

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

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LEAGUE OF UNITED LATIN :
 AMERICAN CITIZENS - RICHMOND :
 REGION COUNCIL 4614, et al., :
 Plaintiffs, :
 -vs- : Case No. 1:18-cv-423
 PUBLIC INTEREST LEGAL FOUNDATION, :
 et al., :
 Defendants. :
 ----- :

HEARING ON MOTIONS

June 22, 2018

Before: Liam O'Grady, USDC Judge

APPEARANCES:

Anisa A. Somani, Sean M. Tepe, Cameron Kistler, and
Jeffrey Loperfido, Counsel for the Plaintiffs

Michael J. Lockerby, William E. Davis, and Eli L. Evans,
Counsel for the Defendants

1 THE CLERK: The Court calls case 1:18-cv-423, League
2 of United Latin American Citizens, Richmond Region Council
3 4614, et al. versus Public Interest Legal Foundation, et al.
4 for a motion hearing.

5 May I have the appearances, please, first for the
6 plaintiffs.

7 MS. SOMANI: Good afternoon. My name is Anisa
8 Somani, I am lead Virginia counsel for the plaintiffs.

9 THE COURT: All right.

10 MR. SOMANI: With me are my co-counsel, I have
11 Cameron Kistler on behalf of Protect Democracy.

12 MR. KISTLER: Good afternoon, Your Honor.

13 MS. SOMANI: We have Mr. Jeff Loperfido on behalf of
14 Southern Coalition for Social Justice.

15 MR. LOPERFIDO: Good afternoon, Your Honor.

16 MS. SOMANI: And we also have Mr. Sean Tepe as pro
17 bono counsel.

18 THE COURT: All right.

19 MR. TEPE: Good afternoon, Your Honor.

20 THE COURT: Good afternoon to each of you.

21 MR. LOCKERBY: Your Honor, I am Mike Lockerby with
22 the Washington office of Foley & Lardner representing the
23 defendants, the Public Interest Legal Foundation and J.
24 Christian Adams.

25 With me at counsel table is my partner, Bill Davis,

1 who has been admitted pro hac vice in this case.

2 And then immediately behind us is Christian Adams to
3 Your Honor's left, who is president of the Foundation and a
4 defendant named individually.

5 Beside Mr. Adams is Eli Evans, an associate in our
6 Washington office.

7 THE COURT: All right, good afternoon to each of you.

8 And I appreciate your patience in getting here. The
9 docket just kind of kept getting longer the closer we got to
10 Friday, and I should have let you know that 10 o'clock wasn't a
11 realistic time. And I apologize for not doing so.

12 All right. This comes on motions to dismiss the
13 complaint. And I've read the submissions and looked at some of
14 the case law, and I will hear anything else you would like to
15 say now, Mr. Lockerby.

16 MR. LOCKERBY: Thank you, Your Honor. With the
17 Court's permission, Mr. Davis and I would like to divide up the
18 argument. I had planned to address the threshold issue of
19 standing of LULAC, as well as the sufficiency of the
20 allegations of violations of the Voting Rights Act and the Ku
21 Klux Klan Act.

22 Whereas, Mr. Davis will address the legal sufficiency
23 of the plaintiffs' defamation claims, along with the anti-SLAPP
24 statute affirmative defense.

25 As Your Honor indicated, this case has been

1 extensively briefed, so I am not going to rehash the factual or
2 legal context in which it arises, except to emphasize a few key
3 points that are critical to all the arguments and all the
4 counts.

5 The Foundation is a public interest law firm
6 dedicated to the integrity of elections. And when the
7 Foundation sought and eventually obtained from state and local
8 elections officials in the Commonwealth certain records about
9 voter rolls, it was exercising its rights under the National
10 Voter Registration Act.

11 And similarly, when the Foundation published two
12 reports summarizing and attaching the public records that it
13 had obtained, it was exercising its First Amendment right to
14 advocate on behalf of U.S. citizens that their votes ought not
15 be cancelled out by the votes of people who aren't citizens.

16 Now, the plaintiffs are --

17 THE COURT: What responsibility did plaintiffs have
18 to review the public records once they were put on notice that,
19 hey, these may not be accurate?

20 MR. LOCKERBY: Well, Your Honor, certainly to the
21 extent that there were some inaccuracies brought to their
22 attention, those were corrected in the second report. And in
23 fact, two of the individual plaintiffs were not named in the
24 second report.

25 Now, there are also some disagreements about the

1 implications to be drawn from those reports, but that's really
2 a First Amendment issue. There are conclusions that the
3 Foundation draws, and then people make countervailing
4 arguments, but at the end of the day these are public records.
5 And if anyone was remiss, if there are any inaccuracies in
6 these records, it really was the state and local officials who
7 maintained the records, not our clients.

8 And what the plaintiffs clearly did is -- or the
9 defendants rather, is they made truthful statements in the
10 reports. First, that it's a felony for a non-citizen to
11 register to vote. And second, it's also a felony for a
12 non-citizen to vote.

13 And the public records from various jurisdictions
14 around the Commonwealth showed literally thousands of
15 non-citizens who were registered to vote -- who are registered.
16 And these truthful statements were the basis for each of the
17 claims that the plaintiffs have asserted.

18 Now, first with respect to standing. Even if the
19 complaint alleged facts sufficient to establish violations of
20 the various causes of action at issue, LULAC, the League of
21 United Latin America Citizens of the Richmond Region, would not
22 have standing to assert these claims.

23 And from their opposition, it appears that LULAC is
24 misinformed about a basic principle of civil procedure. They
25 insist that the reports at issue target Latinos, and that Rule

1 12(b)(6) requires this Court to accept as true the allegations
2 of the complaint that the reports target Latinos.

3 But if there is an inconsistency between what the
4 reports say and what the complaint says the reports say, then
5 the actual language of the reports is controlling.

6 Here, the reports do not mention Latinos. They don't
7 mention Latin American countries at all. They say nothing
8 about the national origin, the ethnicity, the race, or any
9 other demographic characteristic of non-citizens registered in
10 Virginia.

11 The reports also do not distinguish between
12 non-citizens who are legally resident in this country and
13 illegal aliens. As a matter of law, it doesn't make a
14 difference. Either way, it's a felony for a non-citizen to
15 register to vote or to vote.

16 As far as a reader could tell from the reports, the
17 non-citizens could be Canadians who want to live somewhere with
18 a winning hockey team. They could be Russians who want to
19 meddle in elections. It says nothing about Latinos.

20 And so, there is not a single word in either report
21 that could be construed as being directed against members of
22 LULAC. Which, by the way, stands for League of United Latin
23 America Citizens.

24 Now, there are two potential bases for standing, as
25 the parties have argued. Organizational standing, where LULAC

1 brings suit on its own behalf, or under a representational
2 theory on behalf of its members.

3 Under the organizational standing test, LULAC has
4 standing only if it has suffered injury that is concrete and
5 particularized, actual or imminent -- not conjectural -- and
6 likely -- not speculative -- to be redressed through a
7 favorable decision.

8 The case law that we've cited establishes that the
9 types of injury that the plaintiffs are alleging does not meet
10 this test. For example, conflicts between the defendants'
11 conduct and the organization's mission is insufficient under
12 Goldstein. Some general harm to the organizational purpose is
13 insufficient under Jefferson versus School Board of Norfolk.
14 Setback to some abstract social interest, such as eliminating
15 discrimination under Buchanan, that's insufficient. Or harm
16 resulting from the organization's own budgetary choices, which
17 the Fourth Circuit found insufficient in Lane versus Holder.

18 The injury has to be traceable to the defendants'
19 conduct, not the conduct of a third party, and under the Fourth
20 Circuit's decision in Friends of the Earth.

21 Here, the complaint in paragraph 50 talks about
22 anonymous postings by third parties, not these defendants. And
23 much of the negative rhetoric and perceptions that LULAC is
24 concerned about as alleged in the complaint predated
25 publication of the reports.

1 Now, they have come back with the argument that they
2 have been held to have standing in other cases, but that
3 doesn't mean that they meet their burden of showing standing
4 here.

5 And to the contrary, as Judge Doumar found in
6 Goldstein, the fact that LULAC brings so many lawsuits
7 undercuts its diversion of resources claim.

8 Now, in opposition, the plaintiffs have also argued,
9 well, we really meant to allege representational standing. But
10 to meet their burden, again under Friends of the Earth, first
11 of all, they have to show that at least one member of the
12 organization has standing to sue in his or her own right. They
13 haven't alleged a single individual member of LULAC who would
14 have standing as required by the Supreme Court's decision in
15 Summers.

16 Instead, they have merely alleged harm generally to
17 LULAC's members and to the Latino community that LULAC
18 represents, and they have merely speculated that Latino voters
19 will be discouraged from participating in the electoral
20 process.

21 THE COURT: They have also tied in the Bowsher
22 doctrine and said that as long as there is standing by any of
23 the plaintiffs, that as a result standing is not an issue I
24 should even look at, and should permit them to remain in the
25 case, right?

1 MR. LOCKERBY: They have said that, Your Honor. But
2 the individual plaintiffs in this case are not alleged to be
3 members of LULAC. And LULAC has not identified any of its
4 individual members who allegedly would have standing.

5 THE COURT: So the argument would be that they all
6 have a common injury, and that as a result, whether it's an
7 individual who is not Latino or not, isn't controlling?

8 MR. LOCKERBY: Well, they would have to show a common
9 jury. And that really does get to the merits of the other
10 causes of action, the Voting Rights Act, the Ku Klux Klan Act,
11 and defamation, because they can't show, even if a LULAC member
12 was named in these public records, that there has been any
13 injury, let alone any cause of action.

14 And we can start with the Voting Rights Act. Section
15 11(b) does not authorize voter intimidation claims against
16 non-government actors. And to see that that's the case, the
17 Court need look no further than the Fifteenth Amendment upon
18 which the Voting Rights Act is based. It prohibits states --

19 THE COURT: What if I find that it's based on the
20 Elections Clause.

21 MR. LOCKERBY: Well, even if it's based -- there is
22 no evidence that it's based on the Elections Clause. The
23 Voting Rights Act says it's an act to enforce the Fifteenth
24 Amendment to the Constitution of the United States and for
25 other purposes.

1 The DoJ guide to it on the Internet says it codifies
2 and effectuates the Fifteenth Amendment's permanent guarantee
3 that throughout the nation no person shall be denied the right
4 to vote on account of race or color, et cetera. And there is
5 authority cited in our briefs, certainly from the Fourth
6 Circuit and the Eleventh Circuit, and at least one District
7 Court, that it's limited in scope to state actions.

8 So if the Court --

9 THE COURT: Well, why does it say "under color of law
10 or otherwise"? How do I interpret that?

11 MR. LOCKERBY: Well, certainly there is precedent for
12 finding a violation if there is action between a state actor
13 and someone else. For example, a conspiracy under section
14 1985.

15 But certainly with respect to section 11(b), there is
16 no case anywhere that has held that a purely private action is
17 actionable under 11(b). The closest that the plaintiffs have
18 come is they cited a case from Arizona that no other court has
19 followed, which was the Arizona -- I forget the exact name of
20 the party. But in any event, the Court assumed for purposes of
21 the argument that there was a cause of action, and yet found no
22 violation anyway.

23 More importantly, even if it applies to private
24 conduct, and that would be unprecedented, mere publication of
25 the first and second reports is not intimidation, threats, or

1 coercion prohibited by section 11(b).

2 And again, to see the insufficiency of the
3 plaintiffs' allegations in this regard, the Court need look no
4 further than the complaint itself. The complaint alleges, I'm
5 quoting now from paragraph 31, "labelling the individuals named
6 in the reports as non-citizens and, therefore, felonies with
7 reckless disregard for the truth of those allegations."

8 There is no plausible allegation of anything that the
9 defendants did that would rise to the level of intimidation,
10 threats, or coercion. They don't cite any case law finding
11 intimidation, threats, or coercion based on similar facts.

12 The only cases that the plaintiffs do cite involved
13 direct mailings to voters. And even those don't support the
14 plaintiffs. One was a Ninth Circuit case where there were
15 letters sent to individuals targeted -- identified as targets
16 because of their Latino surnames and their party registrations.
17 Another where the complaint alleged that there were postcards
18 mailed, again based on party registrations and race. And even
19 then, the consent decree denied -- or the defendants denied
20 that they had engaged in intimidation.

21 Here there was no targeting of any plaintiff. The
22 reports did not even mention them. Their names were not among
23 the thousands of non-citizen registered voters identified in
24 the government documents attached as exhibits. And they don't
25 allege the requisite intent to intimidate to establish a

1 section 11(b) violation.

2 THE COURT: So if I find that specific intent is not
3 necessary, then what do you believe my standard of review still
4 has to be?

5 MR. LOCKERBY: Well, that there has been an
6 allegation of conduct that is intimidation, coercion, or
7 threats. And those words do have specific meaning. Certainly
8 Judge Lauck said that that requires specific intent to
9 intimidate or attempt to intimidate.

10 But even if Your Honor disagrees with Judge Lauck's
11 interpretation in the Parson case, there has to be conduct,
12 this goes back to Rule 12(b)(6) and Twombly, that plausibly
13 alleges intimidation, threats, or coercion.

14 And here it's simply too attenuated. There is
15 nothing that names the plaintiffs by name. There is nothing
16 that suggests that anyone who is lawfully registered to vote
17 should be prevented from doing so.

18 You simply have a public interest organization
19 advocating that the law be enforced. And there are other
20 groups, including some in this courtroom, that advocate
21 otherwise. And they both have a First Amendment right to so
22 advocate.

23 Similarly, these allegations don't rise to the level
24 of a conspiracy in violation of the so-called Ku Klux Klan Act,
25 section 1985(3). A mere agreement to publish the reports is

1 not sufficient to establish an unlawful conspiracy. As Judge
2 Ellis held in the Polidi case: A plaintiff asserting a section
3 1985 conspiracy must allege an agreement or a meeting of the
4 minds to violate the claimant's constitutional rights.

5 And the essential elements of the conspiracy that the
6 plaintiffs have the burden of alleging is either to prevent by
7 force, intimidation, or threat any citizen who is lawfully
8 entitled to vote from giving his support or advocacy in a
9 federal election or to injure any citizen and person or
10 property on account of such support.

11 Now, in Polidi Judge Ellis also found that state
12 action is required to establish a 1985(3) violation, albeit
13 under a different provision. That's not something that Judge
14 Ellis invented out of whole cloth, although the requirement is
15 admittedly not in the text of the statute. Rather, the
16 decision was based on the Fourth Circuit's decisions in Thomas
17 versus Salvation Army and Simmons versus Poe.

18 And here is where the plaintiffs want this Court to
19 ignore these controlling Fourth Circuit precedents and instead
20 follow the Arizona case to which I alluded earlier, Arizona
21 Democratic Party, that is unpublished, never been cited
22 anywhere. And even that decision doesn't really help them
23 because the Court merely presumed the application of the
24 support and advocacy clause to non-state actors, but ultimately
25 denied the motion.

1 Even if a private conspiracy is actionable, 1985(3)
2 requires an allegation of some racial animus or some other
3 animus that is prohibited. And that's why Judge Cacheris found
4 in the Duressa case, which did not involve support or advocacy,
5 that there has to be some racial or perhaps other class-based
6 invidious discrimination and something that is protected
7 against private as well as official encroachment. And in so
8 holding, the Court was quoting from the Supreme Court's
9 decision in Bray versus Alexandria Women's Health Clinic.

10 The plaintiffs have failed to allege the requisite
11 racial animus. And not surprisingly, the Fourth Circuit in
12 both -- given the name of the statute, the Ku Klux Klan Act and
13 its history, the Fourth Circuit in both Thomas and Simmons held
14 that there had to be allegations and proof of motivation by a
15 specific class-based invidiously discriminatory animus. And
16 these cases, again, do not involve support or advocacy clause
17 claims, but there is no reason to expect that the Fourth
18 Circuit would decide such claims any differently.

19 So with that, unless the Court has any question about
20 these first issues, I would like to turn the podium over to Mr.
21 Davis to address the defamation and anti-SLAPP statute issues.

22 THE COURT: Thank you. Let's hear from Mr. Davis.

23 MR. DAVIS: Good afternoon, Your Honor. William
24 Davis on behalf of the defendants.

25 I will be very brief, I don't want to repeat what Mr.

1 Lockerby said concerning the facts. But I would like to point
2 out that with respect to a defamation claim in this
3 jurisdiction and in most jurisdictions, there is three basic
4 essential elements to it. The first one is a publication about
5 the plaintiff.

6 The second is an actionable statement, which has to
7 be both false and defamatory.

8 And lastly, it has to be done with the requisite
9 level of intent. And with respect to a private party in terms
10 of a defamation, that intent could be based on negligence, it
11 could be based on recklessness.

12 Now, in this particular case, it is our position that
13 given the allegations in the complaint, they do not state a
14 cause of action specifically sounding in defamation. They
15 don't articulate any specific statements which were made by
16 these defendants about these particular defendants.

17 The point is, you know, the defendants' names do
18 appear in appendices amongst hundreds or perhaps even thousands
19 of other individuals. But in terms of the actual published
20 document, it makes reference to a Web site, you have to go to
21 the Web site to actually get the names, and the names are
22 specifically buried amongst --

23 THE COURT: So you don't think it's incorporated by
24 reference and it's available to the public to go and check and
25 see whether these -- you know, the names, whether in one or two

1 are there?

2 MR. DAVIS: I can't deny that it's not incorporated
3 by reference in terms of what the public documents say. I am
4 arguing though that when you look at the four corners of this
5 complaint, there is no statements in the complaint that these
6 allegations are directed at the particular four plaintiffs that
7 are before the Court.

8 THE COURT: Just the accusations that they should not
9 have been eligible to vote, that they did vote, and that
10 they're committing felonies if they did so?

11 MR. DAVIS: There is plenty of statements in the
12 articles concerning what the law is.

13 THE COURT: Right.

14 MR. DAVIS: And concerning whether or not a
15 non-resident, if the non-resident registers, obviously, it's
16 violative of the law and/or if such non-resident votes.

17 But our point is that the allegations are not
18 particularly attributed to these particular plaintiffs before
19 the Court.

20 The other thing is with regard to the evaluation of
21 these two reports in connection with the laws of defamation, I
22 believe the law in this jurisdiction is that they need to be
23 read in their entirety. You need to look at the entire scope.

24 And these particular reports are rife, you know, with
25 what is likely or what is potential or what could happen. So

1 the general gist of it is not necessarily an affirmative
2 allegation of wrongdoing. And it specifically is not directed
3 to these four plaintiffs.

4 There is an Exhibit 10 to the -- I believe it's the
5 second report, which contains somewhat of a disclaimer which
6 says: Data on the report is not accurate. Which is also
7 incorporated by reference. And I think for the purposes of
8 this Court's evaluation of the sufficiency of the pleading,
9 that the exhibit attached to the complaint is controlling over
10 any allegations which are made in the complaint if it's in
11 contradiction.

12 That would be addressing the -- oh, and in terms of
13 the cases which they have cited in their response in response
14 to the motion to dismiss the defamation, there is three cases,
15 Hatfill, Carwile, and Hyland. And in each and every one of
16 those cases, there is a specifically named party plaintiff
17 where the facts are directed to provide the basis for the
18 defamation.

19 Lastly, we believe that the articles with regard to
20 voter registration and non-citizens registering and voting are
21 matters of public concern which should be protected, basic
22 First Amendment rights, and should be protected under the
23 Virginia anti-SLAPP statute. It's a classic reason for that
24 statute.

25 So, Your Honor, on that basis, we would submit that

1 the defamation counts should be dismissed.

2 Thank you.

3 THE COURT: All right. Thank you, sir.

4 All right.

5 MS. SOMANI: With your permission, Your Honor, we
6 would like to divide the argument and response. My colleague,
7 Cameron Kistler, is prepared to present argument or answer any
8 questions you have on the federal voter claims.

9 My colleague, Mr. Jeff Loperfido, is prepared to
10 present any arguments and answer any questions you may have on
11 the defamation claims.

12 And my colleague, Mr. Sean Tepe, is prepared to
13 answer any questions you may have on standing.

14 THE COURT: Okay. All right. Who wants to go first?
15 Go ahead, you are closest to the podium.

16 And you are going to address which argument?

17 MR. KISTLER: The federal claims, Your Honor.

18 THE COURT: All right.

19 MR. KISTLER: Thank you very much. Cameron Kistler
20 for plaintiffs.

21 In the United States against the Knights of the Ku
22 Klux Klan, Judge Wisdom observes that characterization
23 assassination, just as much as threats of violence, is a tool
24 of intimidation.

25 The defendants here have engaged in character

1 assassination. As just one example, the first Alien Invasion
2 report specifically alleges that the United States Attorney in
3 Virginia has done nothing about the felonies committed by the
4 433 aliens registering in Prince William County alone.

5 The reader is then directed to an appendix containing
6 the names of the alien voters. Plaintiff Freeman is named on
7 that list. So that's directly accusing Ms. Freeman of being a
8 felon.

9 That accusation is false. Ms. Freeman is a United
10 States citizen. And that's just of the examples set out in the
11 complaint. The complaint alleges that the defendants knew that
12 their accusations were false, but they published them anyway.

13 The complaint further alleges that defendants hurled
14 those false accusations with the precise purpose of deterring
15 political participation. Defendants may disagree with those
16 assertions, but they cannot ignore them on a motion to dismiss.

17 THE COURT: Well, do you agree that I have the right
18 to look at the actual two publications, Alien Invasion I and
19 II, and look for myself as to what they say and what they don't
20 say regardless of what the complaint says?

21 MR. KISTLER: Absolutely.

22 THE COURT: Even at a 12(b)(6)?

23 MR. KISTLER: Absolutely, Your Honor, and we hope you
24 do.

25 THE COURT: Okay.

1 MR. KISTLER: If it's okay with the Court, I will
2 begin with the Voting Rights Act, and then I will switch to --

3 THE COURT: Sure, go ahead, that's fine.

4 MR. KISTLER: So, the Voting Rights Act, as Your
5 Honor pointed out, the plain text of it specifies it applies
6 whether the defendant is acting under color of law or
7 otherwise. The defendants don't dispute that.

8 Instead, they raise a non-sequitur. They say that
9 section 11(b) can't be justified under the Fourteenth or
10 Fifteenth Amendments. That's irrelevant. The constitutional
11 basis of section 11(b) is the Elections Clause. And they don't
12 seem to have an argument that it couldn't be justified under
13 the Elections Clause. They just say the statutory title
14 doesn't say: The Elections Clause.

15 I would point the Court to the Obamacare decision
16 where Chief Justice Roberts specifically notes that the
17 constitutionality of a statute does not depend on the recitals
18 that Congress makes when passing it. It's just whether or not
19 the Court can come up with a reasonable constitutional basis.

20 And I would point the Court to the legislative
21 history which explains why this is a reasonable use of the
22 Elections Clause and the necessary and proper clause.

23 THE COURT: Why hasn't there been a case brought by a
24 private citizen under 11(b)?

25 MR. KISTLER: I think there is a couple of factors,

1 Your Honor. I think first, unfortunately, I think the very
2 same conditions that produce voter intimidation also make it
3 difficult to sue. I think that a lot of voter intimidation
4 happens on the day of the election. And so, by the time it
5 comes around to get into court, it's already too late.

6 And then it just -- the statute hasn't been used that
7 much. But the plain text of the statute says we can do this.
8 And so, I think we should be permitted to.

9 THE COURT: Okay.

10 MR. KISTLER: I will move to intimidation now.

11 THE COURT: Sure.

12 MR. KISTLER: Under our interpretation of the
13 statute, we must show one of two things. Either the defendants
14 acted to intimidate an objectively reasonable voter, or they
15 intended to intimidate a voter. We allege both in the
16 complaint.

17 I want to begin with the allegations of subjective
18 intent. The complaint alleges that the defendants subjectively
19 intended to intimidate the individuals named in the Alien
20 Invasion report. The basis for those allegations is the
21 defendants' knowing publications of false accusations of felony
22 behavior.

23 It is reasonable to infer that the defendants intend
24 the natural and probable consequences of the acts they
25 knowingly do. The natural and probable consequence of a

1 multiyear campaign of falsely accusing someone of a felony for
2 voting is to discourage them from voting.

3 THE COURT: So the harm is the discouragement from
4 voting?

5 MR. KISTLER: Well, we think there is three
6 categories of harm, Your Honor.

7 I think there is the emotional harm that discourages
8 them from voting. I think there is the representational harm
9 of having the Internet -- having out on the Internet that a
10 former Department of Justice attorney who is on the President's
11 Voter Fraud Commission is saying you're a felon. I think that
12 is a significant reputational harm that would be scary to
13 anyone.

14 And I think the third harm is fear of physical harm.
15 I think it's unfortunate, but having someone's name
16 published -- name and address published on the Internet with
17 the label that you're a felon, is rightfully scary to most
18 people these days. I don't think you need to look farther than
19 the Pizzagate incident or the unfortunate incident of Judge
20 Lefkow to realize that this can have serious consequences for
21 individuals.

22 So I think our plaintiffs are reasonably frightened.
23 I would point the Court superficially to paragraph 49 of the
24 complaint which details why our plaintiffs are worried now.

25 And I think that for the purpose of a motion to

1 dismiss, those allegations should be accepted as true because
2 they are plausible.

3 If the Court doesn't have --

4 THE COURT: So, of course, there is the First
5 Amendment argument that they have identified the law, and they
6 have gotten from public records from the Commonwealth of
7 Virginia and collected them from the different registrars the
8 names that they ultimately published, and accurately -- they
9 didn't modify the information coming from the public records.

10 What effect does that have on your argument about the
11 intent here?

12 MR. KISTLER: Well, I would argue -- well, first,
13 Your Honor, our objection isn't to the use of the public
14 records. Our objection is to the gloss they put on the public
15 records. And that's where the violation of the law occurs.

16 I would also note that their First Amendment
17 arguments, at least for the purpose of the federal statutory
18 claims, are waived. They don't argue that either the Voting
19 Rights Act or Section 1985 are unconstitutional either facially
20 or as applied to them. So I don't think the Court needs to
21 consider the First Amendment arguments.

22 And I would also note that simply because you have
23 public concerns about public issues, that doesn't license you
24 to break the law. I can be worried about crime in my
25 neighborhood. That doesn't mean that I can falsely accuse my

1 neighbor of being an axe murderer in order to draw attention to
2 the issue.

3 THE COURT: Okay.

4 MR. KISTLER: If the Court doesn't have any more
5 questions about the Voting Rights Act, I will jump now to
6 section 1985.

7 THE COURT: Please, go ahead.

8 MR. KISTLER: I will begin with the allegations of
9 conspiracy, and then I will turn to what we have called the
10 extratextual elements.

11 We believe we sufficiently allege a conspiracy. We
12 allege that they jointly wrote, published, and promoted the
13 defamatory reports. That means there clearly was an agreement,
14 a meeting of the minds to engage in conduct that we challenge
15 as intimidating.

16 And when the alleged conspirators tell the world that
17 they worked together on the reports, there is neither a legal
18 requirement nor a need to plead the times and places of the
19 meeting.

20 I know that they point to the Polidi case in their
21 response. I would first point out to Your Honor that we
22 believe the frame they give on their argument in the reply
23 brief is waived. Defendants' opening brief suggests that we
24 allege the conspiracy had the purpose of intimidating those and
25 other voters. That's at the top of page 21 of the opening

1 brief.

2 So they said, we allege the purpose of the conspiracy
3 in their opening briefing. They now in their reply brief are
4 claiming something different.

5 But regardless, if you look at the statute, the "for
6 the purpose language" only appears in the equal protection
7 clauses of the statute. It doesn't appear in the support and
8 advocacy clauses.

9 And even if you were to apply to the tests they say
10 that Polidi requires, we specifically allege they agreed to
11 publish a false report with the purpose of deterring voters,
12 providing support and advocacy, that's paragraphs 54, 60, and
13 62 of the complaint.

14 So I'll transition now to the elements, the other
15 elements of 1985(3).

16 THE COURT: Yeah, go ahead.

17 MR. KISTLER: Our view is that you are bound by two
18 Supreme Court cases on this issue. We believe that Yarbrough
19 controls this Court's disposition of the state action
20 requirement. And Kush controls the disposition of the class-
21 based animus argument.

22 Yarbrough holds that there is no state action
23 requirement for support or advocacy claims. Yarbrough explains
24 that there is not a state action requirement because the
25 support or advocacy clause was passed pursuant to the Elections

1 Clause, not the Fourteenth or Fifteenth Amendments. And 19th
2 century Supreme Court holdings remain binding until they are
3 expressly overturned.

4 The Fourth Circuit's dicta analyzing other clauses in
5 1985(3) don't give you a reason to move way from the express
6 holding of Yarbrough on that point.

7 On the class-based animus issue. I would point the
8 Court to Kush. Kush explains that the class-based animus
9 requirement in section 1985(3) comes from specific statutory
10 language related to equal protection. That language is not in
11 the support or advocacy clause.

12 And I will note that my friend pointed to the Bray
13 case in his opinion as sporting his view. I would point the
14 Court to footnote 13 of the Bray opinion where Justice Scalia
15 specifically reaffirms the centrality of the specific language
16 in the equal protection clause to give rise to the class-based
17 animus requirement.

18 And so, our belief is that you should follow those
19 cases rather than the dicta in cases that aren't analyzing the
20 support and advocacy clause. If you were to follow that dicta,
21 for example, you would be concluding that the Thomas case
22 overturned the Kush case, which is not something I think the
23 Fourth Circuit intended.

24 If Your Honor doesn't have any further questions, I'm
25 happy to yield to my colleagues.

1 THE COURT: No, I don't at this time. Thank you,
2 sir.

3 MR. KISTLER: Thank you very much, Your Honor.

4 MR. LOPERFIDO: Good afternoon, Your Honor. Jeff
5 Loperfido on behalf of the plaintiffs.

6 THE COURT: All right.

7 MR. LOPERFIDO: I think it is telling that given the
8 opportunity to address the facts in this case, both attorneys
9 for the defendants pass on that opportunity. And that is a
10 consistent theme seen in their motion papers. They are running
11 away from our facts and replacing them with their own.

12 The facts of this case as alleged in the complaint,
13 and as Your Honor can read in the report, is that the
14 defendants announced to the world that they had discovered more
15 than 1,000, and I quote "aliens who registered to vote
16 illegally." And by the publication of the second report, that
17 number had risen to 7,500 -- excuse me, 5,000 "illegal
18 registrants who had cast more than 7,000 ballots."

19 The reports go on, as Your Honor astutely noted, to
20 say that this is felonious conduct.

21 And then what is a crucial point is defendants
22 attached the reports. They said, here are the felons that
23 we're talking about in these reports. That is to be understood
24 as a complete report with exhibits. The reports call for
25 readers to look at the exhibits. They did this knowingly,

1 knowing that this was false.

2 That is the framework by which the Court must
3 consider this motion to dismiss. Your Honor is correct that
4 the Court can read the reports and interpret them as you will,
5 but you are limited in some respects in the sense that we're at
6 a motion to dismiss standard, the Iqbal/Twombly standards
7 apply.

8 When addressing whether a statement has a defamatory
9 meaning, the plaintiffs, the one who is alleging defamation, is
10 entitled to every fair inference about the reasonable reading
11 of those reports.

12 The plain words of the reports are meant to be read
13 as plain words. And the Court and juries are meant to
14 understand the words as they would be understood by others.

15 Now I want to address the defendants' argument that
16 there is no specific statement in the reports that state that
17 these specific plaintiffs committed this specific crime on
18 so-and-so date.

19 We don't say that they do, and that's not the
20 standard in the Fourth Circuit. It's not the standard under
21 the Virginia Supreme Court. We cite to the case Hatfill
22 decided by the Fourth Circuit and Carwile decided by the Fourth
23 Circuit which explicitly states they stand for the proposition
24 that a statement, a defamatory statement need not expressly be
25 made. It can be made by inference. It can be made by innuendo.

1 And it matters not how artful the defendants, the defamers try
2 and disguise the meaning of their content. That is what Your
3 Honor will be looking to as you look at the complaint and
4 review the report.

5 THE COURT: So if you look at the Alien Invasion I
6 and II, it really focuses on the fact that the laws are not
7 being followed. Laws are on the books, the governor won't
8 follow them, the registrars follow them, Congress won't follow
9 them, nobody is paying attention to the fact that there are
10 people who are not entitled to vote who are voting.

11 The mechanism for arriving at the decision whether
12 somebody can vote or not is simply checking a box at the DMV.
13 That is absurd and should be stopped, and we need to do
14 something. And I'm going to alert the public to this problem,
15 I think it is a very serious problem. And I have got the
16 evidence that there are either 700 or 5,000 persons who the
17 Virginia Commonwealth says are not entitled to vote. Right?
18 And these are public records I'm using.

19 And then, of course, they go in Invasion 2 and they
20 say, we have been told there are some errors, and they take two
21 persons off the rolls.

22 Where is the intent that you're talking about that is
23 necessary to impute the defamation?

24 MR. LOPERFIDO: Well, I think Your Honor captures
25 that report well, correctly to a point. And that point,

1 importantly, is what those records from the Virginia election
2 officials actually mean. And we have alleged credibly that
3 defendants were on notice that their representation, their
4 characterization of what those reports mean, was false.

5 You asked defense counsel, it's an appropriate
6 question, what responsibility did you have to confirm the
7 accuracy of your reports? We have case law from the Virginia
8 Supreme Court that states that there is a duty of care, a duty
9 of investigation for someone who is going to make a defamatory
10 statement that will clearly injure the person that it's about
11 to do some investigation.

12 We have alleged credibly in the complaint that the
13 defendants were aware that the registrar information relied on
14 did not establish that any particular voter was a non-citizen
15 and/or legally barred from voting.

16 We have credibly alleged that election officials
17 warned the defendants that they were drawing false conclusions
18 and risking accusing eligible voters of felony voter fraud.
19 That's exactly what they did here.

20 So they were warned that what they were about to do
21 was wrong, and then they did it. And yet they stand before
22 Your Honor and say it was reasonable for them to rely on the
23 statements of the election officials, their records -- their
24 records, not their statements. We can rely on the records for
25 what we think they mean. We're going to disregard their

1 statements.

2 The case law is clear that there is an obligation to
3 do some research. The Richmond case, for example, a newspaper
4 reporter commented negative things about a teacher, a public
5 school teacher, taking comments from parents and students and
6 other colleagues at the school.

7 The Court said that a reasonably prudent reporter
8 would have spoken to people with other viewpoints to confirm,
9 verify, or supplement the negative factors that they were
10 doing. They didn't do that, that is defamation.

11 The same allegations, again, after the first
12 publication was made, media reports, we allege, media reports
13 highlighted the fact that there were flaws in the methodology.
14 Additional election officials identified the fact that there
15 were flaws in the methodology.

16 Those factors are actually in the reports
17 acknowledging that what they are doing is not accurate.

18 On the point of the Richmond case, the Court made a
19 point of noting that the people with the other viewpoint were
20 readily available. Defendants had the contact information of
21 the people that they were defaming. They could have called
22 them. They could have said, are you a U.S. citizen? Have you
23 registered to vote? Is this information accurate?

24 Nothing in the report suggests that they did that,
25 that they took any affirmative steps to confirm the defamatory

1 statements that they were about to make.

2 THE COURT: Okay.

3 MR. LOPERFIDO: I also want to address an additional
4 point, speaking about going back to the point of innuendo and
5 inference. Again, the Hatfill case speaks to that issue. The
6 Carwile case speaks to that issue.

7 In both of those cases, especially Hatfill, you have
8 instances where the reporter is hedging their statements. They
9 are saying, well, we have to presume they are innocent until
10 they are proven guilty. They have -- in the Hatfill case
11 specifically, New York Times columnist Nicholas Kristof is
12 saying: The FBI should do something about this. Why won't
13 somebody find who is doing this and enforce the laws? Just
14 like defendants are saying here. And the District Court said,
15 well, this can't be defamation, they are just reporting on an
16 ongoing investigation. They have been very clear about not
17 accusing this individual, Mr. Hatfill, of the anthrax mailings.

18 And the Fourth Circuit said, no, the report, the
19 articles taken as a whole have a clear inference that Mr.
20 Hatfill is the anthrax mailer. And that was a District Court
21 that decided on a motion to dismiss, it was overturned and sent
22 back for proceedings.

23 Within that decision, Hatfill, and this is an
24 important point, not in response to something that appears in
25 the reply, there was no obligation for a defendant to state,

1 excuse me, for a plaintiff to state that their name was
2 specifically identified within the content.

3 The Gazette case, the Virginia Supreme Court case,
4 speaks to that proposition, stating that the plaintiff alleging
5 defamation not need show that he was mentioned by name so long
6 as the publication was, in its description such as to lead
7 those who knew of him to understand that the article was about
8 him.

9 In that case, a reporter was commenting on a growing
10 concern about child abuse in the Alexandria area, and he
11 recounted a story that he heard from a police officer about a
12 child who had had an injury to his head that suggested perhaps
13 some foul play by the parents. When what in actuality had
14 occurred, the child fell and, unfortunately, passed away.

15 The news articles used a pseudonym for the child and
16 they didn't even know the parents' name, but the facts and
17 circumstances of the case made it apparent to the parents, to
18 friends of the parents, people who knew the parents, that this
19 was a case talking about them. And that this reporter was
20 defaming them by calling them child abusers.

21 There was clearly no obligation that the names appear
22 in the reports, but they do. You can see them in the reports
23 attached as exhibits.

24 Your Honor, I will just briefly address the
25 anti-SLAPP argument.

1 THE COURT: Go ahead.

2 MR. LOPERFIDO: And again, we address this in our
3 briefing. We note that the only court in Virginia to address
4 whether this statute is retroactive, because it was passed
5 effective July 1, 2017, and the statements, the cause of action
6 in this occurred before that, the only court to address that
7 question in Virginia has stated that it is not applied
8 retroactively.

9 Clearly Your Honor is not bound by that decision, but
10 the reasoning is instructive there. And the defendants have
11 offered no rebuttal, no case law to support their theory that
12 the cause of action accrual should somehow be tied to when the
13 plaintiffs who have been harmed filed their lawsuit as opposed
14 to what the statute actually says and what this Circuit Court
15 in Virginia decided.

16 Even if it were to apply, and we submit that it does
17 not, the outcome is the same. The statute by its language
18 states that statements are not protected if the defamer, the
19 defendants, had constructive knowledge of the falsity of the
20 statements or acted recklessly with regard to the falsity of
21 the statements.

22 We have alleged that. We have alleged, again,
23 election officials told them what they were doing was wrong.
24 They did it anyway. We have cases to that point.

25 The Fourth Circuit in, excuse me, Shaheen and the

1 Western District of Virginia Court in Via say that an
2 insufficient or non-existent investigation can reach the level
3 of recklessness.

4 The Via case, for example, is interesting because in
5 that case you have a colleague dispute at work, and there is a
6 fire at the building, and the defamer learns from the fire
7 chief that there was no foul play and they had a likely cause
8 of the fire in the building. And yet this person went on to go
9 tell a friend that he thinks that his colleague that he doesn't
10 like was as arson and that's why the fire occurred.

11 Again, the person who is controlling the information
12 telling the defamer that what your conclusion is is wrong, the
13 defamer speaking anyway.

14 We alleged recklessness. We have alleged
15 constructive knowledge plausibly. And there are still the
16 matter of public concern and First Amendment protections.
17 Again, defendants have not offered any case law that suggests
18 that falsely accusing somebody of felony voter fraud is
19 protected teach in any manner. It is not protected peach
20 because it is a public concern. It is not protected speech
21 within the First Amendment context.

22 So if Your Honor has no questions, I will yield to
23 Mr. Tepe.

24 THE COURT: All right, thank you.

25 MR. TEPE: Good afternoon, Your Honor.

1 THE COURT: Good afternoon.

2 MR. TEPE: Sean Tepe. I will be brief. You have
3 been very generous with your time.

4 I just have a couple of points to make which concern
5 the standing argument. Your Honor correctly noted the law that
6 is out there that in situations like this, Your Honor does not
7 need to decide the standing of a particular plaintiff if there
8 is standing of the other plaintiffs there. We are at the
9 motion to dismiss stage --

10 THE COURT: Well, how similar do they have to be for
11 Bowsher to apply? I mean, in this case it's just aliens who
12 are targeted. It could be any alien. Right? It could be
13 somebody from Ireland, somebody from England, somebody from
14 France, somebody from the Philippines. So you've got a very
15 broad undefined group of those who have been accused of
16 wrongdoing through this voter fraud.

17 So you have got LULAC, which believes that it offends
18 and intimidates the Latino population, but we could be in here
19 with a hundred different groups making the same claim. Is it
20 fair to say that?

21 MR. TEPE: Well, I think what Your Honor -- correct
22 me if I am wrong, if I understand you correctly. Counsel
23 talked about, well, there is no standing here because this is
24 LULAC and this report is not targeting Latinos.

25 And we've never in our allegation, even though

1 counsel said that we allege that these reports were targeting
2 Latinos, we don't actually allege that.

3 But it doesn't matter for the function of the
4 standing of LULAC. I will give you an example. Okay. In
5 Veasey v. Perry, which was a case in which LULAC had standing,
6 it was challenging a Texas voter ID law, essentially whether or
7 not photo IDs would be required for voting.

8 It wasn't a law challenging, you know, saying only
9 Latinos have to have photo ID. It was a law of general
10 applicability. However, LULAC, given its stated mission, was
11 able to say, you know, allege in court, and again a motion to
12 dismiss, this is going to impair our mission. Our mission in
13 this case is to increase voter registration, but we can't
14 increase voter registration, we have to divert resources to
15 deal with this photo ID because we need to tell people, okay,
16 you're already registered, you need a photo ID, here is what
17 you need. Oh, you don't have a photo ID? This is how you get
18 a photo ID.

19 And so, that's how the organization was harmed, they
20 were being deterred -- or, excuse me, diverted in their
21 resources.

22 And that's essentially what is being alleged here,
23 Your Honor. There are two in particular concrete and
24 demonstrable injuries alleged. One, that defendants simply
25 ignore, and that's in paragraph 65, that the mission to advance

1 Latino educational attainment is impaired by the fact that they
2 had to delay implementing an educational program. They had a
3 grant for educational attainment in schools that had high
4 Latino populations. They couldn't implement that program
5 because in the last election cycle they were dealing with, you
6 know, well, we've got to get people out to vote, and here we're
7 being discouraged. There is this notion, there is an alien
8 invasion.

9 And again, put in the context of Virginia --

10 THE COURT: Well, even though it doesn't identify the
11 Latino group, and none of the those that were found to be
12 actually eligible to vote and are plaintiffs in the action, are
13 Latinos or members of LULAC. Your argument still holds, you
14 think it is broad enough? You think the Texas case is broad
15 enough to cover that?

16 MR. TEPE: Yes, yes. I mean, this is a report -- and
17 it's not just a report. We also have allegations with respect
18 to Mr. Adams' statements in promoting the report, which we
19 believe are defamatory.

20 So what we have here is a series of statements by
21 defendants saying, look, there is an alien invasion, there are
22 people, thousands of people who are committing voter fraud.
23 And there are people who are on the rolls that shouldn't be on
24 the rolls. This is being stated. And so it doesn't really
25 matter if you're Latino, or African-American, or white, or what

1 have you, the situation is, wait, there is someone out there
2 saying that, you know, I might be voting incorrectly, there
3 might be some criminal liability.

4 Again, there are statements by Mr. Adams saying, you
5 know, there should be criminal prosecutions here --

6 THE COURT: What's wrong with telling the public that
7 if you're not a citizen, you can't vote? And that there are
8 sequences if you do so.

9 What fundamentally -- why is making that statement
10 going to discourage persons who are eligible to vote from
11 voting or becoming eligible to vote? That's the disconnect I'm
12 having.

13 MR. TEPE: But that's not what we've alleged. We've
14 alleged that they have gone beyond that. The title of the
15 report is Alien Invasion. It's not, you know, there is some --

16 THE COURT: Well, there isn't any question that there
17 are some people on the lists who were ineligible to vote. I
18 mean, that was determined by election officials as well, right?
19 And that was reported.

20 MR. TEPE: Actually, Your Honor, I think that's why
21 this case needs to go into discovery and to trial, if
22 necessary, because that I don't think is what the Virginia
23 election officials would say. They would say, we haven't done
24 an independent check of whether or not these folks are
25 citizens. There may be some indicia that there might be a

1 question, and that's why they'll do things like send mailers
2 out to double-check.

3 Defendants know this. And yet they stated that we
4 have found non-citizens who are committing felonies.

5 As Your Honor asked before, isn't there some
6 obligation that you have to check that your statements are
7 accurate? And so, that's why this case needs to go into
8 discovery.

9 We at the motion to dismiss stage have alleged very
10 detailed, concrete allegations that fit all of the elements.
11 And a lot of times what defendants have done is rather than try
12 and challenge that, oh, there is a failure of pleading here,
13 they challenge the facts. And if they want to do that, that's
14 fine, we look forward to doing that in court.

15 And so, to take it back to I guess the standing
16 issue, Your Honor noted under these circumstances, the Court
17 may not need to actually decide LULAC's standing. But if Your
18 Honor decides to take this issue up at the motion to dismiss
19 stage, we have alleged in paragraphs 65 and 64 concrete,
20 demonstrable injuries to LULAC as an organization. In both
21 situations we're talking about impairments of their mission as
22 well as diversion of resources.

23 And those types of injuries have been held repeatedly
24 to constitute plausible injuries and satisfy organizational
25 standing.

1 THE COURT: All right, thank you.

2 MR. TEPE: There is one thing, I do apologize. I
3 want to correct one statement, it's off the standing topic.

4 But I believe defendants' counsel said that they put
5 out Alien Invasion I and then they, you know, found that a
6 couple of people were -- that they were incorrect and they are
7 actually citizens, and they put out Alien Invasion Number II
8 that had these people removed.

9 That's not actually the chain of events. As we
10 allege, and I think as the evidence will show, we believe
11 defendants were on notice of their misuse of these election
12 records even before they published Alien Invasion I. They
13 published Alien Invasion I.

14 Defendants become on even more notice that they are
15 misusing the election records through media reports and through
16 conversations and statements with Virginia election officials.
17 They publish a second report, which now has all four of our
18 individual plaintiffs named.

19 And then at the third time, essentially, they're
20 informed that, listen, here are a couple of people in
21 particular who are not non-citizens, they are citizens. And
22 then what they've done is they've revised the second report to
23 take those names off. But there are still names, including two
24 our plaintiffs, they haven't taken off.

25 THE COURT: Okay.

1 MR. TEPE: Thank you, Your Honor.

2 THE COURT: All right, thank you.

3 All right, Mr. Lockerby.

4 MR. LOCKERBY: Just briefly, Your Honor.

5 THE COURT: Yes.

6 MR. LOCKERBY: With respect to the First Amendment,
7 defendants aren't saying that the Voting Rights Act or any of
8 these other claims are unconstitutional under the First
9 Amendment.

10 What we have said, and we said it on the very first
11 page, and the very first sentence, and the very first section
12 of the motion to dismiss, and also on the last page, is that if
13 applied to the conduct at issue in this case, plaintiffs'
14 allegations would deprive the defendants of their First
15 Amendment rights.

16 Now, with respect to each of the issues before the
17 Court. With respect to standing, LULAC doesn't say that its
18 mission is to ensure that non-citizens are registered to vote.
19 And we've addressed in our brief why the harm that LULAC has
20 alleged is insufficient as a matter of law.

21 With respect to the voting rights claims, we heard
22 from plaintiffs' counsel that this is voter intimidation, first
23 of all, because defendants supposedly engaged in character
24 assassination. There were two examples of that given. One is
25 the report said that the U.S. Attorney has done nothing about

1 prosecuting individuals who are registered to vote but not
2 eligible to vote.

3 That's a true statement. And if it assassinates
4 anyone's character, it would be the U.S. Attorney's, not these
5 plaintiffs.

6 The second alleged act of character assassination is
7 that one individual in Prince William County registered to
8 vote, in fact according to what we now know, apparently was a
9 citizen. If the Prince William County records were inaccurate,
10 that is not the defendants' fault.

11 And the defendants are not in a position to verify
12 whether these voters are in fact citizens. It was like pulling
13 teeth to get the records in the first place, let alone to go
14 behind the information that state and local officials provided
15 to determine whether they're accurate.

16 And as plaintiffs' counsel has admitted, if there
17 were specific individuals identified who were then determined
18 to have been identified improperly, those links were removed.

19 There has also been -- there was the claim that these
20 publications were acts of voter intimidation and that
21 intimidation is why similar claims haven't been brought under
22 section 11(b) in the past. Certainly these voters were not
23 intimidated to bring suit. They have an army of lawyers
24 representing them.

25 And the issue under the Fifteenth Amendment is not

1 constitutional. It's whether the Fifteenth Amendment
2 applies to non-state actors. The answer is no. And the weight
3 of authority is that this provision of the statute, which
4 derives its authority from the Fifteenth Amendment, similarly
5 cannot be applied to conduct solely by non-state actors.

6 The public records, if they provide too much
7 information about individual voters, again, that's an issue for
8 the legislature. Congress passed the National Voter
9 Registration Act. Congress could certainly direct state and
10 local officials, or the Commonwealth could, to redact certain
11 information. They haven't done that. And the complaint that
12 the plaintiffs have, if it is a legitimate one, is with the
13 government, not with our clients.

14 Finally, before turning to defamation, with respect
15 to the Ku Klux Klan Act, this Court's precedents, including
16 Deressa, are clear that the meeting of the minds had to be
17 something other than merely publishing a report. It has to
18 involve intent to deprive voters of their rights, their
19 constitutional right to vote.

20 And there is no conflict between the animus
21 requirement that the Fourth Circuit and this Court have
22 articulated and Supreme Court precedents, such as Kush, which
23 dealt with a different clause of 1985, not this one.

24 And support or advocacy clause cases are clear that
25 there has to be some animus and some intent to deprive the

1 voters of their rights, not simply a general intent to publish
2 a report.

3 So, Mr. Davis has a few closing words on defamation
4 and anti-SLAPP, and then we'll rest.

5 THE COURT: Thank you, sir.

6 MR. DAVIS: Very few, Your Honor, and definitely
7 closing.

8 The point of beginning in the evaluation of the
9 defamation are the articles themselves. The case law basically
10 says, you have got to read them as a whole. If you look at
11 them, there is rife with qualifications.

12 I would point out that counsel's cases that they have
13 cited, Hatfill, Gazette, Carwile, all of those cases, there is
14 sufficient facts that direct towards a particular plaintiff,
15 irrespective of whether that particular plaintiff is named.

16 And I would submit to Your Honor that that is a
17 distinction that makes a significant difference in this case.

18 Thank you.

19 THE COURT: All right, thank you.

20 All right. Well, we'll continue to look at this for
21 a little bit and we'll get you out a decision not too long into
22 the future.

23 We're at the pleading stage, so I'm not going to
24 initiate any kind of discovery order or scheduling order at
25 this stage. Just give us a little bit of time to work through

1 it.

2 Very interesting issues. And I appreciate the
3 written pleadings as well as the advocacy here today.

4 So as I said, we'll get you out a decision as soon as
5 we can. And I thank you very much for coming in today. And
6 you all have a good weekend.

7 All right. Thank you, counsel.

8 -----
HEARING CONCLUDED

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19 I certify that the foregoing is a true and
20 accurate transcription of my stenographic notes.

21

22

23 /s/ Norman B. Linnell
24 Norman B. Linnell, RPR, CM, VCE, FCRR

25

25