

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

MI FAMILIA VOTA EDUCATION FUND;  
SARA SCHWARTZ; and MARLA LOPEZ,

Plaintiffs,

-against-

DONALD J. TRUMP, in his individual and  
official capacity as President of the United States;  
WILLIAM P. BARR, in his official capacity as  
Attorney General; and CHAD F. WOLF, in his  
official capacity as Acting Secretary of Homeland  
Security,

Defendants.

No. 1:20-cv-03030

**MEMORANDUM OF LAW IN  
SUPPORT OF PLAINTIFFS'  
MOTION FOR A TEMPORARY  
RESTRAINING ORDER,  
PRELIMINARY INJUNCTION,  
AND SPEEDY DECLARATORY  
JUDGMENT**

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## PRELIMINARY STATEMENT

Plaintiffs Mi Familia Vota Education Fund, Sara Schwartz, and Marla Lopez seek a temporary restraining order and a preliminary injunction under Federal Rule of Civil Procedure 65 and Section 11(b) of the Voting Rights Act against Defendants Donald J. Trump, William P. Barr, and Chad F. Wolf. Plaintiffs seek the injunctive relief set forth in the accompanying Motion and Proposed Order to prevent Defendants from continuing to intimidate or attempt to intimidate voters in the November 3, 2020 general election. Plaintiffs also seek a speedy declaratory judgment against Defendants, pursuant to Federal Rule of Civil Procedure 57 and Section 11(b) of the Voting Right Act, identifying the types of violations of Section 11(b) committed by Defendants.

An injunction and declaratory relief is warranted because of Defendants' repeated and consistent use of intimidation tactics to dissuade voters from exercising their fundamental right to vote in the upcoming November 3, 2020 general election. Defendants have:

- threatened to send law enforcement to polling places;
- encouraged vigilantes, including white supremacist groups, to go to polling places to watch voters;
- told people in the midst of a global pandemic that voting by mail is illegitimate;
- warned that the courts will have to scrutinize mail-in ballots;
- taken actions to diminish the capacity of the United States Postal Service in advance of the election;
- displayed a clear pattern and willingness to use federal armed law enforcement agents to serve illegitimate interests; and

- cast doubt on whether Trump will voluntarily cede power should he lose the election.

Together, Defendants' actions have cast a shadow of fear and intimidation over the upcoming election, leaving people frightened about voting and concerned that they must either brave the potential physical dangers of both COVID-19 and violent intimidation at polling places, or vote by mail with the risk that their votes may not count or even that they may be subject to criminal proceedings or some other heightened scrutiny.

Plaintiff Mi Familia Vota Education Fund ("MFV"), an organization that is dedicated to registering voters, getting out the vote, and educating voters about issues relevant to their communities, has had to divert substantial resources to combat Defendants' intimidation tactics. MFV has been required to (1) train its canvassers and phone bankers on the reliability of vote-by-mail options to combat Defendants' misinformation campaign, (2) spend time at people's doors and on the phones discussing the reliability of voting by mail and that voting by mail is legal and effective, despite what Defendants have said, and (3) recruit student leaders (in partnership with another non-profit organization) to monitor and clarify the disinformation coming from the highest levels of the federal government. None of these activities would be necessary were it not for Defendants' efforts to intimidate people from voting.

Plaintiff Sara Schwartz is concerned about voting both in person and by mail. She has seen armed vigilante groups in her Philadelphia neighborhood in the past several months and Trump's encouragement and endorsement of such groups. She reasonably fears they will be present at her polling station on Election Day. She also reasonably believes that Defendants' systematic efforts to undermine the efficiency of the United States Postal Service, coupled with Trump's repeated statements that mail-in voting is fraudulent, will make a mail-in vote

ineffective. Despite her own fears, Plaintiff Schwartz has also been forced to try to assuage the fears of her students—first time voters whom she assists with engaging in the electoral process—that their mail ballots will be counted.

Defendants have effectively intimidated Plaintiff Marla Lopez as well. As a lifelong asthma sufferer, Plaintiff Lopez does not want to risk her life by voting in person on Election Day during the COVID-19 pandemic. Defendants' statements that mail-in ballots will be scrutinized, their attacks on the United States Postal Service, and their threats to aggressively monitor polling places, including mail-in ballot drop-off boxes, have made her reasonably fear that voting by mail or drop off may be impossible or dangerous.

Section 11(b) of the Voting Rights Act of 1965 prohibits anyone from intimidating or threatening people in connection with voting activities. Defendants have repeatedly violated this core provision of the Voting Rights Act by engaging in a campaign that has predictably caused voters to fear that they will not be able to effectively exercise their right to vote. With early voting already underway in some states, and only two weeks remaining before Election Day, only a declaration and order enjoining further similar conduct can hope to at least partially address the harm that Defendants' ongoing conduct has caused to the integrity of the electoral process and the fundamental right to vote. Defendants have presented voters with a Hobson's choice: vote by mail and risk potential criminal prosecution by the United States Government and/or your vote not being counted, or vote in person and risk confrontation with federal agents or armed vigilantes, as well as exposure to COVID-19. These threats are not idle or speculative; now that early voting has begun, they are increasingly manifesting in America's streets. Section 11(b) was enacted precisely to prevent this type of intimidation, and Plaintiffs' requested injunction is narrowly tailored to stop it.

## **FACTUAL BACKGROUND**

Donald J. Trump is the President of the United States and a candidate for president in the 2020 general election. United States Attorney General William P. Barr and Acting Secretary of Homeland Security Chad F. Wolf are senior members of the Executive Branch whom Trump has appointed to their current positions.

Together, these Defendants have used the power of their offices to frighten and intimidate prospective voters from participating in the upcoming general election on November 3, 2020. They have made voters feel that polling stations are unsafe by threatening to deploy law enforcement officials and encouraging vigilantes to “monitor” them. They have systematically attacked mail-in voting to discourage voters from exercising their right to vote by mail during a global pandemic. And they have displayed their willingness to use force against those who they perceive as opposing them politically. Collectively, these actions have intimidated and threatened people, including Plaintiffs Schwartz and Lopez, and the people served by Plaintiff Mi Familia Vota, who want to freely exercise their fundamental right to vote.

### **I. DEFENDANTS ENGAGE IN THREATS AND INTIMIDATION TACTICS AGAINST VOTERS INTENDING TO VOTE IN PERSON**

In the months leading up to the general election, Defendants have made repeated and explicit public statements that law enforcement agents and private Trump supporters will be monitoring voters at polling locations and paying particular attention to voters perceived to be in opposition to Trump. These threats are *already* intimidating; they will be even more so if they are executed. For example, in an August 20, 2020 interview, Trump said of federal law enforcement at polling locations: “We’re going to have sheriffs, and we’re going to have law

enforcement. And we're going to have hopefully U.S. attorneys, and we're going to have everybody and attorney generals."<sup>1</sup>

The context for Trump's statements regarding sending "sheriffs" and "law enforcement" and "everybody" to *polling places* cannot be disentangled from Trump's other statements and actions in late 2020. As set forth in more detail in Part III(A), *infra*, over the past several months, Defendants threatened and ordered armed federal law enforcement attacks against peaceful demonstrators in various American cities, and exhorted state and local enforcement to conduct similar attacks. Voters who heard Trump's threats to send law enforcement to polling places would naturally assume he was urging a similar law enforcement response in connection with the election—replete with the tear gas, soldiers without insignia, and seizures without probable cause that characterized the heavily armed Bureau of Prisons riot control teams or Customs and Border Protection "monument protection" teams he deployed this summer.

Trump has also been inciting his supporters to swarm polling locations. At the September 29, 2020 presidential debate, Trump said: "I'm urging my supporters to go in to the polls and watch very carefully, because that's what has to happen."<sup>2</sup> To that end, the Trump campaign has promised to recruit as many as 50,000 "poll watchers" to monitor voting locations on Election Day, styling the recruits as an "Army for Trump" that is "fighting to re-elect him in 2020."<sup>3</sup>

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<sup>1</sup> Justine Coleman, *Trump says he will send law enforcement, US attorneys to polls in November to prevent fraud*, The Hill (Aug. 20, 2020), <https://bit.ly/3m6kB56>.

<sup>2</sup> Dailymail.com Reporter, *Red the full transcript and watch the whole debate*, Daily Mail (Sept. 30, 2020), <https://www.dailymail.co.uk/news/article-8788571/Full-transcript-Donald-Trump-Joe-Biden-debate.html>.

<sup>3</sup> Joshua Partlow, *Trump's call for poll-watching volunteers sparks fear of chaos and violence on Election Day*, Wash. Post (Sept. 30, 2020), [https://www.washingtonpost.com/politics/trumps-call-for-poll-watching-volunteers-sparks-fear-of-chaos-and-violence-on-election-day/2020/09/30/76ce0674-0346-11eb-b7ed-141dd88560ea\\_story.html](https://www.washingtonpost.com/politics/trumps-call-for-poll-watching-volunteers-sparks-fear-of-chaos-and-violence-on-election-day/2020/09/30/76ce0674-0346-11eb-b7ed-141dd88560ea_story.html).

Worse yet, Trump has incited volatile and unpredictable fringe groups to join his efforts. When asked to denounce the white supremacist group “Proud Boys,” Trump instead directed the Proud Boys to “stand back and stand by.”<sup>4</sup> The Proud Boys responded by posting a statement that said, “Standing back and standing by, sir,”<sup>5</sup> and recreating their logo to incorporate Trump’s directive.<sup>6</sup>

Again, the context for Trump’s exhortation of his “army,” white supremacists, and other supporters to *polling places* cannot be disentangled from Trump’s other statements and actions in late 2020. As set forth in more detail in Part III(B), *infra*, over the past several months, Trump has encouraged armed vigilantes, white supremacists, and similar violent fringe groups who were protesting public health orders, or counterprotesting (or worse) against peaceful Black Lives Matter demonstrations. Voters who heard Trump’s encouragement of these groups would naturally see Trump’s conduct as endorsing a similar third-party response on Election Day—replete with the same types of heavily armed militants who first stormed the Michigan Capitol before attempting to kidnap and assassinate its governor.

Trump has spoken particularly forcefully about mobilizing against voters who may be opposed to him. At a September 8, 2020 rally in Winston-Salem, North Carolina, Trump elaborated on his distrust of his political opponents and the need to watch them: “[Y]ou have a Democrat[ic] governor, you have all these Democrats watching that stuff. I don’t like it.”<sup>7</sup> He then instructed his supporters to “[w]atch those ballots” and “[b]e poll watchers” when going to

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<sup>4</sup> Dailymail.com Reporter, *supra* note 2.

<sup>5</sup> Ben Collins (@oneunderscore\_\_), “Story incoming on this, but The Proud Boys took the president’s statement for them to ‘stand one and stand by’ as marching order,” Twitter (Sept. 29, 2020; 10:51 PM), [https://twitter.com/oneunderscore\\_/status/1311136483114442752](https://twitter.com/oneunderscore_/status/1311136483114442752).

<sup>6</sup> Alex Kaplan (@AlKapDC), “The Proud Boys on Telegram have now posted an image with its logo and Trump’s remark,” Twitter (Sept. 29, 2020; 10:44 PM), <https://twitter.com/AlKapDC/status/1311134771171545089>.

<sup>7</sup> Maegan Vazquez, *Trump tells his supporters to become poll watchers with a baseless claim about fraud at voting locations*, CNN (Sept. 8, 2020), <https://cnn.it/32cjKaX>. Plaintiff Schwartz lives and votes in a state with a Democratic governor, as do the voters that Mi Familia Vota services in California, Colorado, and Nevada.

vote to “[w]atch all the thieving and stealing and robbing they do.” *Id.* In a September 12, 2020 interview, when asked what he would do if his opponents “riot” the evening of the election, Trump stated, “We’ll put them down very quickly.”<sup>8</sup> These threats are credible, and are understood by Plaintiffs, in light of Defendants’ actions in violently suppressing earlier public demonstrations.

Trump also directly incited his supporters to add pressure to polling places by attempting in-person voter fraud. On September 3, 2020, Trump told his supporters to first vote by mail, then go to their polling places and attempt to vote a second time: “So, let them send it in, and let them go vote, and if the system is as good as they say it is, then obviously they won’t be able to vote. If it isn’t tabulated, they won’t be able to vote. So that’s the way it is. And that’s what they should do.”<sup>9</sup>

Defendants’ actions foreseeably have incited Trump’s supporters to disrupt open polling stations across the country. On September 19, 2020, the second day of early voting in Virginia, Trump supporters staged a rally outside a polling place, requiring voters to bypass the crowd.<sup>10</sup> One week later, in Philadelphia, a deputy sheriff escorted James Fitzpatrick, Trump’s Pennsylvania director of Election Day operations, out of the satellite election office at Philadelphia City Hall, where he was recording video on his cellphone and “being irate” and “disruptive.”<sup>11</sup> He did not have a poll watcher certificate. *Id.* At least two other Trump campaign

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<sup>8</sup> Michelle Goldberg, *Trump’s Shredding of Civil Liberties Won’t Stop with Antifa*, N.Y. Times (Sept. 14, 2020), <https://www.nytimes.com/2020/09/14/opinion/trump-antifa-civil-liberties.html>.

<sup>9</sup> Maegan Vazquez & Nikki Carvajal, *Trump appears to encourage North Carolinians to vote twice to test the system*, CNN (Sept. 3, 2020), <https://cnn.it/3bD3d32>.

<sup>10</sup> Joshua Partlow, *Trump’s call for poll-watching volunteers sparks fear of chaos and violence on Election Day*, Wash. Post (Sept. 30, 2020), [https://www.washingtonpost.com/politics/trumps-call-for-poll-watching-volunteers-sparks-fear-of-chaos-and-violence-on-election-day/2020/09/30/76ce0674-0346-11eb-b7ed-141dd88560ea\\_story.html](https://www.washingtonpost.com/politics/trumps-call-for-poll-watching-volunteers-sparks-fear-of-chaos-and-violence-on-election-day/2020/09/30/76ce0674-0346-11eb-b7ed-141dd88560ea_story.html).

<sup>11</sup> Zach Montellaro & Holly Otterbein, *Trump calls for poll watchers. Election officials call for calm*, Politico (Sept. 30, 2020), <https://www.politico.com/news/2020/09/30/trump-poll-watchers-election-423996>.

workers tried but were unable to enter Philadelphia satellite polling locations: one person videotaped people attending the polling location from outside a window, *id.*; another person, who was hired and paid by Trump’s campaign, showed up at a polling location to monitor it.<sup>12</sup>

Defendants have also inspired third parties to take violent action against “antifa.” Antifa is a loose movement of self-described antifascist activists, which Trump, Barr, and Wolf have falsely portrayed as an organized terrorist network.<sup>13</sup> On May 31, 2020, Trump announced that “The United States of America will be designating ANTIFA as a Terrorist Organization.”<sup>14</sup> That same day, Barr announced that federal law enforcement would target “violent radical agitators” and that “[t]he violence instigated and carried out by Antifa and other similar groups in connection with the rioting is domestic terrorism and will be treated accordingly.”<sup>15</sup> But Defendants have repeatedly linked the broader racial justice movement with antifa, in the absence of any evidence, using that as a justification to target Black Lives Matter protesters.<sup>16</sup>

The combination of (1) Trump’s urging unnamed audiences to watch or guard polling places with (2) the fact that virtually any opposition to Defendants can be painted as “antifa” and (3) Trump’s and Barr’s false and politically motivated designation of antifa as a terrorist organization, has inspired or caused third parties to take matters into their own hands.

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<sup>12</sup> Ellie Rushing (@EllieRushing), “A woman who told me she was hired and paid by the Trump campaign to monitor polling place just arrived. She wouldn’t speak to me on the record. She said she’s been hired to ‘oversee the integrity of the election’ and was angry they wouldn’t let her inside,” Twitter (Sept. 29, 2020), <https://twitter.com/EllieRushing/status/1310984628388364289>.

<sup>13</sup> See, e.g., Zack Beauchamp, *Antifa, explained*, Vox, June 8, 2020, <https://www.vox.com/policy-and-politics/2020/6/8/21277320/antifa-anti-fascist-explained>.

<sup>14</sup> Donald J. Trump (@realDonaldTrump), Twitter (May 31, 2020), <https://twitter.com/realDonaldTrump/status/1267129644228247552>.

<sup>15</sup> Dep’t of Justice, Office of Public Affairs, *Attorney General William P. Barr’s Statement on Riots and Domestic Terrorism*, May 31, 2020, <https://www.justice.gov/opa/pr/attorney-general-william-p-barrs-statement-riots-and-domestic-terrorism>.

<sup>16</sup> See, e.g., Executive Order No. 13933, “Protecting American Monuments, Memorials, and Statues and Combating Recent Criminal Violence,” 85 Fed. Reg. 40,081 (June 26, 2020) (describing ongoing protests against racism and police brutality as a “fringe ideology” advanced by “[a]narchists and left-wing extremists . . . through violence and mob intimidation”).



For example, on October 9, 2020, the Washington Post reported that “business owners and concerned citizens” in Minnesota paid a private security company to recruit former U.S. military Special Operations personnel to “guard” polling locations in Minnesota on Election Day.<sup>17</sup> The company chairman, Anthony Caudle, stated that the election guards would protect polling places against “Antifa.” *Id.* The company is moving forward despite having no authorization or cooperation from city or state officials, leaving officials concerned about the effect on elections. *Id.* Top Minneapolis election official Casey Carl stated, “[C]ertainly I could appreciate how voters could interpret that as intimidation.” *Id.*

As more states open polling locations for early voting in the coming days, these locations are likely to experience similar patterns of activity from Trump’s employees and supporters, including close-quarters gatherings of Trump supporters, video recording of voters, and disruptive and frightening activity by Trump-affiliated “poll monitors.”

## **II. DEFENDANTS THREATEN AND INTIMIDATE VOTERS INTENDING TO VOTE BY MAIL**

While inciting fear at polling stations, Defendants are simultaneously intimidating and threatening voters who intend to vote by mail. Defendants’ actions have deliberately eroded public trust in the viability of mail-in voting in the face of an unprecedented global pandemic, when mail-in voting is more essential than ever before. Trump has made clear that he is attacking mail-in voting primarily to disenfranchise voters he believes are not his supporters. These attacks on mail-in voting discourage voters for whom mail-in voting might have been the safest option and coerce them into voting in person, where they face increased exposure to both the COVID-

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<sup>17</sup> Joshua Partlow, *Former Special Forces sought by private security company to guard polling sites in Minnesota, company says*, Wash. Post (Oct. 9, 2020), [https://www.washingtonpost.com/politics/private-security-minnesota-election/2020/10/09/89766964-0987-11eb-991c-be6ead8c4018\\_story.html](https://www.washingtonpost.com/politics/private-security-minnesota-election/2020/10/09/89766964-0987-11eb-991c-be6ead8c4018_story.html); see also Steve Fisher, *ARMED SECURITY FOR NOVEMBER ELECTIONS AND POST ELECTION SUPPORT MISSIONS | MSP/MINNESOLTA – POC IN LISTING*, Marine Executive Association (Oct. 7, 2020), <https://www.marineea.org/hotjobs/job/armed-security-for-november-elections-and-post-election-support-missions-mspminnesolta-poc-in-listing/>.

19 pandemic and in-person voter intimidation.

In response to an unprecedented global pandemic and national public health crisis, many states have expanded access to mail-in voting to lower the risk of crowding at polling places and provide voters with an alternative to voting in person. This alternative is essential for individuals particularly vulnerable to COVID-19, including those in Latinx and Black communities<sup>18</sup> and those with underlying health conditions or with similarly vulnerable close relations.

Despite the manifest need for a mail-in voting option, Defendants have used their platforms to tell voters that voting by mail is “fraudulent,” that mail-in votes will not be properly counted, and that mail-in votes will be subjected to heightened scrutiny. Little to no evidence supports the proposition that vote-by-mail is likely to lead to fraud. Trump has made clear that he is attacking mail-in voting not out of a genuinely held concern that it presents risks for the American electorate, but instead primarily because he believes it somehow advantages his political adversaries.

Trump has repeatedly intimated—and often explicitly stated—that voting by mail is a fraudulent tool being used by his opposition against him. On March 30, for example, Trump responded to an interview question about Congressional efforts to expand vote-by-mail by saying: “They had things—levels of voting that, if you ever agreed to it, you’d never have a Republican elected in this country again.”<sup>19</sup> In the following months, Trump repeatedly took to

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<sup>18</sup> People of color are experiencing higher rates of infection, illness, and death because they are less likely to be able to work from home, more likely to live in dense areas, and more likely to live in multi-generational housing. Underlying inequities, including but not limited to lack of fair employment opportunities, unaffordable housing, poverty, and inadequate health care, have increased the vulnerability of Latinx and Black communities to coronavirus outbreaks. *See, e.g.,* Dr. William F. Marshall III, *Coronavirus infection by race: What's behind the health disparities?*, Mayo Clinic, <https://www.mayoclinic.org/coronavirus-infection-by-race/expert-answers/faq-20488802> (visited Oct. 16, 2020).

<sup>19</sup> Aaron Blake, *Trump just comes out and says it: The GOP is hurt when it's easier to vote*, Wash. Post (Mar. 30, 2020), <https://wapo.st/2E7ESFQ>.

Twitter—where, according to the White House, his tweets represent official messages of the President of the United States<sup>20</sup>—to reiterate his baseless message of mail-in voting as a fraudulent act cooked up by his opposition:

- On April 8, 2020, Trump tweeted, “Republicans should fight very hard when it comes to state wide mail-in voting. Democrats are clamoring for it. Tremendous potential for voter fraud, and for whatever reason, doesn’t work out well for Republicans. @foxandfriends.”<sup>21</sup>
- On August 24, 2020, Trump tweeted, “All the Radical Left Democrats are trying to do with the Post Office hearings is blame the Republicans for the FRAUD that will occur because of the 51 Million Ballots that are being sent to people who have not even requested them. They are setting the table for a BIG MESS!”<sup>22</sup>
- On September 2, 2020, Trump tweeted, “Rigged Election?” and shared a tweet stating, “WARNING: Democrat Data Firm Admits ‘Incredible’ Trump Landslide Will Be Flipped By Mail-In Votes Emerging A Week After Election Day.”<sup>23</sup>
- On September 24, 2020, Trump tweeted, “Cheating on Unsolicited Ballots by political hacks, or anyone else, is against the law. We are closely watching!”<sup>24</sup>

*See also* Complaint ¶¶ 113–32.

Not one of these tweets included citation to any credible allegation or evidence

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<sup>20</sup> White House Press Sec’y Sarah Sanders, Press Briefing (Dec. 5, 2017), <https://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-sarah-sanders-120517/>.

<sup>21</sup> Donald J. Trump (@realDonaldTrump), Twitter (Apr. 8, 2020; 8:20 AM), <https://twitter.com/realDonaldTrump/status/1247861952736526336>.

<sup>22</sup> Donald J. Trump (@realDonaldTrump), Twitter (Aug. 24, 2020; 11:45 AM), <https://twitter.com/realDonaldTrump/status/1297922993021042688>.

<sup>23</sup> Donald J. Trump (@realDonaldTrump), Twitter (Sept. 2, 2020; 6:15 AM), <https://twitter.com/realDonaldTrump/status/1301100620741595136>.

<sup>24</sup> Donald J. Trump (@realDonaldTrump), Twitter (Sept. 24, 2020; 8:31 PM), <https://twitter.com/realDonaldTrump/status/1309289455535050752>.

that voting by mail is fraudulent, and no such evidence exists.<sup>25</sup> No tweet indicated any desire to provide alternative means of voting for those afraid of contracting COVID-19 via in-person voting. Instead, Trump’s tweets cumulatively portrayed mail-in voting as a fraudulent activity and directly threatened to “closely watch[]” anyone who wants to vote by mail. Indeed, Trump has threatened to stop state efforts to expand mail-in voting altogether, falsely asserting that he “ha[s] the right to do it” and that “[w]e will see what happens.”<sup>26</sup>

Defendant Barr bolstered Trump’s baseless allegations in a September 2, 2020 CNN interview, where he stated that mail-in voting is “fraught with the risk of fraud and coercion.”<sup>27</sup> As Attorney General, Barr can compel federal law enforcement to investigate any activity he deems “fraudulent” or “coerced,” and has persuasive power over state law enforcement to do the same. Barr’s words suggest that, despite the lack of evidence of fraud, he views mail-in voting as worthy of federal investigation.

During the September 29, 2020 presidential debate, Trump took his threats a step further. After again falsely portraying ongoing mail-in voting as a “fraud and a sham” and proof of a “rigged election,”<sup>28</sup> he threatened that the United States Supreme Court would have to “look at the ballots.” *Id.* Trump’s statements constituted a threat, both direct and implied, that voters who submitted their vote by mail would be subject to intense scrutiny and possibly legal action.

Trump’s Postmaster General, Louis DeJoy, has taken concrete actions to undermine the viability of voting by mail, including eliminating overtime for postal workers,

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<sup>25</sup> Multiple credible studies show that there is a *de minimis* risk of voter fraud associated with mail-in voting. See Jim Rutenberg, *The Attack on Voting*, N.Y. Times (Sept. 30, 2020), <https://www.nytimes.com/2020/09/30/magazine/trump-voter-fraud.html>.

<sup>26</sup> Matt Stieb, *Trump Says He Has the ‘Right’ to Block Expansion of Mail-in Voting*, N.Y. Intelligencer (Aug. 3, 2020), <https://nym.ag/31OY2sq>.

<sup>27</sup> Cheryl Sullenger, *AG Barr: Mail-In Voting “Fraught with the Risk of Fraud and Coercion,”* Operation Rescue (Sept. 4, 2020), <https://www.operationrescue.org/archives/ag-barr-mail-in-voting-fraught-with-the-risk-of-fraud-and-coercion/>.

<sup>28</sup> Dailymail.com Reporter, *supra* note 2.

limiting the number of mail trucks, and removing hundreds of sorting machines from postal facilities, including in states where the presidential election is expected to be closely contested.<sup>29</sup> Since he became Postmaster General, four different courts have issued injunctions against him to preserve the integrity of vote-by-mail.<sup>30</sup>

Crucially, Trump himself directed or ratified these changes, timed to become effective immediately before mail-in voting was set to begin. He has publicly confirmed that the actions constituted a collateral attack on vote-by-mail. In an interview on August 13, 2020, Trump emphasized his own role in blocking congressional funding of USPS: “If we don’t make a deal, that means they don’t get the money. That means they can’t have universal mail-in voting; they just can’t have it.”<sup>31</sup>

Defendants’ threats and attacks on mail voting do not merely inconvenience voters who are now less likely to vote-by-mail. Amidst a global pandemic that has infected more than eight million Americans and killed more than 215,000, these actions present many voters with an impossible dilemma: vote in person and risk *both* being infected with a potentially life-ending virus *and* threatened by armed individuals or law enforcement at the polling place, or vote by mail and risk casting a useless ballot, or worse, being investigated for fraud by the federal government.

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<sup>29</sup> See Jacob Bogage, *Postal Service overhauls leadership as Democrats press for investigation of mail delays*, Wash. Post (Aug. 7, 2020), <https://wapo.st/3iBpLn6>; Michael D. Shear, Hailey Fuchs & Kenneth P. Vogel, *Mail Delays Fuel Concern Trump Is Undercutting Postal System Ahead of Voting*, N.Y. Times (July 31, 2020), <https://nyti.ms/3fO3bpA>; Anjali Hemphill, *USPS Mailboxes Removed in Some New York Area Neighborhoods*, NBC New York (Aug. 17, 2020), <https://bit.ly/34dQWk1>; Marisa Schultz, *Postal slowdown, mailbox removal before November election sparks mounting concerns*, Fox News (Aug. 15, 2020), <https://fxn.ws/2CykAVu>; Aaron Gordon, *The Post Office Is Deactivating Mail Sorting Machines Ahead of the Election*, Vice (Aug. 13, 2020), <https://bit.ly/3hg9VgD>.

<sup>30</sup> Order, *State of Washington, et al. v. Trump*, No. 1:20-cv-03127-SAB (E.D. Wa. Sept. 17, 2020) (ECF No. 81); Order, *Jones v. United States Postal Service*, No. 1:20-cv-6516 (S.D.N.Y. Sept. 21, 2020) (ECF No. 49); Order, *Commonwealth of Pennsylvania v. DeJoy*, No. 20-4096 (E.D. Pa. Sept. 28, 2020) (ECF No. 62); Order, *Richardson v. Trump*, No. 1:20-cv-2262 (D.D.C. Oct. 8, 2020) (ECF No. 65).

<sup>31</sup> Deb Riechmann & Anthony Izaguirre, *Trump admits he’s blocking postal cash to stop mail-in votes*, AP News, Aug. 14, 2020, <https://apnews.com/article/ece1f6e9cea1b2aa0a8c6af7ca003f26>.

### III. DEFENDANTS REPEATEDLY DEPLOY FEDERAL AGENTS AT DEMONSTRATIONS INVOLVING VOTING ADVOCACY

Defendants' threats against voting are not understood in a vacuum, but rather as part of a contemporaneous months-long series of attacks on public demonstrations, including where voting advocacy was taking place. In late May 2020, after the highly publicized police killing of George Floyd, the country bore witness to a wave of civil rights demonstrations of unprecedented size. While these demonstrators primarily advocated against police brutality and for the reformation of policing in America in association with the movement "Black Lives Matter," they also advocated strongly for Americans to participate in local, state, and national elections. Their calls for voter registration were timely; at the time of the demonstrations, local, state, and presidential primary elections were already ongoing. Attendees and speakers at the demonstrations also discussed and highlighted the policy platforms of candidates for public office and advocated for voter participation on those bases.

More recent demonstrations have continued the call for voter registration and participation in the 2020 general election. At recent demonstrations in Philadelphia, for example, Plaintiff Schwartz observed organizers handing out voter registration forms, directing participants to people who would assist them with voter registration, and disseminating information about early voting locations. Declaration of Sara Schwartz ("Schwartz Decl.") ¶ 12. Many people registered to vote or applied for vote-by-mail because of, or even while physically present at, these assemblies.<sup>32</sup>

Political leaders, elected representatives, and candidates for public office attended the demonstrations and spoke directly to constituents who gathered to hear their political

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<sup>32</sup> See, e.g., Jane C. Timm, *Voter registration surged during BLM protests, study finds*, NBC News (Aug. 11, 2020), <https://nbcnews.to/2FvW5JB>.

messages.<sup>33</sup> The demonstrations often included anti-Trump messaging and content. Schwartz Decl. ¶ 5.

Defendants oppose the themes, demands, and legitimacy of these demonstrations. Indeed, Trump described the phrase “Black Lives Matter” as a “symbol of hate.”<sup>34</sup> He also attributed the ongoing demonstrations to Democratic presidential candidate Joseph Biden and his supporters in the 2020 general election. For example, on August 20, 2020 (the same day he was threatening to send “sheriffs” and “law enforcement” to polling places), Trump tweeted, “I STAND FOR LAW AND ORDER AND I TOOK ACTION! Operation LeGend has led to the arrest of over 1,000 criminals, including 90 killers, all while Sleepy Joe Biden and the Radical Left excuses violence and crime in their Democrat-run cities. I want safety & security, Joe allows CRIME!”<sup>35</sup> Defendants’ opposition has threatened not only the demonstrations themselves, but also the voter advocacy work that often takes place during them.

#### **A. Federal Law Enforcement Attacks on Protests**

Shortly after these demonstrations began, Defendants threatened and even conducted armed attacks against them. On June 1, 2020, Trump threatened to deploy the United States military into the streets of America’s cities over the objections of local leaders, explaining in an official Rose Garden address, “If the city or state refuses to take the actions that are necessary to defend the life and property of their residence, then I will deploy the United States military and quickly solve the problem for them.”<sup>36</sup> On June 2, 2020, Trump tweeted, “D.C. had

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<sup>33</sup> George Floyd’s brother joins memorial in Brooklyn, NY Post (June 4, 2020), <https://bit.ly/2FLyZiK>; AOC, Warren and Harris among notable politicians protesting for George Floyd, NY Post (June 3, 2020), <https://bit.ly/3jnSL1K>; ‘I’ve Been Black a Long Time’: Marching With Jumaane Williams, NY Mag (June 2, 2020), <https://nym.ag/3jlcejo>.

<sup>34</sup> Donald J. Trump (@realDonaldTrump), Twitter (July 1, 2020; 9:48 AM), <https://twitter.com/realDonaldTrump/status/1278324680311681024>, <https://twitter.com/realDonaldTrump/status/1278324681477689349>.

<sup>35</sup> Donald J. Trump (@realDonaldTrump), Twitter (Aug. 20, 2020; 7:28 PM), <https://twitter.com/realDonaldTrump/status/1296589900804915202>.

<sup>36</sup> *READ: President Trump’s Rose Garden Speech on Protests*, CNN, June 1, 2020, <https://cnn.it/2GGIDV3>.

no problems last night. Many arrests. Great job done by all. Overwhelming force. Domination. Likewise, Minneapolis was great (thank you President Trump!).”<sup>37</sup> Later, on June 23, 2020, Trump tweeted, “There will never be an ‘Autonomous Zone’ in Washington, D.C., as long as I’m your President. If they try they will be met with serious force!”<sup>38</sup> By deploying federal troops in Washington, D.C., Trump demonstrated to the American public that he was willing and able to act—and direct others to act—in accordance with his stated threats.

In some instances, Defendants deployed armed federal agents in unmarked clothing—lacking any uniforms or insignia that would enable citizens to identify their agencies or even ascertain that they were lawfully authorized law enforcement officers—into the streets to break up the assemblies and detain demonstrators, sometimes violently. For example, in May and June 2020, Trump and Barr deployed such unidentified armed forces against demonstrators in Washington, D.C. These federal forces, which were later revealed to include riot control teams from the Bureau of Prisons,<sup>39</sup> used tear gas to break up the assemblies and detain demonstrators.

On June 26, 2020, Trump stepped up his threatening behavior by signing an executive order purporting to grant Defendants Barr and Wolf sweeping powers to conduct armed attacks on demonstrators using “personnel” tasked with “assist[ing] with the protection of Federal monuments, memorials, statutes, or property.” Executive Order No. 13933, 85 Fed. Reg. 40,081 (June 26, 2020). Wolf exercised those powers shortly thereafter. In July 2020, he directed Customs and Border Protection (CBP), a DHS component agency, to send armed federal agents

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<sup>37</sup> Donald J. Trump (@realDonaldTrump), Twitter (June 2, 2020), <https://twitter.com/realDonaldTrump/status/1267808120136511489>.

<sup>38</sup> Donald J. Trump (@realDonaldTrump), Twitter (June 23, 2020), <https://twitter.com/realDonaldTrump/status/1275409656488382465>

<sup>39</sup> Ryan Lucas, *Attorney General Steps Up Federal Law Enforcement Response To Protests*, NPR (June 1, 2020), <https://n.pr/2FnXjH6>; Emily Goodin, *Federal prisons chief apologizes for letting his riot control guards onto streets of D.C. with NO identification - as pictures show officers acting as Bill Barr’s private army equipped with knives and stun grenades*, Daily Mail (June 4, 2020), <https://www.dailymail.co.uk/news/article-8388143/Bill-Barr-deploys-army-federal-correctional-officers.html>.



to Portland, Oregon, ostensibly to protect the federal courthouse from protesters. These federal agents (often dressed in camouflage and tactical gear without identifying insignia) repeatedly used tear gas and impact munitions to disperse protesters.<sup>40</sup>

Trump has continued to intimate his willingness to use law enforcement against his political opponents. In a series of tweets in late August, Trump suggested sending federal law enforcement to cities governed by Democrats. On August 23, 2020, for example, Trump tweeted: “These riots are an antigovernment movement from the Left that are all in Democrat run cities. The mayors have got to let their police do what they know how to do. Would be very easy to suppress or, call in the Federal Government. We will solve problem fast! @foxandfriends.”<sup>41</sup>

Not only do these tweets serve to intimidate individuals from gathering in any form of public demonstration or advocacy against Trump, they also tend to normalize the intervention of federal law enforcement across the country. On August 31, 2020, in the wake of protests in Kenosha, Wisconsin against the police shooting of Jacob Blake, Trump tweeted: “If I didn’t INSIST on having the National Guard activate and go into Kenosha, Wisconsin, there would be no Kenosha right now. Also, there would have been great death and injury. I want to thank Law Enforcement and the National Guard. I will see you on Tuesday!”<sup>42</sup>

## **B. Encouragement of Armed Vigilantes and Paramilitaries**

Trump, Barr, and Wolf have also successfully encouraged vigilante groups of Trump supporters to engage in violence or other forms of intimidation against demonstrators perceived to be in opposition to Trump or promoting movements or ideologies with which

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<sup>40</sup> Andrew Selsky & Gillian Flaccus, *Oregon officials decry federal agents after protest clashes*, AP News (July 18, 2020), <https://apnews.com/article/f273a11675373e10630e657383c915be>.

<sup>41</sup> Donald J. Trump (@realDonaldTrump), Twitter (Aug. 23, 2020; 8:13 AM), <https://twitter.com/realDonaldTrump/status/1297507346705522689>.

<sup>42</sup> Donald J. Trump (@realDonaldTrump), Twitter (Aug. 31, 2020; 9:10 AM), <https://twitter.com/realDonaldTrump/status/1300420725837266944>.

Trump disagrees. Armed vigilante groups and self-styled militias or paramilitary groups have repeatedly threatened, intimidated, or attacked people around the country attending public assemblies.<sup>43</sup> On August 30, 2020, Trump retweeted a video by reporter Mike Baker in which armed men (apparently not law enforcement officers) fired a weapon at a crowd of people on a Portland sidewalk from the back of a pickup truck bearing a Trump campaign flag. Baker's tweet identified the armed men as "Trump people unload[ing] paintballs and pepper spray. They shot me too."<sup>44</sup> Trump added in his retweet, "The big backlash going on in Portland cannot be unexpected after 95 days of watching and [sic] incompetent Mayor admit that he has no idea what he is doing. The people of Portland won't put up with no safety any longer. The Mayor is a FOOL. Bring in the National Guard!"<sup>45</sup> Trump then shared another tweet with a video of other pickup trucks with Trump signs entering Portland, and added his comment, "GREAT PATRIOTS!"<sup>46</sup>

Trump, Barr, and Wolf also have encouraged armed vigilantes to disrupt the assemblies, by indicating through statements or actions (or inaction) that they will refrain from enforcing the law against armed vigilantes or local officials who unlawfully attack or intimidate people who oppose Trump. For example, after Illinois resident Kyle Rittenhouse allegedly traveled to Kenosha with his firearm and shot two protesters to death during the Jacob Blake protests, DHS—then under Wolf's direction—directed federal law enforcement officials to make

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<sup>43</sup> Safia Samee Ali, *Where protesters go, armed militias, vigilantes likely to follow with little to stop them*, NBC News (Sept. 1, 2020), <https://nbcnews.to/2RdYPhi>.

<sup>44</sup> Mike Baker (@ByMikeBaker), Twitter (Aug. 29, 2020; 11:15 PM), <https://twitter.com/ByMikeBaker/status/1299908467457622016>.

<sup>45</sup> Donald J. Trump (@realDonaldTrump), Twitter (Aug. 30, 2020; 6:00 AM), <https://twitter.com/realDonaldTrump/status/1300010374855524352>.

<sup>46</sup> Donald J. Trump (@realDonaldTrump), Twitter (Aug. 30, 2020; 6:37 AM), <https://twitter.com/realDonaldTrump/status/1300019849540886528>.

public comments sympathetic to Rittenhouse.<sup>47</sup> In May 2020, two weeks after Trump disparaged the Michigan governor's pandemic-related safety order with the tweet "LIBERATE MICHIGAN!",<sup>48</sup> armed militants stormed the Michigan Capitol building to protest the ongoing implementation of the order. Trump sided with the militants, tweeting: "The Governor of Michigan should give a little, and put out the fire. These are very good people, but they are angry. They want their lives back again, safely! See them, talk to them, make a deal."<sup>49</sup> Although heavily armed protesters again returned to the Michigan Capitol only two weeks later and made violent threats against Michigan lawmakers, including the governor,<sup>50</sup> neither Trump, Barr, nor Wolf acted to deploy federal law enforcement to stop these confrontations. On October 8, 2020, thirteen men were arrested and charged with plotting to kidnap the Michigan governor.

Trump has combined his encouragement and orders to commit unlawful violence and voter intimidation with clemency grants and interventions in prosecutions to protect individuals charged with or convicted of crimes after following his wishes. This history creates an advance expectation that crimes committed in support of Trump's political interests during the election will be pardoned. He pardoned Joe Arpaio, the former sheriff of Maricopa County, Arizona, who was convicted of criminal contempt of court for violating a federal injunction barring his office from detaining people, primarily Latinx, without any evidence that they had

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<sup>47</sup> Julia Ainsley, *Internal documents show Trump officials were told to make comments sympathetic to Kyle Rittenhouse*, NBC News (Oct. 1, 2020), <https://www.nbcnews.com/politics/national-security/internal-document-shows-trump-officials-were-told-make-comments-sympathetic-n1241581>.

<sup>48</sup> Donald J. Trump (@realDonaldTrump), Twitter (Apr. 17, 2020; 11:22 AM), <https://twitter.com/realDonaldTrump/status/1251169217531056130>.

<sup>49</sup> Donald J. Trump (@realDonaldTrump), Twitter (May 1, 2020; 8:42 AM), <https://twitter.com/realDonaldTrump/status/1256202305680158720>.

<sup>50</sup> Abigail Censky, *Heavily Armed Protesters Gather Again At Michigan Capitol To Decry Stay-At-Home Order*, NPR (May 14, 2020), <https://n.pr/2RdTGpS>; Steve Neavling, *Gov. Whitmer becomes target of dozens of threats on private Facebook groups ahead of armed rally in Lansing*, Detroit Metro Times (May 11, 2020), <https://bit.ly/3bO61um>; Stephen Sorace, *Michigan man in infamous photo shouting in police's face unmasked gives his side of story*, Fox News (May 6, 2020), <https://fxn.ws/35zRTBM>.

violated state law.<sup>51</sup> He told government officials to ignore any federal laws that might impede construction of a wall on the southern border, including criminal statutes, explaining, “Don’t worry, I’ll pardon you.”<sup>52</sup> He pardoned Army 1st Lt. Clint Lorance and Maj. Matthew Golsteyn, two Army officers accused or convicted of war crimes in Afghanistan. And he reversed the demotion of Navy Chief Petty Officer Edward Gallagher, who was convicted at court martial of posing with the dead body of a teenage captive that he had just killed with a hunting knife. Trump described them all as “great fighters.”<sup>53</sup>

Defendants have repeatedly demonstrated their willingness to use violence and federal law enforcement in a politically discriminatory manner to intimidate their political opponents, including those who would oppose Trump in the voting booth. At the same time, in the many months since Trump began speaking out against the largely peaceful “Black Lives Matters” demonstrations and sending federal law enforcement to violently suppress them, neither Trump, Barr, nor Wolf has ever deployed federal law enforcement to disperse a public demonstration by Trump’s supporters or people acting in accordance with his rhetoric or guidance—even when they carry weapons and engage in violence.

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<sup>51</sup> Max Walker & Josh Frigerio, *Sheriff Joe Arpaio pardon: President Trump hints ‘he’ll be fine’*, ABC 15 News Arizona (Aug. 23, 2017), <http://bit.ly/2k3M6k8>; Richard Pérez-Peña, *Former Arizona Sheriff Joe Arpaio Is Convicted of Criminal Contempt*, N.Y. Times (July 31, 2017), <https://nyti.ms/34fuJkV>.

<sup>52</sup> Nick Miroff & Josh Dawsey, *‘Take the land’: President Trump wants a border wall. He wants it black. And he wants it by Election Day.*, Wash. Post (Aug. 27, 2019), <https://wapo.st/3maCGik>.

<sup>53</sup> Richard Gonzales, *Trump Pardons 2 Service Members Accused Of War Crimes And Restores Another’s Rank*, NPR (Nov. 15, 2019), <https://n.pr/2FaPKUp>.

#### IV. DEFENDANTS' INTIMIDATION AND THREATS DISCOURAGE VOTER PARTICIPATION

Trump's collective statements have caused a national sentiment of fear and uncertainty among voters who cannot predict what actions Trump and his supporters will take in the days leading up to the general election and on Election Day itself.<sup>54</sup>

Defendants' words and actions have created an intimidating environment for Plaintiff Schwartz, Plaintiff Lopez, and other voters (including those serviced by Plaintiff MFV) who plan or had planned to vote in person at their polling places. For individuals who are contemplating casting a vote against Trump, the prospect of walking past a crowd of hostile Trump supporters, or even a single Trump supporter with a video camera, is daunting. As Nick Custodio, a Philadelphia deputy city commissioner, observed, "Nobody, when going into places, likes having people filming them."<sup>55</sup> This is particularly true when Trump has specifically called out to white supremacist supporters to be watchful at polling places. Trump's debate-time call to the Proud Boys to "stand back and stand by," for example, caused Plaintiff Schwartz so much fear about in-person voting that she decided that evening to request a mail-in ballot instead of voting in person. Schwartz Decl. ¶¶ 20, 24–25.

Plaintiff Lopez is similarly intimidated from dropping off her ballot at a drop-off box. Because Plaintiff Lopez is at increased risk of complications from COVID-19 due to her asthma, she requested to complete a mail-in ballot. Declaration of Marla Lopez ("Lopez Decl.") ¶¶ 10–11, 17. She hoped to drop off her ballot at the designated drop-off location, but she is worried that both law enforcement and Trump supporters will be gathered around the location

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<sup>54</sup> Danny Hakim, Stephanie Saul, Nick Corasaniti & Michel Wines, *Trump Renews Fears of Voter Intimidation as G.O.P. Poll Watchers Mobilize*, N.Y. Times (Sept. 30, 2020), <https://www.nytimes.com/2020/09/30/us/trump-election-poll-watchers.html>.

<sup>55</sup> Zach Montellaro & Holly Otterbein, *supra* note 30.

per Trump’s encouragement. *Id.* ¶¶ 24–32 . As a Latinx woman, she is particularly frightened by Trump’s encouragement of the Proud Boys to “stand by” during the election. Her fear of walking past these groups of Trump supporters, some of whom may be armed, as she approaches the drop-off location has left her deeply concerned about dropping off her ballot. *Id.* ¶¶ 30–32 .

Defendants’ actions and statements against mail-in voting have had a similar intimidating effect on Plaintiff Schwartz, Plaintiff Lopez, and other voters’ (including those serviced by Plaintiff MFV) plans to participate in the general election. For example, in Florida (a state where Plaintiff MFV is active), Defendants’ actions led to a broad reduction in willingness to vote by mail. Defendants’ actions affected voters in both major parties, but the effect was unequal. In a July 2020 poll, 27 percent of Florida Republicans planned to vote by mail. In August, after Trump’s and DeJoy’s USPS interference made headlines, the same polling firm found that only 19 percent of Florida Republicans planned to do so.<sup>56</sup> The same poll found that, among Florida Democrats, 61 percent had planned to vote by mail in July, but only 32 percent still planned to do so.<sup>57</sup> It is likely that Trump’s efforts to stigmatize mail-in voting as fraudulent will continue to have a disproportionate effect on members of his opposition party.

Similarly, in Pennsylvania (where Plaintiff Schwartz lives and votes), Pennsylvania Lieutenant Governor John Fetterman said: “The tactic of raising doubts about the integrity of the mail-in voting process is an effort to dissuade Democrats from using it.”<sup>58</sup> He explained that the overwhelming majority of the 2 million people requesting a mail-in ballot are registered Democrats, and that all people requesting mail-in ballots run the risk of being turned

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<sup>56</sup> Eric Cortellessa, *Is Trump Scaring Democrats Away from Vote by Mail?*, Washington Monthly (Sept. 10, 2020), <https://bit.ly/35qmHXB>.

<sup>57</sup> *Id.*

<sup>58</sup> Akela Lacy, *Trump campaign looks to make good on poll-watching threat in Philadelphia*, The Intercept (Sept. 30, 2020), <https://theintercept.com/2020/09/30/philadelphia-early-voting-trump-poll-watchers/>.

away at the polls if they decide they do not want to vote by mail anymore, go to their polling places, and fail to bring the mailed ballot and envelope. “That’s what [Trump campaigners] want,” Fetterman explained. “Let’s say half a million people out of 2 million say, ‘Oh my God, I don’t want to vote by mail anymore.’ Can you imagine that?”<sup>59</sup>

That is the reality for Plaintiff Schwartz, who has grown increasingly wary of submitting her vote by mail as Trump continues to delegitimize the mail-in voting process and throttle the capacity of the USPS to deliver ballots. Schwartz Decl. ¶¶ 34–39. Schwartz is particularly afraid that her mail-in ballot, if submitted, will not be counted, will be tampered with, or will cause some sort of legal investigation or action against her. *Id.* She still has not decided whether she will cast her vote by mail, and every new statement by Trump characterizing mail-in voting as fraudulent makes her more worried about doing so. *Id.* ¶¶ 38–39.

Plaintiff Lopez is also afraid of submitting her ballot by mail, even though it is the only viable voting option available to her. As stated *supra*, Lopez cannot risk going to a polling place in person, she is intimidated by the idea of dropping off her ballot at a drop-off box, and she is nervous about submitting her ballot by mail and facing undue scrutiny by government officials acting in accordance with Trump’s calls to investigate mail-in voter fraud. Lopez Decl. ¶¶ 17–18, 21, 23, 31–34. She is also concerned that her ballot will not be delivered due to Trump’s attacks on the USPS. *Id.* ¶ 35.

Separately, but relatedly, Defendants’ deployment of federal law enforcement against assemblies of individuals perceived to be in opposition to him, when combined with his decision not to deploy federal law enforcement officials against assemblies of individuals perceived to support him and overlook or pardon vigilantes who act in accordance with his

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<sup>59</sup> *Id.*

wishes, has intimidated Plaintiff Schwartz and other individuals who plan to vote against Trump. Plaintiff Schwartz has watched law enforcement in Philadelphia engage in violence against peaceful demonstrators protesting police violence while allowing self-avowed white supremacists to patrol neighborhoods with guns, baseball bats, and golf clubs. Schwartz Decl. ¶¶ 8, 14–15. Plaintiff Schwartz has also followed Trump’s many tweets encouraging federal law enforcement to engage in violence against protesters and members of his opposition party. *Id.* ¶¶ 6, 10, 18. Schwartz is afraid that Trump will similarly call on federal law enforcement to act against his opposition on Election Day, while not protecting his opposition from Trump supporters who may attack them. *Id.* ¶¶ 23–25.

Defendants have directed and endorsed the use of physical violence against Trump’s political detractors. Trump has already shown his willingness to send federal law enforcement to act against peaceful demonstrators under the guise of “law and order,” and voters are reasonably concerned that there is nothing stopping him from sending federal law enforcement to interfere with peaceful and lawful voting activity under the guise of “voting integrity” or some similarly manufactured concern.

### LEGAL STANDARD

Plaintiffs seeking a temporary restraining order and preliminary injunction under Federal Rule of Civil Procedure 65 must demonstrate that (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm absent injunctive relief, (3) the balance of hardships tips in their favor, and (4) the injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *League of Women Voters of United States v. Newby*, 838 F.3d 1, 6 (D.C. Cir. 2016).

Courts have broad discretion to grant expedited declaratory relief under Federal Rule of Civil Procedure 57 and the Declaratory Judgment Act, 28 U.S.C. § 2201. *Bazarian Int’l*



*Fin. Assocs., L.L.C. v. Desarrollos Aerohotelco, C.A.*, 793 F. Supp. 2d 124, 131 (D.D.C. 2011). Expedited declaratory relief is appropriate “where the determination is largely one of law, and factual issues (while expedited discovery is permitted and frequently granted) are not predominant.” *Cty. of Butler v. Wolf*, No. 2:20-CV-677, 2020 WL 2769105, at \*2 (W.D. Pa. May 28, 2020). Where, as here, there “are imminent or ongoing violations of important rights,” expedited proceedings are “especially warranted.” *Id.* “In exercising its discretion to decide whether to grant declaratory relief, the court must consider, among other factors, whether a declaratory judgment will serve a useful purpose.” *Bradford v. Ogbuehi*, No. 1:17-Civ.-01128, 2020 WL 5847015, at \*3 (E.D. Cal. Oct. 1, 2020) (citing *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995)).

## ARGUMENT

### I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR SECTION 11(B) CLAIM

Section 11(b) of the Voting Rights Act of 1965 provides a private right of action to pursue declaratory and injunctive relief against official and private actors who engage in voter intimidation. *Allen v. State Bd. of Elec.*, 393 U.S. 544, 554-56 (1969). The relevant portion of the statute states:

No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under [other provisions of this law].

52 U.S.C. § 10307(b) (formerly codified at 42 U.S.C. § 1973i(b)).

To succeed on a claim under Section 11(b), Plaintiffs must show Defendants (1) intimidated, threatened or coerced, or attempted to intimidate threaten or coerce, another

person (2) in connection with voting, attempting to vote, or urging or aiding another to vote. *See id.*

**A. Defendants Have Intimidated and Threatened Voters**

Defendants have used both overt and indirect tactics to intimidate and threaten voters. The words “intimidate” and “threaten” have a broad meaning under Section 11(b). Indeed, the Supreme Court has recognized that Congress intended to give the Voting Rights Act “the broadest possible scope.” *Allen*, 393 U.S. at 567. Defendants’ conduct is objectively intimidating under Section 11(b) and has had an actual intimidating effect on Plaintiffs.

The ordinary meanings of “intimidate” and “threaten” are expansive. *Leocal v. Ashcroft*, 543 U.S. 1, 2 (2004) (“When interpreting a statute, words must be given their ordinary or natural meaning.”) (internal quotation marks and citation omitted). The definitions in Webster’s Third New International Dictionary, the general usage dictionary most commonly cited by federal courts,<sup>60</sup> are typical. Webster’s Third defines “intimidate” as “to make timid or fearful; inspire or affect with fear; frighten, especially to compel to action or inaction (as by threats).” Webster’s Third New International Dictionary, 1184 (3rd ed.1961). The relevant definition of “threat” in Webster’s Third is “an expression of an intention to inflict evil, injury, or damage on another, usually as punishment for something done or left undone.” *Id.* at 2382.

Section 11(b) protects people who are “voting,” “attempting to vote,” or “urging or aiding any person to vote or attempt to vote.” These phrases have been interpreted expansively, as “voting” under the Voting Rights Act “includes all action necessary to make a vote effective.” *Allen*, 393 U.S. at 566. In *United States v. Bruce*, 353 F.2d 474, 477 (5th Cir. 1965), for example, the Fifth Circuit held that Black insurance collector Lonnie Brown was

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<sup>60</sup> Jeffrey L. Kirchmeier & Samuel A. Thumma, *Scaling the Lexicon Fortress: The United States Supreme Court’s Use of Dictionaries in the Twenty-First Century*, 94 Marq. L. Rev. 77, 82 (2010).

protected from economic intimidation under Section 11(b)'s predecessor statute based on his efforts to help register voters. *Id.* at 477 (holding that coercive acts that “put an end to [Mr. Brown’s] activities in the field of voter registration” violated Section 131(b) of the Civil Rights Act of 1957). In *United States v. McLeod*, the Fifth Circuit held that Selma police officers had engaged in intimidating activity in interference with the right to vote when they (1) surveilled voter registration meetings; (2) arrested individuals in attendance at those meetings under other pretexts; and (3) arrested individuals engaged in “large scale demonstrations relating to voter registration.” 385 F.2d at 738-39 (applying Section 131(b)).

Because the text of Section 11(b) protects against a range of voting-related activity, the courts have found that a plaintiff need only show that the alleged intimidating acts affected an activity sufficiently related to voting to give rise to a Section 11(b) claim. *U. S. by Katzenbach v. Original Knights of Ku Klux Klan*, 250 F. Supp. 330, 353 (E.D. La. 1965) (stating that Section 131(b) “may be extended against interference with any activity having a rational relationship with the federal political process”); *McLeod*, 385 F.2d at 734 (voter registration meetings protected by Section 131(b)); *Willingham v. Cnty. of Albany*, 593 F. Supp. 2d 446, 462-64 (N.D.N.Y. 2006) (filling out blank absentee ballots and ballot applications that were collected from eligible voters via questionable methods could give rise to a Section 11(b) claim). If there is a sufficient nexus between the alleged intimidation and a voting-related activity, Section 11(b) applies. *See also United States v. Robinson*, 813 F.3d 251, 259 (6th Cir. 2016) (“That [the victim] had desired to vote for [a different mayoral candidate] but did not leave his house . . . because of the presence of [defendants] . . . amounted to intentional intimidation and oppression of voting rights.”) (interpreting analogous federal statute at 18 U.S.C. § 241).

### 1. Intimidation by threats of violence

Physical violence and baseless prosecution are unquestionably actionable under Section 11(b), *see, e.g., United States v. Wood*, 295 F.2d 772, 776 (5th Cir. 1961) (courthouse official beat and arrested black voter registration volunteer in front of black residents trying to register in violation of Section 11(b) predecessor statute),<sup>61</sup> as are threats of physical violence and baseless prosecution, *see, e.g., Paynes v. Lee*, 377 F.2d 61 (5th Cir. 1967) (white citizens threatened to “destroy” and “annihilate” black man who tried to register to vote); *United States v. McLeod*, 385 F.2d 734 (5th Cir. 1967) (baseless arrests and prosecutions of black citizens seeking to vote and voter registration volunteers).<sup>62</sup>

Defendants have engaged in these classic forms of intimidation here. Trump has threatened to deploy “sheriffs” and “law enforcement”—actors whose very *raison d’être* is to enforce order through violence, if necessary, and prosecute people—at polling places.<sup>63</sup> This threat is understood by Plaintiffs and by voters more generally—and should be understood by this Court—as evoking the type of law enforcement response that Trump ordered or promoted over the past several months in response to public demonstrations. Moreover, Defendants have publicly encouraged, counseled, or given the “green light” to third parties to intimidate or attack. For example, Trump has encouraged an “army” of his supporters to show up at polling places, likening these “poll watchers” to the military to make clear that they will not hesitate to use

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<sup>61</sup> Some of the cases cited in this brief were brought under Section 131(b) of the Civil Rights Act of 1957, Section 11(b)’s predecessor statute. Like Section 11(b), it prohibits “intimidat[ion],” “threat[s],” and “coerc[ion]” in connection with voting. *See* 52 U.S.C. § 10101(b). Section 11(b) was drafted with the intent of replacing and expanding Section 131(b). *See* H.R. Rep. No. 89-439, at 30 (1965). Consequently, Section 11(b) is interpreted *in pari materia* with Section 131(b), but more broadly.

<sup>62</sup> The use of armed military officers at polling stations has also been prohibited by statute. *See* 18 U.S.C. § 592; 52 U.S.C. § 10102.

<sup>63</sup> Justine Coleman, *Trump says he will send law enforcement, US attorneys to polls in November to prevent fraud*, The Hill (Aug. 20, 2020), <https://bit.ly/3m6kB56>.

violence.<sup>64</sup> And he has refused to denounce white supremacist groups, instead telling them to “stand by” in advance of Election Day.<sup>65</sup>

These statements and actions violate Section 11(b)’s prohibition on voter intimidation in at least two distinct ways. First, the *statements themselves* are objectively intimidating. They have already directly intimidated Plaintiffs Schwartz and Lopez, who both saw these statements for what they were—threats to voters who do not support him and who plan to vote in the general election. In *Joyner v. Browning*, 30 F. Supp. 512 (W.D. Tenn. 1939), for example, a pre-VRA case, the Governor of Tennessee “entered upon a campaign of terror” in order to disenfranchise thousands of Black and women voters ahead of the 1938 elections. The Governor “let it be known that he intended to use State troops to carry out his boast of stopping the voting by local voters in Shelby County and to terrorize them . . . so that timorous electors would stay at home and that those who attempted to vote would be subjected to intimidation.” *Id.* at 514. The district court concluded that the “threatened use of troops and the threat of military dictatorship by the former Governor deprived citizens of the [constitutional] right to vote,” and issued a temporary restraining order and preliminary injunction. *Id.* at 519. Here, the intimidating intent and effect of Trump’s statements does not depend on which white supremacists or vigilantes heed his call to arms; Trump’s statements encouraging or threatening third-party violence are themselves voter intimidation.

Second, *third-party* intimidation that is encouraged, inspired, or counseled by Trump further violates Section 11(b). *Cf. Dwares v. City of New York*, 985 F.2d 94 (2d Cir.

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<sup>64</sup> See Zach Montellaro & Holly Otterbein, *supra* note 30.(describing a Donald Trump, Jr. video in which he states: “We need every able-bodied man [and] woman to join an army from Trump’s election security operation,” he said, spreading the same conspiracy theory of widespread fraud that his father pushes. “We need you to help us watch them, not just on Election Day, but also during early voting and at the counting boards”); see also Donald J. Trump for President, Inc., <https://www.armyfortrump.com/>, (last visited Oct. 19, 2020) (imploing supporters to join “President Trump’s army of supporters”).

<sup>65</sup> DailyMail.com Reporter, *supra* note 2.

1993) (holding that police could be liable under 42 U.S.C. § 1983 for giving skinheads the green light to attack plaintiff, and noting that “a prearranged official sanction of privately inflicted injury would surely have violated the victim's rights under the Due Process Clause”), *overruled on other grounds by Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993). It is hardly speculative that Trump’s encouragement and assurances—including repeated assurances that he will pardon supporters who commit crimes for him—encourage such violence. *See Dwares*, 985 F.2d at 99 (“It requires no stretch to infer that such prior assurances would have increased the likelihood that the ‘skinheads’ would assault demonstrators.”). Indeed, on October 8, 2020, just two weeks after Trump refused to disavow white supremacists, thirteen men were arrested for plotting to kidnap the Governor of Michigan, a Trump political foe and the target of numerous Trump attacks. And in Minnesota, business owners and citizens paid a private security company to recruit former U.S. military Special Operations personnel to “guard” polling locations on Election Day.<sup>66</sup>

These threats are particularly intimidating because Defendants have the full power of the federal government at their disposal and have established a pattern of using that force when they believe it is in their personal political interest to do so. *See Original Knights of Ku Klux Klan*, 250 F. Supp. at 348 (pattern of violence against black citizens to prevent voting was intimidation under Section 11(b) predecessor statute). Over the summer, Defendants violently suppressed lawful assemblies that they found to be inconvenient for their political objectives. On June 1, 2020, for example, Trump and Barr ordered armed federal agents to clear Washington,

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<sup>66</sup> Joshua Partlow, *Former Special Forces sought by private security company to guard polling sites in Minnesota, company says*, Wash. Post (Oct. 9, 2020), [https://www.washingtonpost.com/politics/private-security-minnesota-election/2020/10/09/89766964-0987-11eb-991c-be6ead8c4018\\_story.html](https://www.washingtonpost.com/politics/private-security-minnesota-election/2020/10/09/89766964-0987-11eb-991c-be6ead8c4018_story.html).

D.C.'s Lafayette Square using chemical irritants and flash-bang explosives.<sup>67</sup> In July 2020, Defendants deployed federal agents to Portland, Oregon, where they repeatedly used tear gas and impact munitions to disperse protesters, including people who were engaged in voter registration activities.<sup>68</sup>

Any American who pays even modest attention to the news would interpret Defendants' stated plans for November in light of their past conduct. An ordinary citizen would reasonably interpret Defendants' statements and plans regarding the election in light of Defendants' very recent conduct in response to public assemblies. When Trump threatened to send "sheriffs" and "law enforcement" to polling places, an ordinary citizen would reasonably interpret that as evoking the same type of combative response by federal law enforcement agents that Defendants brought to bear in the summer's demonstrations, and which they encouraged elsewhere by local police. *Cf. Joyner*, 30 F. Supp. at 515, 519 (finding the "threatened use of troops" would have the "effect" of intimidating voters).

An ordinary citizen would also reasonably interpret Trump's statement that violent white supremacist groups like the Proud Boys should "stand by" in the context of his public defense of accused murderer Kyle Rittenhouse and his pattern of pardoning and protecting those who violate the law in order to carry out his wishes. Even though these previous actions did not involve attacks on voter registration activities, through them Defendants have shown their methods and propensities and have rendered their threats of further action credible.

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<sup>67</sup> Evan Perez & David Shortell, *Attorney General Barr ordered authorities to clear protestors near White House, DOJ official says*, CNN Politics (June 2, 2020), <https://www.cnn.com/2020/06/02/politics/barr-protests-white-house/index.html>

<sup>68</sup> Selsky & Flaccus, *supra* note 40.

## 2. Intimidation by disparagement and threats of enhanced scrutiny of mail-in voting

Section 11(b) also prohibits intimidation that falls short of threats of physical violence. According to the Department of Justice, voter intimidation includes a broad range of conduct “intended to force prospective voters to vote against their preferences, or refrain from voting, through activity reasonably calculated to instill some form of fear.”<sup>69</sup> The Ninth Circuit, in interpreting California’s analogue to Section 11(b), noted that intimidation under that law “is not limited to displays or applications of force, but can be achieved through manipulation and suggestion.” *United States v. Nguyen*, 673 F.3d 1259, 1265 (9th Cir. 2012) (finding letter sent to Hispanic voters warning of incarceration or deportation resulting from illegal voting could have “constituted a tactic of intimidation” under California voter intimidation statute); *see also Democratic Nat’l Comm. v. Republican Nat’l Comm.*, 673 F.3d 192, 209 (3d Cir. 2012) (holding that 1982 consent decree continued to be necessary “to help ensure that potential minority voters are not dissuaded from going to the polling station to vote” because, without it, RNC would likely resume engaging in intimidating “ballot security” activities, such as aggressive poll-watching and reporting registered minority voters as ineligible for having undeliverable addresses); Consent Decree, *United States v. N.C. Republican Party, et. al.*, 91-161-CIV-5-F (E.D.N.C Feb. 27, 1992) (consent agreement under Section 11(b) prohibiting “ballot security” measures, after party sent thousands of postcards to registered African-American voters warning that it was a federal crime, “punishable by up to five years in jail,” to give false information to an election official).

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<sup>69</sup> Dep’t of Justice, *Federal Prosecution of Election Offenses*, May 2017, <https://www.justice.gov/sites/default/files/criminal/legacy/2013/09/30/electbook-rvs0807.pdf>



Defendants have engaged in similar conduct here. Trump has repeatedly cast doubt on the legitimacy of mail-in voting, and he has stated that mail-in ballots will be looked at by the courts. The thinly-veiled threat underlying these statements is that people should be wary of voting by mail because both their ballots and their eligibility will be scrutinized, and even inadvertent mistakes could have dire consequences. *Cf. Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 223 (2d Cir. 2001) (letter from company threatening to “address [employee’s] behavior through legal channels” could be found to “intimidate” or “threaten” the employee in violation of the ADA) (quotation marks omitted). Voters have taken notice of these statements, particularly first-time voters, who have expressed reservations about voting by mail for fear that they may complete their ballot incorrectly. *See* Schwartz Decl. ¶¶ 40, 42–43.

**B. Defendants Have Intimidated Plaintiffs with Respect to Voting**

Defendants’ intimidating and threatening conduct has directly impacted Plaintiffs’ voting activities. Because of Defendants’ actions, Plaintiffs Schwartz and Lopez (and many of the citizens that Plaintiff MFV helps) are afraid and concerned about how they will vote, whether their votes will be counted, and/or whether their votes will be unduly scrutinized.

Plaintiff Schwartz, who saw violent white supremacist and law enforcement activity in her city of Philadelphia, fears the violence she might encounter if she attempted to vote in-person at a polling place. Schwartz Decl. ¶ 39. For Schwartz, Defendants’ demonstrated willingness to use armed federal troops makes their threats to do so on Election Day all the more credible, and sends a clear message to his “army” of supporters that violence is an appropriate response to political resistance. *Id.* ¶¶ 6–9. She decided that she could not vote in person, despite having done so many times before, because she was afraid that her personal safety would be threatened by Trump supporters who heeded his call to monitor polling places or by law enforcement who are ordered or otherwise feel emboldened by Trump to harass voters at polling

places. *Id.* ¶¶ 24–25. Although she has received her mail-in ballot, Schwartz is still extremely nervous about submitting it. Trump’s comments delegitimizing the mail-in voting process and characterizing it as an act of fraud have caused her to fear that her ballot may not be counted or may cause her to be investigated for fraud. *Id.* ¶ 26.

Similarly, Plaintiff Lopez, and many of the citizens serviced by Plaintiff MFV, fear the presence of hostile Trump supporters if they attempt to vote in person or deposit a ballot at a drop box, yet also worry that if they send their ballots by mail, the ballots may not be delivered or counted due to Defendants’ actions and statements. Decl. ¶¶ 23–27, 34–35; Declaration of Mi Familia Vota Education Fund (“MFV Decl.”) ¶¶ 12–18, 19–25.

**C. Under Section 11(b), Defendants are Presumed to Intend the Intimidating Effect of Their Objectively Intimidating Conduct**

Section 11(b) does not include an intent requirement. Acts that “intimidate, threaten, or coerce” individuals from engaging in voting-related activity, or that attempt to do so, violate Section 11(b). Defendants’ subjective intent need not be established.

Both the text and legislative history of Section 11(b) confirm the absence of an intent requirement. Section 11(b) borrows much of its language from Section 131(b) of the Civil Rights Act of 1957, 52 U.S.C. § 10101(b). But unlike Section 131(b), Section 11(b) does not require that the intimidation, threats, or coercion be “for the purpose of interfering with” the right to vote. The omission of this “for the purpose of” language demonstrated a clear congressional intent to remove any intent requirement from Section 11(b).

The legislative history confirms Congress’s intent. The House Report on the Voting Rights Act explains: “[U]nlike [Section 131(b)] (which requires proof of a ‘purpose’ to interfere with the right to vote) no subjective purpose or intent need be shown.” H.R. Rep. No. 89-439, at 2462 (1965). And Attorney General Nicholas Katzenbach, who drafted much of the

VRA, stated: “Under [the VRA] no subjective ‘purpose’ need be shown, in either civil or criminal proceedings, in order to prove intimidation under the proposed bill. Rather, *defendants would be deemed to intend the natural consequences of their acts.*” *Voting Rights, Part 1: Hearings on S. 1564 Before the S. Comm. on the Judiciary*, 89th Cong. 16 (1965) (emphasis added).

Thus, courts generally do not require plaintiffs to establish intent in Section 11(b) cases. Conduct that has the “inevitable effect” of discouraging, intimidating, threatening, or coercing people seeking to exercise their right to vote is prohibited. *United States v. Clark*, 249 F. Supp. 720, 728 (S.D. Ala. 1965); *see also, e.g., Daschle v. Thune*, ECF No. 6, No. 4:04 Civ 04177 (D.S.D. Nov. 1, 2004) (granting temporary restraining order under Section 11(b) enjoining individuals from “following Native Americans from the polling places” and making loud remarks about illegal voting by Native Americans; noting that “[w]hether the intimidation was intended or simply the result of excessive zeal is not the issue, as the result was the intimidation of prospective Native American voters in [that county]”)

The few courts that have read an intent requirement into Section 11(b) erroneously based their decisions on cases interpreting Section 131(b) (which explicitly includes an intent requirement), not Section 11(b), such as *United States v. McLeod*. *See, e.g., Olagues v. Russoniello*, 797 F.2d 1511, 1522 (9th Cir. 1986), *vacated*, 484 U.S. 806 (1987) (citing *McLeod*). Because Congress passed Section 11(b) with the explicit purpose of eliminating the intent requirement of Section 131(b), those cases that read an intent requirement back into the statute should not be followed.

Even so, Trump has made his intent clear on numerous occasions, through public statements via his Twitter account and in public speeches. *See* Compl. ¶¶ 110, 113–20.

## II. PLAINTIFFS FACE IRREPARABLE HARM

Plaintiffs will be irreparably harmed absent preliminary relief.

The “deprivation of the right to effective participation in the political process” constitutes irreparable harm. *Flores v. Town of Islip*, 382 F. Supp. 3d 197, 228 (E.D.N.Y. 2019) (collecting cases) (holding that “there would be irreparable harm if the upcoming elections were permitted to proceed under a framework that violated the VRA”); *United States v. Berks Cnty.*, 250 F. Supp. 2d 525, 540 (E.D. Pa. 2003) (collecting cases) (“[T]he holding of an upcoming election in a manner that will violate the Voting Rights Act constitutes irreparable harm to voters.”). Courts have repeatedly stated that plaintiffs “would certainly suffer irreparable harm if their right to vote were impinged upon.” *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986) (“A restriction on the fundamental right to vote . . . constitutes irreparable injury.”). Indeed, individuals deprived of the right to vote in violation of the VRA have no post-deprivation remedy to redress the violation. *See Casarez v. Val Verde Cnty.*, 957 F. Supp. 847, 864–65 (W.D. Tex. 1997) (granting preliminary injunction because monetary damages could not redress Voting Rights Act violation); *see also Democratic Nat’l Comm. v. Bostelmann*, 447 F. Supp. 3d 757, 770 (W.D. Wis. 2020) (citing *Christian Legal Soc’y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006)) (“[T]raditional legal remedies would be inadequate, since infringement on a citizen’s constitutional right to vote cannot be redressed by money damages.”). Thus, courts grant preliminary injunctions and temporary restraining orders against voter intimidation prohibited under Section 11(b). *See, e.g., Daschle v. Thune*, ECF No. 6, No. 4:04 Civ 04177 (D.S.D. Nov. 1, 2004).

Here, Plaintiffs face irreparable harm because Defendants have directly attempted to intimidate them from voting and assisting others with voting. *See Ariz. Democratic Party v. Ariz. Republican Party*, No. 16 Civ. 03752, 2016 WL 8669978, at \*11 (D. Ariz. Nov. 4, 2016)

(“[I]f some potential voters are improperly dissuaded from exercising their franchise, it is unlikely those voters can be identified, their votes cannot be recast, and no amount of traditional remedies such as money damages would suffice after the fact.”); *Newby*, 838 F.3d at 9 (finding irreparable harm when defendants’ actions “ma[de] it more difficult for the [organization] to accomplish their primary mission of registering voters”). “[O]nce the election occurs, there can be no do-over and no redress.” *League of Women Voters of N.C. v. N. Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (holding that discriminatory voting procedures that violate Voting Rights Act are serious violations for which courts grant immediate relief).

Plaintiffs Schwartz and Lopez will be irreparably harmed absent an injunction. Both are scared to vote in person or by mail because of Defendants’ conduct. An injunction will provide necessary assurance that Defendants will not deploy law enforcement or other personnel to polling places, that Trump will cease using his Twitter account to encourage vigilantes to monitor the polls, and that Defendants will not interfere with the delivery of mail-in ballots. Absent an injunction, Defendants’ ability to vote will be jeopardized. Money damage are insufficient to remedy Defendants’ threats to Plaintiffs’ right to vote.

Plaintiff MFV will also be irreparably harmed absent an injunction. MFV’s mission to encourage citizens to vote is in direct conflict with Defendants’ conduct. It has been forced to spend time and resources counteracting Defendants’ intimidation tactics and clarifying the disinformation Defendants have been spreading. As a result, MFV has not been able to speak to as many people or encourage as many people to vote. Nor has it been able to dedicate enough time to educating voters about the issues that affect them. Money damages after the election will not remedy MFV’s inability to devote its full resources to helping people vote.

Because voter registration deadlines, early voting deadlines, and the election itself are all fast approaching, a temporary restraining order and preliminary injunction enjoining Defendants from continuing to engage in intimidating and threatening acts is necessary to avoid the irreparable loss of Plaintiffs' fundamental rights.

### **III. THE BALANCE OF THE EQUITIES AND THE PUBLIC INTEREST WEIGH IN FAVOR OF INJUNCTIVE RELIEF**

The remaining elements—the balancing of equities and the public interest—also favor Plaintiffs. Where, as here, government officials are parties, these two factors merge. *See Ctr. for Pub. Integrity v. U.S. Dep't of Def.*, 411 F. Supp. 3d 5, 14 (D.D.C. 2019); *accord Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236, 256 (3d Cir. 2011) (“we consider together the final two elements of the preliminary injunction framework—the public interest and the balance of the equities”).

“To determine which way the balance of the hardships tips, a court must identify the possible harm caused by the preliminary injunction [or TRO] against the possibility of the harm caused by not issuing it,” and then weigh “the hardships of each party against one another.” *Univ. of Haw. Prof'l Assembly v. Cayetano*, 183 F.3d 1096, 1108 (9th Cir. 1999). As to the public interest, “[i]n exercising their sound discretion, courts of equity should pay particular regard for the public consequences” of issuing preliminary relief. *Winter*, 555 U.S. at 24 (quotation marks and citation omitted).

Plaintiffs and the public face significant hardship if an injunction is not issued. “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.” *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). The public interest thus “favors permitting as many qualified voters to vote as possible.”

*Obama for Am. v. Husted*, 697 F.3d 423, 437 (6th Cir. 2012). Indeed, the Supreme Court has recognized that the states have “a compelling interest in protecting voters from confusion and undue influence.” *Burson v. Freeman*, 504 U.S. 191, 199 (1992).

The public interest in favor of an injunction is particularly strong here because the right to vote freely is “the essence of a democratic society.” *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). “[C]ourts of equity may go to greater lengths to give ‘relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.’” *E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 826 (4th Cir. 2004) (quoting *Virginian Ry. Co. v. Sys. Fed’n No. 40*, 300 U.S. 515, 552 (1937)); *see also Gallagher v. N.Y. State Bd. of Elections*, No. 20 Civ. 5504, 2020 WL 4496849, at \*21 (S.D.N.Y. Aug. 3, 2020) (enjoining New York State Board of Elections to tally mail-in ballots that were improperly invalidated after recognizing the substantial burden to plaintiffs “fac[ing] disenfranchisement through no fault of their own.”). As in *Newby*, “absent an injunction, there is a substantial risk that citizens will be disenfranchised in the present federal election cycle.” 838 F.3d at 12.

In stark contrast, Plaintiffs’ proposed injunction imposes no hardship on Defendants. Much of the conduct Plaintiffs seek to enjoin is already prohibited by federal statute, including, but not limited to, the Voting Rights Act that grounds this motion and the relief requested. Defendants have *no* legally protected interest in engaging in unlawful activity and face no hardship by being enjoined from doing so. *See id.* (“There is generally no public interest in the perpetuation of unlawful agency action. To the contrary, there is a substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations.”) (internal citation and quotation marks omitted).

Under 18 U.S.C. § 592, no “person in the civil, military, or naval service of the United States” may order, bring, or keep “any troops or armed men at any place where a general or special election is held, unless such force be necessary to repel armed enemies of the United States.” *See also* 52 U.S.C. § 10102 (“No officer of the Army, Navy, or Air Force of the United States shall . . . in any manner interfere with the freedom of any election in any State.”); 18 U.S.C. § 1385 (prohibiting “willfully us[ing] any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws”). Tracking this statutory language, Plaintiffs request an Order enjoining Defendants from deploying armed federal agents at or near polling places while voting and ballot counting is underway except where necessary, as demonstrated by specific evidence pertaining to a particular polling place, to repel armed enemies of the United States. *See* Proposed Order ¶ 3.

Other relief Plaintiffs seek has been endorsed elsewhere. Plaintiffs request an Order enjoining Defendants from deploying federal agents at or near polling places to question voters about their credentials; impede or delay voters by asking for identification, videotape, photograph, or otherwise make visual records of voters or their vehicles; or inform voters that voter fraud is a crime or detail the penalties under any state or federal statute for impermissibly casting a ballot. *See* Proposed Order ¶ 2. Similar relief was endorsed by the United States District Court in New Jersey in a 2009 Consent Decree. *See Democratic Nat’l Comm. v. Republican Nat’l Comm.*, No. 81 Civ. 3876, Dkt. 85 (D.N.J. Dec. 1, 2009).

Defendants cannot possibly claim a legitimate interest in limiting the speed or reliability of mail delivery between now and November 10, 2020, *see* Proposed Order ¶ 5, blocking the delivery of ballots or interfering in the counting of ballots, *see* Proposed Order ¶ 4, or encouraging third-parties to bring weapons to polling places or otherwise intimidate voters or



interfere with voting, *see* Proposed Order ¶ 1. Nor does Defendant Trump have any compelling interest in using his Twitter account—from which he makes official statements of the President of the United States, according to the White House<sup>70</sup>—or other official communications channels to suggest that lawful votes will be scrutinized or challenged, or to intimidate people who wish to vote by mail by suggesting that their votes will not be counted or that mail-in votes are fraudulent. *See* Proposed Order ¶ 6.

Enjoining Defendants from engaging in conduct that has no public benefit and is, in some cases, already prohibited by other statutes is crucial to restoring the American public’s confidence in the electoral process, and it is an appropriate use of the Court’s injunctive powers.

#### **IV. PLAINTIFFS ARE ENTITLED TO EXPEDITED DECLARATORY RELIEF**

Plaintiffs are entitled to an expedited judgment declaring that Defendants violated Section 11(b) of the Voting Rights Act.

A request for declaratory relief is appropriate under the Declaratory Judgment Act where “there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *Maryland Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941). Such a controversy exists here. Defendants have been engaging—and are continuing to engage—in conduct that intimidates Plaintiffs in connection with voting and that is imposing a hardship on Plaintiffs as they seek to exercise their fundamental rights to vote or to advise others about voting. *See supra* Section I; *United Christian Scientists v. Christian Sci. Bd. of Directors, First Church of Christ, Scientist*, 829 F.2d 1152, 1159 (D.C. Cir. 1987) (plaintiff’s alleged deprivation of constitutional rights was a controversy that entitled plaintiff to seek declaratory relief). Defendants’ conduct has caused

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<sup>70</sup>White House Press Sec’y Sarah Sanders, Press Briefing (Dec. 5, 2017), <https://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-sarah-sanders-120517/>.

Plaintiffs immediate and ongoing injury and will continue to injure them absent judicial relief. See Section II, *supra*; *Ramer v. Saxbe*, 522 F.2d 695, 703 (D.C. Cir. 1975) (plaintiffs are entitled to request declaratory relief when injury is “not a merely generalized one but is based upon sustained, inescapable and continuing” acts by defendants). Defendants, for their part, continue their unrelenting intimidation tactics. Judicial relief is warranted to resolve this extant controversy and protect Plaintiffs’ fundamental right to vote.

A declaratory judgment is particularly appropriate where, as here, the Court need only decide an issue of law. “A declaratory judgment action under Rule 57 often involves only an issue of law on undisputed or relatively undisputed fact.” Fed. R. Civ P. 57, Advisory Committee Notes (1937); see also *Donald J. Trump for President, Inc. v. Boockvar*, No. 20 Civ. 966, 2020 WL 5658392, at \*4 (W.D. Pa. Sept. 23, 2020) (“[A] Rule 57 hearing . . . suggests that any factual issues here are relatively undisputed.”).

The facts here are not in dispute. Plaintiffs’ allegations draw almost entirely from Defendants’ own public statements and acts. Defendants cannot disclaim them. The only question—and it is a legal question—is whether Defendants’ ongoing conduct is objectively intimidating—that is, whether it has the “inevitable effect” of discouraging, intimidating, threatening, or coercing people seeking to exercise their right to vote. *Clark*, 249 F. Supp. at 728. For all the reasons set forth in Section I, *supra*, there is no doubt that it does.

Moreover, there is good reason for the Court to resolve Plaintiffs’ declaratory relief claim on an expedited basis. Where, as here, “Plaintiffs’ claims do not merely assert past deprivations of rights, but they allege current and ongoing deprivations of rights,” speedy relief is appropriate. *Cty. of Butler*, No. 2:20-CV-677, 2020 WL 2769105, at \*4. Plaintiffs need not establish irreparable harm to warrant a speedy hearing, but the presence of irreparable harm

weighs in their favor. *Id.* at \*5 n.3 (“Unlike proceedings on a request for preliminary injunctive relive, Plaintiffs need not establish immediate and irreparable injury to justify expedited review under Rule 57. However, the potential for such harm is a consideration that a district court would be prudent to consider.”).

As explained in Section II, *supra*, the individual Plaintiffs (and the many voters served by MFV) will suffer irreparable harm if their right to vote freely, without the risk of intimidation or fear, is in any way impaired. An expedited declaratory judgment will protect the fundamental right to vote and make clear that Defendants’ conduct is prohibited by the Voting Rights Act.

## V. TRUMP IS NOT IMMUNE FROM INJUNCTION

The Court has the power to issue the requested relief against Trump. “The Court has the authority to determine whether [the President] has acted within the law.” *Clinton v. Jones*, 520 U.S. 681, 703 (1997). Courts have exercised this authority—including by issuing equitable relief against the President—in a wide variety of contexts. The Supreme Court enjoined President Truman’s seizure of the nation’s steel mills despite his conclusion that the seizure was necessary to avert a national emergency. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). It affirmed a subpoena for confidential White House records in the President’s personal possession for use as evidence in a criminal prosecution implicating the President himself. *United States v. Nixon*, 418 U.S. 683 (1974); *see also United States v. Burr*, 25 F. Cas. 187 (C.C.D. Va. 1807). It affirmed the power of the courts to order the President to release prisoners held as enemy combatants. *Boumediene v. Bush*, 553 U.S. 723, 771 (2008). And it affirmed a declaration invalidating the President’s exercise of the line item veto. *Clinton v. New York*, 524 U.S. 417, 425 n.9 (1998). Following the Supreme Court’s lead, lower courts routinely

conclude that they have the authority to issue injunctive and declaratory relief against the President for his official acts.<sup>71</sup>

Presidents are immune from judicial intervention only where “the dangers of intrusion on the authority and functions of the Executive Branch” outweigh “the constitutional weight of the interest to be served” by the court’s exercise of jurisdiction. *United States v. Nixon*, 418 U.S. 683, 711-13 (1974). That is not the case here. As explained *supra*, the interests at stake here—the right to vote and help others to vote—are fundamental to our democracy. Conversely, there is no danger of intruding on the lawful authority or function of the Executive Branch. Trump’s intimidation tactics are an unlawful abuse of his Presidential pulpit. And much of Plaintiffs’ proposed relief is already prohibited by statute. Granting Plaintiffs’ requested relief will not have any impact on the functioning of the Executive Branch. Notwithstanding the above, in the alternative this Court should issue declaratory judgment against Trump and injunctive relief against the other Defendants.

### CONCLUSION

For the foregoing reasons, Plaintiffs request that this Court grant their motion, issue a temporary restraining order, preliminary injunction, and declaratory judgment, as set forth in the Proposed Order filed herewith, and provide Plaintiffs and voters across the country with immediate relief from Defendants’ intimidating and threatening acts in violation of Section 11(b) of the Voting Rights Act.

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<sup>71</sup> See, e.g., *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 587 (4th Cir. 2017) (enjoining enforcement of President’s executive order and observing that “the Supreme Court . . . has not countenanced judicial abdication, especially where constitutional rights, values, and principles are at stake”), *vacated on mootness grounds sub nom. Trump v. Int’l Refugee Assistance Project*, 138 S. Ct. 353 (2017); *Freedom from Religion Found., Inc. v. Obama*, 691 F. Supp. 2d 890, 908 (W.D. Wis. 2010) (“Defendants are . . . wrong to suggest that the President is immune from injunctive or declaratory relief.”), *vacated on other grounds*, 641 F.3d 803 (7th Cir. 2011); *Mackie v. Bush*, 809 F. Supp. 144, 146 (D.D.C. 1993) (preliminarily enjoining President from removing plaintiffs from government office), *vacated on mootness grounds sub nom. Mackie v. Clinton*, 10 F.3d 13 (D.C. Cir. 1993).

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Respectfully submitted,

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