IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

League of United Latin American Citizens – Richmond Region Council 4614, Eliud Bonilla, Luciana Freeman, Abby Jo Gearhart, and Jeanne Rosen, Plaintiffs, v. PUBLIC INTEREST LEGAL FOUNDATION, an Indiana Corporation, and J. CHRISTIAN ADAMS, Defendants.	Civil Action No. 1:18-cv-00423-LO-IDD

BRIEF OF *AMICI CURIAE* CAMPAIGN LEGAL CENTER, PROFESSOR DANIEL R. ORTIZ, AND PROFESSOR THEODORE M. SHAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT

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STATEMENT OF INTEREST

Amicus curiae Campaign Legal Center ("CLC") is a nonpartisan, nonprofit organization that has been working for fifteen years to advance democracy through law. *Amicus* CLC has litigated many voting rights cases in federal courts, including as arguing counsel for the plaintiffs in the recent United States Supreme Court case, *Gill v. Whitford*, No. 16-1161, as counsel for plaintiffs in *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (challenging Texas's photo ID law), and as counsel for plaintiffs in *LULAC v. Reagan*, No. 2:17-cv-04102 (D. Ariz. 2017) (challenging Arizona's dual registration system). CLC has filed *amicus curiae* briefs in every major voting rights case before the Supreme Court in recent years, including *Cooper v. Harris*, 137 S. Ct. 1455 (2017), *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016), and *Shelby County v. Holder,* 570 U.S. 529 (2013).

Amicus curiae Prof. Daniel R. Ortiz is the Michael J. and Jane R. Horvitz Distinguished Professor of Law and the Director of the Supreme Court Litigation Clinic at the University of Virginia School of Law. Prof. Ortiz has been a member of the Virginia Law faculty since 1985. He teaches constitutional law, administrative law, electoral law, civil procedure, and legal theory. In 2001, Prof. Ortiz served under Presidents Carter and Ford as Coordinator of the National Commission on Federal Election Reform's Task Force on Legal and Constitutional Issues. The Task Force advised the Commission on electoral law and published several reports, which Prof. Ortiz wrote or edited. Congress and the states have enacted many of the Commission's proposals into law. From 1995 until 1997, Prof. Ortiz chaired the American Bar Association's election law committee (Section of Administrative Law and Regulatory Practice). Prof. Ortiz advises and represents a variety of parties on constitutional law and election law in courts and legislatures. He has written or helped write many Supreme Court and appellate briefs

on election law and other issues. The views expressed in this brief are his and do not purport to represent the views of the University of Virginia School of Law, the University of Virginia, or the Commonwealth of Virginia.

Amicus curiae Prof. Theodore M. Shaw is the Julius L. Chambers Distinguished Professor of Law at the University of North Carolina School of Law, where he teaches courses on the Equal Protection Clause of the Fourteenth Amendment and the civil rights statutes of the Reconstruction Era. Prof. Shaw was the fifth Director-Counsel and President of the NAACP Legal Defense and Educational Fund, Inc. ("LDF"), for which he worked in various capacities over the span of twenty-six years. He has litigated education, employment, voting rights, housing, police misconduct, capital punishment, and other civil rights cases in trial and appellate courts, and before the United States Supreme Court. From 1982 until 1987, he litigated education, housing, and capital punishment cases, and directed LDF's education litigation docket. In 1987, under the direction of LDF's third Director-Counsel, Julius Chambers, Prof. Shaw relocated to Los Angeles to establish LDF's Western Regional Office. In 1990, Prof. Shaw left LDF to join the faculty of the University of Michigan Law School. In 1993, Prof. Shaw returned to LDF as Associate Director-Counsel, and in 2004, he became LDF's fifth Director-Counsel. Prof. Shaw's legal career began as a Trial Attorney in the Honors Program of the United States Department of Justice, Civil Rights Division in Washington, D.C., where he worked from 1979 until 1982.

In sum, *amici* have a demonstrated interest in the protection of civil rights and the health of our representative democracy, and thus the interpretation and application of 52 U.S.C. § 10307 ("§ 11(b)") to conduct that intimidates, threatens, or coerces, or attempts to intimidate, threaten, or coerce eligible voters; and the interpretation and application of 42 U.S.C. § 1985(3)

("§ 1985(3)") to conduct that intimidates people from offering their support or advocacy of candidates for federal office or injures people on account of such support or advocacy.

SUMMARY OF ARGUMENT

Amici submit this brief to clarify several issues related to the interpretation and application of § 11(b) and § 1985(3). *Amici* also seek to explain why, based on the plain meaning of the terms "intimidate" and "intimidation" in § 11(b) and § 1985(3), as well as relevant case law and legislative history, Defendants' alleged conduct (as pled) fits squarely within the ambit of those provisions. Thus, Plaintiffs' Complaint states a colorable claim under these two statutory provisions.

Amici note that, in the Memorandum in Support of Defendants' Rule 12(b)(6) Motion to Dismiss ("Defs. Brief"), Defendants state inaccurately that the source of constitutional authority for § 11(b) is the Fifteenth Amendment. Two misinterpretations arise: that § 11(b) only applies to conduct by state actors, and that § 11(b) requires a showing of specific intent or racial animus. In fact, the authority for § 11(b) is the Elections Clause of the Constitution, which—as applicable Supreme Court precedent makes clear—broadly authorizes Congress to enact legislation related to voting. Therefore, § 11(b) is not limited in the manner that Defendants contend.

An additional misinterpretation in Defendants' briefing relates to the specific provision of § 1985(3) that Plaintiffs allege Defendants violated. By assuming that the claim is made under the "equal protection" clauses of § 1985(3), Defendants conclude that claims may not be brought against private actors and that Plaintiffs must allege class-based animus. However, Plaintiffs allege violations of the "support or advocacy" clauses of § 1985(3), which specifically prohibit the obstruction "by force, intimidation, or threat" of any citizen from participating in the electoral process and do not rely upon any external source of rights, such as the First

Amendment. A proper interpretation of the Statute shows that claims may be brought against private actors under the "support or advocacy" clauses of § 1985(3) and that Plaintiffs are not required to allege class-based animus.

A final question before the Court relates to the meaning of the terms "intimidate" or "intimidation" in the statutes. *Amici* examine the ordinary meaning of these terms, their interpretation in federal and state civil rights cases and their interpretation by the U.S. Department of Justice, and assess the application of these terms to Defendants' alleged conduct. *Amici* also alert the Court to historical examples of voter intimidation that occurred during the era in which Congress enacted § 11(b) and show that Defendants' alleged conduct falls squarely within the category of modern forms of acts that § 11(b) sought to prohibit.

In sum, this brief seeks to explain the correct resolution of several significant interpretive issues relating to § 11(b) and § 1985(3) and suggests that the Plaintiffs have pled sufficient facts, such that their claims should survive the motion to dismiss brought under Rule 12(b)(6).

ARGUMENT

I. THE PLAIN TEXT OF § 11(B) AND A PROPER UNDERSTANDING OF ITS CONSTITUTIONAL BASIS DEMONSTRATE THAT IT IS NOT LIMITED TO CLAIMS SOLELY AGAINST STATE ACTORS AND DOES NOT REQUIRE A SHOWING OF RACIAL ANIMUS.

Defendants assert that § 11(b) only applies to action by state actors and that it requires proof of racial animus. Defs. Brief at 10. These propositions are demonstrably incorrect. The plain text of the provision, an understanding of the constitutional basis for the provision, Supreme Court precedent, and the underlying congressional purpose make clear that § 11(b) applies to individual conduct that intimidates, threatens, or coerces (or attempts to intimidate, threaten, or coerce) eligible voters.

"As always, we begin with the text of the statute." *Limtiaco v. Camacho,* 549 U.S. 483, 488 (2007) (Thomas, J.). Section 11(b) provides:

> No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote . . . .

52 U.S.C. § 10307(b). On its face, then, the text of § 11(b) applies to all persons, "whether acting under color of law *or otherwise*" — *i.e.*, not just government actors — and it says nothing about racial animus or intent. Defendants thus face a high bar in arguing for these additional limitations based on the clear instructions of Congress. But our inquiry does not stop with the text. This section of the brief lays out the constitutional authority for § 11(b) and explains how this authority, along with the congressional record and judicial precedent, support Plaintiffs' assertions that § 11(b) can be invoked against private actors and that Plaintiffs need not assert racial animus.

A. The Constitutional Authority for § 11(B) Is the Elections Clause, Not the Fifteenth Amendment.

Defendants assert that § 11(b) was passed pursuant to Congress' authority under the Fifteenth Amendment. Defs. Brief at 10. This is simply incorrect. While most of the Voting Rights Act ("VRA") was passed pursuant to the Fifteenth Amendment, which prohibits racial restrictions on voting by government actors, the House Report for § 11(b) specifically invokes "article I, section 4, and the implied power of Congress to protect Federal elections against corrupt influences, neither of which requires a nexus with race." H.R. Rep. No. 89-439, at 30 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2462.[1]

[1] *See also* "The [VRA] is designed primarily to enforce the 15th [A]mendment . . . and is also designed to enforce the 14th [A]mendment and article I, section 4. " H.R. Rep. No. 89-439, at 6 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2462.

Article I, Section 4 of the U.S. Constitution ("the Elections Clause") grants Congress broad authority to regulate the time, place, and manner of elections. It states: "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators." U.S. Const. art. I, § 4. Therefore, even from a review of the text of the Elections Clause alone, we can see that any exercise of power under it may include regulations as to the time, place, and manner of elections. Regulating voter intimidation is squarely within the regulation of the "manner" of an election.

Supreme Court precedent confirms that the Elections Clause empowers Congress to combat voter intimidation irrespective of whether it has a racial element. More than 100 years ago, the Supreme Court explicitly relied on the Elections Clause in concluding that the power to regulate elections includes the power to enforce voter intimidation laws. *See Ex parte Yarbrough*, 110 U.S. 651, 662 (1884) ("[W]hen, in the pursuance of a new demand for action, [Congress], as it did in the cases just enumerated, finds it necessary to make additional laws for the free, the pure, and the safe exercise of this right of voting, they stand upon the same ground, and are to be upheld for the same reasons.").

Fifty years later, the Supreme Court again recognized that Congress' power to regulate elections under the Elections Clause encompasses the "protection of voters." *See Smiley v. Holm*, 285 U.S. 355, 366 (1932). The Court stated:

> It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, *protection of voters*, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.

Id. (emphasis added).

As recently as 2013, the Supreme Court stated that the Elections Clause's "substantive scope is broad." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8-9 (2013). "'Times, Places, and Manner,' we have written, are 'comprehensive words,' which 'embrace authority to provide a complete code for congressional elections.'" *Id.* (citing *Smiley*, 285 U.S. at 366). Even the narrowest interpretation of the Elections Clause would allow Congress to regulate activities related to the casting of ballots. *See id.* at 35 (Thomas, J., dissenting) (arguing that it is "difficult to maintain that the [Elections] Clause gives Congress power beyond regulating the casting of ballots and related activities"). Any reasonable reading of this authority must include the prevention of voter intimidation.

B. Because Congress Passed § 11(B) Pursuant to Its Authority Under the Elections Clause, Nothing Limits It from Reaching Voter Intimidation by Non-Governmental Actors.

Since Congress enacted § 11(b) pursuant to its authority under the Elections Clause, the Statute reaches both private and public actors. This interpretation is supported by legislative history and judicial precedent as well.

Congress expressed no doubt that § 11(b) reached conduct by private actors when the House Report explained that it was authorized "to reach intimidation by private individuals" by "article I, section 4, and the implied power of Congress to protect Federal elections against corrupt influences"—powers which Congress described as "plenary within their scope." H.R. Rep. No. 89-439, at 30-31 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2462.

The Supreme Court has also affirmed that the Elections Clause allows Congress to regulate private conduct in the context of elections—a principle explicitly upheld in *United States v. Williams*, 341 U.S. 70, 77 (1951) (citing *Ex parte Yarbrough*, 110 U.S. 651 (1884))

("The right of citizens to vote in congressional elections, for instance, may obviously be protected by Congress from individual as well as from State interference.").

Defendants attempt to support their claim that § 11(b) only applies to state actors by citing a single district court decision from 1966 — *United States v. Harvey*, 250 F. Supp. 219, 225 (E.D. La. 1966) (holding that § 11(b) was enforceable only against "action by United States or by particular state"). But that case, given the weight of Supreme Court precedent, is clearly incorrect. In reaching its conclusion, the court in *Harvey* relied on the notion that Congress passed § 11(b) under its Fifteenth Amendment authority. *See id.* But, for the reasons described above, the *Harvey* court was plainly mistaken, relying on Congress' sweeping statements about the entire VRA, rather than the House Report, which spoke to the specific provision at issue, or the Supreme Court precedent, which had already concluded that the Elections Clause empowered Congress to combat voter intimidation.

Defendants also cite a footnote in a dissenting opinion in *Nipper v. Smith*, 39 F.3d 1494 (1994). Defs. Brief at 10-11. But that footnote does not even support the proposition for which they cite it. First, the footnote, *id.* at 1498 n.1, refers to § 2 of the VRA, and second, it questions the authority of Congress to regulate state elections—a matter not at issue here.

The source of constitutional authority for § 11(b), its text, its legislative history, clear precedent, and U.S. Department of Justice practice all point in the same direction: § 11(b) applies to the conduct of private individuals.[2]

[2] *Amici* further note that, as an attorney in the U.S. Department of Justice, Defendant Adams pursued, and vigorously defended in public, litigation against a private actor—the New Black Panther Party—for violating § 11(b). *See, e.g.*, *The New Black Panther Party Hearing (2)*: Hearing Before the U.S. Comm'n on Civil Rights, 111th Cong. 7, 19, 30 (2010) (testimony of J. Christian Adams), available at http://www.usccr.gov/NBPH/07-06-2010_NBPPhearing.pdf ; J. Christian Adams, Adams: Inside the Black Panther Case, Wash. Times (June 25, 2010),

C. Section 11(B) Requires No Showing of Specific Intent, Nor Does It Require Plaintiffs to Plead Racial Animus.

Section 11(b) was drafted specifically to prohibit acts that have the effect of intimidating voters, regardless of whether a defendant subjectively intended this result. Nothing in the text or legislative history of § 11(b) indicates that claimants must demonstrate that a defendant intended for his actions to intimidate voters, let alone that a defendant's conduct must be driven by racial animus. To the contrary, both the plain language and the legislative history of the Statute indicate that no showing of subjective intent is necessary to sustain a § 11(b) claim.

In this regard, it is noteworthy that an earlier provision, § 131(b) of the 1957 Civil Rights Act, 52 U.S.C. § 10101(b), does require specific intent. Section 131(b) states:

> 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 . . . .

52 U.S.C. § 10101(b) (emphasis added). While similar to § 11(b) in certain ways, this language is very different in several critical respects. Most importantly, unlike § 131(b), § 11(b) does not contain the phrase "for the purpose of," emphasized above. Instead, § 11(b) reads: "[n]o person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote . . . ." 52 U.S.C. § 10307(b).

Congress' omission of the phrase "for the purpose of" from § 11(b) was no accident. Before the passage of the VRA, Department of Justice's prosecutions of voter intimidation were routinely frustrated by the fact that § 131(b) required claimants to prove something about the

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https://www.washingtontimes.com/news/2010/jun/25/inside-the-black-panther-case-anger-ignorance-and-/.

state of mind of the defendants. *See* Gilda R. Daniels, *Voter Deception*, 43 Ind. L. Rev. 343, 360-61 (2010). In 1965, testifying before the House Judiciary Committee in support of the passage of § 11(b), Attorney General Nicholas Katzenbach, one of the drafters of the VRA, lamented this feature of existing voter intimidation laws like § 131(b). *See* Voting Rights Act of 1965: Hearing Before the H. Judiciary Comm., 111th Cong. (2010), https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/03-18-1965.pdf. He explained that "perhaps the most serious inadequacy results from the practice of some district courts to require the Government to carry a very onerous burden of proof of 'purpose.' Since many types of intimidation, particularly economic intimidation, involve subtle forms of pressure, this treatment of the purpose requirement has rendered the statute largely ineffective." *Id.* at 12. In contrast, Katzenbach believed § 11(b) was a "substantial improvement" in part because "no subjective 'purpose' need be shown . . . in order to prove intimidation . . . . This represents a deliberate and, in [Katzenbach's] judgment, constructive departure from the language and construction of [§ 131(b)]." *Id.* Katzenbach explained that, instead of relying on a showing of intent, under § 11(b), "defendants would be deemed to intend the natural consequences of their acts." *Id.*

The VRA's House Report shows that Congress adopted Katzenbach's reasoning: "[t]he prohibited acts of intimidation need not be racially motivated; indeed, unlike [section 131(b)] (which requires proof of a 'purpose' to interfere with the right to vote) no subjective purpose or intent need be shown." Ben Cady & Tom Glazer, *Voters Strike Back: Litigating Against Modern Voter Intimidation*, 39 N.Y.U. Rev. L. & Soc. Change 173, 190 (2015). In other words, Congress worded § 11(b) very carefully to ensure that plaintiffs would not have to prove defendants' subjective intent or racial animus. *See id.* at 205 ("The most logical reading of section 11(b), in

light of its legislative history and its textual changes from section 131(b), is that it reaches any objectively intimidating conduct without regard to the defendant's intent.").

Defendants' brief misses the mark by relying on cases addressing § 131(b)'s intent requirement, Defs. Brief at 12-14. For example, Defendants cite to *United States v. McLeod*, 385 F.2d 734 (5th Cir. 1967), which is a § 131(b) case and does not address §11(b) at all. Indeed, Defendants' brief incorrectly and improperly alters a quote from *McLeod* to purportedly cite § 11(b) of the VRA, when in fact the quoted language refers to § 131(b) of the Civil Rights Act of 1957. *See* Defs. Br. at 12 (quoting *McLeod*, 385 F.2d at 740).

Defendants also cite to *Olagues v. Russoniello*, 797 F.2d 1511 (9th Cir. 1986), which relies on *McLeod*'s interpretation of § 131(b)'s intent requirement and, as a result, conflates that statute with § 11(b) with no acknowledgment of the material differences between the plain language of both statutes. But, as discussed above, § 11(b) was drafted specifically *not* to have an intent requirement and so to have a broader reach than § 131(b)). Similarly, Defendants cite, in support of their incorrect interpretation of § 11(b), to *Parson v. Alcorn*, 157 F. Supp. 3d 479 (E.D. Va. 2016) and *Pincham v. Illinois Judicial Inquiry Board*, 681 F. Supp. 1309, 1317 (N.D. Ill. 1988), *aff'd*, 872 F.2d 1341 (7th Cir. 1989). Again, both cases rely exclusively on the incorrect interpretation of § 11(b) set out in *McLeod* and *Olagues*.

The interpretation of § 11(b) in *Olagues* was unfortunate, but this Court is not bound by it or any of its progeny and need not repeat its errors. Instead, the Court should look to the plain meaning of the text and the specific congressional intent behind § 11(b) to correctly interpret the provision to require proof of neither specific intent nor racial animus.

II. A CLAIM UNDER THE "SUPPORT OR ADVOCACY" CLAUSE OF § 1985(3) DOES NOT REQUIRE EITHER PROOF OF A VIOLATION OF AN INDEPENDENT CONSTITUTIONAL RIGHT OR A SHOWING OF CLASS BASED ANIMUS.

Defendants make two main arguments as to why the Complaint is insufficient to state a claim under the text of § 1985(3). First, Defendants suggest that § 1985(3) requires state action and the identification of an independent constitutional right that is being violated. Defs. Brief at 14-15. Second, Defendants argue that the support or advocacy clauses of § 1985(3) require a showing of class-based animus. Defs. Brief at 15-16. Both these assertions are contrary to the plain text of § 1985(3) and to established judicial precedent.

A. The Text of § 1985(3) Shows that There Are Five Distinct Clauses, Four of Which Identify Legally Actionable Claims.

Section 1985(3) consists of five separate clauses, and to understand how distinct those clauses are, it is useful to separate each clause into a paragraph (divided at each semi-colon), as shown below:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the *equal protection of the laws*, or of equal privileges and immunities under the laws;
>
> or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the *equal protection of the laws*;
>
> or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his *support or advoc*acy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States;
>
> or to injure any citizen in person or property on account of such *support or advocacy*;
>
> in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may

> have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3) (emphasis added).

Reviewing § 1985(3)'s five clauses in this way clarifies that the first four clauses set out separate causes of action, and the fifth clause sets out the remedies provided for violations of those causes of action. The first two clauses include a common phrase: "equal protection of the laws" (clause one prohibits conspiring to deprive persons of equal protection of the laws, while clause two prohibits conspiring to prevent or hinder state authorities from securing equal protection of the laws). Similarly, clauses three and four include a common phrase: "support or advocacy" (clause three prohibits conspiring to prevent by intimidation a citizen from supporting or advocating for certain candidates in federal elections, while clause four prohibits conspiring to injure any citizen on account of their support or advocacy for certain candidates in federal elections). Clause five states that parties injured "in person or property" may recover damages from any of the co-conspirators.

Although the different claims have been codified together, they are distinct provisions. Tracing the congressional debate, the equal protection clauses were added first, and it was only later that the "support or advocacy" clauses were added, separately, by an amendment. *See* Cong. Globe, 42d Cong., 1st Sess. 704 (1871). The Supreme Court has recognized that the equal protection clauses of § 1985(3) are distinct from its support or advocacy clauses, and as such, they should be interpreted differently. *See Kush v. Rutledge*, 460 U.S. 719, 726 (1983) ("Although *Griffin* itself arose under the first clause of § 1985(3), petitioners argue that its reasoning should be applied to the remaining portions of § 1985 as well. We cannot accept that argument . . . ."); s*ee also* Cady & Glazer, *supra* at 203-04.

B. Allegations of a Violation of the "Equal Protection" Clauses of § 1985(3) Would Require State Action, But the Plaintiffs Make Claims Based on the "Support or Advocacy" Clauses, and Therefore Validly State Allegations Against Private Actors.

As mentioned above, § 1985(3)'s long block of text might cause confusion about the different requirements to make a claim under each clause. Fortunately, precedent can guide us.

Defendants' § 1985(3) arguments rest on a fundamental misconception about Plaintiffs' § 1985(3) claim – namely, that the claim is made under the "equal protection" rather than the "support or advocacy" clauses. Defs. Brief at 14-19. For example, Defendants assert that "a court faced with a § 1985(3) claim must first determine whether the purported conspiracy is alleged to have breached some otherwise defined federal right." Defs. Brief at 14 (internal quotation marks omitted). Similarly, Defendants assert that Plaintiffs allege a conspiracy to violate their First Amendment rights. Defs. Brief at 15 ("Exercise of such political support or advocacy is a First Amendment right . . . ."). These mistaken assertions lead Defendants to wrongly conclude that § 1985(3) requires state action, the identification of an independent constitutional right being violated, and class-based animus. Defs. Brief 15-19.

In reality, Plaintiffs never alleged that they have had their *First Amendment* rights infringed. Rather, the pleadings allege a violation of Plaintiffs' *statutory* rights under clauses three and four of § 1985(3) – that is, the support or advocacy clauses. Compl. ¶¶ 52-73. Plaintiffs' pleadings include allegations that "Defendants conspired with each other and with VVA to knowingly accuse constitutionally eligible voters, including Plaintiffs, of having committed felony voter fraud with the purpose of intimidating those and other voters in an effort to prevent them from voting or registering to vote," *id.* ¶ 54 (a violation of clause three of § 1985(3)), and that "Plaintiffs Eliud Bonilla, Luciania Freeman, Abby Jo Gearhart, and Jeanne Rosen, each of whom was constitutionally eligible to vote in Virginia, were injured and continue

to be injured by being wrongly accused as having committed multiple felonies and having their contact information . . . published," *id.* ¶ 61 (a violation of clause four of § 1985(3)).

In order to grasp why the "support or advocacy" clauses do not require state action, the identification of an independent constitutional right being violated, or class-based animus, it is useful to understand why these requirements *do* apply to the "equal protection" clauses of § 1985(3). The equal protection clauses of § 1985(3) "provide[] no substantive rights [them]sel[ves]," *Great Am. Fed. Sav. & Loan Ass'n v. Novotny,* 442 U.S. 366, 372 (1979) ("*Novotny*"); they merely refer to the deprivation of either "equal protection of the laws" or "equal privileges and immunities." This means that "[t]he rights, privileges, and immunities that [the equal protection clauses of] § 1985(3) vindicate[] must be found elsewhere." *United Bhd. of Carpenters, Local 610 v. Scott*, 463 U.S. 825, 833 (1983) ("*Carpenters*"). Thus, plaintiffs asserting claims under the "equal protection" clauses of § 1985(3) must identify a separate constitutional right being violated – either a denial of equal protection of the laws or a denial of some other right covered by the reference to "equal privileges and immunities."

That means that alleging a violation under the "equal protection" clauses typically requires a showing of state action, because nearly all of the relevant constitutional rights require state action. For example, if plaintiffs claim an infringement of First Amendment rights, it will be "necessary for respondents to prove that the state was somehow involved in or affected by the conspiracy." *Id.* Some exceptions exist, such as a claim of conspiracy to deprive individuals of their rights under the Thirteenth Amendment, which does not require a showing of state action. The Thirteenth Amendment, after all, applies to private conduct. U.S. Const. amend. XIII, § 1 ("Neither slavery nor involuntary servitude . . . shall exist within the United States . . . ."); *Griffin v. Breckenridge*, 403 U.S. 88, 104-05 (1971).

Furthermore, a claim under the "equal protection" clauses of § 1985(3) must satisfy the two-part test from *Griffin v. Breckenridge*, which requires plaintiffs to show class-based animus. The Supreme Court has unambiguously stated that the *Griffin* class-based animus test applies only to § 1985(3)'s equal protection claim. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 267-68 (1993) (stating that the two-part *Griffin* test applies to "the first clause of § 1985(3)"); *Kush*, 460 U.S. at 725-26 (declining to extend the rationale of *Griffin* to the other § 1985 claims because they are not similarly limited by the equal protection clause). This interpretation is consistent with the KKK Act's legislative history. Congress was concerned not only with the Klan's targeting of blacks, but also political supporters of Reconstruction-Era Republicans. Mark Fockele, *A Construction of Section 1985(c) in Light of Its Original Purpose*, 46 U. Chi. L. Rev. 402, 410-11 (1979) (describing the political threat of the Ku Klux Klan).

And so, in summary, to allege a violation of the "equal protection" clauses of § 1985(3), one must allege: (1) a "racial, or perhaps otherwise class-based" animus, *Griffin*, 403 U.S. at 102; *see also Carpenters*, 463 U.S. at 833-5; (2) a violation of an independent constitutional right; and, if the independent constitutional right applies only to official actions, then one must also allege (3) state action.

By contrast, the "support or advocacy" clauses of § 1985(3) establish their own statutory protections (against conspiracies to prevent by force, intimidation, or threat citizens from supporting or advocating for certain candidates in federal elections or to injure citizens in person or property on account of such support or advocacy). No separate right need be identified. *See, e.g.*, *Paynes v. Lee*, 377 F.2d 61, 63-64 (5th Cir. 1967). Furthermore, given that no separate constitutional right need be implicated, the support or advocacy clauses of § 1985(3) do not require state action, a violation of independent constitutional right, or class-based animus;

instead, they apply, as the language of the provision suggests, to "citizens" that meet the requirements of the provision.

III. DEFENDANTS' ALLEGED CONDUCT RISES TO THE LEVEL OF "INTIMIDATION" AS THAT TERM IS COMMONLY UNDERSTOOD, AND AS THE TERM WAS USED BY CONGRESS WHEN ENACTING BOTH § 11(B) AND § 1985(3).

The Defendants' alleged conduct is the type of serious intimidation and injury that § 11(b) and § 1985(3) proscribe. To understand that the alleged conduct constitutes intimidation, one must discern what the statutes mean when they prohibit "intimidation." In statutory interpretation, words are given "their 'ordinary or natural' meaning." *Leocal v. Ashcroft*, 543 U.S. 1, 8-9 (2004) (quoting *Smith v. United States*, 508 U.S. 223, 228 (1993)). Under that standard, the facts alleged here fall squarely within the statutes.

A. Defendants' Alleged Conduct Falls Within the Commonly Understood Meaning of the Term "Intimidation" Under Both § 1985(3) and § 11(B).

With respect to the natural and ordinary interpretation of "intimidation" in § 11(b) and § 1985(3), the Court can draw guidance from (at least) four sources: at the most basic level, dictionary definitions of the term in question provide helpful guidance; second, the Court can look to the interpretation of the word "intimidation" in the context of other *federal* civil rights cases; third, it can conduct the same inquiry with respect to *state* civil rights cases; finally, this Court can look to the interpretation of the term "intimidation" by the Department of Justice. Each of these sources suggests that the alleged conduct constitutes intimidation for the purposes of § 11(b) and § 1985(3).

Starting with the most basic understanding of the term "intimidate," Webster's dictionary from 1867, which is contemporaneous with the enactment of § 1985(3), defines intimidate as "[t]o make fearful; to inspire with fear.—S[yn]. [t]o dishearten; dispirit; abash; deter; frighten; terrify." Noah Webster, *An American Dictionary of the English Language* 555 (1867),

https://babel.hathitrust.org/cgi/pt?id=loc.ark:/13960/t7cr73m53;view=1up;seq=583; *see also* Cady & Glazer, *supra*, at 196 (citing multiple general use and legal dictionaries and determining that "to 'intimidate' is to make another person fearful, especially in order to influence his or her conduct"). This definition does not mention methods (whether physical, psychological, or otherwise); it merely notes the state of mind that the perpetrator implants in the victim(s).

Moving to federal civil rights cases, the term "intimidation" is used in statutes other than § 1985(3) and § 11(b) and the definition of that term in cases dealing with those statutes is instructive. These cases make clear that "intimidation" is not limited to overt displays of physical force and violence, but extends to a range of conduct that would reasonably place an individual in fear.

The most similar use of the term is in 42 U.S.C. § 1985(2), which prohibits conspiracies to intimidate parties or witnesses in connection with legal proceedings. In interpreting that section, a district court held that emotional stress, not merely physical injury, could give rise to a claim for witness intimidation under that provision. *Silverman v. Newspaper & Mail Deliverers' Union of N.Y. and Vicinity*, No. 97 Civ. 0040 (RLE), 1999 WL 893398, at *4 (S.D.N.Y. Oct. 18, 1999). The court explained that though the Civil Rights Act of 1871 was "adopted to address physical intimidation . . . which often resulted from Klan violence," this "was not the only goal of the statute." *Id.* Further, the court found that the statute was "also designed to address improper interference with the judicial process," and therefore the plaintiff could bring a claim alleging that there was interference "with the witness' ability to give 'free, full and truthful testimony' in federal court." *Id.*

Similarly, 42 U.S.C. § 3617 makes it unlawful to "intimidate, threaten, or interfere with" a person for enjoying or exercising fair housing rights. In cases involving this statute, courts have

held that plaintiffs stated claims for intimidation even where the defendants' conduct did not include physical violence. *See, e.g.*, *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*, 388 F.3d 327, 330 (7th Cir. 2004) (scrawling of a racial slur on plaintiffs' property); *People Helpers, Inc. v. City of Richmond*, 789 F. Supp. 725, 733 (E.D. Va. 1992) (excessive investigations by the city of a rental property).

Section 131(b) of the Civil Rights Act (52 U.S.C. § 10101(b)) is also instructive insofar as it provides guidance on the types of conduct that can be considered intimidating. In interpreting the term "intimidate," courts have found that economic coercion (not merely physical violence) is included in the definition of that term. *See United States v. Bruce*, 353 F.2d 474 (5th Cir. 1965) (voter intimidation claim arose when white landowners ordered black defendant, an insurance collector active in encouraging voter registrations, to stay off their property, preventing him from reaching business clients); *United States v. Beaty*, 288 F.2d 653, 656 (6th Cir. 1961) (white landowners evicted and refused to deal in good faith with black tenant farmers for the purpose of interfering with their voting rights, which gave rise to a voter intimidation claim); *United States v. Deal*, 6 Race Rel. L. Rep. 474 (W.D. La. 1961) (voter intimidation arose when white business owners refused to engage in business transactions with black farmers who attempted to register to vote). *See also* Cady & Glazer, *supra*, at 193-202 (summarizing several cases where courts interpreted the term "intimidate" or "intimidation" with respect to civil rights).

Perhaps the most useful case for defining intimidation in an electoral context is a recent one with a fact pattern similar to this case. In *United States v. Nguyen,* the defendant was alleged to have been involved with a campaign to mail 14,000 letters to newly registered voters with Hispanic surnames. The letters warned that if the recipients voted in the election, their personal

information would be collected by the government and made available to organizations that were "against immigration." 673 F.3d 1259, 1261 (9th Cir. 2012). The court found that intimidation (under California's state criminal voter intimidation statute) is not "limited to displays or applications of force, but can be achieved through manipulation and suggestion," that is, intimidation may be "subtle, rather than forcefully coercive." *Id.* at 1265.

As for the Department of Justice, it says that intimidation is conduct designed to "deter or influence voting activity through threats to deprive voters of something they already have, such as jobs, government benefits, or, in extreme cases, their personal safety." Craig C. Donsanto & Nancy L. Simmons, Public Integrity Section, U.S. Dep't of Justice, *Federal Prosecution of Election Offenses* 54 (7th ed. 2007), https://www.justice.gov/sites/default/files/criminal/legacy/2013/09/30/electbook-0507.pdf.

The descriptions and examples of intimidation outlined in this section demonstrate that there are a variety of ways to intimidate individuals with respect to their civil rights. Regarding the release of sensitive personal information and its ability to constitute conduct that intimidates or injures, we can gain additional insight into the effect of the release of such information from various national sources. The release of personally identifiable information is considered to put individuals at harm of "identity theft, embarrassment, or blackmail," according to the *Guide to Protecting the Confidentiality of Personally Identifiable Information (PII)*, Erika McCallister *et al.*, National Institute of Standards and Technology ES-1 (2010), http://nvlpubs.nist.gov/nistpubs/Legacy/SP/nistspecialpublication800-122.pdf. The Office of Management and Budget has noted that certain data are "particularly sensitive and may alone present an increased risk of harm to the individual. These data elements include, but are not limited to, SSNs, passport numbers, driver's license numbers, state identification numbers, bank

account numbers, passwords, and biometric identifiers." Memorandum from Shaun Donovan, Dir., Exec. Office of the President, Office of Mgmt. & Budget, to Heads of Exec. Dep'ts & Agencies, *Preparing for and Responding to a Breach of Personally Identifiable Information* 22, (Jan. 3, 2017), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/m-17-12_0.pdf.

Plaintiffs have pled colorable claims of intimidation and injury under both § 11(b) and § 1985(3) by the dissemination of voters' private information and personal details, including, in some cases, their Social Security numbers.

B. Defendants' Alleged Conduct Is a Modern Form of the Acts that § 11(B) Sought to Prohibit.

At the time Congress enacted § 11(b), a wide variety of methods were used to intimidate voters in addition to overt physical violence and economic harm. For example, segregationists produced and disseminated lists of names and addresses of black citizens who had registered to vote or who were against segregation. *E.g. U.S. ex rel. Katzenbach v. Original Knights of KKK*, 250 F. Supp. 330, 342 (E.D. La. 1965) (describing intimidating KKK handbills posted to identify specific individuals and businesses that the KKK was targeting). In Haywood County, Tennessee, after African Americans began to register to vote in 1960, more than 100 white citizens organized a "systematic campaign of intimidation," including preparing and circulating a list of black citizens to be denied credit. *Voting Rights: Hearings Before the S. Subcomm. on the Judiciary,* 89 Cong. 1292 (1965). The inclusion of an individual's name on such a list was intimidating because it exposed that individual to harm. *See Civil Rights: Hearings Before the S. Subcomm. on Constitutional Rights of the Committee on the Judiciary*, 85 Cong. 293-99 (1957) (describing the plight of a black family in rural Alabama forced to move to another state after being featured in a *Life* magazine story discussing their support for desegregation).

Publication of black voters' names and addresses was such an effective method of intimidation that, in 1962, the Mississippi state legislature codified the practice, establishing a requirement that, by law, the names of all applicants attempting to register to vote be published in a local newspaper once a week for two weeks. United States Commission on Civil Rights, *Voting in Mississippi* 9 (1965). This requirement removed any hope of anonymity for black voters, thereby exacerbating fears of intimidation and reprisal. *See id.* at 61; *see also King v. Cook*, 298 F. Supp. 584, 587 (N.D. Miss. 1969) ("Reticence to apply for registration might have been intensified . . . by publication in the local newspaper of the names and addresses of all applying for registration . . . ."). As the United States Commission on Civil Rights noted, "[i]n this climate a single incident of reprisal may be sufficient to deter many potential registrants." *Voting in Mississippi* at 39.

And such incidents did occur. In one case, a woman who registered to vote had her name published in the local newspaper and, the next day, was arrested on a charge of passing a bad check for $5.15. *Id.* at 23. In another case, a retired school teacher registered to vote and, when her name was published in the newspaper, she returned home to find a life-sized effigy of a woman hanging above her mailbox. *Id.* at 27. She testified that she thought this was done "to scare [her]," and, although she did go to the county seat to register, the woman testified that "fear of violence made her unwilling to go to her polling place to vote in the elections which followed." *Id.*

Mississippi's registration requirements were so restrictive that, in 1965, the United States Department of Justice challenged them in federal court. While the district court dismissed the complaint, the Supreme Court, in a unanimous decision, held that "the allegations of this complaint were too serious, the right to vote in this country is too precious . . . for this complaint

to have been dismissed." *United States v. Mississippi*, 380 U.S. 128, 144 (1965). The Mississippi Legislature repealed the provision regarding publication of voter information in June 1965, before the lower court could rule on it. *See King*, 298 F. Supp. at 587. However, repeal of Mississippi's law did not end the intimidation of potential voters through collection and publication of their names and addresses.

The Defendants' conduct is a modern form of such intimidating acts. It is widely understood that exposing individuals' direct identifiers on the Internet – including, in this case, the names, addresses, telephone numbers, and Social Security numbers – can cause them significant harm. *See, e.g.*, Joey L. Blanch & Wesley L. Hsu, *Cyber Misbehavior,* 64:3 U.S. Dep't of Just. Bull. 2, 5 (2016), https://www.justice.gov/usao/file/851856/download ("Another form of cyberharassment is 'doxing,' which refers to broadcasting personally identifiable information about an individual on the Internet. It can expose the victim to an anonymous mob of countless harassers, calling their phones, sending them email, and even appearing at the victim's home.").

The dissemination of Plaintiffs' names by Defendants is, arguably, even more egregious due to the magnifying effect of the Internet. At the time the VRA was passed, segregationists were limited in how widely they could distribute the names of individuals they had singled out. Today, however, names can be distributed instantaneously to millions of people over the Internet – significantly increasing the potential harm to those individuals, through, for example, identity theft and online and in-person threats.

Finally, the practice of collecting and publishing individuals' personal information, including their names, addresses, and phone numbers, has repeatedly served as the basis for criminal prosecution. This Circuit upheld the criminal conviction of white supremacist William

White on multiple counts of transmitting in interstate commerce—by email, U.S. Mail, and telephone—threats to injure or intimidate individuals, after White published individuals' personal information on his website, "www.overthrow.com." *See United States v. White*, 670 F.3d 498, 501-04 (4th Cir. 2012). Similarly, the Seventh Circuit upheld the conviction of White for soliciting the commission of a violent federal crime against a juror, after White published online the juror's name, address, and phone numbers. *See United States v. White*, 698 F.3d 1005, 1008 (7th Cir. 2012).

At a time when these types of attacks are on the rise, having one's name and personal information published on the internet by an anti-voting rights group – and being singled out to a mob of online "activists" as someone who has violated the law – would reasonably place one in fear of voting.

C. Congress' Intent in Passing § 1985(3) Was to Stop Intimidation and Injury Serious Enough to Deter Political Engagement.

While the precise historical conduct that § 1985(3) targeted was intimidation by disguised Klansmen, the modern form of conspiracies seeking to intimidate and injure individuals and scare the public from offering their support or advocacy for candidates is perfectly encapsulated in the release of sensitive personal information.

At the height of Reconstruction, Congress was alarmed that members of the Klan, and similar groups, were engaged in a campaign to intimidate and injure individuals not only for the purpose of suppressing the minority vote, but also for the related purpose of producing electoral outcomes favorable to the Klan's political party of choice. And so, in 1871, Congress passed § 1985(3) to combat the Klan's tactics of racial and political suppression. The legislative history and historical backdrop clarify that § 1985(3) was intended to protect individuals from fear or harm caused by conspirators when giving their political support or engaging in political

advocacy. Properly understood in light of this original purpose, § 1985(3) prohibits the type of organized, racially and politically motivated harassment that Plaintiffs allege. Contrary to Defendants' assertions, the Complaint does not allege "purely political conspiracies," Defs. Brief at 16, but instead alleges racially and politically motivated harassment broadly targeting Latinos as a class and their perceived political allies. *Compare* Defs. Brief at 18 *with* Compl. ¶ 63 ("The Latino community, including members of LULAC, will be discouraged from participating in the electoral process as a direct result of Defendants' conduct.").

Immediately following the Civil War, the federal government undertook a broad-based effort to bring African American voters into the political process. By 1870, Congress had passed the Thirteenth, Fourteenth, and Fifteenth Amendments. U.S. Const. amends. XIII, XIV, XV ("Reconstruction Amendments"). These Amendments made possible a period of widespread electoral success for African-American voters and the Republican Party. Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877,* at 291-307 (Henry Steele Commager & Richard B. Morris eds. 1988). A coalition of newly enfranchised black voters and a sympathetic minority of white voters brought nearly all of the Southern governorships and legislatures under Republican control and elected numerous African American representatives to Congress. *Id.* at 353.

In communities across the South, the Klan and similar organizations[3] responded to these sweeping changes with a sustained campaign of violence, threats, and intimidation. Much of the Klan's violence was political in nature. It was directed primarily at black Republicans and, to a lesser degree, their white Republican allies, and it was designed to deter them from engaging in

[3] Foner recounts organizations like the "Knights of the White Camelia" and the "White Brotherhood." Foner, *supra*, at 425.

the political process. The Klan was, in effect, "a military force serving the interests of the Democratic party, the planter class, and all those who desired the restoration of white supremacy." *Id.* at 425.

The escalation of violence and intimidation against black Americans and supporters of the Republican Party drew the attention of Congress. As the legislative history of the bill establishing § 1985(3) reflects, a primary concern of Congress was that the Klan's conduct was politically motivated – specifically, that the Klan sought to undermine the democratic process by deterring Republicans from political engagement through intimidation. *See, e.g.*, Fockele, *supra* at 407-11. The record is unambiguous on this point:

> Such is the conclusion stated in the majority report of the Senate Select Committee to Investigate Alleged Outrages in the Southern States: "[I]t is clearly established . . . [t]hat the Ku-Klux organization does exist, has a political purpose, is composed of members of the democratic or conservative party, [and] has sought to carry out its purpose by murders, whippings, intimidations, and violence." This theme was sounded again and again during the debates in Congress, the Republicans steadily insisting on it and the Democrats steadfastly denying it.
> The immediate goal of the Klan, as seen by the Republican majority, was to wrest control of the state governments from the Republican party and to reestablish Democratic hegemony in the South.

Id. at 408-09 (footnotes omitted; alterations in original) (quoting H.R. Rep. No. 1, 42d Cong., 1st Sess. xxx-xxxi).

The congressional record makes clear that members wanted to curb politically motivated conduct that interfered with the proper functioning of the democratic process. *See, e.g.*, Cong. Globe, 42d Cong., 1st Sess. 460 (1871) (statement of Rep. John Coburn (R-Ind.)), https://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=099/llcg099.db&recNum=575 ("The Democrats do get and use the entire benefit of the Ku Klux Klans. It is exactly, as they say, political. They get up a reign of terror, they encourage crimes of the most frightful nature to

carry elections. We would suppress them, would punish them; we would restore order, fair-dealing, equality, and peace, to secure free elections.").

The drafters of § 1985(3)'s support or advocacy clauses could not have foreseen the development of the Internet. They could not have imagined the existence of a worldwide information repository and communications system, and that nearly all of a person's sensitive information and private communications could be published for the world to see. However, old crimes can occur in modern contexts. If a thief steals from a victim's electronic bank account, it is still theft even if no paper currency has changed hands. And in the context of the Internet age, that politically targeted intimidation or injury occurred online is no reason for Defendants to escape liability under the support or advocacy clauses of § 1985(3).

Defendants' conduct sends a clear message to Plaintiffs – and to all Americans who are considering voting – that the price of political engagement may be the theft of their identities and the publication of their most private personal information. This is a message that could undeniably deter political participation and thereby undermine the proper functioning of the democratic process. This Court should hold that the activities alleged in the Complaint fall within the conduct proscribed by § 1985(3)'s support or advocacy clauses.

CONCLUSION

For the foregoing reasons, the Court should deny the Defendants' motion to dismiss.

Dated this 12th day of June 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of June, 2018, I transmitted the foregoing document to the named parties' emails by means of an electronic filing pursuant to the ECF system.

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