



October 21, 2022

Sent via Email

Re: Advisory on Voter Intimidation Laws

Dear County Election Officials:

All voters should be able to cast their ballots without being subjected to illegal voter intimidation. While we—nonpartisan legal organizations¹ concerned with protecting the rights of voters—support the civic engagement of all Texans regardless of their political views, such engagement must occur in a manner that complies with federal and state law. Over a century ago, the Supreme Court stated that the right to vote is a “fundamental political right, because [it is] preservative of all rights,”² and people must be allowed to exercise that right free from intimidation or harassment. Despite this, there were hundreds of reports of voter intimidation in Texas during the 2020 election.³ Federal authorities are warning that calls for violence around elections will likely increase in the upcoming midterm elections.⁴

Counties have a legal obligation to enforce laws prohibiting voter intimidation and should proactively work to minimize instances of voter intimidation. This advisory summarizes the federal and state regulations that protect voters from intimidation and harassment, which elections officials should review as Election Day and early voting approach.

Voter Intimidation is Unlawful

Voter intimidation can take many different forms. It includes, but is not limited to, displaying firearms near polling locations; aggressively questioning voters about their qualifications to vote, including about citizenship and criminal records; displaying false or misleading information about voting requirements or voter fraud; and harassment of non-English speakers and voters of color.⁵

¹ This letter was drafted by the American Civil Liberties Union of Texas, the Texas Civil Rights Project, and Protect Democracy. The ACLU of Texas and the Texas Civil Rights Project are also a part of the Texas Election Protection network, a nonpartisan coalition that helps safeguard the right to vote by empowering Texas voters with the information they need to vote and helping them solve any problems that arise when they try to cast a ballot.

² *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

³ Voter Intimidation in Texas During the 2020 General Election, TEXAS CIVIL RIGHTS PROJECT (Feb 2021), <https://txcivilrights.org/wp-content/uploads/2021/02/Voter-Intimidation-report.pdf> (“During the 2020 election, the non-partisan Election Protection coalition received 267 reports of voter intimidation in Texas.”)

⁴ National Terrorism Advisory System, *Summary of Terrorism Threat to the United States*, DEP’T OF HOMELAND SECURITY (June 7, 2022), <https://www.dhs.gov/ntas/advisory/national-terrorism-advisory-system-bulletin-june-7-2022>; Sean Lyngaas, *Election workers to be trained to deal with violence at polls as midterms approach*, CNN (Sept. 30, 2022), <https://www.cnn.com/2022/09/30/politics/election-officials-security-violence-midterm-elections/index.html>.

⁵ See *Know Your Rights: Voting Rights*, American Civil Liberties Union, <https://www.aclu.org/know-your-rights/voting-rights/#someone-is-interfering-with-my-right-to-vote> (last viewed October 13, 2022).

Federal voter intimidation law *requires* counties and other government entities to protect voters and enforce laws against intimidation. **Governments cannot look the other way while private parties intimidate voters:** “The law is clear that a [jurisdiction] cannot effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be.”⁶ A county’s failure to enforce voter intimidation laws may expose the county to legal liability. For example, a federal court in Louisiana found that a county failed to take reasonable measures to protect voters from Ku Klux Klan violence. The court ordered the chief of police to publish a plan to rectify the failure to protect, including a chain of command and system for responsibility, and written instructions for police officers to provide adequate protection for voters.⁷ Similarly, the San Marcos Police Department’s failure to address voter intimidation during the so-called “Trump-Train” attack on a campaign bus in 2020 resulted in an ongoing lawsuit against the law enforcement officials involved.⁸

Multiple federal laws explicitly forbid voter intimidation. As early as the Ku Klux Klan Act of 1871, Congress declared it unlawful to “conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote” from doing so.⁹ The Civil Rights Act of 1957 further decreed, “[n]o person, whether acting under color of law or otherwise, shall 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 [they] may choose.”¹⁰ That prohibition still stands today, and violating its requirements carries with it criminal penalties, including the possibility of imprisonment.¹¹

Further, the Voting Rights Act of 1965 makes it illegal to intimidate voters, regardless of whether someone acted with an intent to intimidate.¹² As former Attorney General Katzenbach told the Senate Judiciary Committee in a hearing on the Voting Rights Act, the Act eliminates a “sometimes more subtle, certainly more damaging” obstacle to voting: “*fear*.”¹³ Thus, federal law prohibits anything that has the *effect* of intimidating voters, and further the intentional intimidation of voters is a felony offense.¹⁴

⁶ *United States v. Clark*, 249 F. Supp. 720, 729 (S.D. Ala. 1965); *see also* 42 U.S.C. § 1986.

⁷ *See Hicks v. Knight*, Civ. No.15,727 (E.D. La.), 10 Race Rel. L. Rep. 1504, 1507–09 (1965); *see also U.S. by Katzenbach v. Original Knights of Ku Klux Klan*, 250 F. Supp. 330, 342 (E.D. La. 1965) (citing *Hicks*, noting that the police had “fail[ed] to use all reasonable means to protect” citizens from assault, harassment, and intimidation when exercising their civil rights, and observing that such conduct constitutes unlawful intimidation). The Department of Justice has pursued consent decrees seeking to impose similar requirements in other jurisdictions as well. *See* Hearing on the U.S. Commissioner System Before the Subcomm. On Improvements in Judicial Machinery of the S. Comm. on the Judiciary, 189th Cong. 138–39 (1965) (available at <https://bit.ly/2UZGsj6>) (describing DOJ consent judgment in *United States v. Mathews* that enjoined defendants “from refusing reasonable police protection to any person in need thereof” when exercising the right to vote or encouraging others to exercise the right to vote).

⁸ Acacia Coronado, *Police, Trump supporters sued over Texas highway incident*, AP NEWS (June 24, 2021) <https://apnews.com/article/texas-lifestyle-government-and-politics-98a3c8c9ae703604d57b87910c481c23>.

⁹ 42 U.S.C.A. § 1985(3).

¹⁰ 52 U.S.C.A. § 10101(3)(b).

¹¹ 18 U.S.C.A. § 594 (“Whoever intimidates, threatens, coerces, or attempts 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 [they] may choose . . . shall be fined under this title or imprisoned not more than one year, or both.”).

¹² 52 U.S.C. § 10307(b).

¹³ *Voting Rights: Hearing on S. 1564 Before S. Comm. on the Judiciary*, 89th Cong. 12 (1965) (Statement of the Nicholas deB. Katzenbach, Att’y Gen. of the United States) (emphasis added).

¹⁴ *See, e.g., LULAC v. Pub. Interest Legal Found.*, No. 1:18-CV-00423, 2018 WL 3848404, at *4 (E.D. Va. Aug. 13, 2018) (no showing of specific intent required to establish violation of the Voting Rights Act); 18 U.S.C. § 594 (making

Additionally, Texas state law provides voters additional protections from harassment and intimidation. The Texas Election Code provides that it is unlawful to loiter and to electioneer within 100 feet of a polling place; electioneering includes, but is not limited to, displaying political signs and badges.¹⁵ It is also unlawful to record images or sound within 100 feet of any voting station.¹⁶ Further, no one may operate a sound amplification device or a vehicle with a loudspeaker for the purpose of “making a political speech” or “electioneering for or against any candidate, measure, or political party” within 1,000 feet of a building in which a polling place is located.¹⁷

Other protections for voters do not contain any geographical limitation to the area surrounding a polling place. “[A]bus[ing] or threaten[ing] a person in a public place”¹⁸ and threatening to injure or commit a felony against someone with the intent to “harass, annoy, alarm, abuse, torment, or embarrass” that person are misdemeanors without any geographic limitation.¹⁹ It is a felony to harm or threaten to harm someone in retaliation for voting for or against a candidate, regardless of where that harm or threat to harm occurs.²⁰

Viewed as a whole, Texas state law and federal law contain strong protections against voter intimidation, which counties have a legal obligation to enforce. Counties should formulate plans for handling instances of voter intimidation, including being prepared to explain to someone engaging in voter intimidation that their actions are unlawful. Election workers should also be provided with training on how to handle and de-escalate instances of voter intimidation.²¹ In the event that law enforcement involvement is necessary to address voter intimidation, counties should have plans in place with local law enforcement about how to safely and discreetly de-escalate situations, without creating the kind of police presence that might also intimidate voters. Among other things, this may include decisions about when to deploy uniformed or plainclothes officers, and training on appropriate de-escalation techniques, as well as real-time coordination with local community and civil rights organizations.

Regulations on Firearms

During the 2020 election, there were many reports of armed demonstrators near polling locations. The presence of firearms at or near polling locations is a form of voter intimidation that is prohibited by law and strictly regulated.

Federal law prohibits Texans from carrying firearms in a way that has the effect of

intentional voter intimidation a federal crime punishable by imprisonment); *see also* 52 U.S.C. § 20511(1) (imposing criminal penalties for anyone who knowingly and willfully intimidates or coerces prospective voters in registering to vote, or for voting, in any election for federal office).

¹⁵ TEX. ELEC. CODE § 61.003; *see also* *Poll Watcher’s Guide*, Texas Secretary of State Elections Division (January 2022), <https://www.sos.state.tx.us/elections/forms/pollwatchers-guide.pdf>.

¹⁶ TEX. ELEC. CODE § 61.014.

¹⁷ *Id.* § 61.004.

¹⁸ *Id.* § 42.01(4).

¹⁹ *Id.* § 42.07.

²⁰ TEX. ELEC. CODE § 276.001.

²¹ Sean Lyngaas, *Election workers to be trained to deal with violence at polls as midterms approach*, CNN (Sept. 30, 2022), <https://www.cnn.com/2022/09/30/politics/election-officials-security-violence-midterm-elections/index.html> (“Federal officials are offering state and local election officials training to ‘safely de-escalate’ confrontations with voters that could turn violent ahead of November’s midterm elections.”).

intimidating voters.²² Additionally, the Texas Penal Code makes carrying a firearm “on the premises of a polling place on the day of an election or while early voting is in progress” a felony offense.²³ Similarly, “display[ing] a firearm or other deadly weapon in a public place in a manner calculated to alarm”²⁴ is a misdemeanor without any geographical limitation. Texas state law forbids any group “other than the regularly organized Texas military forces, the armed forces of the United States, or the active militia of another state” from “associat[ing] as a military company or organization or parad[ing] in public with firearms.”²⁵

Polling locations should post Form AW-7-9a, “Notice of Prohibition of Handguns in the Polling Place,” as provided by the Secretary of State.²⁶ Election officials should clearly inform people with firearms at or near a polling location that the county will enforce any laws that prohibit their actions. If necessary, consider coordinating with local law enforcement to remove people with firearms from a polling location, or relocating armed demonstrators to an area not visible from the polling location. Because the mere presence of law enforcement may also intimidate voters, the county should use law enforcement as discreetly as possible to resolve the issue quickly without any escalation.

Regulations on Poll Watchers

State laws regulate poll watchers and prohibit them from intimidating voters. The term poll watcher is reserved for the limited number of people who are officially appointed to observe the conduct of an election on behalf of a candidate, political party, or the proponents or opponents of a measure.²⁷ In order to qualify, poll watchers must be qualified voters from the counties in which they serve,²⁸ and they must present their certificates of appointment and their poll watcher training certificates of completion to the presiding election judge when they report for service.²⁹ People who are not officially appointed poll watchers may not observe polling activities in the same manner.

Under the Election Code, each appointing authority may not appoint “more than two watchers for each precinct polling place” or “more than seven watchers for each main or branch early voting place.”³⁰ Even for early voting, “not more than two watchers appointed by the same authority may be on duty at the same early voting place at the same time.”³¹

In addition to being subject to the regulations described above, poll watchers must follow rules of conduct mandated by the Election Code. Poll watchers “may not interfere in the orderly conduct of an election.”³² Before being accepted for service, each poll watcher must take the following oath administered by the election officer: “I swear (or affirm) that I will not disrupt the voting process or

²² 52 U.S.C. § 10307(b); *see, e.g., LULAC v. Pub. Interest Legal Found.*, No. 1:18-CV-00423, 2018 WL 3848404, at *4 (E.D. Va. Aug. 13, 2018) (no showing of specific intent required to establish violation of the Voting Rights Act).

²³ TEX. PENAL CODE § 46.03(2).

²⁴ *Id.* § 42.01(8).

²⁵ TEX. GOV'T CODE § 437.208.

²⁶ A copy of Form AW-7-9a is available online at <https://www.sos.state.tx.us/elections/forms/pol-sub/7-9a.pdf>.

²⁷ TEX. ELEC. CODE § 33.031.

²⁸ *Id.* § 33.031.

²⁹ *Id.* § 33.051.

³⁰ *Id.* § 33.007.

³¹ *Id.*

³² *Id.* § 33.0015.

harass voters in the discharge of my duties.”³³ A poll watcher must wear an identifying badge, issued by the election judge, that indicates they are a poll watcher.³⁴

Further, each poll watcher’s certificate of appointment must include an affidavit stating that they will not have a device capable of recording images or sound, or that any such device will be disabled or deactivated while poll watching.³⁵ They are explicitly forbidden from “convers[ing] with a voter” or “communicat[ing] in any manner with a voter regarding the election,”³⁶ and they are not allowed to be present “at the voting station when a voter is preparing the voter’s ballot or is being assisted by a person of the voter’s choice,” including a person also serving as an interpreter at the voting station.³⁷

An election judge may remove a poll watcher from a polling location for a violation of the Penal Code.³⁸ An election judge may also remove a poll watcher for a violation of the Election Code or “any other provision of law relating to the conduct of elections” if “the violation was observed by an election judge or clerk.”³⁹ An election judge may also call a law enforcement officer to request a poll watcher be removed if the poll watcher commits a breach of the peace or a violation of law.⁴⁰ Again, if law enforcement officers are contacted, they should be encouraged to discreetly and safely resolve the situation.

Conclusion

We recognize and appreciate the immense amount of work that county officials throughout Texas are doing to facilitate the upcoming elections and to reduce voter intimidation. With swift action and thorough preparation, we believe that counties can further reduce instances of voter intimidation during this election cycle, making them safer for everyone involved. We hope that this communication will aid you in that important work. Please do not hesitate to reach out to us if you have any questions at aharris@aclutx.org.

Regards,

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³³ *Id.* § 33.051.

³⁴ *Id.*

³⁵ *Id.* § 33.006(6).

³⁶ *Id.* § 33.058.

³⁷ *Id.* § 33.057(b); *Poll Watcher’s Guide*, Texas Secretary of State Elections Division (January 2022), <https://www.sos.state.tx.us/elections/forms/pollwatchers-guide.pdf>.

³⁸ TEX. ELEC. CODE § 32.075(g).

³⁹ *Id.*

⁴⁰ *Id.* § 33.075(h).