021); see also United States v. Carmichael, 326 F. Supp. 2d 1267, 1281 (M.D. Ala. 2004).

election-related violence was relevant. Also relevant, the plaintiffs argued, was the combination of all of defendants' actions taken together.[259]

As the Supreme Court observed in *Virginia v. Black*, the First Amendment allows for restrictions on true threats in order to protect individuals "from the fear of violence" and from the "disruption that the fear engenders," on top of the possibility that the threatened violence will occur.[260] In that case, the Court upheld a Virginia law that banned cross-burning with intent to intimidate, since "intimidation in the constitutionally proscribable sense of the word is a type of true threat . . . ."[261] Even expressions that do not explicitly threaten violence may be true threats if they are understood, in context, as signals of impending violence, such as cross-burning, a symbol inextricably linked with the KKK.[262] Conversely, a statement that on its face threatens violence may not be a true threat if, when viewed in context, it was merely politically-charged hyperbolic rhetoric or expressed political opposition.[263]

But, as the DOJ has stated, the case law interpreting the "contours of the true threat exception in context of 11(b)" is limited,[264] and two unresolved issues in the true threat doctrine are particularly relevant to voter intimidation cases: first, whether *civil* plaintiffs must prove that defendants *subjectively intended* to threaten or intimidate under the First Amendment; and second, whether the true threat exception is limited to threats of physical violence and bodily harm.

With respect to this first question, prior to the Supreme Court's recent decision in *Counterman v. Colorado*,[265] there was a circuit split over whether

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[259] The *Clean Elections USA* plaintiffs argued that stationing armed individuals or individuals wearing tactical gear near ballot drop boxes is not protected by the First Amendment, because the conduct is not expressive. Supplemental Brief for Plaintiff at 2, *Clean Elections USA II*, 2022 WL 17088041. Alternatively, plaintiffs argued an injunction was constitutional under the true threat exception, at least when the defendants combined the following: defendants' agents' firearms and tactical gear, coupled with harassing language, posting pictures of voters, and accusing them on social media of being "mules." Id. at 2. Those who were allegedly threatened understood these as threats and, in one instance, "felt the need to redact their name" to protect their privacy and safety. See Supplemental Brief for Plaintiff at 24, *Clean Elections USA II*, 2022 WL 17088041.

[260] Virginia v. Black, 538 U.S. 343, 344 (2003).

[261] Id.

[262] See *Clean Elections USA I*, 638 F. Supp. 3d at 1043 (citing *Black*, 538 U.S. at 360).

[263] Id.

[264] Statement of Interest of the United States at 16, *Clean Elections USA II*, 2022 WL 17088041.

[265] Counterman v. Colorado, 600 U.S. 66 (2023). The case interrogates the outer limits of free speech in the internet age. After cyberstalking a singer-songwriter over Facebook for two years, including hinting in messages that he had made "physical sightings" of her, Counterman was charged and convicted of stalking by a Colorado jury under a criminal state statute. He was sentenced to four-and-a-half years in prison. The statute prohibits communicating with another person in a manner that would cause a reasonable person to suffer serious emotional distress; the statute does not require that a perpetrator intend or know that they have caused such distress. In addressing this statute, the Supreme Court held that the First

true threats need to be intended as threats or merely whether it sufficed to show that a reasonable person would feel intimidated or threatened by the speaker. While the majority of circuits required true threats to meet an objective standard that asked whether an objectively reasonable person would perceive the threat as genuine,[266] the Ninth Circuit held that true threats required proving intent for statutes that *criminalize* speech.[267]

In *Counterman*, the Supreme Court held that recklessness is the required mens rea for establishing true threats in criminal cases.[268] While the Court decided that the First Amendment prohibits *criminalizing* speech that is objectively threatening but not intended or recklessly made as such, the Court left open whether the true threat doctrine also requires proof of subjective intent for *civil* threat statutes like Section 11(b) of the VRA.[269]

The Court indicated that the recklessness requirement serves as a prophylactic guardrail to prevent overcriminalization.[270] It emphasized that true

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Amendment requires a subjective intent standard for laws that criminalize threatening speech. Specifically, a defendant must act recklessly (as opposed to negligently) with respect to whether their words would be perceived as threatening. Id. at 66.

[266] See, e.g., United States v. Clemens, 738 F.3d 1, 12 (1st Cir. 2013); United States v. Davila, 461 F.3d 298, 305 (2d Cir. 2006); United States v. Elonis, 730 F.3d 321, 331 n.7 (3d Cir. 2013), *rev'd*, 575 U.S. 723 (2015) (deciding on statutory rather than constitutional grounds); United States v. White, 670 F.3d 498, 507 (4th Cir. 2012); Porter v. Ascension Par. Sch. Bd., 393 F.3d 608, 616 (5th Cir. 2004); United States v. Jeffries, 692 F.3d 473, 479 (6th Cir. 2012); United States v. Parr, 545 F.3d 491, 499 (7th Cir. 2008); United States v. Nicklas, 713 F.3d 435, 440 (8th Cir. 2013); United States v. Martinez, 736 F.3d 981, 988 (11th Cir. 2013), *vacated*, 135 S. Ct. 2798 (2015).

[267] Thunder Studios, Inc. v. Kazal, 13 F.4th 736, 746 (9th Cir. 2021). Like the Ninth Circuit, the Tenth Circuit also required proving subjective intent for criminal threat statutes. See United States v. Heineman, 767 F.3d 970, 982 (10th Cir. 2014) ("[W]e adhere to the view that Black required the district court in this case to find that Defendant intended to instill fear before it could convict him of violating [the criminal threat statute].").

[268] In the true threats context, a speaker acts recklessly when the "speaker is aware 'that others could regard his statements as' threatening violence and 'delivers them anyway.'" *Counterman*, 600 U.S. at 79 (Alito, J., concurring in part and dissenting in part) (citing *Elonis*, 575 U.S. at 746). As a general matter, even beyond the threats context, a person acts recklessly "when he 'consciously disregard[s] a substantial [and unjustifiable] risk that the conduct will cause harm to another.'" *Counterman*, 600 U.S. at 79 (citing Voisine v. United States, 579 U.S. 686, 691 (2016)).

[269] In dissent, Justice Barrett, joined only by Justice Thomas, criticized the majority's recklessness requirement, in part because its First Amendment logic would apply to civil cases as well, which she deemed inadvisable. *Counterman*, 600 U.S. at 119 (Barrett, J., dissenting). However, the majority opinion is primarily concerned with the special chilling effects of criminal liability, because of criminal penalties' severity and stigma. *Cf.* Smith v. California, 361 U.S. 147, 153 (1959) (observing that criminal liability in the obscenity context raises special concerns). Relatedly, § 1985(3) of the KKK Act is silent as to intent, though its conspiracy provision requires some level of mens rea. Cady & Glazer, supra note 43, at 202.

[270] The Court articulated this premise in *Screws v. United States*, 325 U.S. 91, 101–102 (1945) (stating that an intent requirement serves as a procedural device to prevent a broad statute from being unconstitutionally vague or from failing to provide notice that certain conduct is impermissible). Relatedly, in *Counterman*, a mens rea requirement mitigates self-censorship by reducing an "honest speaker's fear that he may accidentally [or erroneously] incur liability" and thus "provide[s] 'breathing room' for more valuable speech." *Counterman*, 600 U.S. at 75.

threat *prosecutions* create a special risk of chilling speech; and it suggested that its holding applies only to *some* true threats that, if regulated, have the capacity to chill the speaker.[271] Although civil remedies can also have chilling effects, the court's phrasing ("a subjective mental-state requirement shield[s] *some* true threats from liability") suggests that it did not intend to extend its recklessness rule to true threats in civil contexts.[272]

Subsequent to *Counterman*, lower courts have struggled with whether to apply *Counterman*'s holding to civil cases, including in a voter intimidation case.[273] But the *Counterman* opinion does not—and should not—compel a recklessness requirement in Section 11(b) of the VRA. If courts determine that a true threat requires showing recklessness in the civil context, then Section 11(b) would lose much of its utility, given that Congress deliberately omitted an intent requirement from Section 11(b)'s statutory text to ensure effectiveness.[274]

The second open question, as noted above, is whether or not the true threat exception is limited to threats of physical violence and bodily harm or can also include other forms of intimidating speech.[275] While the *Black* Court held that the First Amendment exception "encompasses" threats of bodily harm,[276] the plaintiffs in *Clean Elections USA* argued that other courts have held that true threats are not limited to physical threats.[277] Answering

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[271] *Counterman*, 600 U.S. at 75 ("[T]he First Amendment may still demand a subjective mental-state requirement shielding *some* true threats from liability. The reason relates to what is called a chilling effect . . . .") (emphasis added).

[272] Id. (emphasis added).

[273] Some courts have opted not to apply *Counterman* in the civil context. See Sealed Plaintiff 1 v. Patriot Front, No. 22-cv-670, 2024 WL 1395477, at *29 (E.D. Va. Mar. 31, 2024); Boquist v. Courtney, 682 F. Supp. 3d 957, 969 n.10 (D. Or. July 17, 2023). Other courts have applied *Counterman*'s recklessness requirement to civil cases. See Kindschy v. Aish, 2024 WI 27, ¶ 25, 412 Wis. 2d 319, 334, *reh'g denied* (applying *Counterman* to civil harassment injunctions premised on true threats); Cider Riot, LLC v. Patriot Prayer USA, LLC, 544 P.3d 363 (Or. Ct. App. 2024) (applying *Counterman* to civil tort claims involving threats in a protest context). And some lower courts have treated *Counterman* as relevant in cases while leaving the ultimate question open. See Fair Fight Inc. v. True the Vote, 710 F. Supp. 3d 1237, 1294 (N.D. Ga. 2024) (applying recklessness standard under Section 11(b) to assess whether speech constituted a true threat but not stating that recklessness is required for all voter intimidation claims under Section 11(b)); Davis v. Cisneros, 744 F Supp. 3d 696, 731 (W.D. Tex. 2024) (stating that *Counterman* applies to criminal cases but invoking its recklessness standard as sufficient in a civil context without deciding whether it is necessary).

[274] See Cady & Glazer, supra note 43, at 209.

[275] See Daniel P. Tokaji, True Threats: Voter Intimidation and the Constitution, 40 Harbinger 101, 107–08 (2015).

[276] *Black*, 538 U.S. at 359.

[277] See Supplemental Brief for Plaintiff at 22–23, Clean Elections USA II, No. CV-22-01823-PHX-MTL, 2022 WL 17088041 (D. Ariz. Nov. 1, 2022); see also Wohl I, 498 F. Supp. 457, 479 (S.D.N.Y. 2020) (stating that true threats need not be limited to physical threats, as threats of severe nonbodily harm may engender as much fear and disruption as physical threats); United States v. Tan Duc Nguyen, 673 F.3d 1259, 1266 (9th Cir. 2012) (finding that a letter telling would-be voters that their information could

this question is important because many forms of voter intimidation involve threats of nonphysical harm, such as doxing, prosecutions for voter fraud, having loans called due, and even evictions and job loss—prevalent forms of intimidation in the mid-twentieth-century South.[278] These threats cause fear and disruption (i.e., two rationales offered in *Black*) and deter individuals from voting.[279]

For example, filming and photographing voters using drop boxes is one example of intimidating behavior that may not rise to the level of a true threat, because it typically does not pose a credible threat of physical harm. With the ubiquity of smart phones and video sharing, the issue of filming voters will remain salient. While filming in public is not intimidating as a general matter, evidence of its intimidating impact on individuals about to vote was on full display in *Clean Elections USA*,[280] particularly due to the accompanying threat of doxing. For the *Clean Elections USA* court, plaintiffs' request to bar photography and video surveillance near drop boxes presented the biggest challenge to First Amendment rights.[281] The relief granted in *Clean Elections USA* suggests that filming voters within a legally defined zone surrounding a ballot drop box, and by extension a polling place, can constitute unlawful intimidation—even if those filming are outside of the zone.[282]

Although the First Amendment protects individuals' right to film "matters of public interest," such as how governmental agents conduct themselves, the DOJ has even weighed in, stating that voters are private citizens, not governmental agents, and voting is not a governmental activity.[283]

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be obtained by hostile groups or used against them in deportation proceedings falls within the true threats exception).

[278] See, e.g., Keyssar, supra note 20, at 207.

[279] See, e.g., Daschle v. Thune, No. 04-cv-04177 (D.S.D. Nov. 2, 2004) (finding that loud discussion of prosecuting voters in polling places, following voters to their cars, and writing down their license plates all constituted unlawful intimidation); United States v. Original Knights of the KKK, 250 F. Supp. 330, 343–44 (E.D. La. 1965) (finding that voter intimidation included Klan members showing up and monitoring Black Americans registering to vote).

[280] Transcript of Evidentiary Hearings at 62–82, *Clean Elections USA II*, 2022 WL 17088041 (describing Witness 240's encounter being filmed using a drop box and discovering that the video had gone viral).

[281] See Oct. 31, 2022 Status Conference Transcript, at 31, *Clean Elections USA II*, 2022 WL 17088041. Plaintiffs argued that there are exceptions to the broad First Amendment protections afforded to photographing and videotaping in public: a) when individuals are part of an unlawful conspiracy with an unlawful purpose, as alleged in the case; b) when the videotape is part of something meant to communicate a true threat; and c) even when they are protected by the First Amendment against a content-based restriction, photography and filming may still be regulated when the state seeks to advance a compelling governmental interest.

[282] *Clean Elections USA II,* 2022 WL 17088041, at *3 (prohibiting taking photos of or otherwise recording individuals who are within 75 feet of a ballot drop box).

[283] Statement of Interest of the United States at 12–13, *Clean Elections USA II*, 2022 WL 17088041.

Accordingly, casting a vote is not *automatically* a matter of public interest for purposes of the First Amendment.[284]

Further, the physical isolation of drop boxes (lacking the protection of a community presence of a polling place), combined with a polarized nation's focused anger about elections and heightened risks of online doxing, can make a broad range of behavior—even photographing—intimidating because of the increased risk of physical altercation.

The *Wohl* court recently declared Section 11(b) constitutional, but the Supreme Court has never affirmed Section 11(b)'s constitutionality.[285] Scholars disagree on how vulnerable Section 11(b) is to constitutional attacks.[286] Likewise, while the Supreme Court affirmed the constitutionality of the criminal version of the support-or-advocacy clauses of § 1985(3) of the KKK Act in *Yarbrough*, the Court has never ruled on or directly interpreted the civil version.[287] That said, civil injunctions or damages are generally less chilling of speech than criminal penalties,[288] which *Yarbrough* upheld.

Even if the true threat doctrine only reaches threats of physical violence, that does not end the constitutional analysis. Because Congress intended for voter intimidation laws to reach a broad range of intimidating acts,[289] courts should construe Section 11(b) broadly to prohibit certain objectively intimidating speech that may ultimately fall outside of the true threat (and false speech) exceptions.[290] Such non-physically threatening but nevertheless intimidating speech aimed at voters interferes with democratic governmental processes and public decision-making. While voters are private citizens, and

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[284] Further, the Supreme Court has stated that the First Amendment right to receive information and ideas is context dependent. See Richmond Newspapers v. Virginia, 448 U.S. 555, 576 (1980) (stating that the Court has recognized a "First Amendment right to 'receive information and ideas'" in "a variety of contexts" and thus concluding that the First Amendment bars summarily closing courtroom doors to the public).

[285] See Wohl I, 498 F. Supp. 3d 457, 486 n.29 (S.D.N.Y. 2020) (stating that Section 11(b) is "narrowly tailored to advance compelling government interests").

[286] See, e.g., Cady & Glazer, supra note 43, at 208–12 (relying on the Elections Clause as the source of congressional authority for Section 11(b) and arguing that 11(b)'s practical utility depends on the scope of the unsettled true threat doctrine); see also Tokaji, supra note 275 (arguing that Section 11(b)'s lack of intent requirement is probably consistent with the First Amendment insofar as only civil remedies are available, but this conclusion hinges on the precise scope of the true threats exception which remains unsettled in the civil context, even after *Counterman.*).

[287] Ex parte Yarbrough, 110 U.S. 651, 658 (1884).

[288] See Frederick Schauer, Fear, Risk, and the First Amendment: Unraveling the Chilling Effect, B.U. L. Rev. 685, 697 (1978) (stating that an individual will most often view a criminal penalty as more harmful than a civil sanction).

[289] See Cady & Glazer, supra note 43, at 230.

[290] Some such speech in the voter intimidation context may also be treated as unprotected conduct or as speech incidental to regulated economic activity: consider statements like "You're fired," "Here's your eviction notice," or "We'll be shutting off the utilities in your apartment."

not government officials, their role as citizen-electors is foundational to democratic governance. The Supreme Court has recognized the importance of protecting the integrity of governmental processes from interference.[291] As discussed in Parts VI.C and VI.D, Section 11(b) furthers that compelling interest and should be upheld accordingly.

C. Strict Scrutiny: Why are Election Days Different from All Other Days?

Even where intimidating speech is otherwise protected, courts should uphold Section 11(b) and § 1985(3)—and injunctions issued to enforce the statutes—under strict scrutiny. As both statutes protect compelling and unique voting-related governmental interests, they should receive greater judicial deference than regulations of public discourse.

In its initial denial of the preliminary injunction, the *Clean Elections USA* court's speech-versus-voting-rights framework misconceives the nature of voting and the full range of governmental interests at stake in voter intimidation cases. By framing the case as a dispute of competing and evenly balanced interests (i.e., the right to vote versus ballot watchers' First Amendment freedoms of speech, assembly, association, and expression), the *Clean Elections USA* court missed an opportunity to emphasize why voting is worthy of a unique set of protections that may appear to limit others' speech (and gun) rights.[292] Voting is the exercise of a fundamental interest under the First and Fourteenth Amendments,[293] without which other rights eventually

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[291] See United States v. Alvarez, 567 U.S. 709, 720–21(2012) (justifying restrictions on false speech that interferes with governmental processes); see also United States v. Turner, 720 F.3d 411, 414 (2d Cir. 2013) (upholding conviction under statute prohibiting threats against federal judges). The *Turner* court found that a true threat need not use explicitly threatening language or constitute incitement to imminent lawless action to be properly proscribed in the context of a narrow statute with a compelling governmental interest. Id. at 424–25. The statute prohibited threats to assault, kidnap or murder a federal judge with intent to intimidate or interfere with judicial duties or to retaliate against them on account of their official performance. The Second Circuit affirmed the conviction of the defendant, who had threatened Judges Easterbrook, Bauer and Posner. Id. at 429. The Second Circuit did not state that the statute's narrow scope or compelling governmental interest affected its analysis; because the statements at issue were unprotected true threats, it did not need to. Still, the statute's narrow focus and compelling governmental interest in protecting federal judges from fear that impedes their official duties may have made the speech easier to classify as unprotected. Id. at 423 ("All this is powerful evidence of a true threat—that Turner intended his website to intimidate Judges Easterbrook, Bauer, and Posner and to impede them in the performance of their duties by putting them in fear for their lives.").

[292] With respect to gun rights, the *Clean Elections USA* plaintiffs argued there is no Second Amendment right to carry a gun near a drop box, as *Heller* and *Bruen* both permit the prohibition of firearms in "sensitive places," including polling places, and their modern-day analogues, drop boxes. Plaintiff's Opposition to the Defendant's Motion to Dismiss, Clean Elections USA II, 2023 WL 5278051, at *14.

[293] See, e.g., Bartlett v. Strickland, 556 U.S. 1, 10 (2009) (describing the right to vote as "one of the most fundamental rights of our citizens"); Doe v. Reed, 561 U.S. 186, 224 (2010) (Scalia, J., concurring) ("We have acknowledged the existence of a First Amendment interest in voting . . . ."); Harper v. Virginia

lose effect. As the Supreme Court has observed, voting in a "free and unimpaired manner is preservative of other basic civil and political rights."[294] Voting has its own distinct character apart from the political speech and public debate that precedes and follows voting. As such, voting is a separate sphere, subject to stricter levels of protection than the laissez-faire system for day-to-day public deliberation.

Because of the franchise's unique, central, and necessary role in a democracy, federal law should offer heightened restrictions of speech and conduct surrounding voting that may circumscribe First or Second Amendment principles in the realm of public discourse. This fact notwithstanding, Section 11(b) and § 1985(3)'s content restrictions on speech are not acts of silencing. Anti-intimidation voting laws do not favor one group's or one side of the aisle's speech over another. Instead, such laws aim to protect the rules by which citizens vote and officials administer elections. While there are many places to convey a ballot security message, there are only a limited number of places (and a limited time) to vote, authorizing less tolerance of certain behaviors to shield the voting process from interference. Courts should embrace the full range of governmental interests at stake in voter intimidation cases, namely voting's delegatory function, ensuring the healthy functioning of collective public decision-making, and protecting political participation grounded in empirical voter turnout data.[295]

1. Governmental Interests – Voting as Delegation of Power:

Though voting has expressive elements,[296] it serves broader foundational governmental interests. Voting is not merely an expressive act; it is the means by which power is delegated. Because of the grave stakes in elections, a democracy's laws must ensure an appropriate delegation—one that is

State Bd. of Elections, 383 U.S. 663, 665 (1966) ("[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."); Reynolds v. Sims 377 U.S. 533, 561 (1964) ("[T]he right of suffrage is a fundamental matter . . . .").

[294] Reynolds v. Sims, 377 U.S. 533, 562 (1964).

[295] The Supreme Court, along with lower courts, has affirmed that preventing voter intimidation is a compelling governmental interest, based on a variety of rationales. See, e.g., Burson v. Freeman, 504 U.S. 191, 199–200 (1992) (preventing voter intimidation, harassment, and interference is a compelling governmental interest to maintain peace and ensure the integrity of the electoral process); Brnovich v. Democratic Nat'l Comm., 594 U.S. 647, 672 (2021) ("[e]nsuring that every vote is cast freely, without intimidation or undue influence, is also a valid and important state interest.").

[296] See Adam Winkler, Expressive Voting, 68 N.Y.U. L. Rev. 330, 331 (1993) (arguing that while voting has instrumental aspects, it also has an important expressive function, whereby "voting is a meaningful participatory act through which individuals create and affirm their membership in the community and thereby transform their identities both as individuals and as part of a greater collectivity").

accurate, legitimate, and peaceful. Intimidation undermines all three of these necessities.[297]

Voting as a non-expressive delegation of power is baked into the Constitution itself. Section 3 of the Fourteenth Amendment sets limits on who can be elected,[298] as the goal is not merely to express support for anyone who represents a voter's preferences. A core constitutional aim of any election is to elect someone who will participate in our constitutional democracy, preserve free speech after the election, and hand over the reins at the end of their term.[299] Succession, not deliberation, is the interest being protected.

The Supreme Court has affirmed the non-expressive purpose of election processes on multiple occasions.[300] According to this view, elections are not platforms for expression but instead an act of tallying that ends in a delegation of power. In *Burdick v. Takushi*, which upheld Hawaii's ban on write-in voting, the Court stated that the function of the election process is "'to winnow out and finally reject all but the chosen candidates,' not to provide a means of giving vent to 'short-range political goals, pique, or personal quarrel[s].' Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently."[301]

Election laws, including anti-intimidation provisions, help protect elections' aggregative function (both during casting and counting of ballots), so that election winners accurately reflect the choices of the body politic. Without such laws, private individuals may hijack electoral processes by brute force, delegitimizing electoral outcomes. In *Ex parte Yarbrough,* the Court upheld the criminal version of the support-or-advocacy clauses of the KKK

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[297] See, e.g., Ex parte Yarbrough, 10 U.S. 651, 666–67 (1884) ("In a republican government, like ours, where political power is reposed in representatives of the entire body of the people, chosen at short intervals by popular elections, the temptations to control these elections by violence and by corruption is a constant source of danger . . . . [N]o lover of his country can shut his eyes to the fear of future danger from both sources.").

[298] U.S. Const. amend. XIV, § 3 (barring persons from holding office "who, having previously taken an oath [of office] shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof").

[299] The Court missed an easy opportunity to discuss these values in *Trump v. Anderson*, 601 U. S. 100, 117 (2024) (holding that states lack the power to enforce Section 3 of the Fourteenth Amendment to disqualify federal candidates or officeholders).

[300] See, e.g., Storer v. Brown, 415 U.S. 724, 735 (1974) (stating that a primary election's purpose is to "winnow out" candidates); Burdick v. Takushi, 504 U.S. 428, 439 (1992) (affirming Storer's "winnowing out" theory).

[301] Burdick v. Takushi, 504 U.S. 428, 438 (1992) (citing *Storer*, 415 U.S. at 735, and further stating that the Court has "repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls"). But see Doe v. Reed, 561 U.S. 186, 195 (2010) (stating that electoral activities, such as signing a petition, are still expressive even when they have "legal effect in the electoral process").

Act on such grounds, reasoning that a republican government of delegated representatives "must have the power to protect the elections on which its existence depends, from violence and corruption."[302] Without such a provision against intimidation, the Court reasoned that the federal government would lose its legitimacy, and be no more than "a mere aggregation of delegated agents of other states and governments, each of which is superior to the general government."[303] The governmental duty to protect voters from private intimidation does not solely arise from an individual's right to vote. Instead, the *Yarbrough* Court recognized a governmental necessity in ensuring that votes are freely cast so that elected representatives are freely chosen and indeed *representative.* And in the 1965 case *United States v. Original Knights of the Ku Klux Klan,* Judge Minor Wisdom echoed the structural principle of *Yarbrough*, observing that "violence and intimidation" against Black voters "alloyed the purity of the federal political process."[304]

Anti-intimidation provisions also guard against elections becoming violent by preventing mutual mistrust on both sides from escalating into increasingly intimidating actions, and finally into violence itself. Throughout modern history, the specter of political violence during elections and transitions of power, as seen on January 6, 2021, is especially acute in capital cities, which serve as the seats of government.[305]

2. Governmental Interests – The Machinery of Public Decision-Making and the Proscription of False Speech:

Public discourse is not the only way we make decisions as a society. The law creates protected spheres around processes by which power is delegated and citizens collectively make public decisions. Elections, communicating with government officials through official channels (e.g., notice-and-comment periods or meetings with agendas), and jury trials are all examples of public decision-making domains that are subject to special legal protections and special speech rules.[306] In these areas, the law instructs us on how to make such decisions and places hard limits on the behavior of citizens and the sources of information that may be brought to bear in these spheres.

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[302] Ex parte Yarbrough, 110 U.S. 651, 658 (1884).

[303] Id. at 657–58.

[304] United States v. Original Knights of the Ku Klux Klan, 250 F. Supp. 330, 353 (E.D. La. 1965).

[305] See, e.g., Filipe R. Campante, Quoc-Anh Do, & Bernardo Guimaraes, Capital Cities, Conflict, and Misgovernance, 11 Am. Econ. J. Applied Econ. 298, 299 (2019) (theorizing that conflict is more likely to emerge closer to capital cities, and more likely to dislodge incumbent regimes when it happens close to capitals).

[306] See, e.g., Sheppard v. Maxwell, 384 U.S. 333, 361–63 (1966) (describing speech regulations of trial participants that courts may impose to protect an accused's right to a fair trial).

The analogy to jury trials is instructive. Like elections, juries involve delegations of power to arrive at public decisions. Because of the governmental interest in the integrity of the jury verdict (i.e., a *collective* public decision), the law requires juries to consider only certain kinds of evidence. Not all evidence is admissible. Not all speech in a trial is tolerated.[307] Juries offer a unique epistemological framework, separate from normal public discourse, for ascertaining "the truth." So, too, with voting. The American public ultimately selects its political leaders, not through freewheeling public discourse, but by casting and then counting votes. Voting is its own epistemological mechanism for determining what the body politic wants collectively. As such, a different set of rules should govern the voting process than those regulating public discourse. The *Clean Elections USA* court failed to heed this peculiar aspect of voting in its initial denial of the preliminary injunction, particularly in framing the case as a conflict between defendants' speech rights at ballot drop boxes versus voters' expression in voting.

Just as the law may restrict certain speech in jury trials even if the speech would be protected in other contexts, it also forbids *false* speech in other domains of public decision-making and governmental affairs that would otherwise be protected in non-governmental contexts. Perjury is one such domain, in which false statements made to the government are unprotected by the First Amendment.[308] Impersonating and lying to governmental officials are other categories of unprotected false speech.[309] The Supreme Court in *United States v. Alvarez* justified such restrictions because such speech "undermines the function and province of the law and threatens the integrity of judgments that are the basis of the legal system."[310]

This same rationale offered in *Alvarez* extends to false speech concerning elections that interferes with the official acts of the citizen-voter.[311] Just as perjury falsifies the results of a judicial process, false speech about election rules—such as who may vote or where to vote—that depresses voter turnout falsifies the majority vote, especially if targeted at particular groups. Though casting a vote is not governmental activity, voting is an official act of citizens that is comparable to the previously mentioned domains, where false speech is regulable, because voting means "having a voice in the election of

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[307] Id.

[308] United States v. Alvarez, 567 U.S. 709, 720 (2012).

[309] Id.

[310] Id. at 720–21.

[311] Plaintiffs in *Clean Elections USA II* argued that spreading falsehoods about Arizona voting laws is not protected by the First Amendment based on these same grounds. Plaintiff's Opposition to the Defendants Motion to Dismiss, Clean Elections USA II, No. 22-cv-01823, 2023 WL 5278051, at *14.

those who make the laws under which, as good citizens, we must live."[312] The Supreme Court has recognized this much in *Minnesota Voters Alliance v. Mansky*, a case about regulating political messages on clothing in voting places. The *Mansky* Court suggested in a footnote that private individuals and groups that make false and misleading statements about elections are similarly unprotected by the First Amendment.[313] The *Clean Elections USA* court understood this when it granted equitable relief in the second lawsuit, holding that spreading disinformation about lawful voting practices may be proscribed because it has an "intimidating impact on individuals who are lawfully exercising their right to vote."[314] Accordingly, false speech concerning election rules that deters lawful voting may be banned under Section 11(b).

3. Governmental Interests – Low Voter Turnout:

Low voter turnout is a particular concern that justifies Section 11(b) and § 1983(5)'s prohibitions on intimidating speech. While voter turnout in the United States soared in the 2020 election and was the highest in over a century,[315] voter turnout still lags behind U.S. rates from the nineteenth century[316] as well as contemporary levels in many other democracies worldwide.[317] As a general matter, low voter turnout bears on the legitimacy of elections and the effectiveness of the representation of interests in a legislature. Encouraging broad political participation is also particularly important in light of the Supreme Court's contemporary jurisprudence, which leaves a number of substantive issues (e.g., abortion) to be decided in the political process.[318]

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[312] Clean Elections USA I, 638 F. Supp. 1033, 1045 (D. Ariz. 2022), *vacated and dismissed as moot*, No. 22-16689, 2023 WL 1097766 (9th Cir. Jan. 26, 2023) (citing Wesberry v. Sanders, 376 U.S. 1, 17 (1964)).

[313] Minn. Voters All. v. Mansky, 585 U.S. 1, 18 n.4 (2018) (asserting, in the context of a nonpublic forum, that "[w]e do not doubt that the State may prohibit messages intended to mislead voters about voting requirements and procedures").

[314] Transcript of Evidentiary Hearings at 188, Clean Elections USA II, No. 22-cv-01823, 2022 WL 17088041 (D. Ariz. Nov. 1, 2022).

[315] See, e.g., Kevin Schaul, Kate Rabinowitz, & Ted Mellnik, 2020 Turnout is the Highest in Over a Century, Wash. Post. (Dec. 28, 2020, 4:29 PM), https://www.washingtonpost.com/graphics/2020/elections/voter-turnout/.

[316] John Woolley & Gerhard Peters, Voter Turnout in Presidential Elections, Am. Presidency Project at U.C. Santa Barbara, https://www.presidency.ucsb.edu/statistics/data/voter-turnout-in-presidential-elections (last visited May 17, 2023).

[317] Drew DeSilver, Turnout in U.S. Has Soared in Recent Elections But By Some Measures Still Trails That of Many Other Countries, Pew Rsch. Ctr. (Nov. 1, 2022), https://www.pewresearch.org/short-reads/2022/11/01/turnout-in-u-s-has-soared-in-recent-elections-but-by-some-measures-still-trails-that-of-many-other-countries/.

[318] See, e.g., Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 289 (2022).

In this context, courts should recognize increased political participation as a compelling governmental interest. As the Supreme Court has stated, voting is a "civic obligation" and an act of collective decision-making.[319] When faced with voter interference cases, courts should liberally construe anti-intimidation provisions to protect participation in the political process and ensure that private actors are not discouraging would-be voters from casting ballots.

D. Narrow Tailoring in a New Era of Extended Voting:

Whether speech constitutes harassment or intimidation depends on when and where the speech occurs. If the challenged activity occurs within the polling place, proscribing such speech is certainly narrowly tailored.[320] But the law can also create a protective zone that extends beyond the polling place to enable voters to enter the polling place or arrive at the drop box free from intimidation. As the Court recently observed, "the State may reasonably take steps to ensure that partisan discord not follow the voter up to the voting booth, and distract from a sense of shared civic obligation at the moment it counts the most."[321] The closer the proximity to the polling place or drop box, or the greater the threat, the more the conduct may be proscribed as voter intimidation.

Two new features of voting in our post-pandemic era require a regime of narrow tailoring that defers to legislatures and tolerates certain prophylactic encroachments on otherwise protected speech to safeguard voters from intimidation. Voting now frequently occurs over an extended period of days or weeks,[322] and ballot drop boxes have proliferated since 2020 on public sidewalks and in public parking lots (i.e., traditional public forums).[323] Because of these two developments, a strict scrutiny framework that rigorously requires "the least speech-restrictive means" of protecting voting may fail to ensure that voters remain free from intimidation and interference. Such an approach could lead to an overly narrow interpretation of Section 11(b) or an overly narrow injunction issued to enforce Section 11(b).

The Court in *Burson v. Freeman* recognized that the least restrictive means test—which the Court has employed in other First Amendment

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[319] Minn. Voters All. v. Mansky, 585 U.S. 1, 15–16 (2018) (describing voting as a "weighty civic act" and analogizing voting to returning a jury verdict and legislating).

[320] See, e.g., Burson v. Freeman, 504 U.S. 191, 208 (1992) (finding that a Tennessee statute regulating certain political speech within 100 feet of the entrance of a polling place is narrowly tailored).

[321] *Mansky*, 585 U.S. at 15–16.

[322] See Lo Wang, supra note 108.

[323] See, e.g., Sullivan & Renshaw, supra note 115.

contexts, such as abortion clinic protest cases[324]—need not be so rigorously applied in the voting context.[325] In so deciding, the *Burson* Court recognized the appropriateness of deference to legislative judgments about voting, the breadth of the interests at stake in voting unencumbered and uninfluenced by others, and the interest in avoiding the need to police voting locations for intimidating behavior.[326]

The *Burson* Court held that a Tennessee state law that prohibited solicitation of votes and distribution or display of campaign materials within 100 feet of a polling place did not violate the First Amendment.[327] The state law survived strict scrutiny because of the state's compelling interest in protecting "the right to cast a ballot in an election free from the taint of intimidation and fraud."[328] The Court reaffirmed *Burson*'s principal holding in *Mansky*, which involved a Minnesota law that forbade individuals from wearing a "political badge, political button, or other political insignia" inside a polling place on election day.[329] In order to preserve the polling place as an "island of calm in which voters can peacefully contemplate their choices," the Court in *Mansky* found that a state may reasonably restrict political advocacy via expressive clothing choices in polling places.[330]

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[324] See, e.g., Hill v. Colorado, 530 U.S. 703 (2000); see also Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357 (1997); Madsen v. Women's Health Ctr., 512 U.S. 753 (1994).

[325] Burson v. Freeman, 504 U.S. 191, 208–10 (1992).

[326] Id. at 206–10.

[327] Id. at 193–94. Because the 100-foot radius included public sidewalks and streets, the Tennessee law was a content-based restriction on speech in a public forum and thus triggered strict scrutiny. Id. at 198.

[328] Id. at 211. In upholding the Tennessee statute, the Court held that a "long history, a substantial consensus, and simple common sense" all show that restricted zones around polling places are necessary to protect voting rights. Id. As the *Clean Elections USA* plaintiffs argued, speech restrictions intended to safeguard elections and the right to vote have frequently survived strict scrutiny since *Burson*. See Supplemental Brief for Plaintiff at 14, Clean Elections USA II, No. 22-cv-01823, 2022 WL 17088041 (D. Ariz. Nov. 1, 2022). See, e.g., Williams-Yulee v. Fla. Bar, 575 U.S. 433, 457 (2015) (upholding restriction on solicitation of campaign funds); Citizens for Police Accountability Pol. Comm. v. Browning, 572 F.3d 1213, 1222 (11th Cir. 2009) (upholding Florida's restricted zone around polling places and early voting sites); Wohl I, 498 F. Supp. 3d 457, 486 n.29 (S.D.N.Y. 2020) (finding that the VRA and KKK are narrowly tailored to advance compelling government interests in preventing voter intimidation). Before and after *Burson*, lower courts have upheld many regulations of political speech and photography within a certain radius of a polling place. See, e.g., N.J. Press Ass'n v. Guadagno, No. 12-cv-06353, 2012 WL 5498019, at *4–6 (D.N.J. 2012) (upholding ban on photographing voters within 100-foot zone of polling places); Firestone v. News-Press Pub. Co., 538 So. 2d 457, 460 (Fla. 1989) (upholding prohibition on photographing within polling places).

[329] Minn. Voters All. v. Mansky, 585 U.S. 1, 1 (2018). Because a polling place is a nonpublic forum, Minnesota could make content-based restrictions on speech as long as the restrictions were reasonable and viewpoint-neutral. Id. at 12.

[330] Id. at 3. The *Mansky* Court reasoned that "[c]asting a vote is a weighty civic act . . . . It is a time for choosing, not campaigning." Id. at 15. However, despite granting the legislature latitude to regulate speech in the polling place, the Court struck down the Minnesota law, deeming it unreasonable due to the statute's overly vague and "unmoored use of the term 'political.'" Id. at 19.

The *Burson* Court grappled with *how large* a restricted zone around a polling place may be, seeking a scope broad enough to ensure voters can vote freely, yet sufficiently tailored to avoid impinging on others' First Amendment rights.[331] Ultimately, the Court decided that anti-intimidation laws need not be "perfectly tailored" in order to survive strict scrutiny.[332] The Court rejected the idea that a restricted zone must be as geographically small as possible in order to satisfy the least speech-restrictive means test.[333] Thus, the Court would not shave inches or feet off such a speech restriction, reasoning that the difference between a 100-foot boundary and a 25-foot legally prescribed boundary was a difference "only in degree, not a less restrictive alternative in kind."[334]

The *Burson* Court justified its deference to the Tennessee legislature in the voting context on several grounds. First, legislatures should be free to craft reasonable speech restrictions *ex ante* rather than *ex post* in order to prevent potential interferences in the electoral process.[335] Second, even if a state were willing to risk a tainted election in order to secure proof of intimidation or fraud, isolating the effect of voting laws on such conduct is nearly impossible.[336] As the Court observed, "[v]oter intimidation and election fraud are successful precisely because they are difficult to detect."[337] Third, a majority of voting laws creating restricted zones have been on the books since the 1890s.[338] This makes it difficult for states to offer witnesses who can testify to the consequences of eliminating such laws or at least tailoring them more narrowly.[339] Fourth, creating a restrictive geographic zone eliminates the need for police to monitor polling places for possible intimidation.[340] The absence of police is a good thing, given that voting in our constitutional system is a collective cooperative enterprise, not a zone of friend

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[331] Burson v. Freeman, 504 U.S. 191, 208 (1992).

[332] Id. at 209.

[333] Id. at 210.

[334] Id.

[335] Id. at 209 ("Requiring proof that a 100-foot boundary is perfectly tailored to deal with voter intimidation and election fraud 'would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not *significantly impinge* on constitutionally protected rights.'") (citation omitted).

[336] Id. at 208 ("[I]t is difficult to isolate the exact effect of these laws on voter intimidation and election fraud.").

[337] Id.

[338] Id.

[339] Id.

[340] Id. at 207.

and foe.[341] Thus, the *Burson* plurality held that it would defer to such legislative judgments without subjecting the state law to as rigorous a "least restrictive means" test as the Court might employ in non-voting contexts.[342]

Just as the *Burson* Court did, courts going forward must grapple with *how large* a protective sphere around voting ought to be in our new era of extended voting. Given the increase in early voting since 2020, elections now take place over the course of weeks,[343] which has already resulted in a greater number of anti-voter intimidation claims in federal court seeking injunctive relief under Section 11(b) and damages under § 1985(3). Even prior to the advent of ballot drop boxes, injunctions (and state law) barring intimidating speech and parading guns in public reached conduct in public forums, such as in the 100-foot zone established in *Burson.* Given the presence of ballot drop boxes in streets and parking lots, the need for restrictions on intimidating speech in public forums will only increase. As the plurality in *Burson* explained, states should be free to determine that the fifteen seconds (or any reasonable number of seconds) "before its citizens enter the polling place should be their own, as free from interference as possible."[344] Courts should apply this same logic to cars driving up to a ballot box on the street or in a parking lot, as in *Clean Elections USA.* Voters should not be subjected to the stresses and fears of self-appointed ballot watchers photographing their license plates or tailing their cars in the seconds before they pull up to a ballot drop box. Indeed, extended voting and drop boxes reduce the protection of a community presence that single-day elections provide in a polling place, furthering the need to protect individuals from intimidation.

Such geographic restrictions surrounding polling places and drop boxes are logical when one considers that there are only a limited number of places to vote, while there are a great many places to project a ballot security message. In *Clean Elections USA*, the defendants could have furthered their interest in concerns about accuracy and "election integrity" in ways that did not create a possibility of harassment and voter intimidation, such as by petitioning authorities or by protesting farther away from ballot drop boxes. By contrast, plaintiffs could not easily further their interest in voting without fear by voting elsewhere. An example of this balancing appears in *Hill v.*

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[341] It is worth noting that one recent study found that the presence of police at a polling place is associated with a thirty-two percent reduction in participation by African American voters. See generally David Niven, Policing Polling Places in the United States: The Negative Effect of Police Presence on African American Turnout in an Alabama Election, 18 Democracy and Sec. 170 (2021).

[342] Burson v. Freeman, 504 U.S. 191, 211 (1992).

[343] See Lo Wang, supra note 108.

[344] *Burson*, 504 U.S. at 210.

Colorado,[345] where in the context of abortion clinic protests, the Court determined that citizens have a right to get up front and personal (within eight feet of each other) in communicating their views about another's personal choices. But *Burson*, and later *Mansky*, partially resolved this debate in the voting context, with *Mansky* holding that governmental interests in preventing voter intimidation justify a significantly larger zone of protection where voters are entitled to an "island of calm."[346] Thus, when courts evaluate injunctions issued to enforce Section 11(b) (and when courts evaluate the constitutionality of Section 11(b) itself),[347] they should defer in the first instance to legislative judgments in a manner that is consistent with *Burson*'s application of strict scrutiny to voting, which does not scrutinize speech restrictions down to the last foot or inch.

Courts will also have to consider the temporal dimension in addition to the spatial dimension when crafting relief under Sections 11(b) and 1985(3). While the Tennessee statute in *Burson* only went into effect on "Election Day," elections have been decided throughout a "voting season" since the beginning of the pandemic.[348] More than half of U.S. states permit mail-in voting and most states permit at least two weeks of early voting.[349] Restrictions on intimidating conduct and electioneering near polling places and drop boxes, as well as restrictions on false or deceptive speech concerning voting on social media, may now need to extend over the course of multiple weeks in order to be effective.[350]

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[345] 530 U.S. 703, 707 (2000) (upholding a Colorado statute which prohibits any person within 100 feet of a health care facility's entrance from "'knowingly approach[ing]' within eight feet of another person, without that person's consent, in order to pass 'a leaflet or handbill to, display[] a sign to, or engag[e] in oral protest, education, or counseling with [that] person'").

[346] Minn. Voters All. v. Mansky, 585 U.S. 1, 3 (2018).

[347] One court recently stated that Section 11(b) survives strict scrutiny, because it is "narrowly tailored to advance compelling government interests." Wohl I, 498 F. Supp. 3d 457, 486 n.29 (S.D.N.Y. 2020).

[348] See Lo Wang, supra note 108.

[349] See id.

[350] As part of the Bipartisan Campaign Reform Act of 2002, Congress defined a category of election-related speech along temporal lines: speech within thirty days of a primary or sixty days of a general election was "electioneering communications," which was of a different character and subject to different regulations than other political speech. 52 U.S.C. § 30104(f)(3). The Court struck down this provision in *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010), because it discriminated based on the corporate identity of the speaker; however, the Court accepted the idea that a narrowly tailored restriction on speech along a temporal dimension could be upheld if it did not discriminate based on the identity of the speaker. Additionally, broad language in dicta in *Mansky* suggests that false speech with respect to election laws may simply be unprotected as a general matter. See Minn. Voters All. v. Mansky, 585 U.S. 1, 18 n.4 (2018) ("We do not doubt that the State may prohibit messages intended to mislead voters about voting requirements and procedures."). Elsewhere, the Court has stated that certain proscriptions of false speech in order to protect governmental processes are permissible, such as perjury statutes and statutes barring impersonation of government officials. See United States v. Alvarez, 567 U.S. 709, 720–21 (2012). It remains to be seen whether the Court will affirm *Mansky*'s dicta or whether proscription of

E. Deferring to Voter Intimidation Laws:

Regardless of the state of formal First Amendment doctrine, there are two additional reasons why courts should defer to Sections 11(b) and 1985(3): first, because both statutes reflect carefully considered legislative judgments governing highly specific domains, which pose low risk of arbitrary enforcement or chilling protected speech; and second, because regulating traditionally recognized categories of voter intimidation is consistent with the First Amendment's developing "history and tradition" standard.

1. Deferring to Narrowly Tailored Legislative Judgments:

The Supreme Court's formalistic, generalized free speech doctrine should be tempered by Justice Harlan's laudable analysis in *Cohen v. California*.[351] Writing for the majority, Harlan recognized that statutes deserve greater deference when the legislature has identified a specific harm and carefully addressed it in a narrow context, as they give fair notice and pose considerably lower risks of discriminatory enforcement or chilling lawful speech than broader, vague statutes like general "breach of the peace" laws.[352] Voting regulations like Section 11(b) similarly merit deference, as they target a specific harm without creating chilling effects associated with broader statutes.

In *Cohen*, the Court overturned a conviction under a California law for disturbing the peace "by offensive conduct" after the defendant wore a jacket emblazoned with "Fuck the Draft" in a courthouse corridor.[353] The conviction violated the First Amendment, as the government may not ban public displays of profanity without a more particularized, compelling justification.[354] The Court also noted that the broad California statute failed to articulate the specific interest in protecting a courtroom's captive audience and

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false speech about elections will be subject to time limitations, such as the injunction issued in *Clean Elections USA II*, No. 22-cv-01823, 2022 WL 17088041 (D. Ariz. Nov. 1, 2022). There, the district court was not troubled when it issued an injunction against false speech about voting laws during the period of early voting through Election Day, and it did not feel the need to elaborate on why an eight-day period was narrowly tailored.

[351] Cohen v. California, 403 U.S. 15 (1971).

[352] Id. at 19 (citing Edwards v. South Carolina, 372 U.S. 229 (1963), for the proposition that narrowly tailored statutes reduce chilling concerns by providing fair notice). The *Edwards* Court overturned convictions under the First Amendment because they were based on a vague "breach of the peace" law but implied that convictions under a more precisely drafted statute—such as one regulating traffic or public access to government property—might have survived First Amendment review. *Edwards*, 372 U.S. at 236–37.

[353] *Cohen*, 403 U.S. at 16.

[354] Id. at 19 (citing Edwards v. South Carolina, 372 U.S. 229, 236–37 n.11 (1963)).

did not focus solely on courtrooms, which might have supported a more speech-restrictive statute.[355]

Conversely, precise and narrow statutes reduce chilling concerns by giving fair notice of what kinds of speech and conduct are illegal and the interest that the state seeks to further. Fair notice satisfies individuals' due process rights and simultaneously constrains the discretion of state enforcement officials.[356] By contrast, broad laws may lead individuals to self-censor, because "[u]ncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."[357]

Section 11(b) gives clear notice of the prohibited conduct and does not create the chilling effects that concerned the *Cohen* Court. Unlike the broad "breach of the peace" law in *Cohen*, Section 11(b) targets a specific harm, in most cases at a specific time and place: conduct that interferes with voters' ability to make free and autonomous decisions about whether and how to vote. Section 11(b)'s narrow focus "evinces concern"—i.e., Congress precisely identified the issue it is addressing.[358] Further, Section 11(b) is no more burdensome than necessary: it permits speakers to communicate their views, so long as they do not interfere with those about to vote.

Unlike in *Cohen*, where onlookers were free to turn away from the offensive speech in most applications of the "breach of the peace" law, voters cannot avoid polling places or drop box locations and still exercise their fundamental right. Because of this lack of an alternative, Section 11(b) is justified as a narrowly tailored law that advances the compelling interest of ensuring fair and representative elections. The same logic applies to the narrow focus of § 1985(3) of the KKK Act, which proscribes conspiracies to intimidate voting-eligible citizens from supporting or advocating for federal candidates.[359]

Similarly, *Counterman* addressed a general "stalking" statute. But in the civil and narrow context of Section 11(b), *Counterman*'s prophylactic

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[355] See id. at 22 (stating that the "portion of the statute upon which Cohen's conviction rests evinces no concern . . . with the special plight of the captive auditor").

[356] Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

[357] Id. at 109 (emphasis omitted).

[358] *Cf. Cohen*, 403 U.S. at 22 (describing a general breach of peace statute that failed to target a specific interest).

[359] See 42 U.S.C. § 1985(3) (proscribing conspiracies "to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States").

technique of imposing an intent requirement to avoid chilling effects should be unnecessary where a civil statute precisely addresses limited circumstances.

2. History and Tradition:

Finally, in evaluating First Amendment challenges, courts should defer to Sections 11(b) and 1985(3) because there is a history and tradition of regulating voter intimidation, informed by past electoral experiences and their impact on voters. The *Clean Elections USA* court, for example, supported its initial denial of a preliminary injunction under Section 11(b) by stating that defendants' conduct did "not fall into any traditionally recognized category of voter intimidation."[360] In doing so, the court cited numerous cases involving long-recognized forms of permissible regulation of intimidation.[361] Though the court did not offer a doctrinal explanation for the relevance of this "traditionally recognized" standard,[362] its inquiry fits within the Supreme Court's recent invocations of history and tradition.[363]

Indeed, just last term, the Court applied the "history and tradition" language in the First Amendment context in *Vidal v. Elster*.[364] There, the Court held that the Lanham Act's names clause—a content-based trademark regulation—does not violate the First Amendment, because of the "history and tradition" of restricting trademarks containing a living person's name.[365] Courts should likewise accept certain historically grounded speech restrictions in the voting context—such as Sections 11(b) and 1985(3)—on similar grounds, at least when applied to speech uttered near voting locations and during election periods.

F. Evaluating Intimidation: Totality of the Circumstances:

As courts attempt to define intimidation without infringing on First (or Second) Amendment rights, they may face doctrinal pressure not to

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[360] Clean Elections USA I, 638 F. Supp. 1033, 1044 (D. Ariz. 2022), *vacated and dismissed as moot*, No. 22-16689, 2023 WL 1097766 (9th Cir. Jan. 26, 2023).

[361] Id. (describing various forms of intimidation, including baseless and retaliatory arrests, evictions, and following voters and recording voters' license plates).

[362] Id.

[363] In *Brown v. Ent. Merch. Ass'n.*, the Court stated that the government may not create new unprotected categorical exceptions to the First Amendment without a historical basis. 564 U.S. 786, 792 (2011). As previously indicated, the Court also considers history and tradition in the Second Amendment context. See New York State Rifle & Pistol Association, Inc. v. Bruen, 597 U.S. 1, 17 (2022).

[364] 602 U.S. 286, 310 (2024) (holding that "history and tradition establish" that a content-based trademark regulation does not violate the First Amendment).

[365] Id.

implement a vague, totality-of-the-circumstances standard so as not to chill protected speech. First Amendment doctrine allows for some harmful speech, so as not to chill legitimate expressive conduct. In other words, in the First Amendment context, courts are generally more willing to tolerate false negatives than false positives. Thus, defamation law tolerates some false speech about public officials (and by extension, public figures more broadly) to ensure that speakers are not deterred from critiquing matters of public concern—even if the path to the truth involves factual stumbles.[366]

But this reluctance to chill speech should not lead judges to allow instances of voter intimidation to go unchecked. Despite both exercising constitutionally prescribed power, voters are not like public officials in the defamation context: they do not concede a certain level of privacy as a tradeoff for exercising power.[367] Voting is even different from signing a petition to place an initiative or a referendum to a ballot. Unlike petitioners, whose privacy rights are weaker,[368] voters are not engaging in a legislative act (unless they are voting on an initiative or referendum). A vote is the irreducible minimum unit of power exercised to elect a representative. It is a private tally mark, a necessary act of tabulation without which there are no democratically elected public officials.

A sociological lens can offer more clarity. The law negotiates social relations between people, drawing lines between the tolerable and unacceptable. Defining intimidation is one such judgment about human relations, informed by lived experience. Courts have long inquired into the actual impact of challenged behavior on voters. A group of ballot watchers in lawn chairs snapping photographs of voters at a drop box may be intimidating to those afraid of being doxed. A *Washington Post* photographer doing the same might not be. Similarly, a "line-warming" ban that bars passing out food and water to voters in line in Kansas in November may be tolerable; the same law in Florida or Louisiana—longer lines, warmer weather—might not be.[369]

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[366] See New York Times v. Sullivan*,* 376 U.S. 254, 279 (1964) ("Under [a rule compelling critics to guarantee the truth of their assertions], would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is, in fact, true, because of doubt whether it can be proved in court or fear of the expense of having to do so.").

[367] See Statement of Interest of the United States at 13, Clean Elections USA II, No. 22-cv-01823, 2022 WL 17088041 (D. Ariz. Nov. 1, 2022) (arguing that private citizens are not governmental agents, and voting is not a governmental activity within the context of filming voters using drop boxes in an intimidating fashion).

[368] Doe v. Reed*,* 561 U.S. 186, 201–02 (2010) (upholding disclosure requirements as applied to referendum petitions).

[369] See, e.g., Nick Corasaniti & Reid J. Epstein, What Georgia's Voting Law Really Does, N.Y. Times (Aug. 18, 2021), https://www.nytimes.com/2021/04/02/us/politics/georgia-voting-law-annotated.html

Despite the chill doctrine, a totality-of-the-circumstances analysis may offer the best approach to voter intimidation claims. Informing the totality-of-the-circumstances standard for which the DOJ has advocated with respect to Section 11(b) claims is *United States v. McLeod*.[370] *McLeod* states that under Section 131(b) of the Civil Rights Act of 1957, challenged acts of intimidation "cannot be viewed in isolation," but must be considered as a whole and "against the background of contemporaneous events[.]" Once again, context matters.[371]

Another provision of the VRA may also prove instructive. The Court assesses Section 2 vote dilution claims under *Thornburg v. Gingles*' totality-of-the-circumstances standard.[372] As the Court explained in *Johnson v. De Grandy,* another Section 2 case, "'totality' review springs from [Congress's recognition of] the demonstrated ingenuity of state and local governments in hobbling minority voting power."[373] Similarly, as private parties' intimidation tactics become ever more subtle, creative and less explicit, totality review may be our best option.

Voter intimidation has been a feature of American elections since before the Nation's Founding,[374] and Congress and the courts have tried to deal with the issue since Reconstruction. On multiple occasions, Congress has fashioned remedies, though they have been used infrequently. As voters bring claims under Section 11(b) and § 1985(3) with greater frequency, courts will be faced with how to interpret the anti-intimidation provisions in ways that protect the legitimacy, accuracy, and peacefulness of elections. This is a live issue and, in some ways, is growing. In light of the increasingly subtle tactics and indirect forms of voter intimidation we see today, courts may not be able to fashion a better standard than a totality-of-the-circumstances analysis. This is especially true given that whether conduct is intimidating is

(describing the recently passed Georgia voting law S.B. 202, which, among other things, criminalizes handing out water to voters in line).

[370] United States v. McLeod, 385 F.2d 734, 740–41 (5th Cir. 1967) (finding that baseless arrests and prosecutions of voter registration workers constitutes unlawful intimidation under Section 131(b) of the Civil Rights Act of 1957).

[371] Id.

[372] Thornburg v. Gingles, 478 U.S. 30, 32 (1986) ("As both amended § 2 and its legislative history make clear, in evaluating a statutory claim of vote dilution through districting, the trial court is to consider the 'totality of the circumstances' and to determine, based upon a practical evaluation of the past and present realities, whether the political process is equally open to minority voters.").

[373] Johnson v. De Grandy, 512 U.S. 997, 1018 (1994).

[374] See, e.g., American Violence: A Documentary History 57 (Richard Hofstadter & Michael Wallace eds., 1971).

influenced by context, social meaning, and history, as the Court recognized in *Virginia v. Black*.[375]

VII. CONCLUSION

As long as there are elections, voters will continue to face new and evolving threats. At the same time, courts will continue to grapple with First Amendment concerns as they are faced with the prospect of regulating speech that interferes or tries to interfere with voting. As they do so, courts ought to embrace the full range of governmental interests at stake when votes are cast: voting's delegatory function, ensuring the healthy functioning of collective public decision-making, and encouraging broad political participation. Because of voting's unique role in advancing these necessary collective interests, voting should be conceived of as a separate sphere from day-to-day public discourse. This justifies the prohibition of a broader range of intimidating conduct that may keep voters away from the polls.

Similarly, as voting processes evolve, particularly in the wake of the COVID-19 pandemic, courts should defer to carefully crafted legislative judgments and employ a regime of narrow tailoring that tolerates certain prophylactic encroachments on otherwise protected speech to protect voters from possible interference. Given voting's indispensable role in the creation and functioning of our government, courts should not hesitate to enjoin intimidating conduct under Section 11(b) of the VRA or § 1985(3) of the KKK Act, even in the absence of a threat of physical violence or a showing of subjective intent. Finally, intimidation cannot be examined in isolation from its surroundings: courts should inquire into the challenged conduct's social meaning, historical context, and actual impact on voters.

[375] Virginia v. Black, 538 U.S. 343, 367 (2003) (stating that context factors are necessary to determine whether cross-burning is intended to intimidate).