UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PENNSYLVANIA DEMOCRATIC PARTY, Plaintiff, v. REPUBLICAN PARTY OF PENNSYLVANIA, DONALD J. TRUMP FOR PRESIDENT, INC., ROGER J. STONE, JR., and STOP THE STEAL INC., Defendants.	Civil Action No. 2:16-cv-5664-PD

PLAINTIFF'S REPLY MEMORANDUM OF LAW IN SUPPORT OF TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

Plaintiff Pennsylvania Democratic Party submits this Reply Memorandum of Law in reply to Defendants Republican Party of Pennsylvania (RPP) and Donald J. Trump For President, Inc.'s (Trump Campaign) Response filed November 3, 2016. As demonstrated below: (1) Defendants, and those acting in concert with them, are likely to engage in voter intimidation as a matter of law, thereby warranting preliminary relief, (2) The First Amendment does not protect acts constituting voter intimidation, (3) Plaintiff does not seek to enjoin lawful poll watching activities conducted in compliance with Pennsylvania and federal law, and (4) Section 11(b) does not require proof of specific intent to discriminate.

I. DEFENDANTS HAVE PUBLICLY CALLED FOR THEIR SUPPORTERS TO ENGAGE IN VOTER INTIMIDATION

As detailed in the Complaint, the principal of Defendant Trump Campaign, Donald J. Trump, has repeatedly called for his supporters in Pennsylvania to "watch" voters in "certain areas" in "other communities"—making clear he means Democratic-leaning, predominantly minority communities in "Philadelphia"—because we don't want this election stolen from us … and everybody knows what I'm talking about." Gotlieb Decl. Exs. 10, 11, 13. The Trump Campaign does not dispute that its leader and principal repeatedly has made these statements at public rallies in Pennsylvania and elsewhere, typically attended by tens of thousands of

Trump's vocal supporters.[1] Trump's supporters—including the Chair of Defendant RPP Rob Gleason—have joined these calls through public statements of support, and through action, including a now-failed effort to invalidate Pennsylvania law regulating the conduct of poll-watching. *Id.* Ex. 23. The Trump Campaign has actively recruited volunteers to engage in monitoring designed to detect efforts to "rig" or "steal" the election through its website. *Id.* Ex. 2These efforts have had their desired effect: Encouraging legions of Trump's supporters to descend on Democratic and minority areas of Philadelphia to engage in voter intimidation on Election Day, including "white nationalist, alt-right, and militia movements groups" who plan to interfere with the conduct of the election in Philadelphia by setting up "hidden cameras at polling places" and "sending an army of Alt-Right nationalists to watch the polls." *Id.* at Ex. 22.[2] Trump adviser and Defendant

[1] Defendants appear to rely on authentication and admissibility challenges to the voluminous exhibits to Plaintiff's Motion for a Temporary Restraining Order. Gottlieb Decl. at Ex. 1-24. These evidentiary objections are misplaced. "At the preliminary injunction stage, a district court may rely on affidavits and hearsay materials which would not be admissible evidence for a permanent injunction, if the evidence is 'appropriate given the character and objectives of the injunctive proceeding.'" *Levi Strauss & Co. v. Sunrise Int'l Trading, Inc.*, 51 F.3d 982, 985 (11th Cir. 1995); *see Herb Reed Enterprises, LLC v. Florida Entertainment Management, Inc.*, 736 F.3d 1239, 1250 n. 5 (9th Cir. 2013) ("Due to the urgency of obtaining a preliminary injunction at a point when there has been limited factual development, the rules of evidence do not apply strictly to preliminary injunction proceedings."); *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) ("a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits"). Plaintiff will substantially supplement the record with additional evidence at the hearing scheduled on November 7, 2016.

[2] *See* Bill Wellock, *Area man seeks poll watchers; offers reward for catching fraud*, The Times Tribune, Nov. 4, 2016, available at http://thetimes-tribune.com/news/area-man-seeks-poll-

Roger Stone, is a leader in mobilizing these forces through his organization Stop the Steal—which has announced plans to "target 7,000 precincts throughout the United States" in its sham exit-poll "monitoring", of which "2,000 are in Philadelphia."[3] As of November 5, 177 volunteers registered on Stop the Steal's website to monitor precincts in Pennsylvania, which is 78% of the stated goal.[4]

Defendants' publicly expressed plans to watch, follow, question, and photograph minority and other voters on Election Day that they perceive to be engaged in illegal activity will have the effect of intimidating voters, and courts that have examined similar conduct have found it to be unlawful. *See* Gottlieb Decl. at Ex. 20 (*Daschle v. Thune*, TRO, Civ. 04-4177 (D.S.D., Nov. 1, 2004) (entering TRO barring Republican state party, Republican Senate candidate and their supporters from, *inter alia*, following voters outside polling places, writing down their license plate numbers, and talking loudly in their presence about voter fraud). It is not correct that voter intimidation requires direct confrontation at the polls. *See* Resp. at 6. Section 11(b) of the Voting Rights Act broadly prohibits *any* acts that "intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote." 52 U.S.C. § 10307(b).

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watchers-offers-reward-for-catching-fraud-1.2113139 (reporting plans by out-of-county Trump supporters "to travel to Philadelphia" to "follow" and "photograph" voters they suspect of fraud).

[3] *Report: Alt-right group says it plans to disrupt election in Philly with '40s and weed'*, The Inquirer, Nov. 3, 2016, available at http://www.philly.com/philly/blogs/real-time/Alt-right-group-says-it-plans-to-disrupt-Election-Day-in-Philly-with-weed-40s.html.

[4] *See* https://stopthesteal.org/states/pennsylvania/ (last accessed Nov. 5, 2016).

Defendants public statements have done just that. In *United States v. Tan Duc Nguyen*, for example, the Ninth Circuit considered a Republican candidate for Congress who mailed a letter to 14,000 voters with Hispanic surnames that merely explained that voting is a crime if the recipients were "in this country illegally." 673 F.3d 1259, 1261 (9th Cir. 2012). The Ninth Circuit agreed this mailing constituted voter "intimidation" under an analogous provision of California law, because it could reasonably "constitut[e] a tactic of coercion intended to induce its recipients to refrain from voting." *Id.* at 1266. The Court rejected defendant's argument voter intimidation requires direct confrontations or threats, holding that voter intimidation "can be achieved through manipulation and suggestion" and through "subtle, rather than forcefully coercive means." *Id.* at 1265.[5]

II. PROOF OF PAST VIOLATIONS IS NOT REQUIRED FOR PRELIMINARY RELIEF

[5] Defendants' claim there is no "firm evidence" of voter intimidation (Resp. at 11) ignores that public statements and threats remote from polling places—especially when those threats relate to planned intimidation at the polls—themselves constitute voter intimidation under Section 11(b) and the Klan Act. Defendants are also wrong to suggest that Section 11(b) requires a showing that voters have actually been dissuaded from casting a ballot. Section 11(b) prohibits intimidation "*for*" voting—incorporating the common-sense notion that prospective voters may be deterred *from* voting if they reasonably anticipate threats, harassment, or intimidation *after* they cast their ballot.[5] As addressed *infra*, Section 11(b) establishes an effects-test—meaning that a defendant is liable for actions that cause a reasonable person to feel threatened or intimidated. This Court should find that such an effect is likely on the basis of the voluminous statements by Defendants and their co-conspirators already in the record. And, as Plaintiff's witnesses will testify at the November 7 hearing, intimidation has already occurred and will continue unabated absent this Court's intervention.

As demonstrated, by calling on their supporters to "watch" and harass voters in Democratic-leaning, largely minority communities like Philadelphia, Defendants have already engaged in "subtle" forms of voter intimidation proscribed by Section 11(b) and the Klan Act. But even if this were not the case, Defendants are wrong that preliminary relief is only warranted *after* direct—and possibly violent—confrontations between voters at the polls have already occurred. Defendants' statements and actions give rise to the substantial likelihood that this kind of overt voter intimidation will occur at polling places in Pennsylvania on Election Day.

As Plaintiff sets forth in the Complaint, reports of voter intimidation in Philadelphia by those associated with Defendants have arisen in the recent past. But proof of previous violations of law is neither necessary nor sufficient to entitle a plaintiff to injunctive relief. Instead, a party must "demonstrate the prospect of future harm," by whatever competent evidence available in the record. *Gonzalez-Droz v. Gonzalez-Colon*, 573 F.3d 75, 79 (1st Cir. 2009); *United States v. Oregon State Medical Soc.*, 343 U.S. 326, 333 (U.S. 1952) ("The sole function of an action for injunction is to forestall future violations.").[6]

[6] In determining whether to issue a preliminary injunction, courts do not require plaintiffs to "await the consummation of threatened injury to obtain preventive relief." *Libertarian Party of Los Angeles Cty. v. Bowen*, 709 F.3d 867, 870 (9th Cir. 2013) (citing *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, (1979)). Instead, given the forward-looking nature of injunctive relief, courts "must evaluate the likelihood of *future* . . . violations, and thereby determine whether an injunction is needed." *United States v. Schiff*, 379 F.3d 621, 625 (9th Cir. 2004). The credible threat that Defendants will engage in future violations of law is sufficient to establish irreparable injury warranting preliminary injunctive relief. *See Roe v. Operation*

This election is fundamentally different from any other that has come before it. Plaintiffs are aware of no other nominee of a major political party that has publicly and directly exhorted his followers to travel en masse to far-off polling places to "watch" "other communities" comprised of minority voters who he claims are trying to "steal" the election. RPP Chair Rob Gleason has joined in these calls. Now, unknown numbers of Trump's supporters are mobilizing for action. Intimidation, threats and conflict at polling places will likely result. This Court should not wait until that occurs to intervene. The entire point of established law permitting federal court to order preliminary injunctive relief is to prevent irreparable harm from occurring in the first place.

III. THE FIRST AMENDMENT IS NOT A BAR TO INJUNCTIVE RELIEF AGAINST UNLAWFUL VOTER INTIMIDATION

Sensible limitations on "poll monitoring" activities is consistent with the First Amendment. In no respect does Plaintiff seek to restrain Defendants from publicly questioning the legitimacy of the election as the result of voter fraud—notwithstanding the unrebutted record that such fraud simply does not occur on a widespread basis.[7] What Plaintiff seeks is to restrain Defendants from engaging in

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Rescue, 919 F.2d 857, 864-65 (3d Cir. 1990) (affirming the district court's decision to enjoin defendants' "planned" disruption of reproductive health clinics in Philadelphia based on newspaper reports of those plans, and extending injunctive relief even to plaintiffs that had not yet been subject to any disruptions).

[7] As the State of Pennsylvania agreed in a sworn stipulation filed in this Court in 2012, there "have been no investigations or prosecutions of in-person voter fraud in Pennsylvania; and

direct, in-person voter intimidation in and around polling places in Pennsylvania—whether in the form of unsanctioned, vigilante "poll watching" to monitor for voter fraud, or under the guise of Stop the Steal's sham "exit polling" or "citizen journalist" operations. *See* Doc. 14 Ex. 1 (Proposed Order) at 2.

Voter intimidation conveyed by speech is not protected by the First Amendment. *See United States v. Nguyen*, 673 F.3d 1259, 1261 (9th Cir. 2012) (speech constituting voter intimidation "may be regulated by the state without running afoul of the First Amendment. . . . If the letter by Nguyen's campaign falls within this prohibition, then it is speech that is proscribable under the First Amendment."). Courts have uniformly held that "poll watching" does not fall within the First Amendment's protections.[8] And simply calling an activity "exit polling" does not entitle such activity to First Amendment protection where the planned questioning is more likely to harass voters than it is to inform the public. [9]

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the parties do not have direct personal knowledge of any such investigations or prosecutions in other states." *Applewhite v. Commonwealth*, No. 330 MD 12 (Pa. Commw. Ct. July 12, 2012).

[8] *E.g.*, *Republican Party of Pennsylvania v. Cortés*, No. 16-cv-05524-GJP, at 13, 26 (E.D. Pa. Nov. 3, 2016) (Pennsylvania's restrictions on poll-watching activity "places no burden on . . . constitutional rights"; assertions that "statements made in one's capacity as a poll watcher constitute core political speech is meritless"). *See also Dailey v. Hands*, No. 14-cv-423-KD-M, 2015 WL 1293188, at *4 (S.D. Ala. Feb. 20, 2015) ("poll watching is not a fundamental right which enjoys First Amendment protection."); *Democratic Nat'l Comm. v. Republican Nat'l Comm.*, 671 F. Supp. 2d 575, 596 (D.N.J. 2009) (rejecting as "meritless" the argument that consent decree bar on RNC "ballot security activities" "infringes on activity protected by the First Amendment"), *aff'd*, 673 F.3d 192 (3d Cir. 2012); *Cotz v. Mastroeni*, 476 F. Supp. 2d 332, 364 (S.D.N.Y. 2007) ("poll watching . . . has no distinct First Amendment protection").

[9] Defendants make no effort to show that Stop the Steal's so-called "exit polling" meets the definition of the term—i.e., "a gathering of data from a random sample of voters at polling places on election day" by, "in a scientifically pre-determined pattern asks emerging voters to fill

Contrary to Defendants' assertion, the constitutional value that is truly at stake in this litigation is the "right to vote freely for the candidate of one's choice"—"the essence of a democratic society." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). The Supreme Court has rejected the argument Defendants raise here—that there is "an absolute right to speak to potential voters at any location." *Piper v. Swan*, 319 F. Supp. 908, 910 (E.D. Tenn. 1970) (cited in *Burson v. Freeman*, 504 U.S. 191 (1992)). The Supreme Court, rather, has recognized the "compelling interest in protecting the right of [U.S.] citizens to vote freely for the candidates of their choice." *Burson*, 504 U.S. at 198. Defendants are unfolding a deliberate and dangerous scheme to deprive voters, including in Pennsylvania, of their right to exercise the franchise free from intimidation and coercion. The First Amendment does not protect such conduct.

IV. PLAINTIFF DOES NOT SEEK TO ENJOIN LAWFUL POLL WATCHING CONDUCTED ACCORDING TO LAW

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out a short questionnaire." *ABC v. Blackwell*, 479 F. Supp. 2d 719 (S.D. Oh. 2006); *see Daily Herald Co. v. Munro*, 838 F.2d 380, 383 (9th Cir. 1988) (exit polling protected by the First Amendment where "the media plaintiffs conducted their polling in a systematic and statistically reliable manner."). Indeed, Stone and Stop the Steal have not even taken minimal steps to ensure the reliability or accuracy of their purported exit poll, and the targeting of the polling, the partisan motivation behind it, and the lack of training for those implementing it, leaves little doubt that the operation will intimidate voters. *See* Expert Report and Declaration of Mark S. Mellman at 1.[9] Unlike here, there was no allegation in *Munro* or *ABC* that the exit-polling operations were a pretext for voter intimidation. Indeed, *Munro* recognized the compelling interest in "maintaining peace, order, and decorum at the polls and preserving the integrity of their electoral process," which Defendants threaten by virtue of their planned intimidation tactics. 838 F.2d at 385.

Defendants devote much of their brief to raising the red herring that Plaintiff is seeking to preclude poll watching by credentialed observers in compliance with Pennsylvania law. Resp. 18-22. As detailed in Plaintiff's Proposed Order, the requested relief is limited to restrictions on purported poll watching activity that is outside Pennsylvania's detailed and comprehensive regulatory scheme governing the monitoring of polling places. *See, e.g.*, Proposed Order at 2.a (seeking restraint on, inter alia, encouraging "*individuals who are not officially appointed poll watchers* under Pennsylvania law to be present at or around polling places or voter lines to challenge, investigate, interfere, or otherwise act to prevent any person from voting"). Nor can Plaintiff's requested relief be fairly characterized as seeking merely an "obey the law" injunction unsupported by a credible threat the law will not otherwise be followed. *See* Resp. at 12. For example, Pennsylvania law requires poll watchers to be registered voters in the same county in which they monitor voters—a requirement that was just upheld by another Judge in this Court against Defendant RPP's attempt to invalidate it. Gottlieb Decl. Ex. 23. Yet Trump has specifically exhorted his supporters to violate this law by serving as roving bands of vigilante, uncredentialed poll watchers whose aim is to prevent "other communities" from engaging in activity they perceive as illegal. Trump's supporters have answered this call en masse, mobilized largely by Defendants Stop the Steal and Stone. RPP has sowed this chaos by publicly declaring that

Pennsylvania's reasonable regulation of poll watching activity is unconstitutional—violating Trump's supporters' due process, equal protection, free speech and free speech rights. *See id.* at 2. By projecting a false shroud of legality around blatantly illegal activity, Defendants have contributed directly to the willingness of their supporters to engage in voter intimidation on Election Day. *See* Compl. ¶ 55 (quoting Trump supporter stating "Trump said to watch your precincts. I'm going to go, for sure. . . it's called racial profiling. Mexicans. Syrians. People who can't speak American. I'm going to go right up behind them . . . make them a little bit nervous. *I'll do everything legally*"). This Court's intervention is needed to ensure the orderly conduct of the upcoming election in compliance with applicable state and federal law.

Defendants are therefore misguided in asserting that Plaintiff's requested relief risks "disruption, confusion, or unforeseen deleterious effects" at the polls on Tuesday. Resp. at 24.[10] Precisely the opposite. Without a judicial order restraining Defendants from their planned vigilante behavior, there is a substantial likelihood that Trump's supporters will descend on Philadelphia to engage in voter

[10] Defendants assert the recent *Cortes* decision supports their claim that "it would be highly disruptive and unfair" to award the requested relief in advance of the election. In this regard, *Cortes* is completely inapt. The *Cortes* Court faced the prospect of upsetting the status quo by invalidating longstanding state law regulating the conduct and qualifications of poll watchers. Here, by contrast, Plaintiff seeks to maintain the status quo by ensuring that Pennsylvania elections are fair, orderly, and conducted in compliance with existing state and federal law.

intimidation, resulting in confusion and disruption at the polls. As the District of New Jersey recently observed in evaluating Defendants' statements:

> [S]uch calls for uninformed, vigilante enforcement of voting laws carries with it the very real possibility of subjecting the adherents to legal violations. . . . it appears that some individuals who plan on "watching" polls in "certain areas" are not even aware of the law or its contours. Moreover, such broad calls to action, without specific training as to what is legally permissible, creates untrained watchers with no credible guidance. What are they to watch for? Who are they to watch? Where are they to watch? How are they to act when watching? What action are they to take? What action are they to refrain from? To whom are they supposed to report? What is legally permissible? What is unlawful? Without specific guidance, the "watchers" are left to answer these critical questions for themselves."

DNC. v. RNC, No. 81-3876 at 25 n.13 (D.N.J. Nov. 5, 2016). At bottom, Plaintiff's request is for this Court to provide the necessary "guidance" on the scope of permissible activity in and around polling places in Pennsylvania on Election Day. This is urgently necessary in light of Defendants' deliberate campaign to exhort Trump supporters to violate well-established laws proscribing voter intimidation and other unlawful activity—as well as to sow misinformation and doubt regarding the threat posed by voter fraud, and the lawful means available to members of the general public to combat it.[11]

[11] Plaintiff's attempt to ascribe bad faith to the timing of the lawsuit is without basis. While Trump first spoke of the supposedly "rigged" nature of the election results in August, only very recently did evidence begin to mount that Trump's supporters were responding to his exhortations by making plans for direct, in-person voter intimidation at Pennsylvania polling sites*See* Gottlieb Decl. Ex. 3 ("Trump Loyalists Plan Own Exit Poll Amid Claims of 'Rigged' Election," dated Oct. 20, 2016); Ex. 17 ("Trump-Linked Voter Intimidation Group Releases New Script for 'Citizen Journalists," dated Oct. 26, 2016; Ex. 22 ("White Nationalists Plot Election Day Show of Force," dated Nov. 2, 2016.

V. SPECIFIC INTENT IS NOT REQUIRED TO PROVE A VIOLATION OF SECTION 11(b)

Defendants ignore the text, legislative history, and purpose of Section 11(b) in claiming that liability under Section 11(b) requires proof that Defendants intended to intimidate voters. Resp. at 29. The text of Section 11(b) pointedly does not include an intent requirement—which was a deliberate decision by Congress to displace then existing law (Section 131(b) of the Voting Rights Act) that required proof of specific intent to demonstrate voter intimidation.[12] Accordingly, to violate Section 11(b), a defendant need only engage in activity that would cause a reasonable voter to feel intimidated, and have intended *to engage in that activity*. *See, e.g.*, *Daschle*, Civ. 04-4177, TRO Order at 2 ("Whether the intimidation was intended or simply the result of excessive zeal is not the issue, as the result was the intimidation of prospective Native American voters.").[13]

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[12] *Compare* 52 U.S.C. § 10101(b) (section 131(b) (requiring "purpose" to intimidate) *with* 52 U.S.C.A. § 10307 (Section 11(b)) (no intent requirement); *see also* H.R. Rep. No. 89-439, at 30 (1965) (noting that for Section 11(b) claims, unlike Section 131(b), "no subjective purpose or intent need be shown"), *as reprinted in* 1965 U.S.C.C.A.N. 2462. As Attorney General Nicholas Katzenbach testified during hearings on the Voting Rights Act: "Perhaps the most serious inadequacy [of Section 131(b)] results from the practice of district courts to require the Government to carry a very onerous burden of proof of 'purpose.' Since many types of intimidation . . . involve subtle forms of pressure, this treatment of the purpose requirement has rendered the statute largely ineffective." Voting Rights: Hearings on H.R. 6400 Before the Subcomm. No. 5 of the H. Comm. On the Judiciary, 89th Cong. 9 (1965). As a result, Katzenbach concluded, "defendants [sh]ould be deemed to intend the natural consequences of their acts" for purposes of Section 11(b). Voting Rights, Part 1: Hearings on S. 1564 Before the S. Comm on the Judiciary, 89th Cong. 16 (1965).

[13] In support of their atextual misconstruction of Section 11(b), Plaintiffs cite to the Ninth Circuit's decision in *Olagues v. Russoniello*, 770 F.2d 791 (9th Cir. 1985). As an initial matter, Defendants fail to mention *Olagues*'s discussion of Section 11(b) was dicta, *id.* at 804, and was

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Respectfully submitted,

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vacated by the Supreme Court. *See* 474 U.S. 806 (1987); *see Roe v. Anderson*, 134 F.3d 1400, 1404 (9th Cir. 1998) (vacated decisions not binding). And *Olagues* fails to persuade. The Court's analysis improperly lumped together claims for voter intimidation under Section 11(b) and Section 131(b) of the Voting Rights Act—stating they were subject to the same "two-pronged test"—and in support cited a case *only involving a Section 131(b) claim*. 770 F.2d at 804 (citing *United States v. McLeod*, 385 F.2d 734, 740–41 (5th Cir. 1967)). The Ninth Circuit in *Olagues*, and the two district courts cited by Defendants, [13] never considered the textual differences between Sections 11(b) and 131(b) of the Voting Rights Act, or the legislative history of Section 11(b). For these reasons, Plaintiff respectfully submits that *Olagues* lacks persuasive authority and should not be relied upon by this Court. *See also United States v. Hart*, 212 F.3d 1067, 1071 (8th Cir. 2000) ("To determine whether a true threat exists, a court must analyze the alleged threat in light of its 'entire factual context' and determine 'whether the recipient of the alleged threat could reasonably conclude that it expresses a determination or intent to injure presently or in the future.'").

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