

The Honorable Barbara J. Rothstein

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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

AMBER KRABACH, an individual,

Plaintiff,

v.

KING COUNTY, a local government entity; JULIE WISE, in her individual capacity, and in her official capacity as Director of King County Elections; STEVE HOBBS, in his official capacity as Secretary of State of the State of Washington; and JAY INSLEE, in his official capacity as Governor of the State of Washington,

Defendants.

NO. 2:22-cv-01252-BJR

**MOTION FOR LEAVE TO
FILE AMICUS BRIEF IN
SUPPORT OF DEFENDANTS
BY THE INSTITUTE FOR
CONSTITUTIONAL
ADVOCACY AND
PROTECTION**

The Institute for Constitutional Advocacy and Protection (ICAP) seeks leave to file the attached amicus brief to aid the Court in its resolution of the legal issues at stake in this case. ICAP is a non-partisan public-interest law group within Georgetown University Law Center that is committed to using litigation, policy, and education to defend constitutional rights and values while working to restore confidence in the integrity of our governmental institutions. In addition to litigation in which it represents a party, ICAP has submitted more than 75 amicus briefs in the Supreme Court, appellate, and trial courts, in order to provide its expertise, drawn from its litigators' many years of experience at the U.S. Department of Justice and elsewhere, to constitutional matters before the courts.

1 ICAP's expertise is particularly useful to this dispute. ICAP is committed to a robust
2 First Amendment right to speak and associate freely, and has brought or supported litigation
3 challenging federal, state, and local decisions that intrude on First Amendment rights. *See*
4 ICAP, *Safeguarding First Amendment Rights*, [https://www.law.georgetown.edu/icap/our-
5 work/safeguarding-first-amendment-rights/](https://www.law.georgetown.edu/icap/our-work/safeguarding-first-amendment-rights/) (last visited Oct. 10, 2022). ICAP also recognizes
6 the importance of free and fair elections, including the rights of voters to cast their ballots
7 without intimidation or fear of violence. Based on its expertise in both First Amendment and
8 voter intimidation, ICAP has published guidance and fact sheets for law enforcement and
9 others on how to navigate threats of political violence while preserving First Amendment
10 rights. ICAP, *Guidance Related to Elections and Polling Places*,
11 [https://www.law.georgetown.edu/icap/our-work/guidance-related-to-elections-and-polling-
12 places/](https://www.law.georgetown.edu/icap/our-work/guidance-related-to-elections-and-polling-places/) (last visited Oct. 10, 2022).

13 ICAP's proposed amicus brief draws on Supreme Court precedent recognizing the
14 government's compelling interests in protecting voters from intimidation and preserving
15 election integrity. Those interests have driven more than a century of federal and state criminal
16 laws proscribing voter intimidation. Under the applicable First Amendment framework
17 discussed in the proposed amicus brief, voter intimidation like the speech at issue in this case
18 is not entitled to First Amendment protection. Moreover, even if plaintiff's signs were
19 protected speech, the Supreme Court has been clear that some infringement on First
20 Amendment rights is justified where "the exercise of free speech rights conflicts with another
21 fundamental right, the right to cast a ballot in an election free from the taint of intimidation
22 and fraud." *Burson v. Freeman*, 504 U.S. 191, 211 (1992). Here, where there was no less
23 restrictive means by which King County could protect voters from the intimidation and
24 confusion created by plaintiff's signs than by removing them, its action was constitutionally
25 permitted in furtherance of its compelling interests.

26

1 A “district court has broad discretion to appoint amici curiae.” *Hoptowit v. Ray*, 682
2 F.2d 1237, 1260 (9th Cir. 1982), *abrogated on other grounds, Sandin v. Conner*, 515 U.S. 472
3 (1995). “District courts frequently welcome *amicus* briefs from non-parties ‘concerning legal
4 issues that have potential ramifications beyond the parties directly involved or if the amicus
5 has unique information or perspective that can help the court beyond the help that the lawyers
6 for the parties are able to provide.’” *Chong Yim v. City of Seattle*, Case No. C18-0736, 2018
7 WL 5825965, at *1 (W.D. Wash. Nov. 7, 2018) (quoting *Skokomish Indian Tribe v. Goldmark*,
8 Case No. C13–5071JLR, 2013 WL 5720053, at *1 (W.D. Wash. Oct. 21, 2013)). This Court
9 has also previously authorized the filing of amicus briefs in cases that, like this one, raise
10 constitutional questions. *See, e.g., Rynearson v. Ferguson*, No. 17-cv-05531, Dkt. #51 (W.D.
11 Wash. Oct. 19, 2018) (granting motion for leave by third-party advocacy group to file amicus
12 brief concerning First Amendment issues); *Hopper v. Melendez*, No. 05-cv-5680, Dkt. #182
13 (W.D. Wash. Oct. 23, 2007) (granting motion for leave by third-party advocacy group to file
14 amicus brief concerning constitutional dimension of the right to counsel in immigration
15 proceedings). Because this case may have implications beyond the parties to this dispute, and
16 because ICAP brings a perspective beyond that offered by the parties, ICAP seeks to provide
17 a fuller picture of the constitutional issues at stake.

18 This brief is also timely. The Court’s discretion may be informed by Federal Rule of
19 Appellate Procedure 29, which allows prospective amici curiae to submit a proposed brief
20 accompanied by a motion for leave to file up to “7 days after the principal brief of the party
21 being supported is filed.” Fed. R. App. P. 29(a)(6). The attached brief is timely under this rule.
22 *See Microsoft Corp. v. U.S. Dep’t of Justice*, Case No. C16-0538JLR, 2016 WL 4506808, at
23 *9 (W.D. Wash. Aug. 29, 2016) (analogizing “to the applicable rules found in the Federal
24 Rules of Appellate Procedure” and permitting nonparty to file amicus brief “no later than seven
25 days after ‘the principal brief of the party being supported is filed’”) (quoting Fed. R. App. P.
26 29(a)(6)). ICAP submits this brief in support of defendants, who filed their opposition to

1 plaintiffs' motion for preliminary injunction seven days ago. This case is at a preliminary stage,
2 and no party will be prejudiced by the brief's filing. No party or their counsel provided
3 financial support for the drafting of this brief. Counsel for Defendants have consented to the
4 filing of this brief. On October 10, 2022, undersigned counsel contacted counsel for plaintiff
5 by email to ascertain his position, but as of the time of filing, counsel has not responded.

6 For these reasons, ICAP asks the Court to grant it leave to file the attached amicus brief.

7 Dated this 11th Day of October, 2022.

8 Respectfully submitted,

9 INSTITUTE FOR CONSTITUTIONAL
10 ADVOCACY & PROTECTION

11 s/Rupa Bhattacharyya

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CERTIFICATE OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court’s CM/ECF System, which will serve a copy of this document upon all counsel of record.

DATED this 11th day of October, 2022, at Seattle, Washington.

s/Zachary J. Pekelis
Zachary J. Pekelis, WSBA #44557

The Honorable Barbara J. Rothstein

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**AMICUS BRIEF IN SUPPORT OF
DEFENDANTS BY THE
INSTITUTE FOR
CONSTITUTIONAL ADVOCACY
AND PROTECTION**

1 **INTEREST OF AMICUS CURAIE**

2 The Institute for Constitutional Advocacy and Protection (ICAP) is a non-partisan
3 public-interest law group housed at Georgetown University Law Center. ICAP’s mission is to
4 use the power of the courts to defend American constitutional rights and values while working
5 to restore confidence in the integrity of our governmental institutions. ICAP has extensive
6 experience litigating First Amendment issues and matters aimed at protecting constitutional
7 democracy.¹ ICAP also regularly consults with state and local public officials and community
8 organizations about the scope of governmental regulation that is permissible to protect public
9 safety and democratic processes while preserving and protecting constitutional rights.²

10 As described fully herein, the applicable First Amendment framework does not deprive
11 governments—when confronted with efforts at voter intimidation that deter voters and disrupt
12 the democratic process of elections—of the power to act to safeguard the fundamental right of
13 their citizens to vote freely without fear, threat, or undue influence. Under this framework,
14 King County’s act of removing intimidating signs from near ballot boxes that were open to
15 receive votes cast in Washington’s August 2, 2022, primary elections was not unconstitutional.

16 **SUMMARY OF ARGUMENT**

17 Voter intimidation has a long history in this country, despite the Supreme Court’s
18 repeated recognition of the right to vote freely as central to a representative democracy and
19 necessary to ensure all other rights. The Court has affirmed government’s compelling interests
20 in protecting voters from intimidation and preserving election integrity. *Burson v. Freeman*,
21 504 U.S. 191, 199 (1992); *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989).
22 These same compelling interests drove over a century of federal and state criminal laws
23 prohibiting voter intimidation.

24 _____
25 ¹ ICAP’s work is summarized on its website, <https://www.law.georgetown.edu/icap/> (last visited October 11, 2022).

26 ² Counsel for Defendants have consented to the filing of this brief. On October 10, 2022, undersigned counsel contacted counsel for plaintiff by email to ascertain his position, but as of the time of filing, counsel has not responded.

1 Although political speech is generally entitled to First Amendment protection, speech
 2 that intimidates and threatens voters falls outside of that protection where it constitutes a “true
 3 threat.” *United States v. Nguyen*, 673 F.3d 1259, 1266 (9th Cir. 2012). Such threats are not
 4 limited to threats of violence, but may include subtler means of intimidation that arouse fear of
 5 legal, economic, or other consequences. The signs at issue in this case—falsely claiming that
 6 ballot drop boxes were under surveillance and misleadingly threatening that depositing ballots
 7 for others was illegal—were not entitled to First Amendment protection and King County’s
 8 removal of the signs did not violate plaintiff’s First Amendment rights.

9 Moreover, even if the signs were protected speech, the Supreme Court has been clear
 10 that some infringement on First Amendment rights is justified where “the exercise of free
 11 speech rights conflicts with another fundamental right, the right to cast a ballot in an election
 12 free from the taint of intimidation and fraud.” *Burson*, 504 U.S. at 211. Here, where there was
 13 no less restrictive means by which King County could protect voters from the intimidation and
 14 confusion created by plaintiff’s signs other than by removing them, its action was
 15 constitutionally permitted in furtherance of its compelling interests.

16 ARGUMENT

17 I. VOTER INTIMIDATION IS A THREAT TO DEMOCRACY.

18 For well over a century, the Supreme Court has viewed the right to vote as a
 19 “fundamental political right, because [it is] preservative of all rights.” *Yick Wo v. Hopkins*, 118
 20 U.S. 356, 370 (1886). “The right to vote freely for the candidate of one’s choice is the essence
 21 of democratic society.” *Reynolds v. Sims*, 377 U.S. 533, 555 (1964); see *Powell v. McCormack*,
 22 395 U.S. 486, 540–541 (1969) (“[T]he true principle of a republic is, that the people should
 23 choose whom they please to govern them.” (citation omitted)); *Wesberry v. Sanders*, 376 U.S.
 24 1, 17 (1964) (“No right is more precious in a free country than that of having a voice in the
 25 election of those who make the laws under which, as good citizens, we must live. Other rights,
 26 even the most basic, are illusory if the right to vote is undermined.”); *Sw. Voter Registration*

1 *Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (“There is no doubt that the right to
2 vote is fundamental...”).

3 In order to protect this most precious of rights, the Supreme Court has recognized that
4 government has compelling interests in protecting voters “from confusion and undue
5 influence,” *Burson*, 504 U.S. at 199, and in “preserving the integrity of its election process.”
6 *Eu*, 489 U.S. at 231. In the Court’s view, “preventing voter intimidation and election fraud” is
7 “necessary,” *Burson*, 504 U.S. at 206, and “[e]nsuring that every vote is cast freely, without
8 intimidation or undue influence, is ... a valid and important state interest.” *Brnovich v.*
9 *Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2340 (2021). In addition, there is no doubt that “the
10 State may prohibit messages intended to mislead voters about voting requirements and
11 procedures.” *Minn. Voting All. v. Mansky*, 138 S. Ct. 1876, 1889 n.4 (2018). In particular, the
12 government’s interest in safeguarding the right to vote “carries special weight during election
13 campaigns when false statements, if credited, may have serious adverse consequences for the
14 public at large.” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 349 (1995). Thus, the
15 Court has “upheld generally applicable and evenhanded restrictions that protect the integrity
16 and reliability of the electoral process itself.” *Anderson v. Celebrezze*, 460 U.S. 780, 788, n.9
17 (1983).

18 Voter intimidation is a direct affront to the integrity and reliability of the electoral
19 process. It attempts to “deter or influence voting activity through threats to deprive voters of
20 something they already have, such as jobs, government benefits, or, in extreme cases, their
21 personal safety.” U.S. Dep’t of Just., *Federal Prosecution of Election Offenses* 50 (Richard C.
22 Pilger ed., 8th ed. 2017).³ Voter intimidation is difficult to guard against. *See Burson*, 504 U.S.
23 at 208 (“Voter intimidation and election fraud are successful precisely because they are difficult
24 to detect.”); *see also Federal Prosecution of Election Offenses, supra*, at 50 (“Intimidation ...

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³ Available at <https://www.justice.gov/criminal/file/1029066/download> (last visited October 10, 2022).

1 is amorphous and largely subjective in nature”). And it is difficult to remedy. *Burson*, 504 U.S.
2 at 209 (“[T]he remedy for a tainted election is an imperfect one. Rerunning an election would
3 have a negative impact on voter turnout”); *see also id.* at 207 (“[B]ecause law enforcement
4 officers generally are barred from the vicinity of the polls to avoid any appearance of coercion
5 in the electoral process, ... many acts of interference would go undetected. These undetected
6 or less than blatant acts may nonetheless drive the voter away before remedial action can be
7 taken”). And yet, voter intimidation is wholly detrimental to the functioning of a democratic
8 society. It interferes with the fundamental right to cast a vote “freely, without intimidation or
9 undue influence,” *Brnovich*, 141 S. Ct. at 2340, thereby distorting the very nature of elections,
10 which are meant to be reflective of the view of the people.

11 Voter intimidation has a long and tortuous history in the United States. Following the
12 Civil War, throughout the Reconstruction period, and into the modern era, voter intimidation
13 has threatened the nation’s ability to fully enfranchise its people and live up to its promise of
14 democratic governance. The federal government has repeatedly enacted laws aimed at
15 preventing the worst forms of voter intimidation and all 50 states have followed suit. *See*
16 *generally* Theodore Z. Wyman, *Litigation of Voter Intimidation Law*, 174 Am. Jur. Trials 385,
17 §§ 3-8 (2022) (discussing federal efforts to curb voter intimidation and cataloguing state voter
18 intimidation laws); Ben Cady & Tom Glazer, *Voters Strike Back: Litigating Against Modern*
19 *Voter Intimidation*, 39 N.Y.U. Rev. L. & Soc. Change 173, 181-90 (2015) (summarizing the
20 history of federal laws aimed at voter intimidation).

21 While modern voters are rarely threatened with direct physical harm as they were during
22 the Reconstruction and Civil Rights eras which gave rise to so many of the federal and state
23 laws seeking to safeguard the right to vote, voter intimidation remains no less of a menace today
24 than it was in the past. “Today ... voters are deterred from voting through subtler tactics, such
25 as aggressive poll-watching, anonymous threats of harm, frivolous and excessive voter
26 registration challenges, and coercion by employers.” Cady & Glazer, *supra*, at 178; *see also*

1 *generally* Common Cause & Lawyers’ Comm. for C.R., *Deceptive Election Practices and Voter*
 2 *Intimidation: The Need for Voter Protection* (July 2012) (citing examples).⁴ Approaching the
 3 2022 and 2024 election cycles, ballot box surveillance efforts for the purpose of intimidating
 4 voters is of increasing concern nationwide. *See, e.g.*, Tiffany Hsu & Stuart A. Thompson,
 5 *Hunting for Voter Fraud, Conspiracy Theorists Organize ‘Stakeouts,’* N.Y. Times (Aug. 10,
 6 2022) (describing ballot drop box surveillance efforts in various states).⁵ These subtler
 7 activities tend to have the greatest impacts on unsophisticated voters, who are most likely to
 8 forego voting if confronted with obstacles, and minority groups, whose troubling history of
 9 disenfranchisement makes any targeted suppression of their vote even more insidious. *See* Cady
 10 & Glazer, *supra*, at 178; Dkt. #24 at 14-15.

11 II. VOTER INTIMIDATION IS PROHITED BY LAW.

12 Recognizing the pernicious effect that intimidation of voters can have on the right of
 13 citizens to cast their ballots freely for their own representatives in local, state, and federal
 14 elections, both the United States and every state in the nation, including the State of
 15 Washington, proscribe voter intimidation through criminal statutes. 18 U.S.C. § 594; RCW
 16 29A.84.630 (gross misdemeanor); RCW 29.A.84.620 (class C felony); *see generally* Wyman,
 17 *supra*, § 8 (cataloguing state laws).

18 Federal regulatory efforts began over a century ago, starting with the Enforcement Act,
 19 16 Stat. 140 (1870), and the Ku Klux Klan Act, 17 Stat. 13 (1871), and culminating in the Civil
 20 Rights Acts, Pub. L. No. 85-315, 71 Stat. 634 (1957), Pub. L. No. 89-110, 79 Stat. 437 (1965).
 21 Federal law, 18 U.S.C. § 594, originally enacted as part of the Hatch Act, Pub. L. No. 76-252,
 22 53 Stat. 1147 (1939), makes it a crime to “intimidate[], threaten[], coerce[], or attempt[] to
 23 intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of
 24

25 ⁴ Available at [https://lawyerscommittee.org/wp-](https://lawyerscommittee.org/wp-content/uploads/2015/07/DeceptivePracticesReportJuly2012FINALpdf.pdf)
 26 [content/uploads/2015/07/DeceptivePracticesReportJuly2012FINALpdf.pdf](https://lawyerscommittee.org/wp-content/uploads/2015/07/DeceptivePracticesReportJuly2012FINALpdf.pdf) (last visited October 10, 2022).

⁵ Available at <https://www.nytimes.com/2022/08/10/technology/voter-drop-box-conspiracy-theory.html> (last
 visited October 11, 2022).

1 such other person to vote or to vote as he may choose, or of causing such other person to vote
 2 for, or not to vote for, any candidate for [federal] office ... at any election held solely or in part
 3 for the purpose of electing such candidate.”⁶

4 Washington similarly makes it a crime to “use[] menace, force, threat, or any unlawful
 5 means towards any voter to hinder or deter such a voter from voting,” RCW 29A.84.620
 6 (felony), or to “directly or indirectly, by menace or unlawful means, attempt[] to influence any
 7 person in refusing to give his or her vote in any primary or special or general election.” RCW
 8 29A.82.630 (misdemeanor). These state laws trace their roots to the very first enactment of the
 9 Washington Territorial Assembly in 1854 (pre-U.S. statehood in 1889), where Section 97 of the
 10 criminal code made it a crime for any person to “use any threats, menaces, force, or any corrupt
 11 means, at or previous to any election, held pursuant to the laws of this territory ... to hinder or
 12 deter [a voter] from voting at such election.”⁷

13 **III. KING COUNTY LAWFULLY REMOVED PLAINTIFF’S SIGNS**
 14 **BECAUSE GOVERNMENT MAY TAKE STEPS, CONSISTENT WITH**
 15 **THE FIRST AMENDMENT, TO GUARD AGAINST VOTER**
 16 **INTIMIDATION.**

17 It is against this background that plaintiff brings her claims, alleging that King County
 18 violated her First Amendment rights when it removed her signs. Dkt. #1 at 29, ¶¶ 5-8. But these
 19 signs clearly constituted an effort at voter intimidation. Plaintiff contrived to have the signs,
 20 which she designed and paid for, *see* Dkt. #22 at 4 (citing Dkt. #23, Ex. E), placed near King

21 ⁶ *See also* 52 U.S.C. § 20511(1) (establishing criminal penalties for any person who, *inter alia*, “knowingly and
 22 willfully intimidates, threatens, or coerces, or attempts to intimidate, threaten, or coerce, any person for ...
 23 registering to vote, or voting, or attempting to register or vote”); 52 U.S.C. § 10307(b) (“No person, whether acting
 24 under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce
 25 any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten,
 26 or coerce any person for urging or aiding any person to vote or attempt to vote...”); 52 U.S.C. § 10101(b) (“No person,
 whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten,
 or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he
 may choose, or of causing such other person to vote for, or not to vote for, any candidate for [federal] office.”). The
 federal civil rights statutes include both criminal penalties and avenues for civil enforcement by the United States
 Attorney General and by private parties.

⁷ Available at <https://leg.wa.gov/CodeReviser/documents/sessionlaw/1854pam1.pdf> (last visited October 10,
 2022) at 93.

1 County ballot boxes just as those boxes opened to receive ballots for the August 2, 2022,
 2 primary election. Dkt. #1 at ¶ 24. The signs’ lettering, false claims that the ballot boxes were
 3 “[u]nder [s]urveillance,” misleading warning that “[a]ccepting compensation for harvesting or
 4 depositing ballots may be a violation of Federal law,”⁸ citation to inapplicable legal authority,
 5 and unauthorized solicitation of “suspicious” incident reports to a website affiliated with a
 6 political party, Dkt. #1-1, all caused King County officials to reasonably fear that placement of
 7 these signs near ballot drop boxes would “operate to intimidate voters.” Dkt. #22 at 6 (citing
 8 Dkt. #25 ¶¶ 16-17). Moreover, King County received reports from media and voters about the
 9 impact of plaintiff’s signs, including voters who found the signs to be intimidating. Dkt. #22 at
 10 5-6 (citing Dkt. #25 ¶15). And plaintiff stated that her purpose in posting the signs was to “put
 11 the FEAR OF GOD in some ballot-trafficking mules!” Dkt. #22 at 5 (citing Dkt. #23, Ex. E).
 12 By removing the signs, King County took steps to ameliorate the intimidating effect that the
 13 signs and the false statements made thereon had on the fundamental right of its citizens to vote
 14 in the August primary election. Its action, taken to safeguard a fundamental right and the
 15 sanctity of the democratic process, was not unconstitutional.

16 **A. Plaintiff’s Intimidating Signs Constituted a “True Threat,” Taking**
 17 **them Outside the Protection of the First Amendment.**

18 Intimidation falls outside of First Amendment protection when it constitutes a “true
 19 threat.” *Virginia v. Black*, 538 U.S. 343, 360 (2003); *Watts v. United States*, 394 U.S. 705
 20 (1969). Thus, as the Court of Appeals has held, a “prohibition on intentional acts of voter
 21 intimidation is ... consistent with the state’s power to regulate true threats.” *United States v.*
 22 *Nguyen*, 673 F.3d 1259, 1266 (9th Cir. 2012). In *Nguyen*, the Ninth Circuit applied the true
 23 threats framework to voter intimidation when upholding the issuance of a search warrant against
 24

25 ⁸ According to King County, “harvesting” is a term without legal meaning under Washington law, Dkt. #22 at 6,
 26 and state law does not prohibit depositing ballots for others or accepting compensation to do so. Dkt. #22 at 3-4
 (citing Dkt. #25, Wise Decl.). Depositing ballots for others is also not a crime under federal law. *See generally*
https://ballotpedia.org/Ballot_harvesting_laws_by_state (last visited October 10, 2022).

1 a constitutional challenge. The government sought the warrant to search the defendant’s home
2 based on a law enforcement affidavit attesting that a mass-mailed letter sent on the defendant’s
3 behalf violated California’s laws prohibiting the use of threats to influence voting, interfere with
4 an election, or challenge a person’s right to vote. The letter was sent to immigrant voters
5 warning that a new computer system would collect their personal information if they voted, that
6 this information could be provided to organizations opposed to immigration, and that unlawful
7 voting could lead to incarceration and deportation. 673 F.3d at 1261. The California law, much
8 like the Washington laws at issue here, prohibits any “tactic of coercion or intimidation, to
9 induce or compel any other person to refrain . . . from voting.” *See id.* at 1265 (quoting Cal.
10 Elec. Code § 18540(a)). The Ninth Circuit concluded that the letter could reasonably be
11 interpreted as “a tactic of coercion intended to induce its recipients to refrain from voting,” and
12 that unlawful intimidation may take the form of “manipulation and suggestion,” rather than
13 “forcefully coercive means.” *Id.* (citation omitted). Accordingly, the court concluded that
14 California’s statute was “consistent with the state’s power to regulate true threats” and that such
15 threats are “speech that is proscribable under the First Amendment.” *Id.* at 1266. The court
16 therefore upheld the validity of the warrant that provided the evidence leading to the defendant’s
17 criminal conviction.

18 As the *Nguyen* court recognized, “true threats” need not be limited to threats that imply
19 physical violence. Other courts addressing voter intimidation schemes have agreed. In *National*
20 *Coalition on Black Civic Participation v. Wohl*, 498 F. Supp. 3d 457 (S.D.N.Y. 2020), for
21 example, the court confronted a robocall message circulated during the 2020 election that stated
22 that personal information of those who vote by mail would be disclosed to law enforcement to
23 use to enforce warrants, to creditors to use to collect debts, and to the CDC to identify people
24 for mandatory vaccination. *Id.* at 483. The court held that these statements were “manifestly
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1 false and meant to intimidate citizens from exercising voting rights.” *Id.* at 464.⁹ The court
 2 enjoined the robocall, rejecting a First Amendment defense and recognizing that threats and
 3 intimidation need not be physical or violent to “reasonably arouse fear in recipients about the
 4 consequences of voting by mail” and thus were “subtler, but no less potent, forms of
 5 intimidation” than threats of physical violence. *Id.* at 485.

6 Similarly, commentators have noted that prohibitions on voter intimidation and threats
 7 under the remedial civil rights statutes, *see, e.g., supra* note 6, have been consistently read by
 8 courts “to encompass more subtle forms of conduct, in addition to ... violent, overt, and physical
 9 intimidation” Cady & Glazer, *supra*, at 197. “Actions or communications that inspire fear
 10 of economic harm, legal repercussions, privacy violations, and even surveillance can constitute
 11 unlawful ‘threats’ or ‘intimidation.’” Wyman, *supra*, §11; *see also Federal Prosecution of*
 12 *Election Offenses* at 50, 52 (explaining that voter intimidation may be “subtle” and involve a
 13 “feared loss [that] might be something tangible, such as money or economic benefits, or
 14 intangible, such as liberty or safety”); *id.* at 52 (18 U.S.C. § 594 “criminalizes conduct intended
 15 to force prospective voters to vote against their preferences, or refrain from voting, through
 16 activity reasonably calculated to instill some form of fear.”).¹⁰

17 Plaintiff’s signs constituted a threat like those the courts condemned in *Nguyen* and
 18 *Wohl*. The signs were made to look official and included false and misleading statements
 19 designed to make voters fear that they were subject to surveillance, might be engaging in
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21 ⁹ The robocall message at issue in the *Wohl* case stated as follows:

22 Hi, this is Tamika Taylor from Project 1599, the civil rights organization founded by Jack Burkman and
 23 Jacob Wohl. Mail-in voting sounds great, but did you know that if you vote by mail, your personal
 24 information will be part of a public database that will be used by police departments to track down old
 25 warrants and be used by credit card companies to collect outstanding debts? The CDC is even pushing
 26 to use records for mail-in voting to track people for mandatory vaccines. Don't be finessed into giving
 your private information to the man, stay safe and beware of vote by mail.

498 F. Supp. 3d at 465.

¹⁰ A separate federal statute, 18 U.S.C. § 245(b)(1)(A), specifically prohibits physical violence by establishing criminal penalties for “[w]hoever ... *by force or threat of force* willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with ... any person because he is or has been ... voting or qualifying to vote.” (emphasis added).

1 criminal acts, or might be reported to unspecified authorities, just for exercising their
2 fundamental right to cast their votes for the candidates of their choice in the primary election
3 by depositing their ballot in an official drop box. Plaintiff intended that the signs evoke fear,
4 Dkt. #22 at 5 (citing Dkt. #23, Ex. E), and, as the record demonstrates, voters were in fact
5 fearful. Dkt. #22 at 5-6 (citing Dkt. #25 ¶ 15). As in *Nugyen* and *Wohl*, under the circumstances
6 present here, the First Amendment offers no protection for plaintiff's intimidation tactics and
7 King County did not act unlawfully when it removed plaintiff's signs.

8 **B. King County's Removal of Plaintiff's Signs Survives Exacting Scrutiny**
9 **in Light of Its Compelling Interest in Safeguarding the Fundamental**
10 **Right to Vote.**

11 Although plaintiff's intimidating signs are properly analyzed under circuit precedent as
12 an unprotected "true threat," even *protected* speech must sometimes yield to the government's
13 compelling interests. Supreme Court decisional law establishes that there are circumstances
14 when the First Amendment's goals must give way to the government's compelling interests in
15 safeguarding the fundamental right to vote. *Burson*, 504 U.S. at 211 (where "the exercise of
16 free speech rights conflicts with another fundamental right, the right to cast a ballot in an
17 election free from the taint of intimidation and fraud," some "compromise" is not
18 unconstitutional); *id.* at 213 ("[T]here is a narrow area in which the First Amendment permits
19 freedom of expression to yield to the extent necessary for the accommodation of another
20 constitutional right." (Kennedy, J., concurring)). King County was warranted in removing
21 plaintiff's signs because of its compelling interest in protecting the right of its residents to vote
22 for their elected officials without being subjected to false, misleading, and intimidating speech
23 as they attempt to deposit their ballots.

24 In *Burson*, the Supreme Court considered the constitutionality of a Tennessee law that
25 prohibited the solicitation of votes and the display or distribution of campaign material within
26 100 feet of the entrance to a polling place. As the Supreme Court noted, every state has enacted

1 some version of a restricted zone around polling places. 504 U.S. at 206.¹¹ The Supreme Court
 2 identified these zones as placing a “content-based restriction on political speech,” and thus
 3 subject to “exacting scrutiny,” where the government must show that “regulation is necessary
 4 to serve a compelling state interest and that it is narrowly drawn to achieve that end.” *Id.* at 198
 5 (citations omitted). The Court recognized that regulation of speech around polling places poses
 6 a “truly difficult issue” that forces reconciliation “of our commitment to free speech and our
 7 commitment to other constitutional rights” by requiring balancing of “the accommodation of
 8 the right to engage in political discourse with the right to vote—a right at the heart of our
 9 democracy.” *Id.*

10 Nevertheless, the Court determined that the state had advanced a “compelling interest”
 11 in “protect[ing] the right to vote in an election conducted with integrity and reliability.” *Id.* at
 12 199. “[A] State has a compelling interest in protecting voters from confusion and undue
 13 influence,” and in “preserving the integrity of its election process.” *Id.* (citing *Eu*, 489 U.S. at
 14 228-29, 231). Turning to whether the state’s approach was necessary to serve that compelling
 15 interest, the Court recognized that “a law rarely survives strict scrutiny,” *id.* at 200, but found
 16 that a restricted zone around polling places did so because “an examination of the history of
 17 election regulation in this country reveals a persistent battle against two evils: voter intimidation
 18 and election fraud.” *Id.* at 206, 211. Given the “widespread and time-tested consensus ... that
 19 some restricted zone is necessary in order to serve the States’ compelling interests in preventing
 20 voter intimidation and election fraud,” *id.* at 206., the Tennessee law was “not ... an
 21 unconstitutional compromise.” *Id.* at 211.

22 In the case at bar, even if plaintiff’s intimidating signs contained protected speech (and
 23 they did not), the Supreme Court’s approach to evaluating the law at issue in *Burson* would
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25
 26 ¹¹ Washington is no exception. See RCW 29A.84.520 (proscribing electioneering by election officials at ballot drop boxes); RCW 29A.84.510 (proscribing certain activities within 100 feet of a voting center or 25 feet of a ballot drop box during a voting period).

1 equally justify King County’s act of removing them. Just as in *Burson*, King County operated
2 pursuant to its compelling interest in safeguarding the right to vote and protecting the integrity
3 of its election process. Also, just as in *Burson*, there is a “long history” and “substantial
4 consensus,” *id.* at 211, at both the state and federal levels that voter intimidation must be
5 proscribed, with criminal prohibitions dating back more than a century, *see* Part II, *supra*. The
6 application of “simple common sense,” 504 U.S. at 211, shows that government must be able
7 to take action to prevent intimidation and confusion that interferes with the fundamental right
8 of its citizens to vote.

9 Finally, just as in *Burson*, King County’s options in responding to plaintiff’s
10 intimidating signs were limited and it responded in the least restrictive way possible under the
11 circumstances. *See Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015) Although King County
12 undertook to disseminate true and correct information about how and where to cast ballots in
13 the run-up to August 2, 2022, *see generally* <https://kingcounty.gov/depts/elections.aspx>, it could
14 not have taken other actions that would have been directly effective in countering the threat
15 posed by plaintiff’s signs. King County could not, for example, have posted true information
16 next to plaintiff’s signs without confusing voters, thus generating an additional obstacle to the
17 free exercise of the franchise. Nor could King County have approached plaintiff to provide her
18 with correct information as to the applicable law, attempt to negotiate a resolution of the matter,
19 or seek a court-ordered injunction to have the signs removed, because the signs were posted
20 anonymously, and King County did not have confirmation that plaintiff was behind them until
21 she filed her Complaint in this lawsuit. Dkt. #22 at 5 n.1. And there is certainly no remedy that
22 could have been deployed after the fact, once the election was over, to ameliorate the effects of
23 plaintiff’s signs or to secure any right to vote that had been foregone. *See Burson*, 504 U.S. at
24 209 (“[T]he remedy for a tainted election is an imperfect one.”); *Wohl*, 498 F. Supp. 3d at 489
25 (“[R]estraining Defendants from engaging in further unlawful conduct would not suffice to
26 undo the harm they have brought about it in this case.”). The only reasonable action that King

1 County could take in the moment to safeguard the fundamental right of its citizens to vote freely
2 was to do what it did: remove the signs. That act furthered King County’s compelling interest
3 in safeguarding the right of its voters against intimidation and did so in the narrowest manner
4 possible. *See Reed*, 576 U.S. at 171. As such it survives strict scrutiny and was not
5 unconstitutional.

6 Where false or misleading speech infringes on the ability of voters to exercise the
7 franchise without intimidation or confusion, the government’s—and the public’s—interest in
8 the proper functioning of democracy should prevail. As *Burson* established, when government
9 action is narrowly tailored to achieve its compelling interest in safeguarding the right to vote
10 freely, even protected political speech in a public forum can be restricted on the basis of its
11 content. King County’s act of removing intimidating signs, as with the restriction around
12 polling places upheld in *Burson*, given the strong and compelling government interest at stake
13 and the narrow and limited nature of the action that King County took to effectuate that interest,
14 was not an “unconstitutional choice.” 504 U.S. at 210. Thus, King County’s action did not
15 violate plaintiff’s First Amendment rights.

16 **CONCLUSION**

17 For the reasons stated here, the Court should hold that King County’s actions in
18 removing plaintiff’s intimidating signs did not violate the First Amendment.

19 Dated this 11th Day of October, 2022.

20 Respectfully submitted,

21 INSTITUTE FOR CONSTITUTIONAL
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* Pro Hac Vice Admissions Pending

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CERTIFICATE OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court’s CM/ECF System, which will serve a copy of this document upon all counsel of record.

DATED this 11th day of October, 2022, at Washington, D.C.

s/Zachary J. Pekelis
Zachary J. Pekelis, WSBA #44557