Michael J. Wynne (*pro hac vice)*
TX Bar No. 785289
Cameron Powell (*pro hac vice application to be submitted)*
DC Bar #459020
Adam S. Weiss (*pro hac vice pending)*
TX Bar No. 785207
GREGOR WYNNE ARNEY, PLLC
909 Fannin Street, Suite 3800
Houston, Texas 77010
Phone: (281) 450-7403
Emails:
mwynne@gwafirm.com
cpowell@gwafirm.com
aweiss@gwafirm.com

Alexander Kolodin (SBN 030826)
Veronica Lucero (SBN 030292)
Davillier Law Group, LLC
4105 N. 20th St., Ste. 110
Phoenix, AZ 85016
Phone: (602) 730-2985
Fax: (602) 801-2539
Emails:
akolodin@davillierlawgroup.com
vlucero@davillierlawgroup.com
phxadmin@davillierlawgroup.com

Attorneys for Defendant Melody Jennings

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

League of Women Voters of Arizona,

Plaintiffs,

v.

Melody Jennings, *et al.,*

Defendants.

No. CV-22-01823-PHX-MTL
(Consolidated with CV-22-08196-PCT-MTL)

REPLY IN SUPPORT OF MOTION TO DISMISS

Defendant Melody Jennings ("Defendant" or "Jennings") submits this Reply in

Support of her Motion to Dismiss.

Plaintiff brought this action claiming a defendant (1) made plans to illegally intimidate voters and (2) tried to intimidate voters – but it oddly neglected to bring along any identifiable voter alleging actual intimidation by Jennings. Plaintiff argues it has *standing* because it suffered damages from Jennings' *plans*, social media posts, and third parties' actions, but Plaintiff, which makes no claim itself to being a voter, does not state a claim that it, *let alone any identified voter*, was actually intimidated by Jennings. Plaintiff will not be able to prove intimidation at trial, either, for the simple reasons that (1) Plaintiff is not a voter, (2) the allegedly intimidated but unnamed voters are not identified, and (3) the statutes under which Plaintiff brings its claims to proscribe only intimidation of voters, not mere planning activities that might speculatively lead non-profits like Plaintiff to elect to alter their strategies, even by "divert[ing] money, time, and other resources," Compl., ¶11, or by having to "expend roughly $2,000 to send text messages." *Id*., ¶69.

What Plaintiff alleges instead is that Jennings is primarily liable for the mere existence of information Plaintiff and its lawyers researched, scraped off social media, and collected for their Complaint (collectively, the "Lawyers' Research") about Ms. Jennings' feelings on an issue of public concern – the vulnerabilities to mishap and potential abuse of drop boxes – even if Plaintiff does not allege a single voter him- or herself knew about the information gathered during the Lawyers' Research. Plaintiff's attempts here would make bad precedent for a Voting Rights Act claim, not to mention how unfair they would be to Ms. Jennings.

I. Plaintiff Alleges the Lawyers' Research, If Known by a Voter, Might Have Been Interpreted By a Voter as Intimidation. But Plaintiff Cannot Allege Any Identifiable Voter Knew about the Lawyers' Research.

Plaintiff argues, unpersuasively, that its Complaint contains "a multitude" of "specific and detailed" allegations "directly charging Defendants with unlawful conduct arising from their orchestration of 'a state-wide campaign' to 'surveil and harass voters at Arizona drop boxes.'" Plf's Opp'n at 7 (citing Compl. at ¶6). Later, though, Plaintiff makes clear it is urging liability on anyone who might be implicated in "an air" of fear and anxiety wafting in from reports "in both local and national media." *Id.* at ¶39. And so here we see the cracks in Plaintiff's case: Plaintiff argues that intimidation of individual voters occurs by a defendant's "orchestration" of "campaigns", that might hypothetically intimidate unspecified voters in the future, even without those voters' knowledge. In other words, Plaintiff urges imposition of liability for mere planning and advocacy – something that could be done in a different state entirely, with no impact on any Arizona voter – and for making posts on a secondary social media site, TruthSocial, that Plaintiff fails to allege anyone relevant to its Complaint has even read. Indeed, and fatally, Plaintiff fails to identify a single, actual voter, in Arizona, who knew about Jennings (via the Lawyers' Researcj on her planning or posts on secondary social media), and Plaintiff fails to allege such a such voter was reasonable in feeling intimidated by the Lawyers' Research (and the "air" of fear) and can testify at trial.[1]

[1] Lacking facts plausibly alleging intimidation of actual voters, Plaintiff was forced to speculate about what might happen: "because of Defendants' campaigns, [unidentified, hypothetical] Arizona voters who wish to lawfully use drop boxes must do so under threat that they will be monitored by armed vigilantes, have their faces and cars filmed, be

Language from cases like *Nat'l Coal. on Black Civic Participation v. Wohl*, 512 F. Supp. 3d 500, 509 (S.D.N.Y. 2021) (emphasis added), where the District Court held "intimidation includes messages that a reasonable recipient, *familiar with the context of the message*, would interpret as a threat of injury," has inspired plaintiffs' lawyers nationwide to try to shoehorn into their voting-related pleadings a boundless range of events and circumstances out of any one individual or group's control. But Plaintiff has cited no statute, piece of legislative history, case law, or other authority to support imposing liability for a *context* of alleged voting-related intimidation that *voters were not aware of*. Ms. Jennings's actions that allegedly intimidated unidentified voters include the following plans and obscure social media posts dug up in Plaintiff's Lawyers' Research, none of which any identified voter is alleged to have even known about:

Allegation from Plaintiff's Lawyers' Research . . .	**. . . Lacking Any Alleged Connection to Any Voter**
PLANNING: "[C]onspiring to organize and execute [a] large-scale campaign" to surveil voters at drop boxes and "actively recruiting volunteer[s]" and agents with the goal of stationing "at least ten monitors at each drop box." Compl. at ¶¶6, 43, 46.	These Paragraphs accuse Jennings of organizing and recruiting for the purpose of intimidating hypothetical voters in the future. The paragraphs identify no voters who knew of these activities.
PLANNING: Coordinating volunteers and agents to "in Defendants' words, 'gather video (and live witness evidence)'" of drop box voters by recording voters' faces and license plates numbers. *Id*.	Paragraph 43 further accuses Defendants of coordinating. It identifies no voters who knew of the activities contained therein. It thus states no fact plausibly pleading intimidation of a voter by the alleged acts of Jennings.
OMITTED ALLEGATIONS OF AGENCY: Taking credit for the surveillance of drop box voters by "confirm[ing] that the individuals who intimidated" voters by recording their faces and license plate	Paragraphs 55 and 56 fail to properly plead any agency relationship between the "volunteers" and Jennings. Plaintiff's claim that third parties worked, without pay, with views or concerns similar to Ms. Jennings does not make out a claim that

baselessly reported to law enforcement, and have their reputations and personal safety put at risk." Compl., ¶7.

numbers "were volunteers working with [Jennings] and Defendant CE-USA." *Id*. at ¶ 55; *see also id*. at ¶¶ 56-57.	the third parties were legally *agents* acting under Jennings' authority. Paragraph 57 fails to connect the alleged intimidation to Jennings, and thus fails to state a claim.
PLANNING: Explicitly threatening "to 'dox' voters that Defendants and their volunteers determine are 'mules.'" *Id*. at ¶ 44.	Paragraph 44 fails to identify a single voter who was aware of the alleged threat to dox him or her in some unspecified point in the future.
SPEECH in SOCIAL MEDIA POSTS: Actively disseminating images of drop box voters' license plates or faces alongside baseless accusations that "the voter was engaged in illegal activity." *Id*. at ¶ 50 (social media post that on its face does not make any such allegation); *see also id.* at ¶¶ 49 (same), 55.	Paragraphs 49 and 50 cite social media posts that demonstrably do not make any allegations about illegal activity. The allegations fail to identify any voter who actually knew of Jennings' alleged accusations of their illegal activity. Plaintiff also identifies no likely voter who was *aware* of the social media posts.
SPEECH: "[S]pread[ing] disinformation about the legality of drop box voting." *Id*. at ¶ 22; *see also id*. at ¶¶ 30, 84[2]	These allegations of speech fail to identify any voter who actually knew of the alleged disinformation, let alone one who was reasonably intimidated by it.
SPEECH + OMITTED ALLEGATIONS OF AGENCY: "Claim[ing] responsibility" when Defendants' agents monitored drop boxes while "armed" and "dressed in tactical gear[.]" *Id*. at ¶ 58.	These allegations fail to identify either an agency relationship with the alleged "agents" or a single voter who found the acts of the third parties present at any location who was intimidated by Ms. Jennings or any action she took.

In short, because Plaintiff identifies no voters, or even likely voters, who knew of its Lawyers' Research regarding Jennings' plans and social media posts (some of them about third parties' activities), Plaintiff states no fact plausibly pleading "intimidation" of a voter by Jennings – as Section 11(b) requires. To hold that any unidentified voter was "intimidated" by acts he or she knew nothing about would not be "plausible" under *Iqbal*.

[2] Paragraphs 30 and 84 cannot help Plaintiff on a motion to dismiss. In a case with 22 "Defendants," these paragraphs refer, uselessly, to "Defendants," an instance of impermissible group pleading that may not be construed to refer to Jennings along with the up to 21 other defendants whom Plaintiff chose to "collectively" define as "Defendants". *See* Compl. at 1-2.

II. Plaintiff Fails to Allege that Unknown Third Parties Were Plausibly Acting as "Agents" of Jennings, and Because Their Statements Are Unexcepted Hearsay, They May Not Be Considered on a Motion to Dismiss.

Plaintiff is incorrect to think that Jennings may be held liable for the actions of third parties, *see, e.g.* Compl. ¶¶55-56, unnamed and therefore unavailable for deposition let alone trial, who supposedly said they were "volunteers" "working with" Jennings. There are two fatal defects in these allegations. First, because these allegedly intimidated voters are not identified, their statements are unexcepted hearsay under Fed. R. Evid. 804(a) that can form no basis for denying a motion to dismiss. "[I]t is improper for a court to consider hearsay statements when ruling on a motion to dismiss" unless they are subject to a hearsay exception. *Beydoun v. Wataniya Rests. Holding, Q.S.C.*, 768 F.3d 499, 506 (6th Cir. 2014) (citing *Kamen v. Am. Tel. & Tel. Co.*, 791 F.2d 1006, 1011 (2d Cir.1986);[3] *see also Eshelman v. Orthoclear Holdings, Inc.,* No. C 07-1429 JSW, 2009 WL 506864, at *7 n.1 (N.D. Cal. Feb. 27, 2009) (rejecting "purported testimony by this unidentified witness" on grounds it "is hearsay and therefore inadmissible" and "it is not judicially noticeable on a motion to dismiss"); *Michael Kors, LLC v. Chunma USA, Inc.*, No. 15-23587-CIV, 2016

[3] Even on motions to dismiss for lack of personal jurisdiction, in which courts are not restricted to the pleadings as they are on a 12(b)(6) motion, *see McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988), courts will not consider hearsay even of identified witnesses. *See United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1278 (11th Cir. 2009) (refusing to consider hearsay evidence to establish personal jurisdiction where evidence was controverted by defendant's affidavit); *Park W. Galleries, Inc. v. Franks*, No. 12 CV 3007, 2012 WL 2367040, at *7 (S.D.N.Y. June 20, 2012) (noting "hearsay evidence submitted by plaintiff is not sufficient to defeat a motion to dismiss for lack of personal jurisdiction"); *Campbell v. Fast Retailing USA, Inc.*, No. 14-6752, 2015 WL 9302847, at *6 (E.D. Penn. Dec. 22, 2015) (stating plaintiff cannot satisfy burden in opposing Rule 12(b)(2) motion "by relying on inadmissible hearsay"); *Xcentric Ventures, LLC v. Bird*, 683 F. Supp. 2d 1068, 1071 (D. Ariz. 2010) (finding all evidence submitted to demonstrate personal jurisdiction must be admissible evidence).

WL 11020246, at *5 (S.D. Fla. Feb. 23, 2016) (holding it is appropriate, on a motion to dismiss, "to disregard vague statements about unknown and unnamed witnesses"); *Trinity Christian Ctr. of Santa Ana, Inc. v. New Frontier Media, Inc*., 761 F. Supp. 2d 1322, 1327 (M.D. Fla. 2010) (rejecting plaintiff's argument, on a motion to transfer venue in a trademark case, that it would "likely" call unnamed "Florida consumers to testify regarding customer confusion between the parties' marks" on grounds "it is appropriate to disregard this assertion because it is speculation"). The proponent of a statement has the "burden of showing that a statement fits within a hearsay exception." *Beydoun*, 768 F.3d at 506. Plaintiff's Complaint made no attempt to do so.

Second, Plaintiff's allegations about unknown third parties in Paragraphs 55 and 56 (as well as 58) fail to properly plead any agency relationship between those "volunteers" and Ms. Jennings.[4] Plaintiff makes an *implausible* assumption, not supportable by its own factual allegations, that unidentified third parties who supposedly claim they are "volunteers", who "*worked with*" Jennings, are somehow also *agents* of Jennings. That's not how it works.

"Under traditional agency rules, 'agency' is the 'fiduciary relation which results from the manifestation of [1] consent by one person to another that the other shall act on his behalf and subject to his control, and [2] consent by the other so to act.'" *In re Sky Harbor Hotel Properties, LLC*, 246 Ariz. 531, Para. 6, 443 P.3d 21, 23 (2019) (citing

[4] Defendant Jennings does not even address the numerous paragraphs in the Complaint that claimed (1) an unidentified voter was intimidated by (2) actions of unidentified third parties who are (3) not alleged to be agents of Defendant, such as in Paragraphs 57, 59-62, notwithstanding Plaintiff's careless allegation, in Paragraph 63, that such allegations somehow plead voters were "intimidated by Defendants."

Restatement (Second) of Agency sect. 1 (Am. Law. Inst. 1958)). Plaintiff pleads no facts setting forth mutual consent by Jennings and any unidentified "volunteers" for those volunteers to act (1) "on behalf of" and (2) "subject to [the] control" of Jennings. That unnamed third parties may have acted for similar reasons or claimed they were "volunteers", does not make out a claim that the third parties were agents acting under authority of the defendant. The phrase "working for", which Plaintiff did not use, *might* have pleaded an agency relationship, or merely one of boss-employee. "Working with" is something *colleagues* do with one another. The cases in which third parties were properly alleged to have been acting as agents make this clear. In *National Coalition on Black Civic Participation v. Wohl*, the district court entered a temporary restraining order halting defendants' *hired contractors* from engaging in robocalls of false information. 498 F. Supp. 3d 457, 465 (S.D.N.Y. 2020). In *Daschle v. Thune*, a federal court enjoined individuals *acting on behalf of* a Senate candidate from following voters from a polling place and copying their license plate numbers. In *Council on Am.-Islamic Rels.-Minn. v. Atlas Aegis, LLC*, 497 F. Supp. 3d 371, 379, 381 (D. Minn. 2020), the defendants enjoined by the court had themselves deployed armed guards at polls. And in *Democratic Nat. Comm. v. Republican Nat. Comm*., 673 F.3d 192, 196 (3d Cir. 2012), the RNC was alleged to have enlisted the help of off-duty sheriffs and police officers to intimidate voters.

The court in *Fair Fight v. True the Vote,* Case. No. 2:20-CV-00302-SCJ, recently rejected a plaintiff's attempt to insinuate agency without pleading a factual agency relationship. Referring to third-party social media postings, the court pointed out that those postings did not show that "*Defendants* have intimidated or threatened voters in violation

of Section 11(b).” Ex. A, Order of Jan. 1, 2021, at 27 (emphasis in original). The court explained that “without clearer connections borne out by evidence,” “[h]ow third-party actors react to Defendants’ actions is not directly attributable to Defendants.” *Id.* Plaintiff here has likewise not pointed to evidence or potentially discoverable evidence sufficient to establish any agency relationships with the third parties. Indeed, in the social media post in which Plaintiff claims third parties “confirmed to a reporter they were volunteers with Defendant CE-USA,” Compl. ¶56 n.16, the text of the post itself identifies Plaintiff’s own failure to establish any agency: “This group says they’re ***with*** Clean Elections USA, *but wouldn’t elaborate on if they’re volunteers,* ***or what***.” (Emphasis added). Any avid sports or partisan political fan can boast he or she is “with” a team or a candidate. Moreover, because the allegedly intimidating third parties here are neither identified nor identifiable, Plaintiff will be unable to establish any factual predicate for its case against Jennings.

The *Fair Fight* court even more recently rejected a similar argument defendants were liable under Section 11(b) for all manner of acts known only to the plaintiff’s lawyers, even without any “direct contact” between defendants and any voter, *see* Ex. B, Order at 15 (March 9, 2023), holding that, “for their Section 11(b) claim, Plaintiffs must show *direct action toward voters* that caused or could have caused voters to feel reasonably intimidated,” Order at 11-12 (emphasis added), a requirement that may be satisfied if a plaintiff properly alleges, as Plaintiff does not, that defendants “engaged a third-party to make direct contact with voters.” *Id.* at 20. “The caselaw, while not overt in naming a causation requirement, supports [the point] that Defendants’ actions must have some connection to the voters’ alleged intimidation.” *Id*. at 23-24.

Here, Plaintiff fails to identify either (1) any direct act by Ms. Jennings or (2) any direct act by unnamed third parties doing anything (a) even after, (b) let alone *because*, they interacted with her. Plaintiff says Defendants "took credit" and "took responsibility" for the acts of third parties after the fact, which is not an allegation of *agency* in which Jennings is alleged to have engaged the third parties, prior to their actions, in such a way as to make a defendant vicariously liable for them. Saying "attaboy" after the fact does not substitute for the element of causation required to impose liability.

III. The First Amendment Bars Plaintiff's Voter Intimidation Claims

While Plaintiff claims others' actions may have been intimidating, it points to no evidence anyone was intimidated by *Defendant Jennings* or her erstwhile website. Rather, its claim (before the election) was that hypothetical voters *could be* intimidated by the combination of third parties' actions and Jennings' statements. We addressed above why the unidentified third parties' actions may not be attributed to Jennings without the due process of a showing of agency. That leaves her statements – her speech.

The Supreme Court has long recognized the First Amendment's protection of free speech is at its apogee when the speech to be protected is political in nature. "The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339, 130 S. Ct. 876, 898, 175 L. Ed. 2d 753 (2010) (citation omitted). This protection relates both to the speaker's right to express himself or herself and to the recipient's right to be informed on or at least about all angles on matters of public concern.

Here, the message Jennings sought to convey — and conveyed—is an example of

political speech, entitled to the highest degree of protection. She was trying to call attention to the frailty of an unmonitored drop-box voting system. This is not just *speech*, it goes to the heart of freedom of expression. And that message—whatever one may think of it or how it may be expressed -- is straightforward: we cannot take perceived efficiencies in voting for granted. Unmonitored ballot drop-boxes are vulnerable to mishap, error and indeed mischief – including the opportunity for ill-intentioned persons to disrupt the process by for instance depositing multiple ballots or depositing fraudulent ballots. Calling upon society to be aware of such vulnerabilities is classic political speech—expressing concern about an element of the functioning of democratic government.

Plaintiff cites three other examples of Ms. Jennings' speech and third parties' expressive conduct supposedly giving rise to an intimidation claim against Jennings:

- "Claim[ing] responsibility" when Defendants' agents monitored drop boxes while "armed" and "dressed in tactical gear[.]" Compl. at ¶ 58.
- "[S]pread[ing] disinformation about the legality of drop box voting." *Id*. at ¶ 22; *see also id.* at ¶¶ 30, 84
- Actively disseminating images of drop box voters' license plates or faces alongside baseless accusations that "the voter was engaged in illegal activity." *Id*. at ¶ 50 (social media post that on its face does not make any such allegation); *see also id*. at ¶¶ 49 (same), 55.

Though Plaintiff failed to plead facts establishing any agency relationship, the alleged activities of dressed-up third parties, even if somehow vicariously attributable to Jennings, would still constitute the protected expressive message outlined above. "Spreading" information (of virtually any kind) is obviously speech – and Plaintiff has pleaded no exception to Jennings' right to such speech by pleading an identified voter saw and was *intimidated* by alleged "misinformation". Finally, the Court can and should confirm that the social media posts cited in Plaintiff's Paragraphs 49 and 50 on their face amount to

nothing like an "accusation" that a voter "was engaged in illegal activity." Stretching for its "air" of intimidation, Plaintiff is reaching too far here.

DATED this 27th day of March 2023.

By */s/ Michael J. Wynne*

Alexander Kolodin
Veronica Lucero
Davillier Law Group, LLC
4105 N. 20th Street, Ste. 110
Phoenix, AZ 85016

Michael J. Wynne (*pro hac vice)*
Adam Weiss (*pro hac vice pending)*
Cameron Powell (*pro hac vice pending)*
GREGOR WYNNE ARNEY, PLLC
909 Fannin Street, Suite 3800
Houston, Texas 77010

Attorneys for Defendants Clean Elections USA and Melody Jenkins

CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2023, I electronically submitted the foregoing document to the Clerk's office using the CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants on record.

By */s/ Michael J. Wynne*
Michael J. Wynne