No. 26-7303

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, *et al.*,
Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF JUSTICE, *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of California, No. 3:26-cv-12800 (Hon. Trina L. Thompson)

BRIEF OF *AMICUS CURIAE* JUSTICE CONNECTION IN SUPPORT OF PLAINTIFFS-APPELLEES AND DENIAL OF DEFENDANTS-APPELLANTS' EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR IMMEDIATE ADMINISTRATIVE STAY AND PETITION FOR MANDAMUS

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RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1-1, *Amicus Curiae* Justice Connection certifies that they are non-profit corporations with no parent corporations, and that no public held company own any interest in them.

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INTEREST OF *AMICUS CURIAE*[1]

Justice Connection provides direct support to the Department of Justice's ("DOJ") current and former apolitical career workforce. As a network of DOJ alumni, it connects current and recent employees with pro bono legal representation, mental health counseling, whistleblower assistance, FBI support, employment help, coaching, and media support. It also advocates for the integrity of DOJ's mission-critical work and speaks out in defense of the rule of law. Justice Connection operates as an independent 501(c)(3) organization. Its team of staff and advisors include former prosecutors, civil litigators, judges, FBI agents and analysts, and national security experts, who served in components across DOJ, under both Republican and Democratic administrations. Its DOJ Alumni Network—comprising thousands of former DOJ and FBI employees—includes many who enforced election integrity and voting rights laws at the Department. Justice Connection submits this brief because it has a direct interest in ensuring that DOJ's law enforcement work remains apolitical and lawful, and that DOJ is held accountable when it is not.

[1] Proposed *Amicus Curiae* Justice Connection states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *Amicus* and its counsel, made a monetary contribution to the preparation or submission of the brief.

INTRODUCTION

In its role enforcing Section 11(b) of the Voting Rights Act, 52 U.S.C. § 10307(b) (hereinafter "Section 11(b)"), the United States has argued that the statute "is to be given an expansive meaning." *See, e.g.*, Statement of Interest of U.S. at 4, *United States v. Alabama*, No. 2:24-cv-01329 (N.D. Ala. Oct. 9, 2024), ECF No. 27 (quoting *Jackson v. Riddell*, 476 F. Supp. 849, 859 (N.D. Miss. 1979)). It has also recognized that Section 11(b) includes a private right of action; often called upon courts to determine whether typically authorized or lawful activities have been undertaken in an unlawful manner or to achieve unlawful ends; and asserted that abuses of law enforcement authority fall within that scope. Consistent with this understanding of the law and the important concerns animating it, the United States voluntarily adopted policies and practices that carefully limited federal law enforcement activities around elections to minimize the risk of intimidation, avoid undue interference in ongoing elections, and respect state administration of elections.

This Administration has set aside these well-supported interpretations of federal law and restrained law enforcement approaches by publicly threatening to criminally prosecute elections officials—in every county in California—for doing their jobs and asserting the authority to take other extraordinary (and unlawful) steps to interfere in the ongoing election. These unprecedented actions by DOJ—and

others—are not ordinary law enforcement; they are unlawful strong-arm tactics that undermine any claim the United States has to the "presumption of regularity" it has historically been accorded. Appellants' Mot. at 20.[2] The district court's TRO appropriately ensures that the United States complies with federal law; it is also consistent with Department policy and practice and thus does not overly constrain the executive's ability to engage in critical law enforcement activities. At bottom, Defendants-Appellants cannot avoid complying with Section 11(b) by cloaking themselves in law enforcement authority. If courts cannot narrowly enjoin such unlawful abuses—as the district court rightly did—these protections would be hollow. This Court should deny Defendants-Appellants' Motion.

ARGUMENT

I. The United States has consistently recognized that state power can be wielded in an unlawful manner or to achieve unlawful ends in violation of Section 11(b).

In its past enforcement actions, the United States has recognized Section 11(b) affected a "broad prohibition against intimidation, threats, and coercion." Statement of Interest of U.S. at 4, *League of Women Voters of N.H. v. Kramer*, No. 1:24-cv-00073 (D.N.H. July 25, 2024), ECF No. 86; *see also* Statement of Interest of U.S. at 1, *Colo. Mont. Wyo. State Area Conf. of the NAACP v. U.S. Election Integrity Plan*,

[2] Walter Olson, *Do the Feds Still Merit the Court's Presumption of Regularity?*, CATO Inst. (Jan. 8, 2026), https://perma.cc/EYL7-W5RL.

No. 1:22-cv-00581 (D. Colo. Jan. 3, 2023), ECF No. 74 ("Section 11(b) comprehensively prohibits voter intimidation"). Consistent with that understanding—as well as the statutory text, history, and precedent—the United States has historically defended Section 11(b)'s private right of action and recognized that it extends to abuses of lawful authority or legal process—including state actors' abuses of investigatory, prosecutorial, and law enforcement authority. There is no justification for its current reversal.

The United States has repeatedly exercised its authority under 28 U.S.C. § 517 to submit Statements of Interest urging courts to uphold the private right of action and "ensur[e] the proper interpretation of Section 11(b)." U.S. SOI at 1, *Kramer*, ECF No. 86; *see, e.g.*, U.S. SOI at 1, *Alabama*, ECF No. 27; U.S. SOI at 1, *U.S. Election Integrity Plan*, ECF No. 74. The United States grounded these arguments in the text—arguments that directly contradict those it raises here, *compare* U.S. SOI at 7 n.2, *Kramer*, ECF No. 86, *with* Appellants' Mot. at 17–19—and highlighted that nearly every court to consider this question has found a private right of action. The United States also explained that to do otherwise would undermine the statute's purpose, given the "limited federal resources available to enforce the Voting Rights Act." U.S. SOI at 13, *U.S. Election Integrity Plan*, ECF No. 74.

Moreover, the United States has long recognized that, in Section 11(b) cases, "courts are often called upon to determine when otherwise lawful activities are being

used for unlawful ends." U.S. Br. at 18, *Fair Fight, Inc. v. True the Vote, Inc.*, No. 2:20-cv-0302 (N.D. Ga. Jan. 17, 2023), ECF No. 192. That a defendant may have undertaken the challenged activities pursuant to some plausible authority, then, is not dispositive in assessing whether those actions violate Section 11(b). As the Department explained:

> [C]ompliance with state law and procedure is not sufficient to inoculate otherwise unlawful voter challenges from liability under Section 11(b) . . . . Section 11(b) was designed to provide a remedy against government officials and others who weaponized state law to intimidate and coerce voters with conduct ranging from baseless arrests and prosecutions to abuse of voter registration laws, challenges, and purges.

Id. at 19 n.9. These arguments have also arisen in Section 11(b) actions related to activities like voter outreach, voter challenges, and private poll monitoring—practices ordinarily authorized or even protected by law. *See* Statement of Interest of U.S. at 4–10, *Nat'l Coal. on Black Civic Participation v. Wohl*, No. 20-cv-08668, (S.D.N.Y. Aug. 12, 2022), ECF No. 235; Statement of Interest of U.S. at 7–13, *Fair Fight, Inc. v. Catherine Engelbrecht*, No. 24-10372 (11th Cir. May 20, 2024), ECF No. 27; Statement of Interest of U.S., *League of Women Voters of Ariz. v. Lions of Liberty LLC*, No. 22-cv-08196 (D. Ariz. Oct. 31, 2022), ECF No. 17. Courts have found that the right to engage in these activities is not unlimited and must yield when they become intimidating, threatening, or coercive. The same logic applies to misuse of law enforcement authority.

In determining whether such activities run afoul of 11(b), the United States and courts have required a holistic analysis. Relevant factors, according to the United States, include whether the challenged activities occur close in time or place to elections and whether they would subject individuals to public scrutiny or opprobrium. U.S. SOI at 7, *Lions of Liberty*, ECF No. 17; U.S. SOI at 18, *Kramer*, ECF No. 86. The United States has also explained that private parties' use of law enforcement tactics, such as interrogations, surveillance, or threats of legal consequences, can give rise to 11(b) concerns. *E.g.*, U.S. SOI at 5–8, *Lions of Liberty*, ECF No. 17; U.S. SOI at 12, *Kramer*, ECF No. 86. And private parties' use of such tactics paired with "formal governmental processes" can exacerbate intimidating effects because they "carry the official imprimatur of the state" and "can raise the specter of administrative difficulties and . . . adverse legal consequences." U.S. Br. at 13, *Fair Fight v. True the Vote*, ECF No. 192. Threats of adverse legal action are even more colorable when made by someone with actual power.

Courts, too, have recognized that prosecutions or other adverse government actions taken in retaliation for the exercise of rights can violate the constitution. "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort . . . and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is patently unconstitutional." *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)

(citation modified). The Supreme Court emphasized that even "the fear of . . . vindictiveness may unconstitutionally deter a defendant's exercise" of rights. *Blackledge v. Perry*, 417 U.S. 21, 28 (1974). Courts' recognition that government action taken under color of law can discourage the exercise of political rights contextualizes how such actions can constitute voter intimidation under Section 11(b). And—outside of this context—it is well established that courts can (and must) limit prosecutorial and law enforcement discretion to ensure compliance with federal law. *Barnes v. Felix*, 605 U.S. 73 (2025) (Fourth Amendment protects against excessive force by law enforcement officers); *Haynes v. Washington*, 373 U.S. 503 (1963) (threats and coercion cannot be used to obtain confession); *Miranda v. Arizona*, 384 U.S. 436 (1966) (Fifth Amendment protects people suspected of crimes from self-incrimination). That is no less true in the context of Section 11(b).

II. The TRO is consistent with longstanding government policy and practice and is not overly burdensome.

Consistent with its long-held understanding of Section 11(b), the federal government historically embraced a careful law enforcement approach around elections to minimize the risk that its enforcement activities would harm voters and individuals who aid voters, disrupt the constitution's delegation of election administration to states, or otherwise interfere in the democratic process. The actions challenged here run contrary to this well-founded approach. And in response, the Court's Order does not impose unreasonable or overly burdensome restrictions on

law enforcement; rather, it requires DOJ to adhere to reasonable limitations on its power and to operate consistently with its own policies mandating restraint, as provided in the DOJ's Federal Prosecution of Election Offenses Manual ("EOM"), the Justice Manual's instructions regarding the non-interference in elections, the FBI Domestic Investigations and Operations Guide § 4.4 (2024) ("DIOG"), and the Civil Rights Division's election monitoring program.

The DIOG specifically requires that the "'least intrusive' means or method be considered and . . . used to obtain intelligence or evidence." DIOG § 4.4. Consistent with the DIOG, the EOM explains that, for election fraud matters, "in most cases voters should not be interviewed, or other voter-related investigations done, until after the election is over" because "[s]uch overt investigative steps may chill legitimate voting activities."[3] Accordingly, the EOM instructs that "the Department should not engage in overt criminal investigative measures in matters involving alleged ballot fraud until the election in question has been concluded, its results certified, and all recounts and election contests concluded."[4] Overt criminal investigations were to occur after the election and any preliminary fact gathering was to be done discreetly because of the perception of such investigations by voters and the public.[5] Anything beyond a preliminary investigation required approval from

[3] Federal Prosecution of Election Offenses 11 (Richard C. Pilger ed., 8th ed. 2017).
[4] *Id.*
[5] *Id.* at 11–12.

DOJ's Public Integrity Section ("PIN"). But the Administration has also crippled PIN, reducing it from 36 attorneys to around just two, leaving few of the historical internal constraints on investigating election crimes intact.[6]

Importantly, the EOM emphasizes that the federal government's role is *not* prevention or intervention, but prosecution *after* crimes have occurred—again—in part to protect voters and safeguard the democratic process.[7] This has been consistent for decades. The 1984 EOM reasoned "that the Constitution expressly leaves the States primary responsibility for the conduct of elections raises federalism that make federal intervention in all but the most serious of these matter inappropriate."[8] In investigating and prosecuting election fraud, prosectors were to be deferential to state officials and act as a "last resort to redress longstanding patterns of egregious electoral abuse."[9] Likewise, the Justice Manual's instructions regarding the non-interference in elections cautions that "[t]he Department has a limited role in these processes and should generally avoid interfering or appearing to interfere with election administration, tabulation, validation, or certification."[10]

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[6] *See* Jose Pagliery, *The Justice Department Had 36 Lawyers Fighting Corruption Full-Time. Under Trump, It's Down to Two.*, The Wash. Sun (Sep. 22, 2025), https://perma.cc/459L-2FRD.
[7] *Id.* at 8.
[8] Federal Prosecution of Election Offenses 49 (Craig C. Donsanto ed., 4th ed. 1984).
[9] *Id.*
[10] U.S. Dep't of Just., Just. Manual § 9-85.300 (2018).

This was also true in the civil context. Most notably, the Civil Rights Division structured its election monitoring program to minimize the risk it would intimidate voters, declining to allow criminal prosecutors, investigators, and others who supported criminal work to participate.[11]

The challenged actions here run afoul of both the spirit and letter of these policies. Defendants nevertheless try to recast the exceptional as banal, arguing that DOJ is enforcing federal law and accordingly asked election officials "to temporarily 'pause or segregate ballots'" from individuals suspected to be ineligible voters. U.S. Br. at 10. But this overlooks critical facts, including that the lists the United States provided to officials were replete with errors; that officials have separate legal obligations under federal and state law to process these ballots; and that the efforts the United States has thus far made to require California officials to comply have been roundly halted by federal courts. *See generally*, Appellees' Opp'n at 7.

This Court's Order appropriately recognizes the extraordinary nature of the government's actions and imposes remedial restrictions on DOJ's activities that are consistent with its past practice and thus do not overly burden legitimate activities. Importantly, the Order allows the Department to investigate election officials who are not otherwise complying with state and federal law; it simply restricts the

[11] Stephanie Berger & Regan Rush, *Inside DOJ's Election Monitoring Program, Past and Present*, Red Line for C.R. (Sep. 29, 2026), https://perma.cc/XFG3-DTKJ.

Department from making threats to election officials based solely on the Department's unsubstantiated allegations of an individual's ineligibility and from threatening criminal prosecution if election officials permit lawfully registered voters to vote. Order at 7. For example, DOJ can still act if there is factual predication that a jurisdiction is unlawfully destroying records. The Department can also pursue matters involving officials illegally facilitating voting for non-citizens, so long as those law enforcement actions are not predicated solely on an official's refusal to obey the unlawful federal directives at issue.

As former federal law enforcement officials represented in a related matter, "the government's asserted harm should be measured against what the order actually does": "the order affects when certain steps may be taken, not whether the government may investigate."[12] That DOJ policy long cautioned against or proscribed law enforcement operations of this nature shows how the district court's injunction, which permits investigations into crimes absent coercive threats, "costs an investigation nothing"[13] but safeguards the integrity of a federal election.

CONCLUSION

For these reasons, *Amicus* Justice Connection urges the Court to deny Defendants-Appellants' Emergency Motion.

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[12] Br. of *Amicus Curiae* Former Law-Enforcement Officials *et al.* at 10, *Cal. Nurses Ass'n v. Mullin*, No 26-7139 (9th Cir. 2026), ECF No. 32.1.
[13] *Id.* at 9.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 29(a)(5) because it contains 2,577 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)–(6) because it was prepared using Word for Microsoft 365 in 14-point Times New Roman Font.

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