IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MI FAMILIA VOTA EDUCATION FUND, *et al.*,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	**Case No. 1:20-cv-03030**
	:	
DONALD J. TRUMP, *et al.*,	:	
	:	
Defendants.	:	

[PROPOSED] AMICUS CURIAE BRIEF
IN SUPPORT OF PRELIMINARY INJUNCTION

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Corporate Disclosure Statement

Amici Curiae the Jewish Alliance for Law and Social Action and the Workers Circle hereby state that neither has any parent corporation, nor does any publicly held corporation own 10% or more of the stock of either.

Identity of Amici Curiae, Interest in the Case, and Source of Authority to File

Amici are well-established nonprofit advocacy and social justice organizations that operate, *inter alia*, programs to assist in the protection of voting rights in the United States. The Jewish Alliance for Law and Social Action ("JALSA") is devoted to engaging the community in promoting civil rights, protecting civil liberties and achieving social, economic, environmental, and racial justice. Established in 2001, the organization has the benefit of rich experience in social action with deep inter-community roots, while also having the innovation and dynamism of a new-forward thinking organization. JALSA works with its members, both affiliated and unaffiliated Jews, and those outside the Jewish

community to take personal responsibility for improving our society by advocating with public officials on legislative proposals, using the tools of grassroots community organizing to act on issues, and filing amicus briefs in court cases.

The Workers Circle is a social justice organization that powers progressive Jewish identity through Jewish cultural engagement, Yiddish language learning, multigenerational education, and social justice activism. For over a century it has provided a 360-degree approach to Jewish identity-building. Among other programs, it pursues social justice campaigns and interactive educational programs to connect Jewish adults, children and families of all affiliations to build a better and more beautiful world for all.

Both organizations have a keen interest in this subject matter of this litigation because both are highly active in working to protect voting rights, and both have a deep-rooted involvement in and understanding of the historical Jewish experience which is part of what drives their organizational missions of social justice and civil rights advocacy. Both organizations also work closely with allied nonprofit advocacy organizations outside the Jewish community, including such groups as Reclaim Our Vote and the New Georgia Project, to name a few.

The source of Amici's authority to file under Local Civil Rule 7(o) is the approval of officers of their respective organizations, subject to applicable internal organizational approval processes governing each organization.

FRAP 29(a)(4)(E) Statement

No Party's counsel authored this brief in whole or in part. No Party or Party's counsel contributed money that was intended to fund preparing or submitting this brief. No person – other than the amici curiae, their members, or their counsel – contributed money that was intended to fund preparing or submitting this brief.

ARGUMENT

Amici Curiae, the Jewish Alliance for Law and Social Action ("JALSA") and the Workers Circle (together, "Amici"), by and through their attorneys, Ryan S. Spiegel and the law firm of PALEY, ROTHMAN, GOLDSTEIN, ROSENBERG, EIG & COOPER, CHARTERED, hereby respectfully submit this amicus curiae brief for the Court's consideration in weighing the Plaintiffs' motion for preliminary injunction. In support thereof, Amici state as follows:

INTRODUCTION

In their Complaint and Motion for Preliminary Injunction, Plaintiffs in this case set forth the actions undertaken by the Defendants – the "what" of the voter intimidation activities at issue – and provide detailed legal analysis underscoring that such types of activities do, in fact, amount to intimidation under the law and are appropriately subject to injunction. Amici seek to add to the record an explanation of the "why" – why the actions described are precisely of the type that historically have been used to intimidate vulnerable populations of eligible voters and to strike fear into the hearts of those groups who have suffered from oppression when attempting to exercise their constitutional right to vote, regardless of whether it has been mob violence or state-sanctioned, and regardless of whether it has been actual physical harm or insidious threats that deter voting.

In other words, while the Plaintiffs focus on the acts that have occurred and which are likely to continue occurring through the remainder of this national election, it is critical to recognize and understand the important historical context that explains why the activities of Defendants are indeed intimidating to several vulnerable groups of voters. Calls for armed law enforcement officials at polling stations, for example, cannot be dismissed under the pretext of merely ensuring public safety or "law and order," but rather are a well-known method of suppressing turnout for communities that have been systematically abused by state-sanctioned shows of force in the past. The effect of these types of actions – the "why" of voter intimidation, *i.e.*, why voters feel intimidated and how these types of actions impact their ability to vote and likelihood of voting – is critical to understand when considering the preliminary injunction motion.

HISTORICAL CONTEXT

The history of voter suppression, including voter intimidation in particular, against groups including African Americans and other minorities, is generally known and can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. The Court therefore can and must take judicial notice of these facts under Federal Rule of Evidence 201, particularly in this expedited proceeding when there is insufficient time to gather and submit a compendium of such expansive history that no one seriously denies.

This history includes, without limitation, the obvious and extensive history of disenfranchisement of enslaved people and post-Reconstruction Jim Crow laws and other efforts by state actors and vigilantes, often in collaboration, to instill fear in Black communities to deter them from voting and other activities related to voting such as registration drives and peaceful voting rights demonstrations. Because of the violent history of voter suppression in our country against the Black community, under the circumstances of the 2020 election, all minority voters may feel intimidated because the President has issued statements targeting a variety of racial and ethnic groups, which may incite extremist groups to take violent action on Election Day at the polls.

Fear of threatened violence by state actors in control of the levers of government is clearly also found in the historical experiences of the Jewish community, victimized by the German Nazi regime and by vigilantes encouraged by that government. American Jews carry that collective experience with them, and are particularly aware of when minority groups are deprived of the full rights of citizenship, such as voting, and attuned to the risks of violence, particularly in a time of increased anti-Semitism. The presence of state-sanctioned armed guards, agitators, and informers at polling places must be seen through the lens of these historical experiences. See also Johnny Diaz, "Anti-Semitic Incidents Surged in

2019, Report Says," N.Y. Times, May 12, 2020, *available at* https://www.nytimes.com/2020/05/12/us/antisemitic-report-incidents.html.

Indeed, this is the very reason why armed patrols at polling places are generally prohibited by federal law.[1] Other minority groups who have suffered grievously at the hands of past state-sanctioned violence, e.g., Native Americans, Hispanic Americans, and others, all share a common thread of fear of the presence of imposing armed guards at a place where they are supposed to be free from intimidation to exercise their constitutionally protected right to cast a ballot.

Americans who have enjoyed security in exercising their voting rights, whether they are aware of it or not, may not fully appreciate the impacts of this history on how multitudes of other American citizens perceive the presence of armed guards and vigilante "pollwatchers" at the polls – whether they are federal government agents or not – and they may not fully appreciate how or why the Defendants' statements and actions, as well as the actions of others that they have incited or encouraged, amount to very real intimidation. It is simply wrong to suggest that just because the historical grounds for groups' fears may be rooted in community experiences from decades ago that somehow the fears are not real, or that the intimidation does not still continue, even if sometimes the violative acts of

[1] Though Amici recognize that professional *local* law enforcement may visit polling stations to keep voters safe, which is distinguishable from intimidating conduct and which Amici are not challenging.

2020 take a different form than past examples of armed Ku Klux Klan members chasing voters away or avowed segregationist governors explicitly threatening to use force against Black voters.

Plaintiffs argue convincingly that the actions at issue here are considered *prima facie* intentional and harmful under the law, *i.e.*, they are "objectively intimidating" regardless of motive.

> In short, the [Section 11(b) of the Voting Rights Act] prohibits "intimidation," "threats," or "coercion" against a person, either "for voting or attempting to vote" or "for urging or aiding any person to vote or attempt to vote." Attempts to do the same are also prohibited. And Congress carefully and deliberately excluded any intent requirement from this provision, such that plaintiffs need only show that the conduct in question was objectively intimidating without necessarily proving anything about the defendant's underlying motivation or state of mind.

Ben Cady & Tom Glazer, Voters Strike Back: Litigating Against Modern Voter Intimidation, 39 N.Y.U. Rev. L. & Soc. Change 173, 191 (2015).

But the added context of historical impacts of such intimidation adds to the weight of information the Court should consider. These intimidating actions are not merely "business as usual" or permissible exercises of governmental authority or free speech rights, but rather have the effect of striking real fear into the hearts and minds of voters by encouraging threats, inciting potential and actual violence, and deterring voting—and amount to voter intimidation prohibited by laws meant to prevent the very types of insidious voter suppression tactics on display here.

DOCUMENTED IMPACTS ON VICTIMIZED GROUPS OF ELIGIBLE VOTERS

In addition to taking judicial notice of the indisputable historical facts noted above, the Court can and should also review and accept as record evidence pursuant to Federal Rule of Evidence 902 a powerful array of self-authenticating publications and periodicals cited herein,[2] and incorporated herein by reference, that document and recount the painful history of voter intimidation, the legislative intent of Section 11(b) of the Voting Rights Act, and the reasons why Defendants' actions fit squarely within the definition of voter intimidation in light of the sweeping historical context. See also *Cobell v. Norton*, 391 F.3d 251, 261 (D.C. Cir. 2004) ("preliminary injunction may be granted based on less formal procedures and on less extensive evidence than in a trial on the merits") (citing cases).

"There is a long history of voter intimidation in the United States," including "the Ku Klux Klan's often violent intimidation of African American voters." Daniel P. Tokaji, True Threats: Voter Intimidation and the Constitution, 40 N.Y.U. Rev. L. & Soc. Change 101, 101 (2015) (citing Cady & Glazer at 183-87). Voter intimidation in violation of Section 11 of the Voting Rights Act may include "aggressive pollwatching, challenges to voter eligibility, threats away from the

[2] These resources, in turn, cite other credible authorities for the facts set forth.

polling place, and employer coercion." *Id*. at 102 (citing Cady & Glazer at 216-22).

A report published Oct. 7, 2020 by the Brennan Center for Justice at New York University School of Law,[3] contains clear and succinct explanations of "Why It's Illegal" for federal agents, military servicemembers, private militias and vigilantes to serve as poll watchers or "guard" polling places. See also Dave Roos, "How Voter Suppression Works," 15 May 2012, *available at* https://people.howstuffworks.com/voter-suppression.htm.

A short video published by the Washington Post by National Reporter Janell Ross, *available at* https://peoplesschooldc.wordpress.com/history-of-voter-suppression/, also describes the history of voter suppression. And an article published by the Anti-Defamation League catalogued voter intimidation activities in the 2016 election, *available at* https://www.adl.org/blog/this-election-day-help-protect-the-fundamental-right-to-vote.

Experts are concerned. Kenneth Mayer, professor of political science at the University of Wisconsin-Madison, said: "This raises the potential that we could see a repeat of classic intimidatory tactics of past years – police cars outside polling stations, billboards warning of the penalties for vote fraud posted in Black

[3] The report is incorporated herein by reference and *available at* https://www.brennancenter.org/sites/default/files/2020-10/Voters%20Should%20Not%20Be%20Intimidated_0.pdf

or Latino neighborhoods. … [Y]ou can see how it could get really nasty, and that's deeply worrisome." Ed Pilkington, "In 1981 a 'task force' intimidated voters at the polls. Will Republicans revert to their old tactics?," The Guardian, Aug. 24, 2020, *available at* https://www.theguardian.com/us-news/2020/aug/24/in-1981-a-task-force-intimidated-voters-at-the-polls-will-republicans-revert-to-their-old-tactics. The Court should consider all of these publications and periodicals for the evidentiary record.

The legislative history of the 1975 reauthorization of the Voting Rights Act underscores the threat of law enforcement officials engaging in voter intimidation against targeted minority groups, and the purpose of the Act to prohibit such intimidation:

> The exclusion of language minority citizens is further aggravated by acts of physical, economic, and political intimidation when these citizens do attempt to exercise the franchise. Witnesses testified that local law enforcement officials in areas of Texas patrol only Mexican American voting precincts, and harass and intimidate Mexican American voters. (S. Hearings, 735-737); see also Allee v. Medrano, 416 U.S. 802 (1974).

S. REP. 94-295, 26, 1975 U.S.C.C.A.N. 774, 792.

Far from being a partisan issue, as the Defendants might suggest, reauthorizations and amendments to the Voting Rights Act have been signed into law by Presidents Nixon, Ford, Reagan, George H.W. Bush, and George W. Bush – an explicit, or at least implicit, acknowledgement of the ongoing need to protect

the voting rights of eligible voting groups who have historically been the victims of continued intimidation and suppression efforts.[4]

CONCLUSION

The fear of federal agents, armed guards, other law enforcement officials, and private militias and vigilantes stationed at polling sites, and of corresponding activities that prey upon those fears, stems from a very real and justified – and well documented and generally known – longstanding sense of fear and distrust created by historical experiences of victimized and oppressed cohorts of eligible voters. While the actions of the Defendants' may be "objectively intimidating" under the law, they also borrow generously from a long and loathsome tradition of intimidation tactics used by government representatives and by dangerous private groups sympathetic to the cause of voter suppression. See, e.g., Carol Anderson, "Why is no one talking about the uncounted, suppressed votes in Florida?," The Guardian, Nov. 14, 2018 (highlighting the echoes of the 1946 Mississippi Senate race), *available at* https://www.theguardian.com/commentisfree/2018/nov/14/why-no-one-talking-uncounted-suppressed-votes-florida.

Whether the acts of intimidation are by state actors or by private groups encouraged, incited, and sanctioned by the state is a distinction without a difference under Section 11 of the Voting Rights Act. The Defendants bear

[4] Though notably Section 11(b) of the Act is a permanent provision of the law that does not require reauthorization.

responsibility and must be prohibited from continuing to directly intimidate and to foment intimidation by others. There is no First Amendment shield against such unlawful actions.

It is incumbent upon the Court to acknowledge this tragic history and the reality of the fears felt by vulnerable populations of eligible voters—not just *that* they fear the actions at issue, but *why* they fear them, and why the actions amount to unlawful intimidation. An honest reckoning with history demands it. And no amount of cloaking the Defendants' actions under the guise of other pretexts, or of avoiding outright admission of malicious intent, or of clever use of dog whistles can avoid that honest confrontation with history.

In the end, Plaintiffs are simply asking the Court to order that the Defendants cease doing what is obviously unlawful. Amici respectfully submit that we all know, or should know, *why* it's unlawful, in light of the weight of history. But regardless, it should not be a controversial proposition to enjoin such unlawful acts – especially with in-person voting now underway and Election Day imminent. There can be no serious disagreement that the harm to voters who are the targets of this intimidation, a harm that such targets have endured for decades and indeed centuries, will be irreparable.

For these reasons, Amici respectfully request that the Court grant the Plaintiff's motion for preliminary injunction.

Respectfully submitted,

PALEY, ROTHMAN, GOLDSTEIN,
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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 2,201 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this document was prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font in the Times New Roman style.

/s/ Ryan S. Spiegel
Ryan S. Spiegel

United States Code Annotated
Federal Rules of Evidence (Refs & Annos)
Article II. Judicial Notice

Federal Rules of Evidence Rule 201, 28 U.S.C.A.
Rule 201. Judicial Notice of Adjudicative Facts

Currentness

(a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1) is generally known within the trial court's territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) Taking Notice. The court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) Timing. The court may take judicial notice at any stage of the proceeding.

(e) Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(f) Instructing the Jury. In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

CREDIT(S)

(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1930; Apr. 26, 2011, eff. Dec. 1, 2011.)
Fed. Rules Evid. Rule 201, 28 U.S.C.A., FRE Rule 201
Including Amendments Received Through 10-1-20

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United States Code Annotated
Federal Rules of Evidence (Refs & Annos)
Article IX. Authentication and Identification

Federal Rules of Evidence Rule 902, 28 U.S.C.A.
Rule 902. Evidence That Is Self-Authenticating

Currentness

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

(1) Domestic Public Documents That Are Sealed and Signed. A document that bears:

(A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and

(B) a signature purporting to be an execution or attestation.

(2) Domestic Public Documents That Are Not Sealed but Are Signed and Certified. A document that bears no seal if:

(A) it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and

(B) another public officer who has a seal and official duties within that same entity certifies under seal--or its equivalent--that the signer has the official capacity and that the signature is genuine.

(3) Foreign Public Documents. A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester--or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either:

(A) order that it be treated as presumptively authentic without final certification; or

(B) allow it to be evidenced by an attested summary with or without final certification.

(4) Certified Copies of Public Records. A copy of an official record--or a copy of a document that was recorded or filed in a public office as authorized by law--if the copy is certified as correct by:

(A) the custodian or another person authorized to make the certification; or

(B) a certificate that complies with Rule 902(1), (2), or (3), a federal statute, or a rule prescribed by the Supreme Court.

(5) Official Publications. A book, pamphlet, or other publication purporting to be issued by a public authority.

(6) Newspapers and Periodicals. Printed material purporting to be a newspaper or periodical.

(7) Trade Inscriptions and the Like. An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.

(8) Acknowledged Documents. A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.

(9) Commercial Paper and Related Documents. Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.

(10) Presumptions Under a Federal Statute. A signature, document, or anything else that a federal statute declares to be presumptively or prima facie genuine or authentic.

(11) Certified Domestic Records of a Regularly Conducted Activity. The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record--and must make the record and certification available for inspection--so that the party has a fair opportunity to challenge them.

(12) Certified Foreign Records of a Regularly Conducted Activity. In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification, rather than complying with a federal statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).

(13) Certified Records Generated by an Electronic Process or System. A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).

(14) Certified Data Copied from an Electronic Device, Storage Medium, or File. Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent also must meet the notice requirements of Rule 902(11).

CREDIT(S)

(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1944; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 25, 1988, eff. Nov. 1, 1988; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 26, 2011, eff. Dec. 1, 2011; Apr. 27, 2017, eff. Dec. 1, 2017.)

Fed. Rules Evid. Rule 902, 28 U.S.C.A., FRE Rule 902
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