LIST OF EXHIBITS TO AMICI CURIAE BRIEF OF THE PROTECT DEMOCRACY PROJECT AND VOTERS NOT POLITICIANS

(Exhibits 1 – 12)

Ex. No.	Date	Description
1	06/02/2021	*Allen v Graham*, No. 20-997, 2021 WL 2223772 (MD NC June 2, 2021)
2	11/01/2022	*Arizona Alliance for Retired Am v Clean Elections USA*, No. 22-1823, 2022 WL 17088041 (D Ariz Nov. 1, 2022)
3	08/01/2022	*Counterman v Colorado*, No. 22-138, 2022 WL 3335946 (US Aug. 1, 2022).
4	03/09/2023	*Fair Fight Inc v True the Vote*, unpublished order of the United States District Court for the Northern District of Georgia, issued March 9, 2023 (Case No. 2: 20-CV-00302-SCJ)
5	08/13/2018	*League of United Latin American Citizens - Richmond Region Council 4614 v Public Interest Legal Foundation*, No. 1:18-CV-00423, 2018 WL 3848404 (ED Va Aug. 13, 2018)
6	07/31/2017	*Seals V McBee*, No. 16-14837, 2017 WL 3252673 (ED La. July 31, 2017)
7	01/23/2023	*United States v Mackey*, 21-CR-80, 2023 WL 363595 (ED NY Jan. 23, 2023)
8	02/27/1992	*United States v NC Republican Party, et al*, unpublished Consent Judgment (and Complaint) of the United States District Court, Eastern District of North Carolina, issued Feb. 27, 1992 (Case No. 92-00161-CIV-5-F)
9	10/24/2022	*State v Burkman*, Court Journal Entry (Cuyahoga County Court of Common Pleas Case No. CR-20-654013-A)
10	11/02/2004	*Daschle v Thune, et al*, Temporary Restraining Order of the United States District Court, District of South Dakota, issued Nov. 2, 2004 (Case No. 4:04-cv-04177-LLP)
11	10/24/2022	*Ohio v Wohl, et al*, Transcript of Proceedings on Oct. 24, 2022 (Cuyahoga County Court of Common Pleas Case No. CR-654013-A and B)
12	11/29/2022	*Ohio v Wohl, et al*, Excerpt of Transcript of Proceedings on Nov. 29, 2022 (Cuyahoga County Court of Common Pleas Case No. CR-654013-A and B)

2021 WL 2223772
Only the Westlaw citation is currently available.
United States District Court, M.D. North Carolina.

Sylvester ALLEN, Jr., et al., Plaintiffs,
v.
CITY OF GRAHAM, et al., Defendants.
Gregory Drumwright, et al., Plaintiffs,
v.
Terry Johnson, individually and in his official capacity as Alamance County Sheriff, et al., Defendants.

1:20-CV-997, 1:20-CV-998
|
Signed 06/02/2021

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MEMORANDUM OPINION AND ORDER

Catherine C. Eagles, UNITED STATES DISTRICT JUDGE

***1** These consolidated cases arise out of a political demonstration held on October 31, 2020, in Graham, North Carolina. The plaintiffs allege that the defendants—the City and various City and County law enforcement officers—used pepper spray and overly violent crowd-control tactics to disrupt a peaceful protest and prevent the plaintiffs and others from voting, violating numerous federal and state rights in the process.

After the defendants moved to dismiss, the *Allen* parties resolved their disputes, subject to certain conditions, and the Court has stayed that case. *See* Docs. 73, 76. This order resolves the motions to dismiss in the companion case, *Drumwright v. Cole*, 1:20-cv-998 (M.D.N.C.).[1]

The Court concludes that the *Drumwright* complaint states claims on which relief may be granted, except for the federal constitutional claims against the named City defendants in their official capacities. Those claims will be dismissed as redundant. Otherwise, the motions to dismiss will be denied.

I. The Parties and the Causes of Action

The *Drumwright* plaintiffs include several individuals and two unincorporated entities. The individuals are Reverend Gregory Drumwright, Edith Ann Jones, Faith Cook, Janet Nesbitt, Quenclyn Ellison, Melanie Mitchell, Ernestine Lewis Ward, Edith Ward, Avery Harvey, and Ashley Reed Batten. Ms. Ellison and Ms. Mitchell bring claims on behalf of themselves and their minor children. The entities are Justice 4 The Next Generation and Alamance Alliance 4 Justice.

The amended complaint identifies seven causes of action. As named in the heading for each cause of action, they are:

1. "Violation of the First Amendment" under 42 U.S.C. § 1983;[2]
2. "Violation of the Fourth Amendment" under 42 U.S.C. § 1983;[3]

3. "Violation of Section 11(b) of the Voting Rights Act" under 52 U.S.C. § 10307;[4]
4. "Ku Klux Klan Act of 1871" under 42 U.S.C. § 1985(3);[5]
5. "Violation of Article I, Section 14 of the North Carolina Constitution;"[6]
6. "Violation of Article I, Section 12 of the North Carolina Constitution;"[7]
7. "Common Law Assault and Battery/Excessive Force."[8]

In addition to the City of Graham, the plaintiffs bring claims against several named law enforcement officers as well as unidentified law enforcement "Doe" defendants. The defendants can usefully be divided into two groups: the City defendants and the County defendants.

The City defendants are the City of Graham; Mary Kristine Cole, individually and in her official capacity as Chief of the Graham Police Department; Joaquin Velez, individually and in his official capacity as Lieutenant of the Patrol Division of the GPD; Jonathan Franks, individually and in his official capacity as consultant to the Alamance County Sheriff and the Graham Police Chief; and John and Jane Does, presently unknown officers of the GPD.

***2** The County defendants are Terry Johnson, individually and in his official capacity as Alamance County Sheriff; Cliff Parker, individually and in his official capacity as Alamance County Chief Deputy Sheriff; and John and Jane Does, presently unknown officers of the Alamance County Sheriff's Office.

II. Procedural Posture

Before settling with the *Allen* plaintiffs, the City defendants filed a single motion to dismiss directed at both the *Allen* and the *Drumright* complaints. Doc. 45. The County defendants filed separate dispositive motions directed towards each complaint. *See* Docs. 50 (directed at *Allen*), 52 (directed at *Drumwright*). The motions as to the complaint in *Allen* will be held in abeyance pending finalization of the settlement.

The pending motions to dismiss the *Drumright* complaint cite both Federal Rules of Civil Procedure 12(b) and 12(c). Doc. 45 at 1; Doc. 52 at 1. The briefing addresses only Rule 12(b)(6). The Court will assess the standing issues under the standards applicable to a Rule 12(b)(1) motion and the remaining issues under the standards applicable to a Rule 12(b)(6) motion.[9]

III. The Facts as Alleged

On the final day of early voting and voter registration for the 2020 general election in North Carolina, the individual defendants and other officers pepper-sprayed the plaintiffs while they were participating in the "I am Change March to the Polls," in the city of Graham. Doc. 25 at ¶ 1. The March was organized as a peaceful "march to the polls" that was "focused on racial justice issues," like raising awareness of police brutality, and it was intended to encourage members of the community who had not already voted to do so. *Id*. at ¶¶ 9–12, 68.

The March began at a local church and was scheduled to stop at Court Square, near the Confederate monument in front of the Alamance County courthouse where the organizers planned to speak from a small stage with sound amplifiers. *Id*. at ¶¶ 72, 88. Organizers then planned for the March to continue towards the Elm Street polling place, an early-voting site where attendees could register and vote in the 2020 general election. *Id*. at ¶¶ 9, 72, 80. The organizers had a permit for the March and rally, *id*. at ¶¶ 71–72, 75, 91, and a county attorney authorized the plaintiffs to erect a small stage on courthouse grounds. *Id*. at ¶ 82.

The March began and proceeded peacefully. *Id*. at ¶¶ 1, 88. The marchers complied with COVID-19 protocols. *Id*. at ¶¶ 86, 95. When the marchers arrived at Court Square, they were met by armed sheriff's deputies. *Id*. at ¶ 96. Counter-protestors were also present but left upon instruction from officers soon after the marchers arrived. *Id*. at ¶ 145.

Marchers knelt in silence for 8 minutes and 46 seconds in remembrance of George Floyd, who was killed by police a few months earlier. *Id*. at ¶ 95. Immediately after the remembrance, and before many could even get back up to their feet, officers began indiscriminately discharging pepper spray into the crowd, which included children, the elderly, and those with disabilities. *Id*. at ¶¶ 1, 99–109. The chemical spray irritated and burned the eyes and throats of some plaintiffs. *See, e.g.*, *id*. at ¶¶ 101–08. Some March participants who were in a nearby park attempted to cross over to the courthouse grounds but were stopped and arrested by GPD officers. *Id*. at ¶ 110.

***3** Despite the pepper spray, the rally continued, and Rev. Drumwright was able to set up the stage and a sound system. *Id*. at ¶¶ 99, 111. After several speakers had spoken, deputies attempted to disconnect the sound

system without warning or explanation. *Id*. at ¶¶ 114–15. Shortly after that, Graham police officers and Alamance County deputy sheriffs worked in coordination to pepper spray the marchers a second time. *Id*. at ¶ 116. Several of the named plaintiffs and members of Alamance Alliance and Next Generation were hit by the second spray. *Id*. at ¶¶ 116–22.

GPD and ACSO officers ordered the marchers to leave the area. *Id*. at ¶ 123. Without providing time to disperse or instruction on where or how to leave the area, the officers began spraying a third round of pepper spray into the crowd. *Id*. at ¶ 124. Several of the named plaintiffs and members of Alamance Alliance and Next Generation were also hit by this third round of pepper spray. *Id*. at ¶ 126.

Some of the marchers continued to the Elm Street polling place as planned but took a longer route to avoid officers. *Id*. at ¶¶ 132–33. Many marchers who had intended to vote that day were unable to because of injuries from the defendants' pepper spray. *Id*. at ¶¶ 25, 144, 147. Members of Next Generation and Alamance Alliance, who were lawfully registered voters in Alamance County, were intimidated from voting by the defendants' actions. *Id*. at ¶¶ 152–53. Multiple individual plaintiffs were fearful of attempting to vote on Election Day, three days after the March. *Id*. at ¶¶ 150–51.

Other factual allegations will be recited as necessary to address specific issues.

IV. The § 1983 Claims Against the Individual City Defendants in Their Official Capacities

The City defendants contend that because the plaintiffs bring their claims against the City, the same claims against the individual City defendants in their official capacity are redundant and should be dismissed. Doc. 46 at 17–18; *see Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (treating an official capacity suit "as a suit against the entity"); *Love-Lane v. Martin*, 355 F.3d 766, 783 (4th Cir. 2004) (upholding dismissal of official-capacity claims under § 1983 as redundant). The plaintiffs acknowledge the City defendants' argument but do not address it. Doc. 56 at 13.

The cases cited by the City defendants support dismissal of the § 1983 claims against the individual City defendants in their official capacities. Those claims are redundant to the § 1983 claims against the City and will be dismissed.

The City does not explicitly contend that any state claims or federal statutory claims are redundant, nor does it cite any cases addressing anything other than § 1983 claims. *See infra* note 12. To the extent the motion is directed to any state or federal statutory claims, it will be denied without prejudice.

V. Entity Standing

Both the County and City defendants challenge the standing of entity-plaintiffs Alamance Alliance and Next Generation. Doc. 46 at 19; Doc. 53 at 5. The defendants assert that these unincorporated associations cannot bring suit in North Carolina because they have not filed an assumed business name certification as required by N.C. Gen. Stat. § 1-69.1(a)(3). Doc. 46 at 20; Doc. 53 at 5–6. But "standing to sue in any Article III court is a federal question which does not depend on the party's standing in state court." *Md. Shall Issue, Inc. v. Hogan*, 971 F.3d 199, 219 (4th Cir. 2020) (cleaned up); *see also Protect Our Parks, Inc. v. Chicago Park Dist.*, 971 F.3d 722, 731 (7th Cir. 2020) (stating that state law "obviously cannot alter the scope of the federal judicial power.").

***4** The County and City defendants also contend that the entity plaintiffs have not established Article III standing. Article III standing is a subject matter jurisdiction issue. *Beyond Sys., Inc. v. Kraft Foods, Inc.*, 777 F.3d 712, 715 (4th Cir. 2015).

While the plaintiffs bear the burden of clearly alleging facts "demonstrating that [they are] proper part[ies] to invoke judicial resolution of the dispute," *Warth v. Seldin*, 422 U.S. 490, 518 (1975); *see also Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), the district court should dismiss a case on the pleadings for lack of subject matter jurisdiction "only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999) (cleaned up). When a party moves to dismiss on the basis that a complaint fails to allege facts supporting the Court's subject matter jurisdiction, the plaintiff "is afforded the same procedural protection as he would receive under a Rule 12(b)(6) consideration." *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). And where, as here, a defendant has not provided evidence to dispute the veracity of the jurisdictional allegations in the complaint, courts accept facts alleged in the complaint as true. *Kerns v. United States*, 585 F.3d 187, 192–93 (4th Cir. 2009).

Unincorporated organizations, like the entity plaintiffs here, may satisfy Article III standing in one of two ways. They may show organizational standing to sue on their own behalf, or they may show associational standing to sue on behalf of one or more of their members. *Guilford Coll. v. McAleenan*, 389 F. Supp. 3d 377, 388 (M.D.N.C. 2019). Both plaintiff organizations have made a facial showing of Article III standing to pursue their claims.

First, both entities have organizational standing because the allegations make a facial showing that the actions by the City and County defendants impeded their efforts to carry out their organizational missions and purposes. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (holding "there can be no question that [an] organization has suffered injury in fact" where defendants' actions impaired the organization's ability to provide its services). Next Generation is an unincorporated association of community organizations that promotes social justice and an end to police violence and other forms of systemic racial oppression. Doc. 25 at ¶ 9. Alamance Alliance is an unincorporated organization of Alamance community leaders, parents, and youth with a mission of, among other things, fighting against racism, injustice, and oppression and promoting social equality in Alamance County. *Id*. at ¶ 11. Both organizations allege that they dedicated time and resources to help organize the March and to encourage their members to participate as a means of furthering their organizational goals. *Id*. at ¶¶ 10, 12. The defendants' conduct forced the March to end early and directly interfered with each group's mission. The entity plaintiffs do not have to prove their injuries in the complaint, and they have sufficiently alleged that they were injured by the defendants' conduct. The County defendants' *Lujan* contention that the plaintiffs' injuries are unlikely to be redressed by a favorable decision is conclusory at best.[10] *See* Doc. 53 at 8; *see also Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560–61 (1992) (establishing standing requirements of injury, traceability, and redressability).

***5** Second, both organizations have also made a facial showing of associational standing. An organization has associational standing to sue on behalf of its members if: (1) "at least one of its identified members would otherwise have standing to sue in their own right;" (2) "the interests at stake are germane to the organization's purpose;" and (3) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Outdoor Amusement Bus. Ass'n, Inc. v. Dep't of Homeland Sec.*, 983 F.3d 671, 683 (4th Cir. 2020) (cleaned up).

As to the first element, the complaint alleges that Alamance Alliance President Quenclyn Ellison, Doc. 25 at ¶ 15, and Next Generation's lead organizer, Gregory Drumright, *id*. at ¶ 13, were harmed by the defendants, along with many other unnamed members of each organization. *Id*. at ¶¶ 152–53. The County defendants contend that Next Generation is an unincorporated association of community organizations and does not represent the constitutional rights of individuals. Doc. 53 at 8. The injury to Rev. Drumwright is sufficient to facially satisfy the first element of representational standing.

As to the second element, the interests at stake are germane to each group's organizational purpose. These interests include the freedom to peacefully protest police violence and racial justice and the freedom to participate in political demonstrations, like the March and other similar get-out-the-vote drives. These interests are within Alamance Alliance's mission of "fight[ing] for political, educational, social, and economic equality for all citizens of Alamance County," Doc. 25 at ¶ 11, and Next Generation's organizational purpose of ending "police violence and other forms of systemic racial oppression." *Id*. at ¶ 9. Each organization seeks to promote their mission by organizing and leading public demonstrations like the March and similar vote drives. *Id*. at ¶¶ 9, 11.

As to the third element, the claims asserted and the relief requested will not require evidence and testimony from all individual association members. At most, the litigation will require evidence and testimony from a representative sample of organization members who attended the March. Many courts have found that limited participation by individual members does not defeat associational standing. *Ass'n of Am. Physicians & Surgeons, Inc. v. Texas Med. Bd.*, 627 F.3d 547, 551 (5th Cir. 2010) (approving associational standing where organization could produce "a sampling of evidence from its members"); *accord, e.g., Am. Humanist Ass'n v. Maryland-Nat'l Capital Park & Planning Comm'n*, 874 F.3d 195, 204 (4th Cir. 2017), *rev'd and remanded on other grounds sub nom. Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019) (granting associational standing where case would require testimony and participation by at least some members).

The City defendants contend that organizations do not have standing to assert the rights of their members in § 1983 cases, relying on authority from the Second Circuit. *See* Doc. 46 at 20. First, as discussed *supra*, the entity plaintiffs have asserted their own injuries. Second, as to associational standing, other circuits disagree with the Second Circuit, *see Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 123

(2d Cir. 2017) (Jacobs, J., dissenting and collecting cases), and the Fourth Circuit has applied associational standing rules in § 1983 cases. *See, e.g.*, *Md. Highways Contractors Ass'n, Inc. v. Maryland*, 933 F.2d 1246, 1251 (4th Cir. 1991).

***6** Alamance Alliance and Next Generation have facially alleged organizational and associational standing to pursue their asserted claims. The motions to dismiss for lack of standing and subject matter jurisdiction will be denied. As standing "remains open to review at all stages of the litigation," *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 255 (1994), this denial is without prejudice to a summary judgment motion.

VI. Sufficiency of the Allegations

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Legal conclusions "must be supported by factual allegations" that amount to more than "unadorned, the-defendant-unlawfully-harmed-me accusation[s]." *Id.*

A. The Common Law Assault and Battery Claim

In Count VII, the plaintiffs assert a common law assault and battery claim against 40 unnamed John and Jane Does of the GPD and the ACSO in their individual capacities. Doc. 25 at ¶¶ 211–13. The plaintiffs do not assert this claim against any of the named defendants.

The County defendants appear to misapprehend this fact, as they contend that the plaintiffs have failed to state an assault and battery claim against Sheriff Johnson and Deputy Sheriff Parker. Doc. 53 at 10–14. But as mentioned, the plaintiffs have not sued any individual defendants for assault and battery. The motion by Sheriff Johnson and Deputy Sheriff Parker as to this claim will be denied as unnecessary.

The City defendants contend that the assault claims against the as-yet-unidentified Graham police officers should be dismissed for failing to plead actionable facts sufficient to overcome public official immunity to state claim liability. Doc. 46 at 18. The attorneys for the City have asserted that they do not represent these defendants and have refused to accept service on their behalf. *See* Doc. 57 at 3 ("On December 14 and 15, 2020, counsel for the City of Graham Defendants ... declined to accept or facilitate service of the Doe Defendants employed by their clients."). Because counsel may not move to dismiss claims against defendants they do not represent, the City's motion as to the unidentified Doe defendants will also be denied.

B. The Claims under the North Carolina Constitution

The plaintiffs bring direct claims against the County and City defendants under the North Carolina Constitution for violations of their rights to freedom of speech and freedom of assembly. Doc. 25 at ¶¶ 200–10. To assert a direct constitutional claim, "a plaintiff must allege that no adequate state remedy exists to provide relief from the injury." *Copper ex rel. Copper v. Denlinger*, 363 N.C. 784, 788, 688 S.E.2d 426, 428 (2010); *Corum v. Univ. of N.C.*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992). "An adequate state remedy exists if, assuming the plaintiff's claim is successful, the remedy would compensate the plaintiff for the same injury alleged in the direct constitutional claim." *Estate of Fennell ex rel. Fennell v. Stephenson*, 137 N.C. App. 430, 437, 528 S.E.2d. 911, 915–16 (2000), *reversed in part on other grounds*, 354 N.C. 327, 554 S.E.2d 629 (2001).

The County and City defendants contend that the plaintiffs are precluded from bringing direct claims under the North Carolina Constitution because they have asserted federal § 1983 claims and state common law claims, which, if successful, would compensate the plaintiffs for their injuries. Doc. 46 at 12–13; Doc. 53 at 14–15. But they do not provide any cases supporting their contention that the plaintiffs' federal claims are an adequate state remedy for violations of distinct and independent state constitutional rights. *See* Doc. 4 at ¶ 1 (Standard Order reminding parties that "legal arguments require citation to legal authority"); *see also infra* note 12. Nor do they support their contention that the plaintiffs' common law claims for assault and battery are an adequate remedy for free speech and assembly injuries, and North Carolina courts have ruled that no state remedy exists for the violation of the state constitutional right to freedom of speech. *Corum*, 330 N.C. at 783, 413 S.E.2d at 290 ("Having no other remedy, our common law guarantees plaintiff a direct action under the State Constitution for alleged violations of his constitutional freedom of speech rights."); *see also Randleman v. Johnson*, 162 F. Supp. 3d 482, 489–90 (M.D.N.C. 2016) (rejecting an unsupported argument that the mere

assertion of another state law claim precludes direct action under the state constitution).

***7** The County and City defendants have not shown that the plaintiffs are precluded from advancing direct claims under the North Carolina Constitution. Both motions will be denied as to the state constitutional claims.

C. The Voting Rights Act Claim

The plaintiffs bring a cause of action under § 11(b) of the Voting Rights Act, which is codified at 52 U.S.C. § 10307. *See Pa. Democratic Party v. Republican Party of Pa.*, No. 16-5664, 2016 WL 6582659, at *4 (E.D. Pa. Nov. 7, 2016). The statute prohibits conduct that "intimidate[s]," "threaten[s]," or "coerce[s]" someone who is "voting, "attempting to vote," or "urging or aiding any person to vote or attempt to vote." 52 U.S.C. § 10307(b). Multiple courts have found that the statute extends to private conduct and establishes a private cause of action. *Nat'l Coal. on Black Civic Participation v. Wohl*, No. 20 Civ. 8668 (VM), 2021 WL 480818, at *5 (S.D.N.Y. Jan. 12, 2021) (collecting cases); *see also League of United Latin Am. Citizens – Richmond Region Council 4614 (LULAC) v. Pub. Interest Legal Found.*, No. 1:18-cv-00423, 2018 WL 3848404, at *3 (E.D. Va. Aug. 13, 2018) (holding that the statute reaches private conduct).

The plaintiffs allege that the County and City defendants used physical force and pepper spray to intimidate and prevent the plaintiffs from voting during a peaceful march to the polls, one block from where they intended to register to vote and cast ballots on the final day of early voting in North Carolina. Doc. 25 at ¶¶ 99, 116, 124, 131, 133, 144, 151–53, 155–56, 162, 186. The plaintiffs also allege that many of them felt threatened and intimidated by this unnecessary and excessive force, which halted the march to the polls and deterred many plaintiffs from voting in the 2020 election. *See, e.g.*, *id.* at ¶¶ 1, 3, 5, 106, 114–116, 119, 123–27, 133, 144, 151–56, 162, 185–87. The use of physical violence and pepper spray to deter an individual from voting or engaging in voting-related activity states a plausible § 11(b) claim. *See Katzenbach v. Original Knights of Ku Klux Klan*, 250 F. Supp. 330, 341 (E.D. La. 1965) (citing violence against individuals "participating in a march ... to protest denial of equal rights" as actionable voter intimidation under § 11(b)'s predecessor statute).

The County defendants contend that the plaintiffs have not alleged that the defendants' actions were acts of intimidation or attempts to intimidate within the meaning of the statute. Doc. 53 at 18. There is limited case law discussing what "threaten" and "intimidate" mean in the context of § 11(b), but at least one court has held that alleged conduct that "put[s] [an individual] in fear of harassment and interfere[s] with their right to vote" is "intimidation sufficient to support [a] § 11(b) claim." *LULAC*, 2018 WL 3848404 at *4. Other courts addressing § 11(b) and similar language in other voting-rights statutes have gone so far as to find that even nonviolent actions can constitute impermissible threats, intimidation, or coercion. *See Nat'l Coal. on Black Civic Participation*, 2021 WL 480818 at *5 (collecting cases). This argument is better addressed on a more developed factual record.

The City defendants contend that the plaintiffs must allege facts supporting an inference that voting rights were denied based on race or color. Doc. 46 at 6. The one case they cite, *Acosta v. Democratic City Comm.*, 288 F. Supp. 3d 597, 647–48 (E.D. Pa. 2018), does not so hold. The *Acosta* court construed the complaint as arising under § 2 of the VRA, *id.* at 647, not § 11(b), and nothing in § 11(b) mentions race or color. And while the *Acosta* court noted that the plaintiffs did not allege they were denied the right to vote based on race or color, that was simply an example of the dearth of factual allegations in the complaint. The *Acosta* court made it clear that the claim was dismissed because the plaintiffs made only a passing reference to the Voting Rights Act and did not include any factual allegations to support the claim. *Id.* This argument is without merit.

***8** The City defendants also contend that the plaintiffs do not allege that they were voting or attempting to vote at the time of the pepper-spraying and that an allegation of misconduct unrelated to voting, but which thereafter has an adverse effect on voting, cannot support a VRA claim. Doc. 46 at 6–7. But the plaintiffs allege that at least some members of their group were on their way to vote. Doc. 25 at ¶¶ 14, 25–26, 144, 152–53, 155. And in any event, the language of the statute does not support the City's argument, as it specifically protects "urging" others to vote or attempt to vote. 52 U.S.C. § 10307(b). Even the case cited by the City defendants does not directly support their argument, and there are many cases holding that § 11(b) protects not just voting but voting-related conduct, which includes encouraging others to vote or helping register other voters. *See, e.g.*, *National Coal. On Black Civic Participation*, 2020 WL 6305325 at *12; *LULAC*, 2018 WL 3848404 at *4.

The County and City defendants both contend that the plaintiffs did not allege that the defendants viewed or treated the March as a voting activity and therefore that

the defendant officials did not have the subjective intent to, or purpose of, interfering with the right to vote. Doc. 46 at 7; Doc. 53 at 18. First, neither group of defendants cite any cases supporting their contention that subjective intent to interfere is an element of this claim, and the statute itself does not directly mention intent.[11] The Court need not do the legal research on this question if the defendants did not think it worth their time. *See Cathey v. Wake Forest Univ. Baptist Med. Ctr.*, 90 F. Supp. 3d 493, 509 (M.D.N.C. 2015). Even assuming this is an element, the plaintiffs allege that the March was specifically identified as a "March to the Polls," and the complaint details the plaintiffs' efforts in planning the March weeks in advance, including by applying for a permit from the County officials and by providing details to both the County and City officials about where, when, and how the plaintiffs planned to proceed with the March. Doc. 25 at 67–83. It is a plausible inference at this stage that the defendants knew one of the purposes of the March was to support voting. The causation or intent aspects of the cause of action are better evaluated on a factual record with more developed legal argument.

The County and City motions will be denied as to the § 11(b) claim.

D. The 42 U.S.C. § 1985(3) Claim

The plaintiffs bring a claim against the County and City defendants under 42 U.S.C. § 1985(3), the Ku Klux Klan Act of 1871. Doc. 25 at ¶¶ 189–99. Section 1985(3) creates a private cause of action, in relevant part, "if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote" from voting. 42 U.S.C. § 1985(3).

The County defendants contend that dismissal is warranted because the plaintiffs have not alleged any facts to support their claim of a conspiracy or agreement. Doc. 53 at 19–20. This is not so. *See, e.g.*, Doc. 25 at ¶ 31 (alleging a consultant gave orders and assigned duties to both City and County law enforcement officers), ¶ 123 (alleging City and County officers worked in coordination in shouting at marchers to disperse), ¶ 154 (alleging named City and County actors planned and approved violent crowd-control tactics used by City and County officers). Drawing all reasonable inferences in the plaintiffs' favor, the complaint states a plausible claim.[12] The motion to dismiss this claim will be denied.

E. The § 1983 Claims

1. The City of Graham's Municipal Liability

***9** The City defendants contend that the plaintiffs have failed to allege facts sufficient to establish municipal liability for their federal constitutional claims under § 1983. Doc. 46 at 7–12. It is well established that a municipality may be liable under § 1983 if a municipal policymaker approves or ratifies unconstitutional acts. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978); *Semple v. City of Moundsville*, 195 F.3d 708, 712 (4th Cir. 1999). The plaintiffs have adequately alleged that Chief Cole had final policymaking authority and exercised it to deprive them of their constitutional rights. Doc. 25 at ¶¶ 35–36. The motion to dismiss the federal constitutional claims against the City on this basis will be denied.

To the extent that the City defendants contend that Chief Cole did not have actual authority to ratify the use of pepper spray as a municipal policymaker, or that she did not ratify the use or pepper spray at all, that factual argument is premature. Whether an official possesses final authority to establish or ratify municipal policy is a fact-intensive inquiry usually inappropriate for resolution on a motion to dismiss. *See, e.g.*, *Hunter v. Town of Mocksville*, 897 F.3d 538, 556–57 (4th Cir. 2018) (assessing final policy maker authority on developed factual record); *Davidson v. Loudoun Cnty. Bd. of Supervisors*, No. 16-cv-932 (JCC/IDD), 2016 WL 4801617, at *6 (E.D. Va. Sept. 14, 2016) ("Whether ratification has taken place is an issue of fact.").

2. The First Amendment Claim Against the County Defendants

The County defendants assert that the facts alleged show that the plaintiffs' First Amendment claim cannot succeed. Doc. 53 at 15–16; *see* Doc. 25 at ¶¶ 175–78. But the County defendants rely on a selective recitation of only some of the facts alleged and ignore allegations that disrupt their narrative. The plaintiffs allege that the demonstration was peaceful and that the defendants used force to prevent the plaintiffs from protesting. The defendants' factual assertion that their acts were needed to "stop[ ] an unlawful assembly" and to "clear[ ] the streets," Doc. 53 at 16, are more appropriately raised at summary judgment.[13]

3. The Fourth Amendment Claim Against the County Defendants

The County defendants move to dismiss the plaintiffs' Fourth Amendment claim pursuant to Rule 12(b)(6). Doc. 53 at 17. Their argument on this issue amounts to a one sentence "request" that the Court "find that Plaintiffs have failed to state a claim." *Id.* The County defendants' motion on this issue will be denied. *See Landress v. Tier One Solar, LLC*, 243 F. Supp. 3d 633, 639 n.7 (M.D.N.C. 2017) (noting that where a party fails to develop an issue in its brief, courts have deemed the issue waived and citing *Belk, Inc. v. Meyer Corp.*, 679 F.3d 146, 152 n.4 (4th Cir. 2012)).

4. Qualified Immunity

***10** Some of the defendants raise a qualified immunity defense to the claims brought against them in their individual capacities. Specifically, the City defendants assert qualified immunity for Lt. Velez, Chief Cole, and Officer Franks, Doc. 46 at 13–17, while the County defendants claim immunity in a conclusory fashion for seemingly all defendants. Doc. 53 at 20–21.

Qualified immunity bars § 1983 actions against government officials in their individual capacities "unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time." *Barrett v. Pae Gov't Servs.*, 975 F.3d 416, 428–29 (4th Cir. 2020) (citation omitted). Qualified immunity is, as the City defendants acknowledge, a highly fact-specific inquiry, Doc. 46 at 16, and ordinarily "should be decided at the summary judgment stage." *Willingham v. Crooke*, 412 F.3d 553, 558 (4th Cir. 2005). Dismissal on grounds of qualified immunity is inappropriate where its resolution "turn[s] on disputed facts." *Raub v. Bowe*, 960 F. Supp. 2d 602, 608 n.8 (E.D. Va. 2013).

As an affirmative defense, the defendants bear the burden of establishing qualified immunity. *Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 305 (4th Cir. 2006). In their briefing, the defendants focus only on the first qualified immunity prong of whether the named defendants violated a federal statutory or constitutional right; neither set of defendants contends at this point that the federal rights at issue are not well-established. *See* Doc. 46 at 13–17; Doc. 53 at 20–21.[14] Because the Court has already decided not to dismiss any of the federal claims against the defendants in their individual capacities for failure to state a claim, *see supra*, the defendants have not satisfied the first qualified immunity element. The plaintiffs have plausibly and specifically alleged that the individual City and County defendants responded to their lawful and peaceful march, either directly or in a supervisory capacity,[15] with excessive physical force and pepper spray,[16] and that this response violated the plaintiffs' clearly established constitutional rights. Dismissal on qualified immunity grounds without a more fully developed factual record would be inappropriate.[17]

F. Punitive Damages Against the County Defendants

***11** The County defendants contend that the plaintiffs have not alleged the degree of aggravated conduct necessary to warrant punitive damages and that the claim for punitive damages should be dismissed. Doc. 53 at 21. An award of punitive damages is an intensely fact-bound determination, and federal courts regularly decline to address the availability of that remedy in response to a Rule 12 motion. *See, e.g.*, *Davis v. G. Allen Equip. Corp.*, No. 4:20-CV-49-BO, 2020 WL 4451169, at *2 (E.D.N.C. Aug. 3, 2020) (holding that a request for punitive damages is not "a separate cause of action" and therefore "dismissal is not warranted"); *Taylor v. Bettis*, 976 F. Supp. 2d 721, 747 (E.D.N.C. 2013) ("[I]t is premature to foreclose the possibility of punitive damages at this time."); *Jones v. Wake Cnty. Hosp. Sys.*, 786 F. Supp. 538, 547 (E.D.N.C. 1991) (declining to rule on punitive damages issue on a 12(b)(6) motion). Given the allegations in the complaint concerning the use of excessive force, physical assault by pepper spray, and other allegedly unjustified acts to break up a peaceful and otherwise lawful exercise of First Amendment rights, dismissal of the plaintiffs' request for punitive damages is inappropriate. The County defendants' motion as to this issue will be denied.

VII. Conclusion

The plaintiffs have adequately alleged each of their claims against the City and County defendants. Both motions will be denied, except as to the redundant § 1983 claims against the individual City defendants in their official capacities, which will be dismissed.

It is **ORDERED** that:

1. The City defendants' motion for leave to exceed word limitation, Doc. 47, is **GRANTED**.

2. The City defendants' motion to dismiss, Doc. 45, is **GRANTED in part** and the § 1983 claims against Chief Cole, Lt. Velez, and Officer Franks in their official capacities for violating the plaintiffs' First and Fourth Amendment rights, Doc. 25 at ¶¶ 175–82, are **DISMISSED**. The § 1983 claims against all other defendants will proceed, and the City defendants' motion to dismiss is otherwise **DENIED** as to the *Drumwright* complaint. The City's motion is **HELD IN ABEYANCE** to the extent it is directed at the *Allen* complaint, Doc. 24.

3. The County defendants' motion for judgment on the pleadings, Doc. 52, is **DENIED**.

All Citations

Slip Copy, 2021 WL 2223772

Footnotes

1 Because all relevant pleadings and briefs have been filed in *Allen v. City of Graham*, 1:20-cv-997 (M.D.N.C.), the lead case, *see* Doc. 22 (granting motion to consolidate), the Court will use citations to the *Allen* docket.

2 Doc. 25 at ¶¶ 175–78.

3 Doc. 25 at ¶¶ 179–82.

4 Doc. 25 at ¶¶ 183–88.

5 Doc. 25 at ¶¶ 189–99.

6 Doc. 25 at ¶¶ 200–05.

7 Doc. 25 at ¶¶ 206–10.

8 Doc. 25 at ¶¶ 211–13.

9 Technically, challenges to standing are made pursuant to Rule 12(b)(1), not Rule 12(b)(6) or 12(c). *See Pitt Cnty. v. Hotels.com, L.P.*, 553 F.3d 308, 311 (4th Cir. 2009) (noting that the district court recharacterized a defendant's challenge to standing from a motion to dismiss for failure to state a claim under Rule 12(b)(6) to a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1)). The Court will treat this aspect of the motions as if made pursuant to Rule 12(b)(1), given its independent duty to evaluate subject matter jurisdiction.

10 In their brief, the County defendants assert that the plaintiffs must seek relief, which, if granted, will benefit the injured members of the association. Doc. 53 at 8–9 (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)). But they do not clearly contend that this requirement has not been met here. The Court will not address this issue, if it is one, on the undeveloped

factual record.

11 At least one court has held that § 11(b) does not include a specific intent or racial animus element. *See LULAC*, 2018 WL 3848404 at *3–4.

12 The City defendants offer no substantive argument about this claim, referencing it only in a conclusory footnote. Doc. 46 at 12 n.7. The Local Rules explicitly state that an argument must be supported by citation to the record and legal authority. *See* LR 7.2(a). An argument is waived where the party fails to cite "legal authority of any kind." *Hayes v. Self-Help Credit Union*, No. 13-cv-880, 2014 WL 4198412, at *2 (M.D.N.C. Aug. 22, 2014).

13 In the complaint, the plaintiffs allege that the defendants' actions were unreasonable time, place, or manner restrictions on First Amendment activity, Doc. 25 ¶ 168, and the defendants discussed that legal standard in their brief. Doc. 53 at 16; *see Perry Educ. Assoc. v. Perry Local Educators' Assoc.*, 460 U.S. 37, 45 (1983) (explaining the government's power to enact speech restrictions on various categories of government-owned property). The plaintiffs also alleged that the defendants' actions were not justified by a compelling or substantial government interest, Doc. 25 ¶ 168, but in their briefing, they frame the claim more as an incitement of lawlessness issue by citing the "clear and present danger" standard. *See* Doc. 62 at 11 (citing *Jones v. Parmley*, 465 F.3d 46, 57 (2d Cir. 2006)). As part of the pretrial conference, and certainly before summary judgment briefing, the parties may want to clear up the nature of this claim and the appropriate First Amendment standard so that the briefing is more helpful.

14 The County defendants do assert that "[p]laintiff has alleged no conduct on the part of the Defendants which deprived Plaintiff of a constitutional right that was clearly established at the time of their actions," Doc. 53 at 21, but they do not identify the constitutional right allegedly at issue.

15 Supervisors may be held liable under § 1983 if they "failed or refused to intervene when a constitutional violation took place in [their] presence ...." *B.J.G. ex rel. McCray v. St. Charles Cnty. Sheriff*, No. 4:08-cv-1178 CDP, 2010 WL 1838414, at *3 (E.D. Mo. May 6, 2010), *aff'd sub nom. B.J.G. ex rel. McCray v. St. Charles Cnty. Sheriff*, 400 F. App'x 127 (8th. Cir. 2010); *see also Armstrong v. City of Greensboro*, 190 F. Supp. 3d 450, 464 (M.D.N.C. 2016) (noting that supervisory liability under Section 1983 lies for affirmatively approving unconstitutional conduct).

16 *See, e.g.*, Chief Mary Kristine Cole, Doc. 25 at ¶¶ 5, 38–39, 119, 154, 157; Officer Jonathan Franks, *id*. at ¶¶ 5, 31, 154; Sheriff Terry Johnson, *id*. at ¶¶ 27–28, 116, 123, 154, 172, 195–96; Deputy Sheriff Cliff Parker, *id*. at ¶¶ 29–30, 116, 154, 172 195; Lt. Joaquin Velez, *id*. at ¶¶ 5, 40–42, 154, 196.

17 Courts in this circuit have previously denied qualified immunity to law enforcement acting in retaliation to protected First Amendment activity. *See Jordan v. Large*, No. 7:16-cv-00468, 2018 WL 1158422, *4–5 (W.D. Va. Mar. 5, 2018) (finding allegations that officer used force in response to protected speech sufficient to state claim for First Amendment retaliation); *Raub*, 960 F. Supp. 3d at 614 (denying motion to dismiss because officer arrested plaintiff because of his political views); *Lowe v. Spears*, No. 3:06-cv-0647, 2007 WL 9718279, at *5 (S.D.W. Va. May 4, 2007) (denying motion to dismiss where officer retaliated at least in part because of plaintiff's protected speech). Courts in this circuit have also previously denied qualified immunity at the Rule 12 stage in cases where officers were alleged to have used pepper spray on nonviolent persons. *See, e.g.*, *Cooper v. Nichols*, No. 1:17-cv-1466 (AJT/TCB), 2019 WL 418856, at *4 (E.D. Va. Feb. 1, 2019) (denying a motion to dismiss based on qualified immunity by an officer who allegedly used OC spray on peaceful inmate).

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2022 WL 17088041
Only the Westlaw citation is currently available.
United States District Court, D. Arizona.

ARIZONA ALLIANCE FOR RETIRED AMERICANS et al., Plaintiffs,
v.
CLEAN ELECTIONS USA, et al., Defendants.

No. CV-22-01823-PHX-MTL
|
Signed November 1, 2022

Attorneys and Law Firms

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Alexander Michael Kolodin, Veronica Lucero, Davillier Law Group LLC, Phoenix, AZ, for Defendants Clean Elections USA, Melody Jennings.

Dana Paikowsky, Jennifer J. Yun, T. Christian Herren, Jr., Michael Elliot Stewart, Richard Dellheim, U.S. Dept of Justice - Civil Rights, Washington, DC, for Amicus United States of America.

TEMPORARY RESTRAINING ORDER

Michael T. Liburdi, United States District Judge

***1** For the reasons stated on the record,

IT IS ORDERED granting the parties' stipulated restraining order:

Stipulated Temporary Restraining Order

1. Defendants, their officers, agents, servants, employees, and attorneys, and other persons in active concert or participation with them are **RESTRAINED** from engaging themselves or training, organizing, encouraging, or directing others to, while monitoring drop boxes:

a. Intentionally enter within 75 feet of (i) a ballot drop box or (ii) the entrance to a building where a drop box is located.

b. Intentionally follow individuals delivering ballots to the drop box when such individuals are not within 75 feet of a drop box.

c. Unless spoken to or yelled at first, speak to or yell at an individual who that Defendant knows is (i) returning ballots to the drop box, and (ii) who is within 75 feet of the drop box.

d. (i) Openly carry firearms within 250 feet of a ballot drop box or (ii) visibly wear body armor within 250 feet of a ballot drop box. But Defendants shall not be in breach of this order if they accidentally and unknowingly reveal a concealed firearm or concealed body armor.

2. Defendants shall, within 24 hours of the date of this order, post the following in a conspicuous place on Clean Elections USA's website and on the Truth Social page, @TrumperMel, and leave it posted through the close of voting on Election Day 2022:

a. "It is not always illegal to deposit multiple ballots in a ballot drop box. It is legal to deposit the ballot of a family member, household member, or person for whom you are the caregiver. Here are the rules for ballot drop boxes by which I ask you to abide:"

b. The preceding statement shall be followed by a copy of the entire statutory text of Arizona Revised Statutes § 16-1005 or link thereto.

c. A copy of this temporary restraining order or a link to this temporary restraining order.

3. The preceding shall not prohibit Clean Elections USA from changing its name or the domain of its website pursuant to an agreement with Clean Elections, provided that any new website of Clean Elections USA posts the same through the close of voting on Election Day 2022.

4. Defendant Melody Jennings shall post on the Truth Social page, @TrumperMel, the following statement, and leave it posted through the close of voting on Election Day 2022: "Any past statement that it is always illegal to deposit multiple ballots in a ballot drop box is incomplete; a family member, household member, or caregiver can legally do so," along with a copy of the entire pertinent statutory text of Arizona Revised Statutes § 16-1005 or a link thereto and a copy of or link to this order.

5. Defendants' agreement to the entry of this partial order shall not be construed as an admission by Defendants that they have engaged in any of the activities this order prohibits or an admission by Defendants that any of those activities would be contrary to the law.

6. No person who has notice of this order shall fail to comply with it, nor shall any person subvert the order by sham, indirection, or other artifice.

***2** 7. This order applies to Defendants, their officers, agents, servants, employees, and attorneys, and other persons in active concert or participation with them. Notwithstanding that, Defendants shall not be held liable or in contempt based solely on a violation of this order by persons over whom Defendants do not have actual control.

8. This restraining order will go into effect immediately and shall remain in effect for fourteen days.

IT IS FURTHER ORDERED that the Court enters the following temporary restraining order proposed by Plaintiffs and contested by Defendants:

Temporary Restraining Order

1. Defendants, their officers, agents, servants, employees, and attorneys, and other persons in active concert or participation with them are **RESTRAINED** from engaging themselves or training, organizing, encouraging, or directing others to:

a. In connection with any specific claim that individuals committed voter fraud based solely on the fact that they deposited multiple ballots in a drop box, post online or otherwise disseminate images or recordings of, or personal information about, individuals who return ballots to a drop box, including but not limited to information about the individuals' identity, their distinguishing features, their license plate number, model and make of car, and/or similar information; or

b. Take photos of or otherwise record individuals who are within 75 feet of a ballot drop box.

2. Defendants shall cease and desist making false statements about Arizona Revised Statutes § 16-1005 immediately through the close of voting on Election Day 2022.

3. This restraining order will go into effect immediately and shall remain in effect for fourteen days.

IT IS FINALLY ORDERED waiving the bond requirement.

All Citations

Slip Copy, 2022 WL 17088041

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2022 WL 3335946 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

Billy Raymond COUNTERMAN, Petitioner,
v.
THE PEOPLE OF THE STATE OF COLORADO.

No. 22-138.
August, 2022.

On Petition for a Writ of Certiorari to the Colorado Court of Appeals, Division II

Petition for a Writ of Certiorari

Megan A. Ring, State Public Defender, Mackenzie Shields, Colorado State Public, Defender, 1300 Broadway Suite 400, Denver, CO 80203, (303) 764-1400.

John P. Elwood, Counsel of Record, Anthony J. Franze, Arnold & Porter, Kaye Scholer LLP, 601 Massachusetts Ave., NW, Washington, DC 20001, (202) 942-5000, john.elwood@arnoldporter.com, William T. Sharon, Arnold & Porter, Kaye Scholer LLP, 250W. 55St., New York, NY 10019, (212) 836-8000.

***I QUESTION PRESENTED**

Whether, to establish that a statement is a "true threat" unprotected by the First Amendment, the government must show that the speaker subjectively knew or intended the threatening nature of the statement, or whether it is enough to show that an objective "reasonable person" would regard the statement as a threat of violence.

***II RELATED PROCEEDINGS**

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

• *Counterman v. People*, No. 21SC650, Supreme Court of Colorado. Petition for review denied April 11, 2022.

• *People v. Counterman*, No. 17CA1465, Colorado Court of Appeals, Division II. Judgment entered July 22, 2021.

• *People v. Counterman*, No. 16CR2633, District Court, Arapahoe County, Colorado. Judgment entered April 27,2017.

***III TABLE OF CONTENTS**

APPENDIX CONTENTS

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***IV TABLE OF AUTHORITIES**

Cases

Constitution, Statutes, & Rules

***X Constitution, Statutes & Rules-Continued**

Other Authorities

[Note: Table of Authorities page numbers missing in original document.]

*1 OPINIONS BELOW

The order of the Supreme Court of Colorado (App. 40a) is unreported. The opinion of the court of appeals (App. la-39a) is reported at 497 P3d 1039. The trial court's orders rejecting petitioner's motions to dismiss (App. 41a-57a) are not reported.

JURISDICTION

The Supreme Court of Colorado denied a timely petition for review on April 11, 2022. App. 40a. On June 29, 2022, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including August 9, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law * * * abridging the freedom of speech." U.S. Const. amend. I.

Colorado Revised Statutes § 18-3-602(1)(c) provides, in relevant part: "(1) A person commits stalking if directly, or

indirectly through another person, the person knowingly: * * *(c) Repeatedly follows, approaches, ***2** contacts, places under surveillance, or makes any form of communication with another person * * * in a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person, * * * to suffer serious emotional distress." Colo. Rev. Stat. Ann. § 18-3-602(1)(c).

STATEMENT

This case concerns an important First Amendment question that has divided lower courts and that members of this Court have called on it to answer: What is the mental state necessary to establish that a statement is a "true threat" under the First Amendment? While the First Amendment does not protect true threats, *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam), the scope of that exception has generated widespread confusion. In *Virginia v. Black*, this Court held that true threats "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence." 538 U.S. 343, 360 (2003). Within the decade after *Black*, there was a recognized "circuit split" "on the question whether proof of a true threat requires proof of a subjective intent to threaten," or whether it was enough that an "objectively reasonable person would view [the] message as [a] serious expression of intent to harm." Br. in Opp. at 13, 23, *Elonis v. United States*, No. 13-983, 575 U.S. 723 (2015).

The Court "granted review in *[Elonis]* to resolve [that] disagreement among the Circuits," *Elonis*, 575 U.S. at 743 (Alito, J., concurring in part and dissenting in part), but ultimately decided the case on narrow statutory grounds rather than constitutional ones, holding that "a guilty mind is a necessary element" of the federal threat offense and a "reasonable person" standard " is inconsistent with the conventional requirement for criminal *conduct-awareness* of some wrong-doing," ***3** *id.* at 734, 737-738 (internal quotation marks omitted). Justice Alito lamented that the Court had "compounded-not clarified-the confusion" in the lower courts. *Id* at 743 (Alito, J., concurring in part and dissenting in part). Justice Thomas similarly observed that the Court's "failure to decide" the acknowledged circuit split "throws everyone from appellate judges to everyday Facebook users into a state of uncertainty." ***Id.*** at 750 (Thomas, J., dissenting).

Since then, lower courts continue to disagree about the standard for determining what constitutes a true threat under the Constitution. The First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits, as well as Arizona, Arkansas, Colorado, Connecticut, California, Hawaii, Iowa, Louisiana, Mississippi, Montana, North Dakota, Oregon, Pennsylvania, South Dakota, Washington, and Washington D.C., apply versions of an objective standard that focuses on how reasonable people would interpret the speaker's words. By contrast, the Ninth and Tenth Circuits, as well as Kansas, Massachusetts, North Carolina, and Rhode Island, use a subjective standard, requiring proof that the speaker intended the statement as a threat. Georgia requires knowledge that the statement will be viewed as a threat, and Illinois and Pennsylvania require recklessness as to the statement's threatening nature. At least nine states are subject to conflicting state and federal standards, so that the constitutional protection given speech depends on the happenstance of the courthouse in which the case is prosecuted.

Members of this Court have recognized this conflict and called for its review. See, *e.g.*, *Perez v. Florida*, 137 S. Ct. 853, 853-855 (2017) (Sotomayor, J., concurring in denial of cert.) (observing that the Court should "decide precisely what level of intent suffices under the First Amendment-a question [the Court] avoided * **in ***4** *Elonis"); Kansas v. Boettger*, 140 S. Ct. 1956, 1956 (2020) (Thomas, J., dissenting from the denial of cert.) (urging the Court to "resolve the split on this important question"). Lower courts and commentators likewise have recognized that the conflict is important and needs this Court's resolution. See pp. 13-14, *infra.*

This case presents an ideal vehicle to resolve this recurring question. Here, a jury in Colorado convicted petitioner of violating a state statute that prohibits certain speech without regard to the speaker's mental state. The courts below applied a purely objective test for determining whether petitioner's statements were true threats. While petitioner's mental state would have made all the difference in federal district court in Colorado, see, *e.g.*, *United States v. Heineman*, 767 F.3d 970, 975 (10th Cir. 2014) ("[T]he First Amendment * * require[s] the government to prove in any true-threat prosecution that the defendant intended the recipient to feel threatened."), the Colorado courts have made clear that they apply an "objective test" that treats the speaker's mental state as irrelevant to the First Amendment inquiry. App. 12a.

Petitioner's conviction cannot stand. As this Court has explained, "[h]aving liability turn on whether a 'reasonable person'

regards [a] communication as a threat-regardless of what the defendant thinksreduces culpability on the all-important element of the crime to negligence." *Elonis*, 575 U.S. at 738 (internal quotation marks omitted). Permitting felony convictions for pure-speech crimes based on negligence alone conflicts with First Amendment principles and this Court's decision in *Black*. Further review is warranted not only to correct a manifest error but to resolve a conflict and provide guidance to the lower courts.

***5 A. Factual Background**

1. In 2014, petitioner sent a Facebook friend request to C.W., a Colorado musician. App. 3a. C.W accepted the request. App. 17a. Over the next two years, petitioner sent periodic messages to C.W.'s account from several different Facebook accounts. App. 3a. The messages were largely text, but some included images of items. App. 6a-7a. The messages included:

• "Was that you in the white Jeep?"

• "Five years on Facebook. Only a couple physical sightings."

• "Seems like I'm being talked about more than I'm being talked to. This isn't healthy."

• "I've had tapped phone lines before. What do you fear?"

• "I'm currently unsupervised. I know, it freaks me out too, but the possibilities are endless."

• An image of liquor bottles, captioned, "[a] guy's version of edible arrangements."

• "How can I take your interest in me seriously if you keep going back to my rejected existence?"

• "Fuck off permanently."

• "Your arrogance offends anyone in my position."

• "You're not being good for human relations. Die. Don't need you."

• "Talking to others about me isn't prolife sustaining for my benefit. Cut me a break already.... Are you a solution or a problem?"

• "Your chase. Bet. You do not talk and you have my phone hacked."

• "I didn't choose this life."

***6** • "Staying in cyber life is going to kill you. Come out for coffee. You have my number."

• "A fine display with your partner."

• "Okay, then please stop the phone calls."

• "Your response is nothing attractive. Tell your friend to get lost."

Ibid. C.W never responded to any of petitioner's messages and blocked him from messaging her. App. 3a, 17a, 49a.

In 2016, C.W told a family member that petitioner's messages frightened her. App. 4a. C.W then contacted an attorney. *Ibid* C.W also reported petitioner to law enforcement and obtained a protective order. *Ibid* Petitioner did not contact C.W after she obtained the order, which he learned of only after his arrest. Pet. C.A. Br.4.

2. Police arrested petitioner and he was charged with, as relevant here, stalking under Colorado Revised Statute § 18-3-602(1)(c), which prohibits "knowingly * * * [r]epeatedly * * * mak[ing] any form of communication with another person, * * * in a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person ***to suffer serious emotional distress." Colo. Rev. Stat. Ann. § 18-3-602(1)(c). As the Supreme Court of Colorado held in 2006, conviction under that provision requires proof only that the speaker "knowingly" make repeated communications, and does not "require that a perpetrator be aware that his or her acts would cause a reasonable person to suffer serious emotional distress." *People v. Cross*, 127 P.3d 71, 77 (Colo. 2006) (en bane).

B. Proceedings Below

1. Before trial, petitioner moved to dismiss the stalking count. App. 4a-5a, 7a-8a; see also App. 42a-44a. ***7** He argued that his Facebook messages were not true threats and thus were protected speech under the First Amendment. *Ibid* The trial court denied the motion. Consistent with binding state law, the court applied a purely objective test, considering "the plain language of the statements," App. 45a, the recipient of the statements, App. 48a, the manner in which the statements were made (*e.g.*, on Facebook), App. 48a-49a, and the reaction of the alleged victim, App. 48a. It did not make any findings about whether petitioner intended the statements to be threats, was aware that his messages could be construed as threatening, or even whether he had behaved recklessly. See App. 45a-50a. The court commented that some statements were "borderline delusional," App. 47a-48a, and another "could suggest a loss of control," App. 48a. The trial judge concluded: "I believe that [petitioner's] statements rise to the level of a true threat, although ultimately that will be a question of fact for the jury to decide." App. 49a.

2. After the prosecution's case-in-chief, petitioner renewed his motion to dismiss on the ground that his statements were not true threats and were protected by the First Amendment. App. 55a-56a. The trial court applied the purely objective analysis again, App. 50a, 56a, and denied the request, concluding that "a reasonable jury could find that [petitioner's] statements rise to the level of * * * a true threat," App. 56a. In the trial court's view, petitioner's messages "would not be considered protected speech," and thus "submitting the charges to the jury [would] not impermissibly intrude on or violate [petitioner's] First Amendment rights." *Ibid*

The prosecution accordingly argued to the jury in closing that petitioner "did not need to know that a reasonable person would suffer serious emotional distress, and he did not need to know that [C.W.] suffered serious emotional distress. * * * All he had to know was ***8** that he was sending these messages and that these messages were practically certain to be sent." App. 60a-61a. The jury convicted petitioner, and the court sentenced him to four-and-a-half years of imprisonment. App. 5a.

3. Petitioner appealed, arguing that the trial court had erred by applying an objective standard that considered a reasonable listener's interpretation to determine whether his statements constituted true threats. Quoting *Black*, petitioner argued that "true threats" encompass only "those statements where the speaker *means* to communicate a serious expression of an intent to commit an act of unlawful violence." Pet. CA. Br. 18 (quoting *Black).* Petitioner argued that the court "should adopt the subjective intent requirement [for] its 'true threat' analysis." *Id* at 32.

The Colorado Court of Appeals affirmed the conviction. The court acknowledged that "[s]ocial media * ** magnify the potential for a speaker's innocent words to be misunderstood." App. 20a. But it nonetheless refused petitioner's request to apply a standard that looked to the speaker's mental state and instead applied "an objective test" that considered the reasonableness of the victim's reaction to determine "that Counterman's statements were true threats that aren't protected under the First Amendment." App. 12a, 21a. The court of appeals wrote that, "[i]n the absence of additional guidance from the U.S. Supreme Court, we decline * * * to say that a speaker's subjective intent to threaten is necessary for a statement to constitute a true threat for First Amendment purposes." App. 12a (quoting *People ex rel. R.D.*, 464 P3d 717, 731 n.21 (Colo. 2020)).

The Supreme Court of Colorado denied a timely petition for review. App. 40a.

***9 REASONS FOR GRANTING THE PETITION**

A. There Is An Acknowledged Split On The Standard Of Intent Necessary For "True Threats"

1. More than seven years after *Elonis-and* nearly twenty years since *Black-the* federal courts of appeals and state courts of last resort remain deeply divided about the implications of those decisions on the basic question whether a subjective or objective test (or some combination) governs the true threat inquiry.

Like the decision below, the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits have applied an objective test. The Fourth Circuit, for example, has held that "*Elonis* [did] not affect [its] constitutional rule that a 'true threat' is one that a reasonable recipient familiar with the context would interpret as a serious expression of an intent to do harm." *United States v. White*, 810 F.3d 212, 220 (2016). That court, in an earlier case decided by a divided vote, had construed *Black* as requiring only a general intent to communicate a statement, not the specific intent that the statement contain a threat. *United States v. White*, 670 F.3d 498, 509 (2012), abrogated in part by *Elonis*, as recognized by *White*, 810 F.3d at 220; but see *id* at 520 (Floyd, J., concurring in part and dissenting in part) ("*Virginia v. Black* is a superseding contrary decision that makes our purely objective approach to ascertaining true threats no longer tenable"). Likewise, the Eighth Circuit has reaffirmed its purely objective "reasonable person" standard since *Elonis*, which it has defended by citing concerns that a subjective test would insufficiently protect listeners from the fear of violence. See *United States v. Mabie*, 663 F.3d 322, 332-333 (2011); *United States v. Ivers*, 967 F.3d 709, 718, 720-721 (2020) (reiterating the objective test, *post-Elonis)*, cert. denied, 141 S. Ct. 2727 (2021).

***10** The Second Circuit has continued to apply an objective test, see *Heller v. Bedford Cent. Sch. Dist.*, 665 F. App'x 49, 51 n.1 (2016) (summary order) ("The test for whether a communication is a true threat is objective * * *."), writing that "the Supreme Court's holding in *Elonis* does not significantly alter the standard by which we determine whether a threat is a true threat," *United States v. Wright-Darrisaw*, 617 F. App'x 107, 108 (2015) (summary order). That court has acknowledged, however, the uncertainty that both *Black* and *Elonis* have created, see *id.* at 108 n.2; see also *United States v. Turner*, 720 F.3d 411, 420 n.4 (2d Cir. 2013) (noting that "disagreement has arisen among [the] circuits regarding whether *Black* altered or overruled the traditional objective test for true threats by requiring that the speaker subjectively intend to intimidate the recipient of the threat").[1]

***11** 2. By contrast, other circuits use a subjective test. As the Tenth Circuit recognized, "the First Amendment, as construed in *Black*, require[s] the government to prove in any true-threat prosecution that the defendant intended the recipient to feel threatened." *United States v. Heineman*, 767 F.3d 970, 975 (10th Cir. 2014).[2]

Likewise, the Ninth Circuit has held that "the First Amendment allows criminalizing threats only if the speaker intended to make 'true threats.'" *United States v. Bachmeier*, 8 F.4th 1059, 1064 (9th Cir. 2021). As Judge O'Scannlain explained, "[t]he clear import of *[Black] is* that only *intentional* threats are criminally punishable consistently with the First Amendment." *United States v. Cassel*, 408 F.**3d** 622, 631 (9th Cir. 2005). The Ninth Circuit has concluded that reading is consistent with *Elonis. Bachmeier*, 8 F.4th at 1064.

Although the Seventh Circuit in the past applied an objective standard, it has repeatedly questioned that decision in light of intervening precedents. It has observed that "[b]efore the Supreme Court's decision in *[Black]*, we used an objective reasonable person standard to determine whether speech constituted a true threat. After *Black*, we and other courts have wondered whether speech only qualifies as a true threat if the speaker subjectively intended his words to be threatening." *United States v. Khan*, 937 F.3d 1042, 1055 *(7th Cir. 2019) (internal quotation marks omitted). As* ***12** Judge Sykes explained, it is "likely * * * that an entirely objective definition [of 'true threats'] is no longer tenable" after *Black. United States v. Parr*, 545 F.3d 491, 500 (7th Cir. 2008). But "[b]ecause the Supreme Court has not definitively answered the question" of what mental state is necessary to establish a "true threat," the court concluded that the answer to that important question has not been "clearly established." *Maier v. Smith*, 912 F.3d 1064, 1072 (7th Cir. 2019).

3. State courts are likewise divided. Some, like Colorado here, apply a purely objective test. See, *e.g.*, *Citizen Publ'g Co. v. Miller*, 115 P.3d 107, 114 (Ariz. 2005) (en bane); *Jones v. State*, 64 S.W.3d 728, 736 (Ark. 2002); *People ex rel. R.D.*, 464 P.3d 717, 731 n.21 (Colo. 2020); *People v. Baer*, 973 P.2d 1225, 1231 (Colo. 1999) (en banc); *State v. Taupier*, 193 A.3d 1, 18 (Conn. 2018); *People v. Lowery*, 257 P.3d 72, 77 & n.1 (Cal. 2011); *In re S.W*, 45 A.3d 151, 156 & n.14 (D.C. 2012); *State v. Valdivia*, 24 P.3d 661, 671-672 (Haw. 2001); *State v. Soboroff*, 798 N.W2d 1, 2 (Iowa 2011); *State ex rel. RT*, 781 So. 2d 1239, 1245-1246 (La 2001); *Hearn v. State*, 3 So. 3d 722, 739, n.22 (Miss. 2008); *State v. Lance*, 721 P.2d 1258, 1266-1267 (Mont. 1986); *State v. Johnson*, 964 N.W2d 500, 503 (N.D. 2021); *State v. Moyle*, 705 P.2d 740, 750-751 (Or.

1985) (en bane); *Austad v. Bd. of Pardons and Paroles*, 719 N.W.2d 760, 766 (S.D. 2006); *State v. Trey M.*, 383 P.3d 474, 478, 481 (Wash. 2016) (en banc); *State v. Perkins*, 626 N.W.2d 762, 770 (Wis. 2001).

Others apply a hybrid test that considers *both* the speaker's subjective mental state and whether the statement is reasonably viewed as a threat. Most such states have held that establishing a true threat requires proof of "the *intent* to cause fear of violence." *State v. Boettger*, 450 P.3d 805, 818 (Kan. 2019) (emphasis added); accord *State v. Taylor*, 866 S.E.2d 740, 753 (N.C. 2021); *O'Brien v. Borowski*, 961 N.E.2d 547, 557 (Mass. 2012), ***13** abrogated on other grounds by *Seney v. Morhy*, 3 N.E.3d 577 (Mass. 2014); *State v. Grayhurst*, 852 A.2d 491, 515 (R.I. 2004). Others combine an objective test with the speaker's *knowledge* the statement will be viewed as a threat. *People v. Ashley*, 162 N.E.3d 200, 215 (Ill. 2020). Some merely require that an objective threat be made *recklessly*. See *Int. of: J.J.M.*, 265 A.3d 246, 270 (Pa. 2021); see also *Major v. State*, 800 S.E.2d 348, 351-352 (Ga. 2017) (holding that mens rea of recklessness, "conscious disregard of a substantial risk," is sufficient to satisfy First Amendment). One state, Indiana, requires intent as a matter of state constitutional law, but also has observed that this standard "is consistent with *Black's* focus on 'whether a particular communication is intended to intimidate.'" *Brewington v. State*, 7 N.E.3d 946, 964 (Ind. 2014) (quoting *Virginia v. Black*, 538 U.S. 343, 345 (2003)) (brackets omitted). And Vermont has applied an intent test, see *State v. Miles*, 15 A.3d 596, 599 (Vt. 2011), but has since suggested that the standard is uncertain, see *State v. Noll*, 199 A.3d 1054, 1063 n.6 (Vt. 2018).

4. This case thus involves a question about which lower courts are in conflict and a paradigmatic example of a case warranting this Court's review. See S.Ct. R. 10; *Noll*, 199 A.3d at 1063 n.6 (acknowledging split). In the years since *Elonis*, the lower courts repeatedly have noted "the continuing disagreement and lack of definitive guidance from the Supreme Court," *Trey M.*, 383 P.3d at 483, such that "the necessary subjective intent one needs to make a true threat is rather hazy," *United States v. Ackell*, 907 F.3d 67, 77 n.4 (1st Cir. 2018); accord, *e.g.*, *Maier*, 912 F.3d at 1072 ("[T]he Supreme Court has not definitively answered the question * * *."); *People ex rel. R.D.*, 464 P.3d at 731 n.21 (noting lack of "additional guidance from the U.S. Supreme Court"); *Wright-Darrisaw*, 617 F. App'x at 108 n.2 (recognizing that ***14** *Elonis* did not resolve the uncertainty); *United States v. Nissen*, 432 F. Supp. 3d 1298, 1316 (D.N.M. 2020) ("*Elonis* * * * offers no guidance as to the First Amendment's true-threat requirement"); *Boettger*, 450 P.3d at 811 (noting that "the United States Supreme Court [has not] explicitly decided the question"). Commentators have likewise noted that the courts are "split on the meaning of intent in a true-threat analysis," John Sivils, *Online Threats: The Dire Need for a Reboot in True-Threats Jurisprudence*, 72 SMU L. Rev. Forum 51, 51 (2019), reflecting so much "judicial confusion" that "lower-court opinions in true threat cases are, collectively, a mess," Renee Griffin, Note, *Searching for Truth in the First Amendment's True Threat Doctrine*, 120 Mich. L. Rev. 721, 729-730 (2022); see also Caroline Fehr et. al., *Computer Crimes*, 53 Am. Crim. L. Rev. 977, 989 (2016) ("After *Elonis*, lower courts still do not know ***the required mens rea for the 'true threats' exception to the First Amendment * * *."); Jessica Miles, *Straight Outta Scotus: Domestic Violence, True Threats, and Free Speech*, 74 U. Miami L. Rev. 711, 733 (2020) ("Resolution of the circuit court split seems likely to bring the issue to the Supreme Court's attention again.").

Underscoring the urgent need for review, at least nine "[s]tate high courts have further muddled the intent question in true-threats jurisprudence by adopting analytical standards that differ from the federal appellate circuits in which they sit." Sivils, *Online Threats*, *supra*, at 51. As noted, the Tenth Circuit considers the speaker's subjective intent, see *Heineman*, 767 F.3d at 975, while Colorado applies a purely objective test, see *People ex rel. R.D.*, 464 P.3d at 731 n.21; see also *Baer*, 973 P.2d at 1231. The First Circuit has applied an objective test, see *United States v. Nishnianidze*, 342 F.3d 6, 16 (1st Cir. 2003), but both Massachusetts and ***15** Rhode Island have applied a subjective one, see *O'Brien*, 961 N.E.2d at 557 (Massachusetts); *Grayhurst*, 852 A.2d at 515 (Rhode Island). The Fourth Circuit applies a purely objective test, see *White*, 810 E3d at 220, but North Carolina, noting the disagreement with that court, "define[s] a true threat as an objectively threatening statement communicated by a party which possesses the subjective intent to threaten," *Taylor*, 866 S.E.2d at 753. And California, Hawaii, Montana, Oregon, and Washington apply an objective definition of true threats, in conflict with the Ninth Circuit's subjective intent standard. Compare *Lowery*, 257 P.3d at 77 & n.1 (California), *Valdivia*, 24 P.3d at 671-672 (Hawaii), *Lance*, 721 P.2d at 1266-1267 (Montana), *Moyle*, 705 P.2d at 750-751 (Oregon), and *Trey M.*, 383 P.3d at 478, 481 (Washington), with *Cassel*, 408 E3d at 632-633.

These state-federal conflicts are particularly problematic, because they mean that speakers' constitutional rights depend on the courthouse in which they are prosecuted. Cf. *Madsen v. Women's Health Ctr, Inc.*, 512 U.S. 753, 761-762 (1994) ("We granted certiorari to resolve the conflict between the Florida Supreme Court and the Court of Appeals over the constitutionality of the state court's injunction." (citation omitted)). And the growing use of joint federal-state investigations increases the risk of opportunistic behavior by law enforcement officials, who have an incentive to prosecute in whichever

jurisdiction applies the objective test.

Beyond that, the conflict here stems from confusion over the intersection of this Court's decisions in *Black* and *Elonis.* This Court often grants review "where the decision below is premised upon a prior Supreme Court opinion whose implications are in need of clarification." Stephen M. Shapiro et al., *Supreme Court Practice* § 4.5, pp. 4-23, 4-24 (11th ed. 2019). Only this Court can ***16** clarify the standard of scienter for true threats under the First Amendment and should do so here.

B. The Decision Below Is Wrong

History, tradition, and this Court's prior decisions show that heightened scienter is necessary to true threats.

1. "[A]s a general matter, our criminal law seeks to punish the 'vicious will.'" *Ruan v. United States,* 142 S. Ct. 2370, 2376 (2022) (quoting *Morissette v. United States,* 342 U.S. 246, 251 (1952)). "With few exceptions," therefore, "wrongdoing must be conscious to be criminal." *Ibid.* (quoting *Elonis,* 575 U.S. at 734). Thus, "consciousness of wrongdoing is a principle 'as universal and persistent in mature systems of criminal law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.'" *Id* at 2376-2377 (quoting *Morissette,* 342 U.S. at 250) (brackets omitted).

The First Amendment broadly protects speech except "in a few limited areas," and it "has never 'included a freedom to disregard these traditional limitations.'" *United States v. Stevens,* 559 U.S. 460, 468 (2010) (quoting *R.A.V. v. City of St. Pal, Minn.,* 505 U.S. 377, 382 (1992)) (brackets omitted). A "hallmark" of the constitutional right to free speech is "to allow 'free trade in ideas'-even ideas that the overwhelming majority of people might find distasteful or discomforting." *Black,* 538 U.S. at 358 (quoting *Abrams v. United States,* 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)). The First Amendment thus bars the State from proscribing speech, even if "a vast majority of its citizens believes [it] to be false and fraught with evil consequence." *Whitney v. California,* 274 U.S. 357, 374 (1927) (Brandeis, J., concurring).

***17** Because this Court has long recognized the essential role that a mental state requirement plays in protecting speech, this Court has declined to allow the "elimination of the scienter requirement" when doing so would "work a substantial restriction on the freedom of speech and of the press." *Smith v. People of the State of California,* 361 U.S. 147, 150 (1959). In its incitement cases, for example, this Court has required proof that the speaker's "advocacy of the use of force" was "*directed to* inciting or producing imminent lawless action." *Brandenburg v. Ohio,* 395 U.S. 444, 447 (1969) (per curiam) (emphasis added). There must be evidence that the speaker's "words were *intended* to produce, and likely to produce, imminent disorder." *Hess v. Indiana,* 414 U.S. 105, 109 (1973) (per curiam) (emphasis added).

Likewise, in the obscenity context, "the constitutional guarantees of the freedom of speech and of the press stand in the way of * * * dispensing with any requirement of knowledge" of, or, at least, recklessness as to, the nature of the obscene content. *Smith,* 361 U.S. at 152-153; see also *Osborne v. Ohio,* 495 U.S. 103, 114 n.9 (1990).

Employing an exclusively objective standard for identifying true threats is fundamentally inconsistent with First Amendment principles--particularly in a criminal statute:

In essence, the objective interpretation embodies a negligence standard, charging the defendant with responsibility for the effect of his statements on his listeners. We have long been reluctant to infer that a negligence standard was intended in criminal statutes; we should be particularly wary of adopting such a standard for a statute that regulates pure speech.

***18** *Rogers v. United States,* 422 U.S. 35, 47 (1975) (Marshall, J., concurring) (citation omitted); accord *United States v. Jeffries,* 692 F.3d 473, 484 (6th Cir. 2012) (Sutton, J., concurring *dubitante*) (observing that "what an objective test does" is "reduc[e] culpability * * * to negligence"; doing so is inconsistent with "[b]ackground norms for construing criminal statutes," which "presume that intent is the required mens rea in criminal laws"), conviction vacated, in light of *Elonis,* by *Jeffries v. United States,* No. 10-CR-100 (TWP), 2018 WL 910669, at *4 (E.D. Tenn. Feb. 15, 2018). Thus, the "objective construction" of true threats "would create a substantial risk that crude, but constitutionally protected, speech might be criminalized," particularly when that speech concerns "merely crude or careless expression of political enmity." *Rogers,* 422 U.S. at 43-44 (Marshall, J., concurring).

The notion that one could commit a "speech crime" *by accident* is chilling: Imprisoning a person for negligently misjudging how others would construe the speaker's words would erode the breathing space that safeguards the free exchange of ideas. For this reason, First Amendment doctrine in many contexts imposes "*mens rea* requirements that provide 'breathing room' * * * by reducing an honest speaker's fear that he may accidentally incur liability for speaking." *United States v. Alvarez*, 567 U.S. 709, 733-734 (2012) (Breyer, J., concurring in the judgment); see generally Leslie Kendrick, *Free Speech and Guilty Minds*, 114 Colum. L. Rev. 1255, 1295 (2014) (surveying First Amendment law and concluding that a "speaker's intent matters to speech protection").

2. The purely objective test in Colorado and some other jurisdictions is incompatible with this Court's true threats jurisprudence. "'True threats' encompass those ***19** statements where the speaker *means* to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Black*, 538 U.S. at 359. In *Black*, eight justices agreed to overturn the defendant's crossburning conviction because the Virginia statute had allowed the jury to presume he had "the *purpose* of threatening or intimidating a victim." *Id* at 366 (plurality) (emphasis added); see also *id* at 372-373 (Scalia, J., concurring in part and dissenting in part); *id.* at 385-386 (Souter, J., concurring in part and dissenting in part).

This Court also held that "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons *with the intent* of placing the victim in fear of bodily harm or death." *Black*, 538 U.S. at 344 (emphasis added); see *id* at 372 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("[t]he plurality is correct" that it is "constitutionally problematic" to convict someone for burning a cross when the action is not intended to intimidate). Although some courts have read the word "type" to imply there are other "types" of true threats that do not require heightened scienter,[3] "[t]his Court has long stressed that the language of an opinion is not always to be parsed as though [it] were * * * the language of a statute." *Brown v. Davenport*, 142 S. Ct. 1510, 1528 (2022) (internal quotation marks and brackets omitted). At bottom, all eight justices who concurred in the judgment in *Black* "agreed that intent to intimidate ***20** is necessary" under the Constitution "and that the government must prove it in order to secure a conviction." *Cassel*, 408 F.3d at 632 (O'Scannlain, J.); *Heineman*, 767 F.3d at 979 (Hartz, J.) (noting that the concurring justices in *Black* "obviously assumed" that the majority "had already established that an intent to threaten was required"). And even to the extent *Black* left some ambiguity about the *level* of scienter necessary for true threats, it did not dispense with a heightened scienter requirement altogether.

Focusing on the speaker's subjective intent protects speech in a second respect. Objective tests tend to focus on the reaction of a reasonable recipient of the statement. As this Court has observed, "[l]isteners' reaction to speech is not a content-neutral basis for regulation." *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992). "Under a purely objective test, speakers whose ideas or views occupy the fringes of our society have more to fear," because their statements "even if intended simply to convey an idea or express displeasure, [are] more likely to strike a reasonable person as threatening. They are the ones more likely to abstain from participating fully in the marketplace of ideas and political discourse." *White*, 670 F.3d at 525 (Floyd, J., concurring in part and dissenting in part); cf. *Alvarez*, 132 S. Ct. at 2553 (Breyer, J., concurring) ("[T]hose who are unpopular may fear that the government will use [the prosecution of false statements] selectively, * * * while ignoring members of other political groups who might make similar false claims."). But it is a basic tenet of First Amendment law that "[s]peech cannot be * * * burdened, any more than it can be punished or banned, simply because it might offend a hostile mob." *Forsyth Cnty.*, 505 U.S. at 134-135. Use of a subjective intent standard would act as a safeguard against potentially discriminatory enforcement.

*21 C. The Question Presented Is Important And Recurring

1. The standard for determining whether a statement is a true threat unprotected by the First Amendment is unquestionably important, as this Court recognized by granting review in *Elonis*. Members of this Court have acknowledged that the question presented here is an important one warranting review. In his partial concurrence in *Elonis*, Justice Alito observed in the statutory context that "[a]ttorneys and judges need to know which mental state is required for conviction" for making threats. 575 U.S. at 742 (Alito, J., concurring in part and dissenting in part). In his dissent, Justice Thomas likewise observed that the "failure to decide" the requisite scienter "throws everyone from appellate judges to everyday Facebook users into a state of uncertainty." *Id* at 750 (Thomas, J., dissenting).

More recently, Justice Sotomayor lamented the same uncertainty in the constitutional context, observing that this Court should determine "precisely what level of intent suffices under the First Amendment" in true threats cases, "a question [the Court] avoided * * * in *Elonis.*" *Perez v. Florida*, 137 S. Ct. 853, 855 (2017) (Sotomayor, J., concurring in denial of cert.). Justice Thomas also has expressed that this Court should "resolve the split on this important question." *Kansas v. Boettger*, 140 S. Ct. 1956, 1956 (2020) (Thomas, J., dissenting from the denial of cert.). Likewise, in the years since *Elonis*, the lower courts repeatedly have commented on the "the absence of a definitive instruction from the High Court" and requested this Court's guidance-regretfully noting that, in its absence, "we must chart our own course." *Int. of J.J.M.*, 265 A.3d at 265. As the North Carolina Supreme Court has written, "[s]peakers need clarity on the type of communication ***22** which constitutes a true threat." *Taylor*, 866 S.E.2d at 749.

This issue implicates the validity of numerous threat prosecutions by federal and state authorities each year. There are at least a half-dozen federal threat statutes. See, *e.g.*, 18 U.S.C. § 871(a) (threatening the President), § 873 (blackmail), § 875(c) (threatening to kidnap or injure any person), § 876(c) (mailing threatening communications), § 878 (threats and extortion against foreign officials, official guests, or internationally protected persons), § 879 (threats against former Presidents and certain other persons), § 1503(a) (threats against a jury member), § 1951(a) (interference with commerce), § 115 (influencing, impeding, or retaliating against a federal official by threatening or injuring a family member).

Most, if not all, states criminalize threats.[4] The Commonwealth of Virginia represented in *Boettger* that nearly half of all states-24 of them-have enacted statutes incorporating a *mens rea* of either reckless disregard or knowledge, but stopping short of a requirement of specific intent. See Br. *Amici Curiae* of Virginia et al. at 11-12 & nn.13-14, *Kansas v. Boettger*, No. 19-1051.

The preeminence of online communication makes this issue more important today than ever before. While social media and the internet have vastly increased the potential to communicate, they have simultaneously magnif[ied] the potential for a speaker's innocent words to be misunderstood." App. 20a; Megan R. Murphy, ***23** *Context Content, Intent: Social Media's Role in True Threat Prosecutions*, 168 U. Pa. L. Rev. 733, 734 (2020) (noting that the internet "amplifies the potential for a receiving user to interpret a statement as conveying something different than what the speaker intended to convey"). That is because "the tone and mannerisms of the speaker are unknown," and frequently, the speaker is too. Kyle A. Mabe, Note, *Long Live the King:* United States v. Bagdasarian *and the Subjective-Intent Standard for Presidential "True-Threat" Jurisprudence*, 43 Golden Gate U. L. Rev. 51, 89 (2013); accord Justin Kruger et al., *Egocentrism Over E-Mail: Can We Communicate as Well as We Think?* 89 J. Personality & Soc. Psychol. 925, 933 (2005) (noting that "[g]esture, voice, expression, context" do "more than merely *supplement* linguistic information, [they] alter it completely").

Moreover, modern media allow statements intended for one particular audience to be viewed by people who are unfamiliar with the context and thus may interpret the statements differently than the speaker intended. Internet-based communication has thus "eroded the shared frame of background context that allowed speakers and hearers to apply context to language," Caleb Mason, *Framing Context, Anonymous Internet Speech, and Intent: New Uncertainty About the Constitutional Test for True Threats*, 41 Sw. L. Rev. 43, 72 (2011), and "different discourse conventions" often "lead[] to misinterpretations," Lyrissa Barnett Lidsky & Linda Riedemann Norbut, *#I-<<image not displayable>>U: Considering the Context of Online Threats*, 106 Cal. L. Rev. 1885, 1890 (2018). It is therefore unsurprising that online statements have proven to be a major basis (perhaps the *leading* basis) for criminal threat prosecutions. See, *e.g.*, *Taylor*, 866 S.E.2d at 744 (Facebook); ***24** *Town ofBrookfield v. Gonzalez*, 2021 WL 4987976, *4 (Wisc. App. Oct. 27, 2021) (Instagram and Snapchat); *United States v. Miah*, 546 E Supp. 3d 407,420 (W.D. Pa. 2021) (Twitter); *United States v. Bagdasarian*, 652 F.3d 1113, 1115 (9th Cir. 2011) (Yahoo message board). Commentators have thus noted the conflict among the courts and called for this Court's review, observing that "[t]he inadequacy of current true threats doctrine is especially acute in the social media era." Lidsky & Norbut, *supra*, at 1890.

And unlike traditional mail, which is sent to a specific address in a known jurisdiction, e-mail, Facebook messages, and other online communications can be read anywhere, subjecting online speakers to different constitutional standards based on geographical chance.

D. This Case Is An Excellent Vehicle To Decide The Question Presented

This case squarely presents a single purely legal issue. The facts of this case aptly frame the constitutional question presented.

Unlike in *Perez*, where "the lower courts did not reach the First Amendment question," 137 S. Ct. at 854 (Sotomayor, J., concurring in denial of cert.), the decision below squarely addressed the question, explaining that the Colorado Supreme Court had "[j]ust last year" adopted an "an objective test" for true threats that was controllingg]." See App. 12a. The Supreme Court of Colorado, having only recently written extensively on the mental state required to establish a "true threat" and already "decline[d] * * * to say that a speaker's subjective intent to threaten is necessary," *People ex rel. R.D.*, 464 P.3d at 731 n.21, saw no need to revisit the subject again so quickly and denied review, App. 40a.

This case involves no predicate jurisdictional, factual, or legal disputes. Petitioner squarely raised the mental state question, Colorado addressed the question on the merits without asserting the issue was unpre-served, ***25** and the decision below passed on the issue, holding that the constitutional "true threat" standard "is an objective test." App. 12a; see also Pet. Colo. S. Ct. Cert. Petit., at 9-12; Resp. Colo. S. Ct. Br. in Opp., at 1-8. Nor does this case involve an antecedent statutoryinterpretation issue of the sort this Court answered in *Elonis*. As noted, the Supreme Court of Colorado has held that the "knowingly" mens rea in the statute does not apply to the "serious emotional distress" elements, so the statute does not "require that a perpetrator be aware that his or her acts would cause a reasonable person to suffer serious emotional distress." *Cross*, 127 P.3d at 77; see also App. 60a-61a. Because this Court is "bound by the construction given [the] statute by the highest court of the State," *Interstate Oil Pipe Line Co. v. Stone*, 337 U.S. 662, 666 (1949), the only question is "precisely what level of intent suffices under the First Amendment," the unresolved question that this Court "avoided * * *in *Elonis*" on statutory grounds. *Perez*, 137 S. Ct. at 855 (Sotomayor, J., concurring in denial of cert.). The issue is squarely presented and ripe for review, and nothing would be gained from delaying review further.

CONCLUSION

The petition for a writ of certiorari should be granted.

***26** Respectfully submitted.

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Appendix not available.

Footnotes

1 Other circuits have not squarely addressed the question post-*Elonis* but have applied an objective test. See, *e.g.*, *United States v. Nishnianidze*, 342 F.3d 6, 15 (1st Cir. 2003) ("A true threat is one that a reasonable recipient familiar with the context of the communication would find threatening."); *United States v. Elonis*, 730 F.3d 321, 332 (3d Cir. 2013) (noting that Supreme Court precedent "does not say that the true threats exception requires a subjective intent to threaten"), rev'd on other grounds, 575 U.S. 723 (2015); *Porter v. Ascension Par. Sch. Bd.*, 393 F.3d 608, 616 (5th Cir. 2004) (explaining that "[s]peech is a 'true threat' and therefore unprotected if an objectively reasonable person would interpret the speech as a serious expression of an intent to cause a present or future harm" (internal quotation marks omitted)); *United States v. Jeffries*, 692 F.3d 473, 480-481 (6th Cir. 2012) (applying an objective standard), conviction vacated, in light of *Elonis*, by *Jeffries v. United States*, No. 10-CR-100 (TWP), 2018 WL 910669, at *4 (E.D. Tenn. Feb. 15, 2018); *United States v. Stewart*, 411 F.3d 825, 828 (7th Cir. 2005) ("Whether the letter contains a 'true threat' is an objective inquiry."); *United States v. Martinez*, 736 F.3d 981, 986 (11th Cir. 2013) (declining to "import a subjective-intent analysis into the true threats doctrine"), vacated in light of *Elonis*, 576 U.S. 1001 (2015).

2 The Tenth Circuit later appeared to endorse an objective standard, see *United States v. Wheeler*, 776 F.3d 736, 743 n.3 (10th Cir. 2015), but *Heineman*, the binding circuit precedent, has not been overruled, see, *e.g.*, *Derosier v. Balltrip*, 149 F. Supp. 3d 1286, 1295 (D. Colo. 2016) (adhering to *Heineman* to hold that "a defendant can be constitutionally convicted of making a true threat only if the defendant *intended* the recipient of the threat to feel threatened").

3 See, *e.g.*, *Jeffries*, 692 F.3d at 480 (emphasizing "that intimidation is *one* 'type of true threat'"); *Int of: J.J.M.*, 265 A.3d at 264 ("That sentence is best read as describing one 'type of true threat,' not the only type." (emphasis removed)).

4 Ala. Code § 13A-10-15; Ark. Code Ann. § 5-13301; Cal. Penal Code § 140; Conn. Gen. Stat Ann. § 53a-183; D.C. Code § 22-407; **Fla.** Stat. Ann. § 836.10; Haw. Rev. Stat. § 707-716; Iowa Code Ann. § 712.8; Mich. Comp. Laws Ann. § 750.411i; Okla. Stat.

Ann. tit. 21, § 1378; Va. Code Ann. § 182-60; Wash. Rev. Code Ann. § 9.61.160; Wis. Stat. Ann. § 940.203.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

FAIR FIGHT INC., SCOTT BERSON, JOCELYN HEREDIA, and JANE DOE,

Plaintiffs,

v.

TRUE THE VOTE, CATHERINE ENGELBRECHT, DEREK SOMERVILLE, MARK DAVIS, MARK WILLIAMS, RON JOHNSON, JAMES COOPER, and JOHN DOES 1-10,

Defendants,

CIVIL ACTION FILE

No. 2:20-CV-00302-SCJ

ORDER

This matter appears before the Court on the Parties' Cross Motions for Summary Judgment.[1] Doc. Nos. [155-1] (Defendants' Motion for Summary Judgment); [156-1] (Plaintiffs' Motion for Summary Judgment). For the foregoing

[1] All citations are to the electronic docket unless otherwise noted, and all page numbers are those imprinted by the Court's docketing software.

reasons, the Court **GRANTS IN PART** Plaintiffs' motion. Plaintiffs are entitled to summary judgment on Defendants' affirmative defenses of vote dilution and unconstitutional vagueness. The Court **DENIES** Plaintiffs' motion on the remaining issues, namely Plaintiffs' Section 11(b) claim and Defendants' First Amendment defenses. The Court further **GRANTS IN PART** Defendants' motion as it relates to arguments of Muscogee County voter intimidation based on Defendants' Section 230 challenges, but otherwise **DENIES** Defendants' motion.

I. BACKGROUND

The Court begins by addressing the relevant background of this case. The Court first will outline some preliminary facts and the Parties at issue, and then give a summary of each Party's factual account of this case. The Court subsequently will give a brief account of the case's procedural history.

A. Preliminary Factual Overview

This case involves a claim brought under the Voting Rights Act (VRA), specifically Section 11(b) which, generally speaking, makes liable any person who intimidates, coerces, or threatens another person's right to vote. 52 U.S.C. § 10307(b). As specified in greater detail below, Plaintiffs contend that

Defendants violated Section 11(b) by amassing a large number of challenges to registered voters' eligibility under Georgia law, O.C.G.A. § 21-2-230 (hereinafter, "Section 230 challenges" or "voter challenges"), and engaging in other intimidating conduct toward voters in the weeks leading up to the Senate run-off elections in 2021.[2]

Plaintiffs consist of the organization Fair Fight, and individuals Jane Doe, Scott Berson, and Jocelyn Heredia. The individual Plaintiffs are Georgia voters who had their voter eligibility challenged by Defendants despite being properly registered to vote in their respective counties.

Defendants are the organization True the Vote, and individuals Catherine Engelbrecht, Derek Somerville, Mark Davis, Mark Williams, Ron Johnson, James Cooper, and John Does 1–10. Individual Defendant Catherine Engelbrecht founded and is the executive director of True the Vote. Individual Defendants

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[2] At the time Defendants mounted these voter challenges, O.C.G.A. § 21-2-230(a) (2019) provided that "[a]ny elector of the county or municipality may challenge the right of any other elector of the county or municipality, whose name appears on the list of electors, to vote in an election." After a challenge had been filed, the board of registrars was required to "immediately consider such challenge and determine whether probable cause exists to sustain such challenge." Id. § 21-2-230(b). The statute furthermore affords a challenged voter opportunity to prove his or her voting eligibility, even in the face of a probable cause finding by the board of registrars. See, e.g., id. § 21-2-230(b), (c), (e).

Mark Williams, Ron Johnson, and James Cooper worked with True the Vote to coordinate the voter challenges. Defendants Somerville and Davis also made a list of voters to challenge across Georgia, with a similar motivation as True the Vote (*i.e.*, to ensure only eligible voters were voting in the run-off election).[3]

B. Plaintiffs' Account of the Factual Background

Plaintiffs contend that Defendant True the Vote's mass Section 230 challenges of properly registered voters throughout Georgia[4] constituted an attempt to intimidate[5] these voters from voting in the 2021 Georgia Senate run-off

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[3] The connection between Defendant True the Vote's and Defendants Somerville's and Davis's voter challenge efforts is disputed. See, e.g., Doc. No. [173-1] (Defendants' Response to Plaintiffs' Corrected Statement of Material Facts), 28–30, ¶¶ 39–40. The Parties, nevertheless, do not always clearly distinguish between Defendant True the Vote's efforts and Defendants Davis's and Somerville's efforts.

The Court also has a growing concern about a potential conflict of interest between Defendant True the Vote and Defendants Davis and Somerville. All Defendants are currently represented by the same counsel, but it unclear if the Defendants' interests in their respective defenses continue to be aligned. See, e.g., Doc. No. [210] (Feb. 1 Hearing Tr.) Tr. 55:13–16 (Defense counsel defending True the Vote by arguing that True the Vote did not make voter challenges themselves, but that challenges were "made by someone else, *such as Mark Davis and Mr. Somerville* who were doing their own thing, completely independent." (emphasis added)).

[4] While Plaintiffs allege that True the Vote's efforts to intimidate voters occurred nationwide (Doc. No. [156-1], 6–7), this case solely involves the Georgia elections and voters and thus the Court will only consider the acts and evidence pertaining to Defendants' activities in Georgia.

[5] Section 11(b) prohibits acts of intimidation, threats, *and* coercion. To remain succinct,

election. Doc. No. [156-1], 6. Specifically, Plaintiffs argue that Defendants submitted a mass number of voter challenges under Georgia law, O.C.G.A. § 21-2-230, two-weeks before the election that were knowingly frivolous and intimidating to voters. Id. at 15–22. Plaintiffs submit an expert report detailing how Defendants' challenges failed to account for deficiencies in the data sets and ultimately led to an over-inclusive, discriminatory, and unreliable list of voters to challenge. Id. at 17–21. Plaintiffs further contend that Defendants based these challenges on unreliable data from the U.S. Postal Service's National Change of Address (NCOA) database. Id. at 16–17. Plaintiffs submit evidence that insiders to Defendants' voter challenge efforts criticized Defendants' methods and challenger lists. Id. at 21–22. One of Defendants' recruited challengers even retracted his challenges when he discovered errors in the lists provided. Id.

According to Plaintiffs, the public nature of the challenges, along with the other actions that led to and combined with the challenges, show that Defendants' actions intimidated voters. Doc. No. [174], 9. Plaintiffs argue that

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the Court may refer to Section 11(b)'s prohibitions as only "intimidation" (or "coercion," or "threats") with the understanding that when one prohibited act is referenced, the Court is implicating Section 11(b) broadly.

Defendants harassed voters by offering a "bounty" for reports of voter fraud and recruiting Navy SEALS to accost voters and poll workers. Doc. No. [156-1], 24–26. Defendants Somerville and Davis furthermore engaged with the public on social media, including responding to one post about obtaining a search warrant against a voter and being tied to a thread that made a violent comment toward ineligible voters, to which Davis and Somerville did not respond. Doc. No. [156-1], 33. Plaintiffs also connect Defendants to efforts by a Twitter account "Crusade for Freedom" to publish the names of challenged voters on the internet, an act specifically decried in conversations between Defendants Somerville and Davis as going too far. Id. at 34–36.

Thus, in Plaintiffs' view, Defendants violated Section 11(b) by intimidating voters through making frivolous and discriminatory voter challenges under Section 230, initiating a bounty for voter challengers, recruiting Navy SEALS to intimidatingly oversee polling places, and publishing challenged voters' names.

C. Defendants' Account of the Factual Background

Defendants denounce that they attempted to intimidate voters. They claim instead that their actions leading up to the 2021 run-off election were for the "clear and lawful" purpose to "alert the proper government officials" that not all

voters may be eligible to vote. Doc. No. [155-1], 8. Defendants argue that the data they used to formulate the voter challenge lists was "carefully analyzed" (Doc. No. [173], 4) and that the "proprietary process" used protected against large-scale erroneous challenges (Id. at 23–27). Defendants maintain that they were careful in their calculations and that any unintended errors in their data sets were reasonable. Id. at 27–28.

Defendants furthermore contend that they never contacted any voter directly and that any challenge made was in accordance with Georgia law. Id. at 4. Defendants expressly disclaim that there was any bounty offered for reporting fraudulent voters, but instead that the money available was a "legal defense fund" put into place to assist whistleblowers with any legal issues arising as a result of being part of the voter challenges. Id. at 18–19. Defendants also maintain that they did not recruit veterans to "patrol" polling places (Id. at 20–21), or encourage any "election-related vigilantism on social media" (Id.).

In sum, in Defendants' view, they were making lawful challenges under Georgia law to potentially ineligible voters, who had been identified through a careful vetting process. Defendants offered financial resources for its voter challengers who faced legal complications from making challenges and

attempted to increase order at polling places by recruiting veteran volunteers. Defendants moreover deny that they were part of any efforts to publish challenge voters' names or encourage violence toward challenged voters.

D. Procedural Background

Plaintiffs filed their complaint, alleging Defendants' actions violated Section 11(b) of the Voting Rights Act, on December 23, 2020. Doc. No. [1]. They then filed a motion for a temporary restraining order on December 29, 2020. Doc. No. [11]. The Court denied the TRO request, concluding that Plaintiffs had not shown a likelihood of success on the merits of their claim, but also acknowledged that it was "deeply concerned" about the legality of Defendants' voter challenges and that "Plaintiffs may yet prove their Section 11(b) claim." Doc. No. [29], 21–28.

After the close of discovery, on May 16, 2022, both Parties filed their motions for summary judgment. Doc. Nos. [155-1]; [156-1]. Plaintiffs also filed a motion in limine to exclude improper expert testimony offered by OpSec's Gregg Phillips[6] and Defendants Davis and Somerville. Doc. No. [172]. The Court has

[6] True the Vote worked with OpSec to create the lists of challenged voters in Georgia.

granted this motion in limine in a previous order and will address the summary judgment evidence in the light of this exclusion. Doc. No. [221].

The Court ordered a hearing on the cross-motions for summary judgment and directed the Parties to file supplemental briefing responding to several questions. Doc. Nos. [184]; [186]. The Court also issued a certification order notifying the United States Government of the constitutional challenges to Section 11(b). Doc. No. [182]. The Government noticed its intent to intervene. Doc. No. [187]. Thereafter, the Parties, the Government, and an amicus curiae in support of Plaintiffs' position filed supplemental briefing.[7] Doc. Nos. [191]; [192]; [193]; [194]. The Court held a hearing on the cross-motions for summary judgment on February 1, 2023. Having considered the arguments made, the Court now turns to the merits of the Parties' motions.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 56(a) provides "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.

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[7] The Court granted the amici's request to file a brief and gave each Party an opportunity to respond. Doc. Nos. [207]; [208]; [216]; [218].

R. Civ. P. 56(a). A factual dispute is genuine if the evidence would allow a reasonable jury to find for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A fact is "material" if it is "a legal element of the claim under the applicable substantive law which might affect the outcome of the case." Allen v. Tyson Foods, Inc., 121 F.3d 642, 646 (11th Cir. 1997).

The moving party bears the initial burden of showing, by reference to materials in the record, that there is no genuine dispute as to any material fact that should be decided at trial. Hickson Corp. v. N. Crossarm Co., 357 F.3d 1256, 1260 (11th Cir. 2004) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). The moving party's burden can be discharged either by showing an absence of evidence to support an essential element of the nonmoving party's case or by showing the nonmoving party will be unable to prove their case at trial. Celotex, 477 U.S. at 325; Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1115 (11th Cir. 1993). In determining whether the moving party has met this burden, the court must consider the facts in the light most favorable to the nonmoving party. See Robinson v. Arrugueta, 415 F.3d 1252, 1257 (11th Cir. 2005).

Once the moving party has adequately supported its motion, the non-movant then has the burden of showing that summary judgment is improper

by coming forward with specific facts showing a genuine dispute. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). There is no "genuine [dispute] for trial" when the record as a whole could not lead a rational trier of fact to find for the nonmoving party. Id.; see also Nebula Glass Int'l, Inc. v. Reichhold, Inc., 454 F.3d 1203, 1210 (11th Cir. 2006) (the nonmoving party cannot survive summary judgment by pointing to "a mere scintilla of evidence"). All reasonable doubts, however, are resolved in the favor of the nonmoving party. Fitzpatrick, 2 F.3d at 1115.

The filing of cross motions for summary judgment "does not give rise to any presumption that no genuine issues of material fact exist." 3D Medical Imaging Sys., LLC v. Visage Imaging, Inc., 228 F. Supp. 3d 1331, 1336 (N.D. Ga. 2017). Rather, cross motions for summary judgement "must be considered separately, as each movant bears the burden of establishing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law." Id. (citing Shaw Constructors v. ICF Kaiser Eng'rs, Inc., 395 F.3d 533, 538–39 (5th Cir. 2004)).

III. ANALYSIS

The Court proceeds as follows: (A) the Court will determine what standard governs a Section 11(b) claim and if either Party is entitled to summary judgment thereunder, and (B) the Court will address Defendants' constitutional affirmative defenses. As is clear from the Court's above discussion of each Party's account of this case, there is not much factual agreement between the Parties. Ultimately, these factual disputes are material to most of the claims and defenses at issue, and accordingly, summary judgment is not appropriate for either Party on the Section 11(b) claim (with one exception, see *infra* Section (III)(A)(2)(b)(3)(b)) or the First Amendment speech and petition defenses. Given the lack of evidence supporting Defendants' vote dilution and constitutional vagueness defenses, the Court, however, grants Plaintiffs summary judgment on these defenses.

A. Section 11(b)

Before turning to the facts of this case, the Court must first determine what test or standard should be applied to a Section 11(b) claim. This task is not a clear or easy given the overall shortage of law interpreting Section 11(b). The Court however determines that for their Section 11(b) claim, Plaintiffs must show direct

action toward voters that caused or could have caused voters to feel reasonably intimidated.

1. Test or Standard Governing Section 11(b)

Section 11(b) provides, in relevant part that "[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). Black's Law Dictionary currently defines "intimidation" as "[u]nlawful coercion; extortion"; "threat" as "[a] communicated intent to inflict harm or loss on another . . . "; and "coerce" as "compel[ling] by force or threat." INTIMIDATION, THREAT, COERCE, Black's Law Dictionary (11th Ed. 2019). Another district court articulated that at the time Congress passed Section 11(b), "[i]ntimidate mean[t] to 'make timid or fearful' or 'inspire or affect with fear,' especially 'to compel action or inaction (as by threats).' Threaten mean[t] to 'utter threats against' or 'promise punishment, reprisal, or other distress.'" Ariz. All. for Retired Ams. v. Clean Elections USA, No. CV-22-01823-PHX-MTL, 2022 WL 15678694, at *3 (D. Ariz. Oct. 28, 2022) (some internal quotation marks excluded) (quoting Webster's Third New International Dictionary 1183, 2381(1966)) vacated and dismissed as moot Ariz.

All. for Retired Ams. v. Clean Elections USA, No. 22-16689, 2023 WL 1097766, at *1 (9th Cir. Jan. 26, 2023). While "instructive," id., the Court overall finds the statutory text and its relevant definitions largely unhelpful to guide its assessment of Section 11(b) in the light of this case's particular facts.

The clearest articulation of a Section 11(b) test is in National Coalition on Black Civic Participation v. Wohl, 512 F. Supp. 3d 500 (S.D.N.Y. 2021). There, the district court determined, "intimidation includes messages that a reasonable recipient, familiar with the context of the message, would interpret as a threat of injury—whether physical or nonviolent—intended to deter individuals from exercising their voting rights." 512 F. Supp. 3d 500, 509 (S.D.N.Y. 2021). The Wohl court went on to explain that these illegal acts "may take on many forms," and can include "actions or communications that inspire fear of economic harm, legal repercussions, privacy violations, and even surveillance can constitute unlawful threats or intimidation under the statute."[8] Id. (citing United States v. Beaty, 288 F.2d 653, 656 (6th Cir. 1961)).

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[8] Another district court, relying on a Ninth Circuit decision, determined that "to succeed on [a Section 11(b) claim], a plaintiff must show both an act of intimidation or attempt to intimidate, and that the act was done with the specific intent to intimidate or attempt to intimidate." Parson v. Alcorn, 157 F. Supp. 3d 479, 498 (E.D. Va. 2016). A

At the Court's instruction, the Parties and the Government proposed standards to govern Section 11(b). Doc. Nos. [191]; [192]; [194]; [208]. Plaintiffs contend that intimidation under Section 11(b) can be non-violent if it prevents someone from voting, does not require intent or racial animus, and does not require direct contact. Doc. No. [193], 12–29. Defendants conversely argue that intimidation requires a direct connection between the intimidator and the one being intimidated. Doc. No. [191], 3–4. The Government suggests that the Court ask, using a totality of the circumstances analysis, if the conduct attempted to or actually intimidated any person from voting or trying to vote. Id. at 12–17. Moreover, the Government acknowledges Section 11(b) requires some direct

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specific intent requirement, however, has been rejected by several courts who have determined that there is no specific intent requirement in 11(b) cases, namely by relying on Section 11(b)'s different statutory language from prior voter intimidation statutes. See, e.g., Wohl, 498 F. Supp. 3d at 476–77 ("A plaintiff need not show racial animus or discrimination to establish a violation of Section 11(b). First, the statutory text prohibits intimidation, threats, and coercive conduct, without any explicit or implicit reliance on the motivation of the actor. Indeed, the legislative history makes clear that the prohibited acts of intimidation need not be racially motivated." (alteration adopted) (quotation and citation omitted)); see also Nicholas Katzenbach, U.S. Attorney General, Statement before the House Judicial Committee on the Proposed Voting Rights Act of 1965 (March 18, 1965) (henceforth "Katzenbach, House Judiciary Statement"). For similar reasons, the Court finds Parson to be an unpersuasive interpretation of Section 11(b).

connection between the intimidator and the voter, but concedes that this connection may be supplied by a third-party.[9] Doc. No. [192], 17–21.

In the light of the statutory text, the Parties' submissions, and the prior cases interpreting the statute, the Court agrees with the Government insofar as finding that intimidation requires considering the totality of the circumstances. Furthermore, nothing about intimidation suggests that it must be violent or made personally by the intimidator. Accordingly, the Court will consider non-violent conduct and third-party actions that have been directed by the Defendants. To alleviate any concern about all-encompassing or unforeseeable liability, the Court further determines that the intimidation felt or threatened must also be objectively reasonable.

In short, the Court concludes that for Plaintiffs to succeed in their Section 11(b) claims against Defendants, they must show that (1) Defendants' actions directly or through means of a third-party in which they directed, (2) caused, or

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[9] The amicus curiae argues that Section 11(b) does not have an intent requirement, covers non-violent conduct, and does not have a direct causation requirement. Doc. No. [208], 10–12, 15–17. It specifically counsels the Court to ban three categories of non-violent intimidation: (1) false statements or implications that lawful voters are unlawful voters, (2) falsely stating consequences of voting or suggesting falsely that a person could be penalized for voting, and (3) monitoring voting activities in a harassing manner, especially if directed at individual voters. Id. at 12–15.

could have caused[10], (3) any person to be reasonably be intimidated, threatened, or coerced from voting or attempting to vote.[11] To assess these required showings, the Court will use a totality of relevant circumstances inquiry.

2. Section 11(b) in the Present Case

With this framework in mind, the Court turns to the Parties' arguments. The Court will address each element in turn: (A) if Defendants (or their agents) *directly* engaged with voters, (B) whether Defendants' actions *caused* or *could have caused* voters' fear, (C) if the voters' potential or experienced intimidation was *reasonable*.

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[10] The Court includes the "could have caused" alternative with the understanding that Section 11(b) also attaches liability for *attempts* to intimidate, coerce, or threaten voters. 52 U.S.C. § 10307(b) ("No person, whether acting under color of law or otherwise, shall . . . *attempt* to intimidate, threaten, or coerce any person for voting or attempting to vote . . . ." (emphasis added); cf. also ATTEMPT, Black's Law Dictionary (11th ed. 2019) (defining "attempt" as "the act or an instance of making an effort to accomplish something.").

[11] The Court acknowledges that this test does not clearly apply to an organization like Plaintiff Fair Fight, which itself does not possess the capacity to vote. However, Fair Fight, has in part, argued that it has organizational standing to assert these claims because it diverted funds to address Defendants' purported practices. Doc. No. [29], 19–20. To that end, the Court adds that for Plaintiff Fair Fight to be successful, it must show how the framework applies to voters and how Defendants' actions injured Fair Fight.

The Parties dispute every element, and nearly every fact raised. They disagree broadly whether Defendants directed action at voters and caused (or could have caused) these voters to feel intimidated. The Parties further disagree about the following factors that bear, at the very least, on the reasonableness of voters' felt intimidation: (1) the relevance of the proximity of Defendants' challenges to the run-off election, (2) the frivolity of the challenges made, (3) the intent to target specific voters or demographics of voters, (4) the bounty (or legal defense fund) created to incentivize challengers, (5) the recruitment of Navy SEALS to guard (or work) polling places, and (6) the publication of challenged voter's names.

The Court proceeds by discussing each element: directness, causation, and reasonable intimidation. Given that the Court announces this standard governing Plaintiffs' Section 11(b) claim for the first time in this Order, the Court acknowledges that the Parties' arguments do not neatly fit into these categories. The Court does its best to situate each argument (and its relevant evidence) within its framework, though many of the facts at issue implicate more than one

element. For example, the Court discusses the six factors mentioned above under the reasonableness analysis, but most factors also present causation issues.[12]

a) Directness of Defendants' actions toward voters

The first element identified by the Court for a Section 11(b) claim requires that the Defendants' directed their actions at voters, or directed the actions of a third-party toward voters, in an intimidating fashion. The basis for this requirement is supported by Section 11(b)'s caselaw where direct contact—violent or non-violent—has affected prior decisions on whether a violation has occurred. See, e.g., Wohl, 498 F. Supp. 3d at 485 (making robocalls to voters by means of a third party agent); Ariz. Democratic Party v. Ariz. Republican Party, No. CV-16-03752-PHX-JJT, 2016 WL 8669978, at *6–8 (D. Ariz. Nov. 4, 2016) (facilitating poll watchers over polls where voters would be voting); Daschle v. Thune, No. 4:04-cv-04177 2004 WL 3650153 *5–6 (D.S.D. Nov. 1, 2004) (following Native American voters at polling places "ostentatiously making notes," tracking their license plate numbers, and having "loud conversation[s] in

[12] Indeed, to avoid any risk that the Court's focus on reasonable fear in this Order might send the wrong signal to the Parties, the Court now emphasizes that it has significant questions regarding causation in this case. The Court encourages Plaintiffs (who bear the burden) to particularly address this element at trial.

a polling place . . . about Native Americans who were prosecuted for voting illegally . . . ."), TRO granted Daschle v. Thune, No. 4:04-cv-04177, Doc. 6 (Nov. 2, 2004); Willingham v. Cty. of Albany, 593 F. Supp. 2d 446, 462–63 (N.D.N.Y. 2006) (going to voters' homes and disseminating false information about the absentee ballot process).

The Court again emphasizes that the direct contact with voters need not be made by the named Defendants themselves. Certainly, a person cannot escape liability by doing indirectly through another what he or she would be liable for directly doing themselves. As long as Plaintiffs are able to show that the named Defendants engaged a third-party to make direct contact with voters, this element can be satisfied. See, e.g., Wohl, 498 F. Supp. 3d at 485; Willingham, 593 F. Supp. 2d at 462–63.

Another question is whether the acts of intimidation must be violent. The Court hereby joins the courts who have considered sufficiently intimidating non-violent conduct in Section 11(b) claims. See, e.g., Wohl, 498 F. Supp. 3d at 484 ("It is true that the robocalls were not themselves violent and are not as egregious as the physical acts of intimidation seen in some of the case law . . . There is no requirement—in the statutory text or the case law—that intimidation be violent

or physical."). Thus, while violent direct contact might more readily present a scenario of illegal voter intimidation, non-violent conduct may also support liability under Section 11(b).

The evidence of Defendants' direct contact with voters in this case is disputed. Plaintiffs maintain that Defendants' manner of making the voter challenges[13], setting up the bounty for challengers, and recruiting of Navy SEALS for poll-watching is sufficient contact to have intimidated voters. The Court finds that the recruitment of Navy SEALS and payment of the bounty to challengers as Plaintiffs contend occurred here might constitute Defendants' acting directly—through means of a third-party—in a manner that would intimidate voters. The Court further, at this stage, accepts that Defendants' mass voter challenges as described by Plaintiffs could constitute direct contact with voters. Thus, to the extent that Plaintiffs have submitted evidence that voters felt or could have felt intimidated by being, or possibly being, challenged by Defendants via their county challengers, this element would be satisfied.

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[13] When the Court discusses Defendants' voter challenges, the Court is discussing the Defendants' physical challenges to voter qualifications, Defendant True the Vote's efforts to recruit Georgia electors to challenge other voters' qualifications, and Defendants Sommerville's and Davis's efforts to recruit Georgia electors to challenge other voters' qualifications.

Defendants however contest these actions. Broadly, Defendants submit that "Plaintiffs provided no evidence" that Defendants (or their agents) contacted any other voter. See, e.g., Doc. No. [173-1], 23 (showing no contact with Plaintiff Heredia specifically). They cite to interrogatory responses and deposition testimony from organizers of the challengers that prove they made no contact, nor directed or endorsed any contact, with voters. Doc. Nos. [155-8], 21–23 ("TTV never counsels or trains volunteers to confront or approach individuals who are attempting to vote with any concerns that may arise. TTV always trains and counsels its volunteers to work through the proper authorities with any questions or concerns . . . TTV did not accuse, either directly or indirectly, any voter of acting improperly, and it certainly did not seek to prevent those legally authorized to vote from doing so."); [155-15], 13 ("I [Somerville] have had no communications with any Targeted Voter determined to be a resident of the county in which they were registered."); [161-1] (Davis Dep. Tr. 1) Tr. 171:17–21 ("I would encourage people to avoid any kind of contact with these voters unless it's done by an elected official or a county official or someone conducting an official investigation."). Defendants also dispute Plaintiffs' characterization of the "bounty" (instead contending it to be a "legal defense fund") and the recruitment

of veterans and first responders to work polling places in close contact with voters in an intimidating fashion. See *infra* Section (III)(A)(2)(c)(4)–(5).

Ultimately, given these factual disputes about Defendants' direct actions toward voters, summary judgment is inappropriate on the direct contact element.

b) Causation

The Court also determines that Section 11(b) requires a causal link between Defendants' action and whether voters' felt intimidation. In this section, the Court will first discuss the legal basis for this requirement, and then address Plaintiffs' evidence that Defendants caused or could have caused intimidation in the broad voter population[14] or in the specific voters identified in this case.

(1) Legal basis for causation element

To intimidate, coerce, or threaten implicitly requires that the actions at issue lead to the adverse effect of intimidation on the voter. The caselaw, while

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[14] The Parties need to also address at trial the more fundamental question of whether any of the Plaintiffs have asserted an injury on behalf of the broad voter population. Plaintiff Fair Fight asserted a personal injury (not a grievance on behalf of all Georgia voters) in the TRO proceedings, which constituted sufficient injury for standing purposes. Doc. No. [29], 19–20. Because such consideration does not affect the Court's conclusion that summary judgment should be denied, for purposes of this Order, the Court will briefly address whether Defendants' conduct could have intimidated the broader voter population.

not overt in naming a causation requirement, supports that Defendants' actions must have some connection to the voters' alleged intimidation. Cf. Wohl, 498 F. Supp. 3d at 480 ("[C]ourts have concluded that conduct *putting others* 'in fear of harassment and interference with their right to vote' constitutes intimidation 'sufficient' to support a Section 11(b) claim." (emphasis added) (citing League of United Latin Am. Citizens-Richmond Region Council 4614 v. Pub. Interest Legal Found. ("LULAC"), No. 18 Civ. 423, 2018 WL 3848404, at *4 (E.D. Va. Aug. 13, 2018)); cf. also id. at 482 (comparing Section 11(b) intimidation to Fair Housing Act intimidation, which requires "a showing that the [defendant's] activities *had generated* fear in the [plaintiff]" (alteration in original) (emphasis added) (quoting Walker v. City of Lakewood, 272 F.3d 1114, 1129 n.4 (9th Cir. 2001)). Moreover, Section 11(b) generally attributes to Defendants the *natural consequences* of their actions, which also implies a causation requirement.[15] Cf. e.g., Katzenbach, House Judiciary Statement ("[D]efendants [are] deemed to intend the natural consequences of their acts.").

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[15] While legislative speeches are no basis alone to interpret a statute, Section 11(b) text supports Katzenbach's account of the legislative history given the lack of intent requirement, especially in contrast to prior Civil Rights statutes. Thus, the Court finds Katzenbach's speech persuasive as it is supported by Section 11(b)'s text and legislative context.

Thus, the Court determines that there must be some connection between Defendants' conduct and the intimidation that is reasonably felt or could be reasonably felt by a voter. The Court however does not believe that this causation requirement needs to be onerous. Defendants' actions need only be connected to the voters feeling (or potentially feeling) intimidated. Cf. Wohl, 498 F. Supp. 3d at 480. Put differently, the Defendants' conduct must generate the possibility that voters would feel threatened, intimidated, or coerced. Cf. id. at 482.

(2) Causation evidence that Defendants' actions intimidated the broad voter population

Here, for the broad voter population, the evidence supporting causation largely repeats the evidence already discussed for Defendants' direct actions toward voters, including the allegations and evidence that Defendants issued, encouraged, or enabled frivolous mass voter challenges, recruited Navy SEALS as poll watchers, and created a bounty for challengers. Also relevant is Defendants' role or foreknowledge of the publication of challenged voters' names. The Court reserves its more thorough discussion of these facts for the reasonableness inquiry. See *infra* Section (III)(A)(2)(c)(2), (4)–(6). Clearly, however, there are material disputes of fact precluding summary judgment.

(3) Causation evidence that Defendants' actions intimidated specific voters

For evidence pertaining to specific voters in this case, Defendants also raise causation issues that require further discussion. Plaintiffs seem to submit evidence of intimidation felt by three named Plaintiffs (Ms. Heredia, Ms. Jane Doe, and Mr. Berson), and two non-Plaintiff-voters (Ms. Stinetorf and Mr. Turner). Ultimately, for Plaintiff-voters Heredia and Jane Doe, the Court determines that questions of fact regarding causation preclude summary judgment on their claims. For Plaintiff Berson and the two non-Plaintiff voters, however, the Court determines that summary judgment is appropriate for Defendants as it pertains to intimidation based on *Defendants making Section 230 voter challenges* given the undisputed evidence that causation is lacking. Because other methods of intimidation (*e.g.*, publication of challenged voters' names) present questions of fact, however, summary judgment overall is inapposite.

(a) <u>Plaintiffs Heredia and Jane Doe</u>

Plaintiff Heredia testified to feeling afraid while voting once she discovered the challenge to her voting eligibility and was required to provide additional proof of eligibility to vote. Doc. No. [163-1] (Heredia Dep. Tr.) Tr.

24:3–23. Specifically, she cited the "longer process" she underwent to vote (ultimately taking 3-4 hours) and the fact that, as one of the only minority voters at the polling place, she "fel[t] intimidated" by the challenge. Id. at 44:19–45:8. While no one directly spoke to her, Heredia contended that "people can talk with their eyes," which contributed to her feeling intimidated. Id. at 48:19–21. She also testified to being afraid when she discovered that she had been published on the county's website as a challenged voter. Id. at 31:24–32:3. Heredia concluded, that during the process of voting, "I felt very intimidated. Like even when I went home, I was still shocked." Id. at 47:23–25.

Defendants dispute that Heredia was actually intimidated by having her voter eligibility challenged. Defendants cite to Heredia's deposition testimony that she "felt intimidated from the get-go, as soon as I was there [at the polling place]. Because . . . I'm the only Hispanic coming to vote at a predominantly Republican county; I'm the only non-white; so from there, I felt intimidated." Id. at 48:6–10. Defendants thus argue that it was not the voter challenge, but other circumstances at her polling place (unrelated to Defendants) that caused her to be afraid. Doc. No. [173], 10–13. Defendants also maintain, as discussed *infra* Section (III)(A)(2)(c)(6), that they had no role in publishing the names of

challenged voters. Accordingly, there are disputes of fact on whether Defendants' conduct caused Heredia to be intimidated.

Similar arguments were made regarding Plaintiff Jane Doe. Jane Doe claims that she was "extremely upset when [she] learned that [her] eligibility to vote had been challenged by True the Vote . . . when [she] read a story in the local paper about True the Vote's challenges and saw her name and address had been published online." Doc. No. [156-19], ¶ 5. She claims the "challenge [was] upsetting" because "it felt like someone was trying to deprive my right to vote, and in a public way." Id. at ¶ 6. Other than the challenge being "stressful," she also "feared that [she or her family] could become the next target of harassment from True the Vote and their supporters." Id. at ¶ 9. She fears future challenges and questioning of her eligibility to vote. Id. at ¶ 11.

Defendants dispute that their conduct caused Jane Doe's fear. Again, as discussed in greater detail *infra* Section (III)(A)(2)(c)(6), they dispute that they directly published or had a role in pushing her name. Doc. Nos. [168-1] (TTV Dep. Tr.) Tr. 257:11:–14; [166-1] (Somerville Dep. Tr. 2) Tr. 73:7–14; [165-1] (Davis Dep. Tr. 2) Tr. 46:7–14, 80:4–10. Defendants also dispute that they had any direct contact with Jane Doe, let alone contact that would have put her in fear of voting

or of future harassment. Doc. Nos. [155-8], 21–2; [155-15], 13. Finally, Defendants dispute that any of their actions deprived, or were intended to deprive, Jane Doe's right to vote as an eligible voter. Doc. Nos. [168-1] (TTV Dep. Tr.) Tr. 152:15–54:19, 170:7–18; [165-1] (Davis Dep. Tr. 2) Tr. 199:15–21. The dispute between the Parties comes down to weighing the facts and assessing Jane Doe's credibility. Consequently, the Court cannot grant summary judgment for either Plaintiffs or Defendants on Jane Doe's claim.

(b) Muscogee County voters: Stinetorf, Turner, Plaintiff Berson

Plaintiffs also submit declarations by two non-Plaintiff voters, Stephanie Stinetorf and Gamaliel Turner, who were registered to vote in Muscogee County with legitimate reasons for temporarily relocating, which did not affect their eligibility to vote in Muscogee County. Stinetorf and Turner each submitted statements about the fear and intimidation they felt given the challenges to their voting eligibility. Doc. Nos. [156-20], ¶¶ 7–13 (discussing Stinetorf's anxiety after voting absentee and learning that her vote had been challenged and blocked by a court order); [156-21], ¶¶ 7–12 (discussing Turner's voter challenge which

resulted in him suing the Muscogee County Board of Elections and paying for expedited shipping of his absentee ballot).

Defendants do not dispute Stinetorf's and Turner's experiences but argue the voter challenges made against them cannot be attributed to Defendants because Defendants' efforts did not lead to any Section 230 challenges being made in Muscogee County. Doc. Nos. [155-6], 7–8 (listing counties where True the Vote made challenges—which does not include Muscogee County—and representing that "TTV submitted no other challenges"); [165-1] (Davis Dep. Tr. 2) Tr. 144:9–15 (discussing how the Somerville and Davis lists did not result in challenges in Muscogee County). The same applies to Berson, who is also a challenged voter from Muscogee County. Doc. No. [155-23], 2, 6.

Plaintiffs do not dispute that Defendants Davis and Somerville did not make Section 230 challenges in Muscogee County. Doc. No. [174-1], 86. Likewise, the evidence is uncontroverted that Defendant True the Vote did not make voter challenges through its agents in Muscogee County. Doc. No. [155-6], 7–8.

Thus, based on the undisputed facts, the Court concludes that the Section 230 challenges against Stinetorf, Turner, and Berson were not caused by

Defendants. In short, no evidence connects the Muscogee County voters' intimidation based on voter challenges with the Defendants.

This determination, however, does not mean that Section 11(b) does not apply to these voters. The Section 230 voter challenges are only one basis of intimidation alleged by Plaintiffs against Defendants. Plaintiffs also allege, for example, that Defendants intimidated voters by recruiting Navy SEALS and publishing lists of challenged voters. Discussed *infra* Section (III)(A)(2)(c)(5)–(6), these actions, independent of the voter challenges, could cause a person to be reasonably intimidated in exercising his or her right to vote. Thus, the Court determines that Defendants are entitled to summary judgment on Plaintiffs' claims *relating to Section 230 voter challenges in Muscogee County*, but the Section 11(b) claim nevertheless survives summary judgment for all voters because of other factual disputes of allegedly intimidating conduct.

c) Objectively reasonable intimidation

Finally, the Court addresses whether Defendants' actions reasonably could have intimidated or did actually intimidate voters. Every claim of intimidation will be different, and thus a totality of the circumstances test allows Section 11(b)'s scope to manifest across evolving norms and discrete situations.

In this case, there are numerous disputed facts relevant to the reasonableness inquiry that preclude summary judgment for either Party. The Parties present six-factors for the Court to consider in in determining whether Defendants' actions might have or did cause reasonable intimidation in this case: (1) the proximity of the challenges to the election, (2) the frivolity of challenges, (3) Defendants' motivation in making the challenges, (4) the bounty (or legal defense fund) to incentivize challengers, (5) the recruitment of Navy SEALS to watch (or work) polling places, and (6) the publication of challenged voters' names. Again, the Parties dispute nearly every factor, and thus summary judgment is still inapposite.[16]

(1) Proximity of the voter challenges to the run-off election

The Court first considers the proximity of Defendants' challenges. Defendants disclosed their intent to make Section 230 voter challenges in mid-December 2020 in anticipation of the January 5, 2021 run-off election.

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[16] Given there is a dispute on most every factor, the Court reserves any consideration on the weight to accord these factors until it has heard the evidence presented and is able to make credibility and factual determinations as the trier of fact.

The Court finds there is a federal interest in not purging voter rolls close to an election. Congress clearly expressed this interest in the National Voter Registration Act (NVRA), 52 U.S.C. § 20507, when it prohibited states from mass removals of voters' names from voting registration lists less than 90-days before an election. Such removals can only occur within the 90-day period "(1) at the request of the registrant; (2) as provided by State law, by reason of criminal conviction or mental incapacity; [or] (3) upon death of the registrant." Arcia v. Fla. Sec'y of State, 772 F.3d 1335, 1345 (11th Cir. 2014). Thus, "individualized removals are safe to conduct at any time," but "[f]or programs that systematically remove voters . . . Congress decided to be more cautious." Id. at 1346.

While cautious heavily rely on the NVRA in this case,[17] the Court considers the NVRA's prohibitions on mass removals of voters from registration lists close

[17] This statement is admittedly in some tension with the Court's expressed concern in the TRO about Defendants' actions circumventing the NVRA's requirements and limitations. Doc. No. [29], 11–15. The Court maintains its concern about Defendants' motivation, but also must limit its decision to the Section 11(b) claim and its standards governing the instant motion for summary judgment. And, here, the NVRA is not at issue. Plaintiffs do not bring a claim under the NVRA. Nor do Defendants have authority over a state's voter registration list—which is primarily what the NVRA protects against. The Court moreover is not faced with deciding if any state or county entity who received these mass challenges could have removed the challenged voters from their registration lists without violating the NVRA. At least one sister district court, in a case involving Section 230 voter challenges brought against a county board of

to an election in assessing the reasonableness of Defendants' challenges which were made within weeks of an election. This consideration is especially relevant since Defendants' actions *could* implicate the NVRA by forcing many voters to prove their voting eligibility or risk being removed from a voter roll within 90-days of an election. Because Congress has established that no major changes to the voter rolls should occur within 90-days of an election, the Court will use 90-days as a baseline for determining the relative closeness of the challenge to the election. Thereby, given that Defendants do not contest that they made these voter challenges within 30-days of the January 5, 2021 run-off election, this factor

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registrars, has determined through a "fair reading," that Section 230 challenges are not preempted by the NVRA. Majority Forward v. Ben Hill Cty. Bd. of Elections, 512 F. Supp. 3d 1354, 1368–69 (M.D. Ga. 2021). In short, the NVRA's role in this case is limited.

The Court further notes that the NVRA's the 90-day bar on mass removals of voters and the additional procedures required to verify NCOA information, in context, are within statutory requirements to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of (A) the death of the registrant; or (B) a change in the residence of the registrant [in accordance with the remaining statutorily limitations.]" 52 U.S.C. § 20507(a)(4); see also, e.g., id. § 20507(c)(1) ("A State may meet the requirement of subsection (a)(4) by establishing a program [where NCOA data is used and verified]."). The interplay the NVRA's countervailing concerns (*i.e.*, mandating states remove ineligible voters and protecting eligible voters from the states' removal programs) is lost in a case claiming voter intimidation against a private party.

is undisputed, and weighs in favor of finding that the challenges reasonably could have resulted in voter intimidation.

(2) Frivolity of challenges

Plaintiffs also argue that Defendants' voter challenges were frivolous. The Court will first address some preliminary considerations regarding frivolity as a factor in this Section 11(b) case, and then will turn to the evidence presented and arguments made by the Parties.

(a) preliminary considerations

Plaintiffs' argument connecting the frivolity of Defendants' challenges to voter intimidation is still somewhat unclear. The Court construes Plaintiffs to argue that a frivolous challenge can be reasonably intimidating because such challenge has no chance of stopping an ineligible voter, and thereby only has the effect of deterring (*i.e.*, coercing) eligible voters from trying to vote. The Court recognizes that, with the right proof under the totality of the circumstances, this theory might support a Section 11(b) claim against Defendants.

The Court has, however, an open question about how to assess if a challenge was frivolous or not.[18] Plaintiffs assert simply that frivolity is a lack of probable cause. Doc. No. [210] (Feb. 1 Hearing Tr.) Tr. 13:24–14:3. In other words, if a county determines there is no probable cause to pursue whether a voter is eligible to vote, then the challenge was frivolous. Defendants conversely argue that frivolity ought to be determined only if the challenge lacks a basis in law and fact. Id. at 30:16–19.

At this time, the Court does not determine an exact standard for frivolity in reference to Section 11(b) intimidation in this case. The purpose of assessing frivolity in the Section 11(b) analysis is to determine if Defendants' challenges reasonably contributed to voters feeling (or potentially feeling) threatened in exercising their right to vote. In this Court's estimation, the intimidating *effect* of a potentially frivolous challenge does not necessarily require the challenge itself

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[18] This question is further complicated by the fact that Plaintiffs use "frivolity" in two distinct arguments—(1) the instant issue regarding whether Defendants challenges intimidated voters, and (2) in response to Defendants' First Amendment petition defense, where Plaintiffs argue that frivolous petitions are not constitutionally protected. Doc. Nos. [156-1], 15; [174], 25–26. The Court requested supplemental briefing on frivolity in reference to the petition defense (Doc. No. [184]), and addresses both issues of frivolity in this Order. It need not (and does not), however, determine as a legal matter if frivolity for a Section 11(b) intimidation analysis and the petition defense require the same proof.

meet any specific standard of frivolousness. Put somewhat differently, at issue for Section 11(b) purposes is the perceived effect of the challenges, not whether the challenges were actually frivolous.

Nevertheless, the Court's forthcoming analysis more closely resembles Defendants' proposed test. The Court is unpersuaded that every instance where a county does not pursue a Section 230 voter challenge means that the challenge is frivolous. Given that the Court has accepted Plaintiffs' argument that frivolous challenges may cause reasonable intimidation, Plaintiffs' probable cause standard could mean that every failed challenge would support Section 11(b) liability. This result cannot be. The bar for frivolity, thereby, in this Court's view must be higher than the county's mere failure to determine probable cause.[19]

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[19] Probable cause, although not a high bar, is a higher bar than frivolity. "Probable cause to institute civil proceedings requires no more than a 'reasonabl[e] belie[f] that there is a chance that [a] claim may be held valid upon adjudication.'" DeMartini v. Town of Gulf Stream, 942 F.3d 1277, 1300–01 (11th Cir. 2019) (quoting Pro. Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 62–63 (1993); Restatement (Second) of Torts § 675, cmt. E (Am. Law Inst. 1977)). "Therefore, 'it is not necessary to show that the instigator of a lawsuit was certain of the outcome of the proceeding, but rather that he had a reasonable belief, based on the facts and circumstances known to him, in the validity of the claim.'" Id. at 1301 (quoting Mee Indus. v. Dow Chem. Co., 608 F.3d 1202, 1211 (11th Cir. 2010)). By comparison, a frivolous claim has been defined as being "so lacking in arguable merit as to be groundless or without foundation." Sullivan v. Sch. Bd. of Pinellas Cty., 773 F.2d 1182, 1188 (11th Cir. 1985) (citing Jones v. Texas Tech Univ., 656 F.2d 1137, 1145 (5th Cir. 1981)).

In short, whether a voter challenge was "legitimate" or merely "frivolous" might affect the reasonableness of a voters' feelings of fear or intimidation. It might also bear on Defendants' motivation in making the challenges, how serious the board of registrars (or the public more generally) should have taken the challenges, and whether any burden felt by a challenged voter was necessary or proper. All of these implications might have an effect on whether Defendants' actions could have or did cause reasonable voter intimidation.[20]

(b) <u>evidence presented of frivolity</u>

With these preliminary considerations in mind, the Court turns to the Parties' substantive arguments. Plaintiffs assert several arguments that Defendants' methods of compiling the lists of voters to challenge lacked rigor, was incomplete, and ultimately incorrect. Doc. No. [156-1], 15–23. Plaintiffs contend that the following evidence support the Court finding as a matter of law that Defendants' challenges were frivolously made and reasonably caused voter intimidation: (i) True the Vote's data used bad data sets and analytics, (ii) True

[20] By considering the challenges with an emphasis on the challenges' *effect* on voters, the Court also need not resolve any issues of Section 11(b) preempting Georgia's Section 230 voter challenges. The Court has considered the preemption question a great deal, but ultimately determines that further assessment is not required here.

the Voter's data was criticized by insiders to its voter challenge initiative, (iii) the exclusive use of the NCOA data set makes the challenges frivolous as a matter of federal law, and (iv) Davis's and Somerville's lists were poorly formulated. Id. Defendants contest each piece of this evidence. Doc. No. [173], 14–28. Ultimately, the Court concludes that disputes of material fact preclude summary judgment based on the frivolity of the Defendants' challenges.

i) True the Vote's data sets and analytics

Plaintiffs submit expert testimony from Dr. Kenneth Mayer who assessed the adequacy of Defendants' data and methodology, and concluded they were inadequate. Doc. No. [156-16], 5. Mayer's conclusion relies on True the Vote's data not having a "unique identifier" or a matching process to ensure the persons who submitted NCOA requests reflected the same voters on the registration lists. Id. at 6–11. Mayer further opined about a number of blatant and significant errors in True the Vote's challenge list, including missing fields of information, wrong zip codes, and inconsistent abbreviations and spellings. Id. Mayer also relied on Defendants' lists containing likely eligible voters who had legitimately relocated for military service or higher education. Id. at 35 ("In total, I identified 57,534

registrants in the challenge file who appear to have moved to or near a military installation, or to a municipality with a college or university. This constitutes 22.9% of the registrants in the challenge file.").

Defendants dispute that their methodology was inadequate. Defendants cite heavily to the deposition testimony of Greg Phillips, the spokesperson of OpSec, who created the algorithms and completed the data analysis True the Vote used to craft its lists of voters to challenge. Phillips testified, contrary to Plaintiffs' contention, that Defendants used multiple data files (not just the NCOA data) and algorithms to create the list of voters to be challenged. Doc. Nos. [167-1] (OpSec Dep. Tr.) Tr. 95:10–96:17; [168-1] (TTV Dep. Tr.) Tr. 134:21–135:1 (indicating True the Vote used "a variety of databases and filters [and] evaluated from the rolls what records showed up on the NCOA standard given additional filters."). Phillips further outlined OpSec's data cleansing process (to cure the incomplete or mismatched data) and verification of "identity" (to reduce the number and severity of potential mistakes).[21] Doc. No. [167-1] (OpSec Dep. Tr.) Tr. 115:1–18, 94:1–2.

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[21] According to Phillips, "verifying" or "resolving identity" is OpSec's proprietary process that reduces the inherent risk of voter data, the lack of unique identifier in data

Phillips also discussed that the algorithms were intended removed eligible military and student voters from the lists. Doc. Nos. [167-1] (OpSec Dep. Tr.) Tr. 128:1–15; [168-1] (TTV Dep. Tr.) Tr. 203:3–11 ("NCOA link versions gives you the opportunity to filter out any recognized military address" and also "efforts [were] made to recognize the standard zip codes, orientations of bases [addresses]" and that "those were filtered out."). True the Vote recognized specifically that military members relocate with greater frequency and that their change of address data, thereby is more "sensitive." Doc. No. [168-1] (TTV Dep. Tr.) Tr. 104:16–22.

Philips candidly admits that there will be voters on the challenge list that are eligible to vote and reiterates that the final decision regarding voter eligibility (or the need to prove such) belongs to the county, not the challengers. Doc. Nos. [167-1] (OpSec Dep. Tr.) Tr. 129:8–15; [168-1] (TTV Dep. Tr.) Tr. 232:19–22. ("[A]ccording to the analysis that we provided, or that we supported, records

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sets, and problems relating to shared (or duplicate) names and addresses among voters. Doc. No. [167-1] (OpSec Dep. Tr.) Tr. 107:9–108:4. Per the Court's order on Plaintiffs' motion in limine (Doc. No. [221]), however, the Court will not consider any technical opinions rendered by this lay witness, which in this case includes any lay witness's assessment of the reliability of these processes in reducing risk.

[informing the voter challenges] corresponded with individual decisions to permanently change their residence.").

Given the conflicting factual accounts, the Court determines that there are material disputes of fact regarding what data True the Vote used to make their challenges and its attentiveness in ensuring eligible voters were removed from its lists. Accordingly, a trier of fact must weigh this evidence, and it cannot be a basis for summary judgment.

ii) criticisms of True the Vote's lists

Plaintiffs also cite Joseph Martin's and Mark Davis's testimony as evidence that True the Vote's challenge lists were inadequate. Martin volunteered as a True the Vote challenger, but ultimately retracted his challenges when two voters he challenged were proven eligible to vote. Doc. No. [159-1] (Martin Dep. Tr.) Tr. 77:10–78:12, 62:7–16, 64:4–20, 65:19–66:17. Martin thereafter raised his concerns about the True the Vote's lists.[22] Id. at 83:20–84:6, 87:7–21.

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[22] The Parties also appear to disagree about whether True the Vote submitted the challenges under Martin's name without his consent. Doc. Nos. [159-1] (Martin Dep. Tr.) Tr. 56:5–57:15; [157-1] (Cooper Dep. Tr.) Tr. 75:8–76:4. While there is a dispute, the Court does not find it material for purposes of summary judgment on the claims at issue as presented in the Parties' arguments.

For his part, Davis "took exception with some of [True the Vote's] logic" and indicated that their methodology and strategy in compiling the challenger lists was "not the way I would have done it," specifically stating that he "probably would have narrowed the scope" of the challenges made.[23] Doc. No. [161-1] (Davis Dep. Tr. 1) Tr. 60:17–19, 61:6–7. Plaintiffs argue that these criticisms of True the Vote's list compiling methodology by persons close to its initiative supports Plaintiffs' argument that True the Vote knowingly asserted frivolous challenges. Doc. No. [156-1], 21–23.

Defendants argue that Martin retracted his challenges because he did not want to put the voting registrar through the "painful process of validating" the rest of the challenged voters. Doc. No. [159-1] (Martin Dep. Tr.) Tr. 78:6–9. Defendants further maintain that of the 37 people on Martin's lists, only 3 voters are discussed and 2 of them in fact did not live in the county they were registered in: one voter was registered in the wrong county and another did not live in the county but remained eligible to vote through the homestead exemption. Doc.

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[23] True the Vote admits that they "wanted to review as many records, recognizing that the state hadn't cleaned their rolls in two years . . . ." Doc. No. [168-1] (TTV Dep. Tr.) Tr. 149:12–19.

Nos. [173], 27–28; [159-1] (Martin Dep. Tr.) Tr. 64:4–66:7. Defendants further argue that Mark Davis's actual statement was not a criticism, but a difference of opinion on the right strategy to take in challenging voters. Doc. No. [173-1], 56–57, ¶ 77.

Because the Parties put forth different interpretations of these statements and the circumstances giving rise to them, a credibility determination is required. Such determination must be made by a trier of fact and is not proper for summary judgment resolution.

iii) exclusive use of NCOA data

Plaintiffs next rely on the NVRA's prohibition on removing a voter from a voting list based on change of address (NCOA) data alone. The NVRA requires a state either "confirm[] in writing that the registrant has changed residence . . . outside the jurisdiction" or has failed to receive a response "to a notice [sent], and has not voted or appeared to vote . . . in an election" in the two federal general elections since the date of the notice. 52 U.S.C. § 20507(d)(1). Thus, according to Plaintiffs, if Defendants only relied only on NCOA data, then the challenges could not have been used to remove voters as a matter of federal law. Doc. No. [156-1], 21–22.

Defendants respond with both a legal argument and a factual argument. Legally, Defendants contend that initiating a voter eligibility determination with the NCOA data is "undisputedly lawful." Doc. No. [173], 23–24 (citing Husted v. A. Philip Randolf Inst., 138 S.Ct. 1833, 1839-40 (2018)). Factually, Defendants argue that they used multiple data files and algorithms to create the list of voters to be challenged, not just NCOA data. Doc. No. [167-1] (OpSec Dep. Tr.) Tr. 95:10–96:17. True the Vote specifically testified that it used "a variety of databases and filters [and] evaluated from the rolls what records showed up on the NCOA standard given additional filters . . . ." Doc. No. [168-1] (TTV Dep. Tr.) Tr. 134:21–135:1.

The Court agrees with Defendants' contention that using the NCOA data can be a proper starting point for assessing voter eligibility. The NVRA clearly conceives of a situation where NCOA data prompts state investigation into a voter's eligibility. See 52 U.S.C. § 20507(c)(1), (d)(1). Thus, Defendants use of the NCOA data as a basis for their voter challenges does not *per se* require a finding that the challenges were frivolous. If, however, Defendants only used the NCOA data to make their lists, then such fact might weigh in favor of finding that the challenges were frivolous because a change of address alone is not sufficient to

remove a voter from the voting rolls. Because the Parties dispute whether, and to what extent, Defendants used other data sets to form their challenge lists, summary judgment cannot be granted on this basis.

iv) Davis's and Somerville's lists

Plaintiffs also claim that Mark Davis and Derek Somerville's lists led to frivolous voter challenges. Davis testified that he did not recall how many voters they "scrub[bed]" who lived near military bases, nor did he remember "scrubbing" voters who were on college campuses. Doc. No. [161-1] (Davis Dep. Tr. 1) Tr. 149:9–150:3. Plaintiffs further cite Phillips' OpSec testimony that Davis and Somerville used "bad process" in making their lists. Doc. No. [167-1] (OpSec Dep. Tr.) Tr. 103:16.

Defendants recall Phillips' full statement, which was a "*guess*" that Davis did not use proper procedures and algorithms. Id. at 103:12–15 (emphasis added). Davis defends his lists. In his belief, the types of issues Plaintiffs raise were better left to a board of registrars' probable cause review, or the Secretary of State's office investigation into the challenged voter. Doc. No. [161-1] (Davis Dep. Tr. 1) Tr. 150:3–9.

While the Court reads Phillips' statement to plainly criticize the methods used by Davis and Somerville,[24] it does not find Plaintiffs' evidence sufficient to say conclusively that Davis's and Somerville's methods resulted in a frivolous list of voters. Nor does it find Davis's and Somerville's non-expert, lay testimony sufficient to say their challenges were non-frivolous. In short, this evidence presents a question of fact and credibility inappropriate for summary judgment resolution.

(c) disputes of fact preclude summary judgment based on voter challenges being frivolous

Here, the Court clearly is faced with two drastically different accounts of True the Vote's process of making the challenged voter lists. Thus, the care (or lack thereof) with which Defendants ensured challenged voters on their lists were potentially ineligible is not a factor that can be resolved on summary

[24] The Court also acknowledges Plaintiffs' objection to this section of Phillips' deposition testimony where Phillips confers with his lawyer before seemingly retracting the force of his criticism. Doc. No. [156-1], 28 n. 7. Given that summary judgment must be denied for both Parties, the Court will defer a ruling on this objection, but Plaintiffs may reraise the issue in a pre-trial motion.

judgment, for any Defendants, given the credibility and factual determinations that must be made.

(3) Motivation in challenging voters

Plaintiffs further argue that Defendants intended to intimidate voters, specifically minority voters. Both Parties agree that Section 11(b) does not impose an intent requirement and that Section 11(b) does not require Defendants act with racial animus. See, e.g., Allen v. City of Graham, No. 1:20-CV-997, 2021 WL 2223772, at *7 (M.D.N.C. June 2, 2021); Council on Am.-Islamic Rels.-Minn. v. Atlas Aegis, LLC, 497 F. Supp. 3d 371, 375 (D. Minn. 2020); Wohl, 498 F. Supp. 3d at 476–77.

The Court agrees that there is no intent requirement in Section 11(b) cases. In other cases, however, courts have looked at intent as a factor for determining if intimidation has occurred. Moreover, it is commonly cited in Section 11(b) cases that "'normally' a person 'is presumed to have intended the natural consequences of his deeds.'" Id. at 485 (citing Washington v. Davis, 426 U.S. 229, 253, (1976) (Stevens, J., concurring)); Katzenbach, House Judiciary Statement ("[U]nder the language of [Section 11(b)], no subjective 'purpose' need be shown . . . in order to prove intimidation under the proposed bill. Rather

defendants would be *deemed to intend the natural consequences of their* acts." (emphasis added)). To determine if Defendants' actions reasonably caused or could have reasonably caused intimidation, the Court will thereby assess Defendants' (a) intent to intimidate voters broadly, and (b) intent to intimidate minority voters specifically.

(a) intent to intimidate voters broadly

Plaintiffs' argument and submissions regarding intent are unclear. Plaintiffs certainly put forth evidence (and Defendants do not dispute) that Defendants intended to make the mass number of Section 230 challenges before the election. See, e.g., Doc. No. [156-31] (recruiting challengers from counties in Georgia to make the challenges). Plaintiffs also seem to argue that Defendants intended for these challenges to have the effect of burdening challenged voters to prove eligibility to vote. Again, Defendants do not appear to contest that they intended, as a natural consequence of the challenges, that once a challenge was made, then the challenged voter would be forced to prove their eligibility. See, e.g., Doc. Nos. [156-25] (indicating that "filing the challenges . . . will help ensure only legal, eligible votes are counted . . . ."); [156-4], 1 (indicating a goal of the Validate the Vote effort was "[t]o ensure the 2020 election returns reflect one vote

cast by one eligible voter and thereby protect the right to vote and the integrity of the election."); [165-1] (Davis Dep. Tr. 2) Tr. 37:17–18 (acknowledging the "inconvenience" of being challenged).

Plaintiffs' argument therefore must be that intending the burden of proving eligibility constitutes intent to intimidate. In support, Plaintiffs cite to Mayer's expert report in which he states that "voters whose eligibility is challenged may perceive a legal risk if they vote, which again dramatically increases the cost of voting and discourages turnout even if the individual is eligible." Doc. No. [156-16], 44. Another of Plaintiffs' expert witnesses further testifies that "voters may be reasonably hesitant to arrive at the polls to 'prove' their eligibility if it has been challenged, even if the voter is in fact eligible to vote." Doc. No. [156-17], 27. Defendants dispute that the burden of being challenged means Defendants' intended to intimidate eligible voters. In fact, they maintain there is clear evidence to the contrary . Doc. Nos. [165-1] (Davis Dep. Tr. 2) Tr. 37:16–18 ("Our goal was to produce legitimate challenges as much as possible. We didn't want to inconvenience people unnecessarily . . . ."); [156-4] (stating the goal of Validate the Vote was "[t]o ensure the 2020 election returns

reflect one vote cast by one eligible voter and thereby protect the right to vote and the integrity of the election.").

The Court acknowledges Mayer's expert conclusion that the burdens imposed could have the effect of threatening a voter from voting, and reiterates that "[D]efendants [are] deemed to intend the natural consequences of their acts." Katzenbach, House Judiciary Statement. Because the issue of intent ultimately requires weighing credibility, the Court determines that this factor cannot support summary judgment for either Party.

(b) intent to intimidate minority voters specifically

Intent to intimidate "a particular group or groups" has further been a factor that other courts have considered in a Section 11(b) analysis. Atlas Aegis, 497 F. Supp. 3d at 375. Exemplary is Daschle v. Thune, where the specific targeting of Native American voters led the district court to grant a TRO under Section 11(b). 2004 WL 3650153 *5–6. The Court likewise will consider any evidence that Defendants specifically targeted minorities in their voter challenges to determine if the alleged intimidation felt was reasonable.

Plaintiffs' expert, Dr. Mayer, concludes that True the Vote's challenges were skewed toward counties with higher percentages of Black voters. Doc. No. [156-16], 37–40. Specifically, Mayer finds that of the 65 counties where Defendants submitted voter challenges, 3 had the highest percentage of Blacks in Georgia, that 10 of the 20 counties with the highest percentage of Blacks in Georgia were challenged, and that only 4 of the 20 counties with the lowest percentages of Blacks were challenged. Id. at 37. Mayer furthermore stated that "27.3% of individuals overall in the challenge file [were] African American, [but] 40.3% of the individuals in duplicated records are African American." Id. at 29. Plaintiffs rely on this evidence to assert that Defendants specifically targeted challenges toward counties with a greater minority presence.

Defendants contend that they did not assess any demographic data until after Plaintiffs filed this lawsuit. Doc. Nos. [167-1] (OpSec Dep. Tr.) Tr. 149:14–17 (declaring that they did not "analyze demographic information or other characteristics of the individuals" challenged "until after [Plaintiffs] sued"), 163:13–164:10 (discussing an excel spreadsheet with demographic data, specifically racial data, that Defendants claim they "probably looked at after we were sued, but not before"); [168-1] (TTV Dep. Tr.) Tr. 248:13–22 (indicating that

the racial analysis occurred "post the elector challenge effort or initiative); [166-1] (Somerville Dep. Tr. 2) Tr. 31:14–20 ("I wanted to make sure that as we compiled our data, that our data was distributed and driven by the conditions that we set forth, which was the change of address, and that there wasn't any particular bias regarding any other factor other than the data."); [156-25], 2 (declaring in a press release about the challenges that "True the Vote's research was performed uniformly across all counties, without regard to any demographic or voting history.").

Plaintiffs' expert report indicates that there is a statistical basis for concluding Defendants targeted racial minorities in their challenges, and Defendants dispute this conclusion with testimonial evidence that they did not consider demographics when making voter challenges. Thus, there is a credibility determination that must be decided by a trier of fact. Thereby, the Court cannot weigh this factor on summary judgment.

(4) The bounty (or legal defense fund)

Plaintiffs argue that Defendants' creation of a bounty to incentivize challengers contributed to reasonable voter intimidation. Plaintiffs raise statements made by Defendant Catherine Engelbrecht that the True the Vote

campaign was "putting a bounty on the fraud" and going to create "an environment for whistleblowers to come forward and . . . mak[e] sure that they have protections, mak[e] sure that they have compensation . . . ." Doc. No. [156-46] (True the Vote Podcast Tr.) Tr. 3:2–6.

Defendants dispute that the funds were a bounty. Instead, Defendants submit that it was a legal defense fund to assist any challengers who might incur legal expenses on account of the challenges asserted (*e.g.*, defending defamation claims). Engelbrecht's deposition testimony explained what she meant when she said that there would be a "bounty on the fraud," specifically that there would be funds available to provide "legal support" as a means of "encourag[ing] people who were otherwise concerned" about legal implications of challenging voters. Doc. No. [168-1] (TTV Dep. Tr.) Tr. 74:13–15; see also Doc. No. [168-1] (TTV Dep. Tr.) Tr. 75:7–18 ("[I]t doesn't take too much to end up being caught into a lawsuit . . . that has a very chilling effect. And so the thought was to try to create an environment . . . for people to come to and know they wouldn't be alone."), 76:15–19 ("We thought that creating or making it known that if people came forward and needed some kind of legal support that we would help support that. That was the reason that I said what I said."). The podcast

contextually also somewhat supports the idea that the bounty could have been a legal defense fund, given Engelbrecht's statement that True the Vote "will give [whistleblowers] not only support, financial support, but legal support, and whistleblower immunity where appropriate." Doc. No. [156-46] (True the Vote Podcast Tr.) Tr. 4:14–16.

While the Court is aware of no other Section 11(b) cases with similar conduct (*i.e.*, setting up a financial incentive for third-parties to purportedly threaten the rights of others to vote), the Court finds that if Defendants indeed created a bounty for challengers, then this could reasonably intimidate voters.[25] Ultimately, however, whether Engelbrecht's explanation of the "bounty on the fraud" statement is a truthful and effective explanation of the potentially intimidating conduct is a credibility determination. Thus, the Court cannot weigh this factor for purposes of summary judgment.

(5) Recruitment of Navy SEALS

Plaintiffs also allege that Defendants' recruitment of former Navy SEALS to watch polling places constituted intimidation. Plaintiffs cite to another podcast

[25] The "bounty" determination could also affect the directness and causation elements.

statement where Engelbrecht discussed a different True the Vote campaign ("Continue to Serve") which she described as "recruiting veterans and first responders to work inside the polls." Doc. No. [156-27] (Seal the Polls Tr.) Tr. 2:8–9. Engelbrecht explains that True the Vote encouraged the recruitment of veterans and first responders because they were "people who understand the respect law and order and chain of command . . . people who were unafraid to call it like they see it all the way down the line." Id. at 2:10–17. Plaintiffs contend the presence of these former Navy SEALS—especially because they would be, per Defendants' instructions, directly engaging with voters—could reasonably constitute voter intimidation.

Defendants dispute the conclusion that the presence of Navy SEALS would cause an intimidating atmosphere for voters. They maintain that these veterans and first responders were to serve as mere poll workers. Doc. No. [168-1] (TTV Dep. Tr.) Tr. 63:2–7 ("[T]hings can get very confusing in polling places. And the thought was just the individuals that are . . . familiar with that kind of law of order and chain of command and understanding process are very decisive . . . ."). Moreover, Defendants dispute that the SEALS would be in direct contact with voters, specifically stating that veteran's contact would depend on the role

assigned. Id. at 63:22–64:3 ("If they were serving in the capacity of poll watcher, they would not engage with anyone. If they were working as a judge or a clerk, then they may.").

Several other Section 11(b) cases have involved poll watchers and armed guards. Generally, poll watchers watching or partaking in non-disruptive activities at polling places without any (or very limited) voter contact has not been found to be "impermissible" intimidation. Pa. Democratic Party v. Republican Party of Pa., No. CV 16-5664, 2016 WL 6582659, at *6 (E.D. Pa. Nov. 7, 2016); see also Ariz. All., 2022 WL 15678694, at *3–5 (finding that there was no likelihood of success on a Section 11(b) claim based on merely watching ballot drop-off locations when, among other factors, the volunteers were directed to follow all applicable laws and not directly engage voters); Ariz. Democratic Party, 2016 WL 8669978, at *11 (finding no intimidation in conducting exit polls that followed applicable laws and were non-disruptive).

Conversely, stationing private armed guards at polling places has been determined "certainly likely to intimidate voters." Atlas Aegis, 497 F. Supp. 3d at 375. Further, people following closely behind Native American voters, taking

notes and being disruptive was also found to create an intimidating and threatening environment. Daschle, 2004 WL 3650153 *5–6.

The Court cannot conclude that the mere presence of veterans would in and of itself contribute to creating an intimidating or threatening environment for voters.[26] Because, however, as presented on the summary judgment record, the actual role of these recruited veterans is unclear, the Court finds that there is a factual question of if Defendants' recruitment of Navy SEALS, veterans, or other first responders would reasonably cause a voter to feel intimidated.[27] Thereby, the Court cannot resolve these disputes on summary judgment and this factor must be decided by a trier of fact.

(6) Publication of challenged voters' names

Finally, the Court addresses the fact that Plaintiffs Jane Doe, Berson, and Heredia, discovered their names had been published as challenged voters. As has

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[26] Being a Navy SEAL or United States veteran is an honorable distinction. The Court agrees with Defendants that the mere fact someone is a former Navy SEAL—or other classification of United States veteran—does not automatically make him or her intimidating.

[27] These facts implicate the directness and causation elements as well. Specifically, the Court has yet to see any connection between the threat of recruiting veterans and intimidation of voters in this case.

been alleged, non-governmental parties publishing the names of challenged voters to the public can constitute reasonable intimidation. See, e.g., Wohl, 512 F. Supp. 3d at 511 ("Indeed, the threat of dissemination of personal information alone could plausibly support a Section 11(b) claim."); LULAC, 2018 WL 3848404, at *1, 4 (discussing published reports of voters who had committed felonies, which included "the names, home addresses, and telephone numbers of the alleged felons," in determining that plaintiffs adequately pleaded voter intimidation).

While there does not appear to be a dispute that Heredia, Berson, and Jane Doe's names were published, Defendants dispute that *they* published or directed the publications of challenged voters' names. Doc. No. [173], 6, 14. Defendants submit the depositions of Engelbrecht, Somerville, and Davis, all three of which testify that they did not wish, and even expressly counseled against, voters names being published. Doc. Nos. [168-1] (TTV Dep Tr.) Tr. 257:11–14 ("Q: Has True the Vote ever discussed or considered publishing the list of challenged voters in Georgia? A. No."); [166-1] (Somerville Dep. Tr. 2) Tr. 73:7–14 ("There is no scenario under which I would have either contemplated or agreed to anything [like publishing the names on social media], nor would have Mark. That would

have been too inflammatory, and it would have been counter to the intent of the effort. So, no, there's no scenario under which we would have considered that."); [165-1] (Davis Dep. Tr. 2) Tr. 46:12–14 ("I don't recall us publishing it to the general public. I wouldn't see any reason to do that."), 80:4–10 ("I don't like to talk much about individual voters by name. I don't think that's a smart thing to do. And I certainly don't support publishing any of this analysis or putting people on the spot, and, you know, we avoided doing that with these efforts.").

Plaintiffs, however, assert that Defendants had a role in publishing the names of challenged voters. They submit a social media post made by an organization named "Crusade for Freedom," which states, "[i]f the Georgia counties refuse to handle the challenges of 366,000 ineligible voters in accordance with the law, I plan to release the entire list . . . ." Doc. No. [156-26], 2. Plaintiffs connect Crusade for Freedom to True the Vote and Catherine Engelbrecht through (1) the post's hashtags ("validatethevoteGA" and "#eyesonGA"), (2) a lack of evidence that any other group was conducting mass voter challenges in Georgia during this time period, and (3) the similarities between Crusade for Freedom's logo and another organization founded by Engelbrecht and Phillips. Doc. No. [168-1] (TTV Dep. Tr.) Tr. 264:2–16, 260:11–261:18. Defendants,

however, maintain that there is no affiliation between True the Vote and Crusade for Freedom, and that Engelbrecht was no longer affiliated with the other organization at the time of True the Vote's challenges. Id. at 261:12–14, 259:11–18, 338:17–20.

Plaintiffs also cite conversations between Davis and Somerville, expressing concern about being "flooded with defamation complaints" upon hearing of a forthcoming webpage with voter data, and Davis's "perception" that voter challenges made "were going to be public as well." Doc. No. [165-1] (Davis Dep. Tr. 2) Tr. 129:6–19. Plaintiffs submit Somerville's testimony that he and Davis recruited volunteers to challenge voters, and that voter lists were distributed to interested challengers via email or Dropbox with "no meaningful way to manage other people's activities . . . .". Doc. No. [162-1] (Somerville Dep. Tr. 1) Tr. 98:7–99:15, 91:5–13. Plaintiffs attribute the publication of the Davis and Somerville Banks County voter list to these recruiting efforts. Doc. No. [174-1], 85.

There is a dispute of fact over whether the publication of voters' names can be attributed to Defendants. Because of these disputes and required credibility

determinations, the Court cannot consider the publication of challenged voters' names as a factor on summary judgment.[28]

3. Summation: Section 11(b)

In the above discussion, the Court has determined that factual disputes preclude summary judgment on all three elements of the Section 11(b) claim. Particularly, the Court has found disputes over the frivolity of the voter challenges, Defendants' direct action toward voters, the creation of a whistleblower bounty (or legal defense fund), Defendants' recruitment of Navy SEALS to guard (or volunteer at) polling places, Defendants' role in publishing voter names, and others. A trier of fact must make these determinations, and thus summary judgment for either Party must be denied on the Section 11(b) claim.

However, the Court finds that no causal link exists between Defendants' Section 230 challenges and the Muscogee County voters, thus summary

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[28] In addition to these disputed facts, the Court is also concerned about the possibility of names being obtained from Defendants' lists on the basis of an open records request—a possibility that Davis expressly acknowledges. Doc. No. [165-1] (Davis Dep. Tr. 2) Tr. 46:9–12 ("[C]ertainly members of the public could have obtained [a list of challenged voters] from an Open Records Request from any of the counties where they were filed."). This possibility, Defendants' knowledge of it, and any efforts by Defendants to indirectly publish the challenged voters names, would all be considerations the Court would weigh at trial.

judgment is granted on this issue for these voters, and Plaintiffs are precluded from arguing otherwise at trial.

B. Affirmative Defenses

Defendants also raise several affirmative defenses, arguing that finding them liable under Section 11(b) would violate their rights to free speech, rights to petition, and rights to vote. Doc. No. [155-1], 32–35. Defendants also contend that Section 11(b) would be unconstitutionally vague if applied against them. Id. at 36–37. Plaintiffs disagree with all of Defendants' affirmative defenses. Doc. No. [174], 24–29. The Government, moreover, argues as an intervenor that Section 11(b) is not unconstitutional, on its face or as would be applied to voter challenges in this case. Doc. No. [198-1]. The Court will address in turn: (1) Defendants' First Amendment speech defense, (2) Defendants' First Amendment petition defense, (3) Defendants' Fourteenth Amendment vote dilution defense, and (4) Defendants' defense that Section 11(b) as applied in this case would be unconstitutionally vague or overbroad.

1. First Amendment Speech Defense

Defendants first argue that if Section 11(b) is applied against them, then such application would violate their right to free speech. Doc. No. [155-1], 32–34.

Plaintiffs respond that Defendants' speech is not protected by the First Amendment's because "true threats of nonviolent or nonbodily harm and defamation, have been carved out from constitutional protection." Doc. No. [174], 24–25.

The Court ordered supplemental briefing specifically on the true threat exception applying to non-violent speech. Following this supplemental briefing, the Court has distilled Defendants' First Amendment speech defense into two issues: (1) if Defendants' conduct here constitutes expressive conduct protected by the First Amendment, and (2) assuming Defendants' conduct is expressive conduct, if it constitutes a true threat or defamation excepted from First Amendment protection.[29] Ultimately, the Court determines questions of fact preclude summary judgment adjudication of these two issues.

[29] Because the Court denies summary judgment on the issue of whether Defendants' conduct in this case constitutes First Amendment protected speech (and alternatively, a true threat or defamation exception to the First Amendment), the Court will not address in this Order the less than fully briefed issue of whether Section 11(b) regulation of the Defendants' conduct meets the level of scrutiny required to not be a First Amendment violation. See Doc. No. [198-1], 38–41 (Government's discussion of scrutiny analysis).

a) Expressive conduct

The first issue that the Court must address is whether imposing Section 11(b) liability would violate Defendants' First Amendment speech rights. "To determine 'whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play,' the two-part Johnson test asks: (1) 'whether [a]n intent to convey a particularized message was present,' and (2) whether 'the likelihood was great that the message would be understood by those who viewed it.'" Burns v. Town of Palm Beach, 999 F.3d 1317, 1336–37 (11th Cir. 2021) (alteration in original) (internal quotation marks omitted) (quoting Texas v. Johnson, 491 U.S. 397, 404, (1989)).

The Court first specifies what conduct is at issue for this defense. In Defendants' motion for summary judgment, they initially only mention their Section 230 challenges as protected First Amendment speech. Doc. No. [155-1], 30–31. Later, in the true threat discussion, Defendants broadly allude to the other alleged intimidating acts being protected. Id. at 33 (arguing the true threat exception did not apply because the voters challenged were not the direct recipients of Defendants' actions). In the additional briefing, moreover, other alleged acts of intimidation have been generally raised in relation to the

First Amendment speech defense. See, e.g., Doc. No. [198-1], 37 (listing as intimidating conduct "lodging voter challenges in an intimidating, threatening, or coercive manner; submitting false voter challenges; or combining voter challenges with other intimidating, threatening, or coercive conduct."). Thus, for purposes of assessing the First Amendment defense raised (and the exceptions to that defense), the Court will assess the totality of Defendants' conduct at issue in the Section 11(b) claim to determine if it implicates the First Amendment.[30]

"Constitutional protection for freedom of speech 'does not end at the spoken or written word.'" Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale, 901 F.3d 1235, 1240 (11th Cir. 2018) (quoting Johnson, 491 U.S. at 404). The Eleventh Circuit articulates the requirements for expressive conduct to be protected by the First Amendment: (1) the communicator intended "to convey a particularized message" and (2) a "great" "likelihood" that others would understand a message was being communicated. Burns, 999 F.3d at 1336 (quoting

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[30] The Court will assess Defendants' conduct in the aggregate to determine if it is First Amendment protected. While the Court is unaware of any legal rule explicitly endorsing aggregate treatment, other cases involving numerous distinct acts have treated all acts together to determine if the conduct is First Amendment protected. Cf., e.g., Fort Lauderdale, 901 F.3d at 1242–43 (discussing multiple "food sharing" events and different communicative conduct present in the events, such as inviting the public and distributing pamphlets, setting up tables, and having banners).

Johnson, 491 U.S. at 404). This second determination, however, does not require that viewers perceive the *specific* message intended, but rather only that *a* message was being communicated. See id. 1336–37.

(1) Intent to communicate a message

In the most recent Eleventh Circuit cases, the first requirement for expressive conduct has not been at issue because it has either been stipulated to or it was obvious that the speaker intended to communicate a message. See, e.g., id. at 1337 ("Palm Beach [the opposing party] conceded to the magistrate judge, and does not dispute on appeal, that Burns had the intent to convey a message."); Fort Lauderdale, 901 F.3d at 1240 ("[W]e have no doubt that FLFNB intended to convey a certain message.").

While not presented with a clear stipulation, the Court concludes that Defendants intended to communicate a particularized message—even if the factual disputes inhibit determining what that intended message was. From the Plaintiffs' perspective, Defendants intended their conduct to communicate a threat to all voters. By Defendants' account, they intended to communicate to ineligible voters that they should not be voting and to the wider public that elections were free from ineligible voters casting ballots. Either way, Defendants'

conduct at issue sufficiently communicated a particularized message for the Court to hold dismissal of their First Amendment defense on summary judgment is not appropriate on the first element of the expressive conduct analysis.

(2) Perception that a message was being communicated

The second requirement to find expressive conduct—that there is a great likelihood of viewers' perceiving a message was being communicated by Defendants' conduct—has received much more recent attention. "Expressive conduct has a 'communicative' element, but only insofar as it, 'in context, would reasonably be understood by the viewer to be communicative.'" Burns, 999 F.3d at 1337 (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 294 (1984)). In general, "[t]he 'circumstances surrounding an event' help a reasonable observer discern the dividing line between expressive conduct and everyday conduct." Burns, 999 F.3d at 1343 (quoting Fort Lauderdale, 901 F.3d at 1241).

The Eleventh Circuit has identified five factors to consider in this analysis: (1) if the conduct at issue is distinguishable from actions in everyday life, such as "set[ting] up tables and [a] banner, and distribut[ing] literature," (2) if the public had access to the conduct, (3) the location of the acts, such as in a public city park

or other traditional public forum, (4) if the conduct involved "an issue of concern in the community," and (5) if the conduct historically has been a type that communicates a message. Id. at 1343–44 (quoting and citing Fort Lauderdale, 901 F.3d at 1242–43). However, "[t]here may be other factors . . . relevant to whether [specific conduct] is expressive conduct protected by the First Amendment." Id. at 1346. Again, "[t]he circumstances surrounding an event often help set the dividing line between activity that is sufficiently expressive and similar activity that is not." Fort Lauderdale, 901 F.3d at 1241.

Expressive conduct is not protected by the First Amendment, moreover, when the conduct's message is provided by other speech. In other words, when the "[t]he expressive component of [an action] is not created by the conduct itself but by the speech that accompanies it." Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 66 (2006). This limitation is informed by the fear that "[i]f combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking about it." Id. The Government specifically relies on this limitation in its argument that Defendants' conduct in this case is not First Amendment protected expressive conduct. Doc. No. [198-1], 32 n. 10.

Here, "the circumstances surrounding" Defendants' conduct present numerous clear disputes of fact that preclude summary judgment determination of whether the public would have viewed Defendants' conduct as communicating a message. Among other determinations, a trier of fact's conclusions on Defendants' direct engagement with voters, role in publishing the challenged voters' names to the public, and connection to Crusade for Freedom's social media posts would impact the decision regarding if an observer would perceive a message to be communicated. As already indicated, however, these are disputed facts that prohibit summary judgment. See *supra* Section (III)(A)(2)(a)–(c).

In short, the Court cannot grant summary judgment on the issue of whether Defendants' conduct in this case constitutes expressive conduct protected by the First Amendment. While certainly a threshold issue for the affirmative defense, there are material disputes of fact precluding summary judgment resolution. Thus, the Court denies summary judgment on the First Amendment speech defense for both Parties.

b) True threats and defamation

The Court alternatively denies summary judgment on Defendants' First Amendment defense because issues of fact also inhibit determining if Defendants' conduct constituted a true threat or defamation unprotected by the First Amendment. For purposes of this section, the Court will assume Defendants engaged in First Amendment protected expressive conduct, and assess if Defendants' conduct is exempted from the First Amendment. United States v. Fleury, 20 F.4th 1353, 1365 (11th Cir. 2021) (discussing "well-defined and narrowly limited classes of speech" for which "content-based restrictions are permitted," including defamation and true threats).

The Supreme Court has said that true threats "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individual." Virginia v. Black, 538 U.S. 343, 359 (2003). There need not be any intent to act on the threat, however. Id. at 360 ("[A] prohibition on true threats 'protects individuals from the *fear of violence*' and 'from the *disruption that fear engenders*,' in addition to protecting people 'from the possibility that the threatened violence will occur.'" (alteration adopted) (emphasis added) (quoting

R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992) In the context of cross-burning, which placed the victim "in fear of bodily harm or death," the Supreme Court articulated that "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat . . . ." Id. at 359.

Nevertheless, there is still an open question of whether *non-violent* intimidation can be a true threat. Compare Aubin v. Columbia Cas. Co., 272 F. Supp. 3d 828, 834 (M.D. La. 2017) ("Threatening to take non-violent action does not constitute a 'true threat.'") and Seals v. McBee, No. CV 16-14837, 2017 WL 3252673, at *4 (E.D. La. July 31, 2017), aff'd, 898 F.3d 587 (5th Cir. 2018), as revised (Aug. 9, 2018) ("Threats to take lawful, non-violent action are not 'true threats' or any other category of speech that has not historically been protected by the First Amendment.") with Wohl, 498 F. Supp. 3d at 479 ("This Court does not interpret the Supreme Court's analysis in Black to suggest that the government can ban only threats of physical harm. The threat of severe nonbodily harm can engender as much fear and disruption as the threat of violence.").

A further complication is that many of the cases invoking the true threat exception to the First Amendment involve *criminalized* acts or threats, which

almost necessarily require some form of harmful or violent threat. See, e.g., Fleury, 20 F.4th at 1361 (discussing the constitutional challenges and true threat exception to a criminal prosecution under 18 U.S.C. § 2261A(2)(B), which requires "the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person"); United States v. Castillo, 564 F. App'x 500, 501 (11th Cir. 2014) (prosecuting the criminal defendant under 18 U.S.C. § 871(a) for "making a threat to injure or kill the President of the United States"). Given the caselaw's largely criminal context, the Court declines to read precedent as implicitly limiting true threats to violent conduct or threats.

Neither has the Eleventh Circuit issued clear guidance on whether non-violent conduct can constitute a true threat outside the protection of the First Amendment. Indeed, a few cases suggest a more expansive application of the true threat exception—one that would be inclusive of non-violent threats. In United States v. Tapanes, 284 F. App'x 617, 620 (11th Cir. 2008), the Eleventh Circuit concluded that an obscene hand gesture during a sentencing was not protected by the First Amendment because it was a true threat. While certainly in the context of a criminal sentencing this gesture is threatening, it is

not "violent" in the traditional sense of threatening imminent physical harm. In Everett v. Cobb Cty., 823 F. App'x 888, 892 (11th Cir. 2020), the Eleventh Circuit held that a speaker's "obscene communications intended to harass and frighten the recipient" were not covered by the First Amendment.[31] (alteration adopted). Again, while not perfect examples or clear rules of law endorsing non-violent true threats, these cases at least suggest that non-violent expressive conduct or speech may fall outside First Amendment protections as true threats.

Moreover, the Southern District of New York's treatment of Black did not read the Supreme Court "to suggest that the government can ban only threats of physical harm." Wohl, 498 F. Supp. 3d at 479. It persuasively reasoned that the Supreme Court used the language "*encompass[ed]*" when describing "unlawful violence" as a manifestation of true threats, and thus did not make any ruling on whether "*only* threats of unlawful violence are true threats." Id. (emphasis

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[31] Admittedly, the speech involved in Everett was more aggressive and verged on physical threats, though the Court sees no indication in the facts described that Everett ever actually threatened physical violence. 823 F. App'x at 892 (discussing the relevant facts as "(1) demand[ing] an apology using threatening language; (2) warn[ing] that she planned to visit [the victim's] place of work because she 'needed to see [her] cry'; (3) repeatedly describ[ing] the [basis for the threats, which was a sexual affair between her husband and the victim] in detail; (4) threaten[ing] to upend [the victim's] personal and professional life; and (5) follow[ing] through on that threat").

added) (quoting Black, 538 U.S. at 359). The Wohl court further analyzed that a "threat of severe nonbodily harm can engender as much fear and disruption as the threat of violence." Id.

The Court agrees. Threats of nonviolent harm may be exempted from First Amendment's speech protections as true threats. Cf. Black, 538 U.S. at 360 ("Intimidation in the constitutionally proscribable sense of the word is a type of true threat."). This conclusion is reinforced by the context in this case where the alleged intimidation would potentially interfere with another's constitutionally and statutorily protected right to vote free of such intimidation.

Thus, the question becomes whether Defendants' actions in this case constituted true threats outside First Amendment protection. Plaintiffs' account of Defendants' conduct, if factually supported, could be intimidation, that is "a serious expression of an intent to commit an act of unlawful [non-]violence" against voters. Id. at 359. Outstanding disputes of fact (*i.e.*, the publication of voters' names, use of Navy SEALS, etc.) however must be resolved before the Court can make a final determination. Summary judgment is thereby inapposite.

Plaintiffs also raise a defamation exception to Defendants' speech being protected. The voter challenges and the publication of the challenged voters'

names might be defamation of the challenged voters' reputations by falsely suggesting that these voters are attempting to vote unlawfully.[32] As discussed in the Section 11(b) analysis *supra*, however, these facts are disputed. Thus, the Court also denies summary judgment on the defamation exception to Defendants' First Amendment affirmative defense.

2. First Amendment Petition

Defendants next raise a First Amendment petition defense to Section 11(b) liability. Doc. No. [155-1], 34. The right to petition is constitutionally guaranteed, but not absolute. Cf. Borough of Duryea v. Guarnieri, 564 U.S. 379, 386 (2011).

Generally, "the Petition Clause protects people's rights to make their wishes and interests known to government representatives in the legislature, judiciary, and executive branches." Biddulph v. Mortham, 89 F.3d 1491, 1496 (11th Cir. 1996). "Interpretation of the Petition Clause must be guided by the objectives and aspirations that underlie the right. A petition conveys the special

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[32] The Court has grappled with the implications of Plaintiffs' failure to specifically raise a defamation claim. The Court has treated defamation as an exception to the First Amendment, regardless of whether a claim of defamation has been brought, because defamation is commonly listed as a First Amendment exception without any qualification that a separate defamation claim must be brought to invoke the exception. See, e.g., Fleury, 20 F.4th at 1365.

concerns of its author to the government and, in its usual form, requests action by the government to address those concerns." Guarnieri, 564 U.S. at 388–89. "The right to petition is in some sense the source of other fundamental rights, for petitions have provided a vital means for citizens to request recognition of new rights and to assert existing rights against the sovereign." Id. at 397.

The Court does not doubt that Defendants' Section 230 voter challenges are petitions. In these challenges, Defendants are "mak[ing] their wishes and interests known to government representatives . . . ." Biddulph, 89 F.3d at 1496. On the summary judgment record, however, Defendants' other conduct involved in the Section 11(b) intimidation inquiry would not be protected by the Petition Clause because it is not activity directed at a governmental entity.[33] Accordingly, the Court will only assess the First Amendment petition defense in the light of Defendants' voter challenges.

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[33] While the Court will not address Defendants' other actions in this Order, if the evidence of other petitions is presented at trial, then the Court will consider it for this affirmative defense.

The Court also encourages the Parties to address at trial how the First Amendment petition defense applies to the out-of-state Defendants, True the Vote and Catherine Engelbrecht, in the light of the fact that only Georgia residents may institute a Section 230 challenge. See O.C.G.A. § 21-2-230(a) ("Any elector of the county or municipality may challenge the right of any other elector . . . to vote in an election.").

The primary argument made against the First Amendment petition defense is that Defendants' voter challenges were frivolous and thus cannot be protected by the Petition Clause. Doc. Nos. [174], 25–26; [193], 39–41. In supplemental briefing, the Court inquired into the standard to apply to determine a "frivolous" petition outside First Amendment protection. Plaintiffs did not propose any specific test in their briefing, but instead reiterated that "[t]he First Amendment does not license baseless, frivolous challenges targeted at eligible voters; at most, it provides a buffer against liability for mistaken allegations made in good faith." Doc. No. [193], 39. At the summary judgment hearing, however, Plaintiffs specified that a frivolous challenge would be one that lacked probable cause—*i.e.*, when the board of registrars did not act on a challenge. Doc. No. [210] (Feb. 1 Hearing Tr.) Tr. 13:24–14:3.

Defendants argued that a frivolous petition was one without any basis in law or fact. Doc. No. [191], 28–32. Drawing on the antitrust context specifically, Defendants contend the Court should ask if the challenge was "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits" and then, if objectively unreasonable, if the challenger has a

"reasonable belief that there is a chance that a claim may be held valid upon adjudication." Id. at 30–31 (quoting Pro. Real Est. Inv'rs, 508 U.S. at 60).

The Government argues that the right to petition should not and cannot protect "illegal and reprehensive practice[s]."[34] Doc. No. [198-1], 43 (quoting Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972)). Moreover, the Government encouraged the Court to "consider the degree to which a challenged restriction impairs the core right the [Petition] Clause affords" and any reasonable limits on the right in the face of the governmental interests in the regulation. Doc. No. [198-1], 44–45.

Taking a cue from other contexts where petition rights are at issue, the Court agrees in part with Defendants (and seemingly the Government) that there must be more than a lack of probable cause for voter challenge petitions to be frivolous, *i.e.*, outside First Amendment protection. Again, a county's treatment of a Section 230 challenge cannot be the sole basis for finding a challenge was

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[34] The Court is unconvinced by the Government's position that the speech analysis can resolve the petition defense in this case. Doc. No. [198-1], 42–43. While the Court agrees that it would be unlikely to find unprotected speech (*i.e.*, a true threat or defamation) to be protected by the Petition Clause, conduct constituting a petition is further subject to a frivolity limitation. Thus, at the least, the Petition Clause defense requires a separate frivolity analysis.

frivolous, unprotected by the First Amendment, and potentially creating liability under Section 11(b). See *supra* Section (III)(A)(2)(c)(2)(a).

The Court furthermore is persuaded by the comparisons made between Defendants' Section 230 voter challenges and cases involving baseless litigation. As the Supreme Court noted in the public employment context, "[w]hen a petition takes the form of a lawsuit against the government employer, it may be particularly disruptive. Unlike speech of other sorts, a lawsuit demands a response." Guarnieri, 564 U.S. at 390. The Court went on, drawing on non-public employment situations, and noted that the First Amendment petition right did "not protect 'objectively baseless' litigation that seeks to 'interfere directly with the business relationships of a competitor.'" Id. (quoting Real Est. Inv'rs, 508 U.S. at 60–61). Thus, in these latter cases, it appears that a "baseless" claim is one that is "objectively baseless" and "interfere[s] directly" with another person, namely (but perhaps not exclusively) through "consum[ing] time and resources" by "demand[ing] a response." Guarnieri, 564 U.S. at 390.

Here, the voter challenges demanded a response from the board of registrars in each county where challenges were made. These challenges thus compelled at least *some* action and started a process that might have required a

challenged voter to prove his or her voter eligibility. However, Defendants' Section 230 challenges are disputed as it relates to objective reasonableness, directness, and causation. See *supra* Section (III)(A)(2)(a)–(c). These disputes therefore preclude summary judgment on Defendants' First Amendment petition defense for either Party.

3. Right to Vote via Vote Dilution

Defendants' next raise the "right to vote via vote dilution" as a defense to Section 11(b) liability. Defendants first argued their activities were protected because they sought to "prevent vote dilution by ensuring that all the people listed as eligible voters were legally eligible to cast votes." Doc. No. [155-1], 35. Later, they articulated the protection as "preventing the dilution of their own voting power by the counting of unlawful ballots." Doc. No. [193], 41.

The Court will not linger on this amorphous defense. Even after additional briefing, the Court still is unsure about the legal basis for Defendants' argument, or if the law even supports vote dilution being raised as an affirmative defense.[35]

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[35] Vote dilution ordinarily arises as a statutory claim under the Voting Rights Act Section 2, or as an Equal Protection Claim under the Fourteenth Amendment. Here, Defendants raise a constitutional defense, and thus the Fourteenth Amendment vote dilution law must apply.

Nonetheless, even assuming that vote dilution can be raised as a defense, Defendants have not met the high evidentiary requirements of proving vote dilution. Accordingly, summary judgment must be granted for Plaintiffs.

When asserting vote dilution under the Fourteenth Amendment, Defendants must prove not only the requirements of a Voting Rights Act Section 2 vote dilution case but must also show discriminatory intent. Johnson v. DeSoto Cty. Bd. of Comm'rs, 204 F.3d 1335, 1344 (11th Cir. 2000) ("[T]he Supreme Court, historically, has articulated the same general standard, governing the proof of injury, in both section 2 and constitutional vote dilution case . . . ."); Lowery v. Deal, 850 F. Supp. 2d 1326, 1331 (N.D. Ga. 2012) ("[T]he primary difference between vote-dilution claims brought under § 2 and similar claims brought under the Equal Protection Clause is that the Equal Protection Clause requires a showing of discriminatory intent, while § 2 does not . . . the requirements to establish that vote dilution has occurred (separate from any discriminatory intent) are the same under both provisions.").

Thus, for Defendants to successfully assert a vote dilution defense they must show: "(1) that the minority group is 'sufficiently large and geographically compact to constitute a majority in a single-member district;' (2) that the minority

group is 'politically cohesive;' and (3) that sufficient racial bloc voting exists such that the white majority usually defeats the minority's preferred candidate." Wright v. Sumter Cty. Bd. of Elections & Registration, 979 F.3d 1282, 1288 (11th Cir. 2020) (quoting Solomon v. Liberty Cty. Comm'rs, 221 F.3d 1218, 1225 (11th Cir. 2000)). After these proofs, the Court then must assess a totality of the circumstances "to determine whether members of a racial group have less opportunity" than other groups. Id. at 1289 (listing factors).

Again, assuming that a constitutional vote dilution claim is legally available, Defendants have not made any effort to argue or prove these requirements. Nor have Defendants shown that Plaintiffs intended to deprive them of their right to vote for a constitutional vote dilution defense (in fact, Plaintiffs' claim the opposite—that Defendants' actions sought to deprive voters of the right to vote). Thus, as the proponent of the affirmative defense, Defendants have not submitted the required proofs to even create a dispute of fact. Consequently, Plaintiffs are entitled to summary judgment on Defendants' vote dilution defense.

4. Unconstitutional Vagueness

Finally, Defendants assert that Section 11(b), if applied to their Section 230 voter challenges, would be unconstitutionally vague because such liability would be based on a "mass" Section 230 challenge, and it is unclear what would constitute a "mass" challenge moving forward. Doc. No. [155-1], 36. Defendants contend that this uncertainty would "chill" the exercise of the First Amendment rights. Id. Plaintiffs disagree and argue that Defendants improperly limit the Section 11(b) issue to be the mass challenges when Plaintiffs' "problems with Defendants' challenges go well beyond quantity." Doc. No. [174], 28. The Government echoes Plaintiffs' submission that "[a] wide range of factual evidence therefore could establish a Section 11(b) violation . . . But 'the mere fact that close cases can be envisioned' is insufficient to 'render[] a statute vague.'" Doc. No. [198-1], 48 (alteration in original) (quoting United States v. Williams, 553 U.S. 285, 305–06 (2008)).

No disputes of fact affect the Court's determination on this Due Process defense, and the Court dismisses the defense because Section 11(b), if applied to Defendants, is not unconstitutionally vague or overbroad. "Unconstitutionally vague laws fail to provide fair warning of what the law requires, and they

encourage arbitrary and discriminatory enforcement by giving government officials the sole ability to interpret the scope of the law." Dream Defs. v. Governor of the State of Fla., 57 F.4th 879, 890 (11th Cir. 2023) (internal quotations omitted) (quoting Keister v. Bell, 29 F.4th 1239, 1258 (11th Cir. 2022)). While there is a heightened concern in cases implicating the First Amendment of a vague statute, the Court finds that Section 11(b) presents no such concern of unconstitutional vagueness. Section 11(b) uses terms often used in statutes—intimidate, threaten, and coerce. United States v. Eckhardt, 466 F.3d 938, 944 (11th Cir. 2006) (discussing the terms "intimidate" and "harass" as not unconstitutionally vague). If "the meaning of the words used to describe the [impermissible] conduct can be ascertained fairly by reference to judicial decisions, common law, dictionaries, and the words themselves because they possess a common and generally accepted meaning" then there is no vagueness concern. Id. While the facts of every voter intimidation case may vary, the terms and standards governing liability do not rise to the level of being unconstitutionally vague.

Neither is Section 11(b) overbroad. "A statute is overly broad if it 'punishes a substantial amount of protected free speech, judged in relation to the statute's

plainly legitimate sweep.'" Dream Defs., 57 F.4th at 890–91 (quoting Virginia v. Hicks, 539 U.S. 113, 118–19 (2003)). Again, any totality of the circumstances inquiry is fact and context specific, but the terms that inform Section 11(b) liability are well known in caselaw and statute, thus inherently limit the potential for making a "sweep" of otherwise lawful and protected conduct, unlawful. Thus, Section 11(b) is not overbroad. Summary judgment for Plaintiffs is granted on Defendants' Due Process defense.

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS IN PART** and **DENIES IN PART** both Plaintiffs' and Defendants' Motions for Summary Judgment (Doc. Nos. [155-1]; [156-1]). The Court **GRANTS** Plaintiffs' summary judgment on Defendants' vote dilution and unconstitutional vagueness defenses. The Court **GRANTS** Defendants' summary judgment on the narrow issue of Section 11(b) liability for Muscogee County voters as it pertains to the Section 230 voter challenges only—the undisputed facts show there is no causation evidence between the voter challenges in Muscogee County and Defendants. On all other issues raised by both Parties, the Court **DENIES** summary judgment. Pursuant

to Local Rule 16.4, NDGa, the consolidated pretrial order shall be filed within **THIRTY DAYS** of the entry of this Order.

IT IS SO ORDERED this 9th day of March, 2023.

Steve C. Jones

HONORABLE STEVE C. JONES
UNITED STATES DISTRICT JUDGE

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2018 WL 3848404
Only the Westlaw citation is currently available.
United States District Court, E.D. Virginia,
Alexandria Division.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS – RICHMOND REGION COUNCIL 4614 et al, Plaintiff,
v.
PUBLIC INTEREST LEGAL FOUNDATION et al, Defendant.

Civil No. 1:18-cv-00423
|
Signed 08/13/2018

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MEMORANDUM OPINION & ORDER

Liam O'Grady, United States District Judge

***1** Currently before the Court is Defendants' Motion to Dismiss (Dkt. 30; 31). The Court has considered the evidence and the pleadings and heard the parties' oral arguments on June 22, 2018. Dkt. 61. The Court finds good cause to **DENY** the motion.

I. Background

On April 12, 2018, Plaintiff League of United Latin American Citizens ("LULAC") and four other individually named Plaintiffs ("Bonilla," "Freeman," "Gearhart," and "Rosen") filed suit against Defendants Public Interest Legal Foundation ("PILF") and J. Christian Adams. Compl. ¶¶ 12-18. Plaintiffs allege that in September 2016, Defendants, in conjunction with nonparty Virginia Voters Alliance, published a written report titled *Alien Invasion I* to national media which accused Virginia voters of "committing multiple, separate felonies, from illegally registering to vote to casting an ineligible ballot." Id. at ¶¶ 24-25, 31. Specifically, Plaintiffs allege that Defendants obtained from Virginia county registrars several lists of "[Virginia voter] registrants who had been purged from the voter rolls." Id. at ¶¶ 27, 46. Plaintiffs assert that Defendants published this information, presenting it as evidence of illegal electoral activity in Virginia. Id. at ¶¶ 27-29, 46.

The voter registration lists obtained by Defendant, however, contained registrants who were, in fact, properly voting citizens who had been removed from the voting rolls for various administrative reasons. Id. at ¶ 32. Plaintiffs allege, on information and belief, that Defendants were informed by Virginia election officials "that they were drawing false conclusions from the registrar information and running the significant risk of wrongfully accusing constitutionally eligible voters of committing felony voter fraud." Id. at ¶ 33. Defendants published *Alien Invasion I* anyway. Id.

Plaintiffs allege that even after Virginia election officials repeatedly informed Defendants of the methodological deficiencies of *Alien Invasion I*, Defendants published a sequel, *Alien Invasion II*, in May 2017. Id. at ¶ 35. *Alien Invasion II* "affirmatively reiterates the accusation ... that certain voters in a number of Virginia jurisdictions ... were guilty of committing one felony by registering to vote and likely guilty of committing another felony by actually voting." Id. at ¶ 38. Similar to *Alien Invasion I*, "*Alien Invasion II* was published along with a roughly eight-hundred-page appendix containing voter registration forms, which included the names, home addresses, and telephone numbers of the alleged felons." Id. at ¶ 41. Initially, each individually named Plaintiff's personally identifying information was contained in the *Alien Invasion II* appendix. Id. at ¶ 42. Defendants subsequently published a revised version which removed several names from the list. Id. at ¶ 43. Nevertheless, this revision failed to exclude the names and information of Plaintiffs Bonilla and Freeman, who remain in the final version of the report. Id.

Plaintiffs allege multiple harms resulting from

Defendants' conduct. Id. at ¶¶ 48-51. Specifically, the individually named Plaintiffs report the detrimental impact of adverse publicity, intimidation, embarrassment, and fear of harassment associated with their participation in the electoral process. Id. Organizational Plaintiff LULAC reports that its "members and the Latino community [it] represents have been and continue to be intimidated and threatened by Defendants asserting that registering to vote and/or voting constitutes an unlawful 'alien invasion' that should be prosecuted." Id. ¶ 63. Plaintiff LULAC also alleges that "[i]nstead of engaging in its ordinary course initiatives, [it] must devote time and resources to combat the false narrative that Latinos who vote are doing so illegally." Id. at ¶ 64.

***2** Plaintiffs allege violations of 42 U.S.C. § 1985(3) and § 11(b) of the Voting Rights Act. The individually named Plaintiffs also allege defamation. In their Motion to Dismiss, Defendants seek to bar LULAC's claims due to lack of standing, and also seek a broad dismissal of the Complaint for Plaintiffs' failure to state a claim. See Dkt. 30; 31.

II. Legal Standard

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a complaint must contain sufficient factual information to "state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 550 (2007). A motion to dismiss pursuant to Rule 12(b)(6) must be considered in combination with Rule 8(a)(2), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), so as to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." Twombly, 550 U.S. at 555.

While "detailed factual allegations" are not required, Rule 8 demands that a plaintiff provide more than mere labels and conclusions stating that the plaintiff is entitled to relief. Id. Because a Rule 12(b)(6) motion tests the sufficiency of a complaint without resolving factual disputes, a district court "must accept as true all of the factual allegations contained in the complaint' and 'draw all reasonable inferences in favor of the plaintiff." Kensington Volunteer Fire Dep't v. Montgomery County, 684 F.3d 462, 467 (4th Cir. 2012) (quoting E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc., 637 F.3d 435,440 (4th Cir. 2011)).

III. Analysis

Defendants raise four issues in support of their Motion to Dismiss: (1) Plaintiff LULAC does not have standing to invoke federal jurisdiction; (2) Plaintiffs have failed to state a claim under § 11(b) of the Voting Rights Act; (3) Plaintiffs have failed to state a § 1985(3) claim; and (4) Plaintiffs have failed to state a defamation claim and, regardless, Defendants are entitled to qualified immunity under Virginia's Anti-SLAPP statute. Dkt. 33 at 7-26.

a. LULAC's Standing

Defendants do not dispute that standing is proper with respect to the individually named Plaintiffs. Rather, Defendants challenge Plaintiff LULAC's standing. Id. at 7-10. However, both the Supreme Court and the Fourth Circuit have held that the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement. See Bowsher v. Synar, 478 U.S. 714, 721 (1986); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252,263-64 (1977); Bostic v. Schaefer, 760 F.3d 352, 370 (4th Cir. 2014). Accordingly, the Court ought not inquire into LULAC's organizational standing at this time.[1] The Court notes, however, that the "One Good Plaintiff Rule" is often limited to cases where each Plaintiff raises the same legal issues and requests the same type of remedy.[2] See Sierra Club v. El Paso Props., Inc., No. 01-cv-02163, 2007 WL 45985, at *2-3 (D. Colo. Jan. 5, 2007); PSINet, Inc. v. Chapman, 108 F. Supp. 2d 611, 619-20 (W.D. Va. 2000). For this reason, the Court invites further briefing on the matter following discovery, should there be good cause.

b. Section 11(b) of the Voting Rights Act

***3** Defendants argue that Plaintiffs' § 11(b) claim should fail because (i) Section 11(b) applies only to state actors, (ii) Section 11(b) claims require specific intent and racial animus, and (iii) Plaintiffs fail to sufficiently allege "intimidation" under the meaning of § 11(b). Dkt. 33 at 10-14. For the following reasons, the Court finds these arguments unpersuasive.

i. Section 11(b)'s reach to private actors

As to the issue of whether § 11(b) claims can be brought against non-state actors, the statutory text is dispositive.

The relevant portion of § 11(b) reads:

> 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) (2012) (emphasis added). 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)). Here, the language "or otherwise" indicates Congressional intent to reach both government and private conduct under § 11(b).

As a counterpoint to the statutory text, Defendants cite Yi v. Democratic Nat'l Comm., 666 F. App'x 279, 280 (4th Cir. 2016), reh'g denied (Jan. 3, 2017) in support of the proposition that the Voting Rights Act ("VRA") derives constitutional authority from the Fifteenth Amendment, which applies only to state actors. See Dkt. 33 at 10. However, as Plaintiffs recognize, "[Yi] merely notes for context in a footnote how the VRA works 'in tandem' with the 15th Amendment; it does not hold, or even suggest, the VRA's scope is limited to that of the 15th Amendment." Dkt. 50 at 17. Defendants also fail to present any binding case law that precludes application of § 11(b) to private conduct. They cite only to a dissent in Nipper v. Smith, 39 F.3d 1494, 1547 (11th Cir. 1994).

By comparison, multiple Supreme Court opinions hold that the Elections Clause broadly authorizes federal regulation of "ballot casting." See Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 8-9 (2013); United States v. Williams, 341 U.S. 70, 77 (1951); Smiley v. Holm, 285 U.S. 355, 366 (1932); Ex parte Yarbrough, 110 U.S. 651, 662 (1884). These holdings point to the Elections Clause – not the Fifteenth Amendment – as the constitutional authority for § 11(b). The plain text of the Elections Clause comports with this reading. See U.S. Const. art. I, § 4. Accordingly, the Court holds that § 11(b) can reach private conduct.

ii. Section 11(b)'s requirement of specific intent and racial animus

Defendants also argue that a § 11(b) claim requires a showing of specific intent to intimidate and a showing of racial animus. Dkt. 33 at 10-14. Again, the Court's analysis begins with the statutory text of § 11(b), which makes no reference to either of Defendants' proposed requirements. See 52 U.S.C. § 10307(b) (2012).

A statutory reading that omits "specific intent" and "racial animus" requirements is further buttressed by a comparative statutory analysis of § 11(b) and § 131(b) of the 1957 Civil Rights Act, a similarly-worded statutory provision on voter intimidation that predated § 11(b). Section 131(b) reads:

> 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....

***4** 52 U.S.C. § 10101(b) (2012) (emphasis added). The text of § 11(b), unlike § 131(b), plainly omits "for the purpose of," suggesting § 11(b)'s deliberately unqualified reach.

Defendants' reference to nonbinding case law that reads specific intent and racial animus requirements into § 11(b) is also unpersuasive. These cases trace back to United States v. McLeod, which, in fact, adjudicated claims brought under the 1957 Civil Rights Act. 385 F.2d 734, 738 (5th Cir. 1967). Therefore, in the absence of plain statutory text, statutory history, or binding case law to the contrary, the Court does not find that a showing of specific intent or racial animus is required under § 11(b).

iii. Intimidation within the meaning of § 11(b)

Defendants also allege that their conduct does not rise to the level of intimidation under the meaning of § 11(b). However, Defendants have linked Plaintiffs' names and personal information to a report condemning felonious voter registration in a clear effort to subject the named individuals to public opprobrium. Defendants' suggestion that more is needed to support a finding of intimidation is untenable. See Dkt. 33 at 13-14. This is particularly true at the motion to dismiss stage, where the Court accepts Plaintiffs' well-pleaded facts as true. Plaintiffs have alleged, plausibly, that the *Alien Invasion* reports put them in fear of harassment and interference with their right to vote. They have alleged intimidation sufficient to support their § 11(b) claim. See Damon v. Hukowitz, 964 F. Supp. 2d 120, 149 (D. Mass. 2013) ("Intimidation means putting a person in fear for the purpose of compelling or deterring his or her conduct.") (internal citations omitted).

c. Section 1985(3)

Defendants argue that Plaintiffs' § 1985(3) claim must be dismissed because (i) Plaintiffs have made only a bare assertion of conspiracy without providing concrete supporting facts and (ii) Plaintiffs have failed to allege two required elements of a § 1985(3) claim: a state action in violation of an independent right and an action based on a race or class-based invidious discriminatory animus. Dkt. 33 at 15-21. For the following reasons, these arguments also fail.

i. Conspiracy

Defendants are correct to note that the Fourth Circuit has rejected § 1985 claims whenever a purported conspiracy is alleged in a merely conclusory manner, in the absence of concrete supporting facts. See Thomas v. The Salvation Army Southern Territory, 841 F.3d 632, 637 (4th Cir. 2016); Simmons v. Poe, 47 F.3d 1370, 1377 (4th Cir. 1995). Here, however, Plaintiffs *have* sufficiently alleged facts supporting a conspiracy in their Complaint. See Compl. ¶¶ 23, 37, 54. At the motion to dismiss stage, these assertions are sufficient for the claim to survive.

ii. Section 1985(3)'s requirement of state action & class-based animus

The parties agree that the first two clauses of Section 1985(3) provide no independent substantive rights and that plaintiffs asserting a claim under those clauses must identify a violation of a separate constitutional right (and typically show state action). See Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 373 (1979). Additionally, plaintiffs making a claim under the first two clauses of Section 1985(3) must allege that some racial or otherwise class-based invidiously discriminatory animus lay behind the conspirators' action. See Kush v. Rutledge, 103 S.Ct. 1483, 1487 (1983).

***5** The parties disagree about whether it is proper to apply a different standard to the third clause of Section 1985(3), described by Plaintiffs as the "support and advocacy clause." Plaintiffs assert that the requirements identified above apply *only* to the first two clauses of Section 1985(3): those that refer to equal protection of the law. Because Plaintiffs' claim arises under the "support and advocacy" clause, they argue, they need not show a violation of any right other than that arising under the "support and advocacy" clause, nor need they allege that any class-based animus motivated Defendants' actions. Although the case law is not entirely clear, Plaintiffs persuasively argue that their claim arising under the "support and advocacy" clause of Section 1985(3) is subject to a different standard than that which courts have applied to claims arising under Section 1985(3)'s equal protection clauses.

In Griffin v. Breckenridge, 403 U.S. 88 (1971), the Supreme Court considered the pleading standard for the first clause of Section 1985(3) ("conspiring or going in disguise on the highway ... for the purpose of depriving [persons of equal protection]"). The Court upheld the application of § 1985(3) to purely private conspiracies, and held that plaintiffs must allege a racial or "otherwise class-based, invidiously discriminatory animus" by defendants. Id. at 102-03. Subsequently, the Supreme Court made clear that the second part of 1985(3) does not require class-based, invidiously discriminatory animus because that part arises from a statutory provision without language requiring that conspirators act with intent to deprive their victims of equal protection of the laws. See Kush, 103 S.Ct. at 1487-88 (explaining that the limiting language in Griffin arose under the first clause of § 1985(3) and that "there is no suggestion" that Griffin's reasoning should apply to "any other portion of § 1985"). The Court explained that the legislative background which gave rise to the equal protection clauses of Section 1985(3) "does not apply to the portions of the statute that prohibit interference with federal officers, federal courts, or federal elections." Id. The refusal to extend Griffin beyond the first clauses of Section 1985(3) was confirmed in Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 267 (1993) ("Our precedents establish that in order to prove a private conspiracy in violation of the first clause of § 1985(3), a plaintiff must [show some racial or class-based animus].") (emphasis added).

In Federer v. Gerhardt, the Eighth Circuit applied this analysis, relying on Kush to hold that "plaintiffs are not required to show class-based animus as part of a support and advocacy claim under the second part of Section 1985(3)." See Federer v. Gephardt, 363 F.3d 754, 760 (8th Cir. 2004); see also McCord v. Bailey, 636 F.2d 606, 614 & n.12 (D.C. Cir. 1980) (finding meaning in the absence of language demanding "equal protection of the laws" in the first clause of Section 1985(2)). Cases from the Fourth Circuit do not necessarily contradict this conclusion, because those cases which have addressed Section 1985(3) claims either focus on the clauses related to equal protection, or do not explicitly distinguish

between different portions of Section 1985(3).

For example, in Buschi v. Kirven, 775 F.2d 1240, 1257 (4th Cir. 1985), the Fourth Circuit held that "an action under Section 1985(3) consists of these essential elements: (1) a conspiracy of two or more persons; (2) who are motivated by a specific class-based, invidiously discriminatory animus; (3) to deprive the plaintiff of the equal enjoyment of the rights secured by the law to all; (4) and, which results in injury to the plaintiff as (5) a consequence of an overt act committed by the defendants in connection with the conspiracy." However, the court did not distinguish between the portions of 1985(3), although the third element identified by the court (equal enjoyment) suggests a focus on the first clause of 1985(3).

***6** Similarly, in Deressa v. Gobena, 2006 WL 335629 (E.D. Va. Feb. 13, 2006), the court explained that "to state a claim for a private conspiracy in violation of the first clause of 42 U.S.C. § 1985(3), a plaintiff must allege, *inter alia*, (1) the some racial, or perhaps otherwise class-based, invidiously discriminatory animus [lay] behind the conspirators' action, and (2) that the conspiracy aimed at interfering with rights that are protected against private, as well as official, encroachment." Id. at *5 (emphasis added). And in Shooting Point, LLC v. Cumming, 238 F. Supp. 2d 729 (E.D. Va. 2002), the court required an allegation that the acts of the defendants were motivated by class-based animus because "section 1985(3) prohibits conspiracies to deprive persons of the equal protection of the law." Id. at 739 (emphasis added). Again, the identification of "equal protection" suggests the court's analysis was focused on the first clause of Section 1985(3).

For these reasons, and for good cause shown, the Court finds that Plaintiffs have stated a claim under the "support and advocacy" clause of Section 1985(3), which unlike the equal protection part of Section 1985(3) does not require allegations of a race or class-based, invidiously discriminatory animus or violation of a separate substantive right.

d. Defamation

Under Virginia law, the necessary elements of the tort of defamation are "(1) publication of (2) an actionable statement with (3) the requisite intent." Chapin v. Knight–Ridder, Inc., 993 F.2d 1087, 1092 (4th Cir. 1993). To be actionable, a statement "must be both false and defamatory." Id. A written statement is per se defamatory when it alleges that an individual has committed a felony which he or she did not commit. Schnupp v. Smith, 457 S.E.2d 42, 46 (Va. 1995). Regarding the requisite intent requirement, both parties agree that the proper standard here is negligence, meaning that Defendants "either knew [the published statement] to be false, or believing it to be true, lacked reasonable grounds for such belief, or acted negligently in failing to ascertain the facts on which the publication was based." Dragulescu v. Virginia Union Univ., 223 F. Supp. 3d 499, 508 (E.D. Va. 2016). In Virginia, a defendant acts negligently in failing to ascertain the facts on which a publication is based when they fail to investigate information that poses a substantial danger or risk of reputational injury to another. Richmond Newspapers, Inc. v. Lipscomb, 234 Va. 277, 288 (1987).

Here, all the elements of Virginia's defamation tort are satisfied. First, *Alien Invasion I* and *Alien Invasion II* were publications which listed Plaintiffs' names in the attached appendices of the reports. Compl. ¶ 42. Second, Defendants imputed felonious conduct to these individuals by inference in the reports. For example, Plaintiffs allege, "[*Alien Invasion I*] states clearly: The United States Attorney in Virginia has done nothing about the felonies committed by 433 aliens registering in Prince William County alone." Id. at ¶ 75 (internal quotation marks omitted). Last, Plaintiffs assert that Defendants cast aside warnings from Virginia elections officials about the falsehood of their reports on two separate occasions. Id. at ¶¶ 33-34. Defendants also fail to show that they conducted even a cursory investigation of the accuracy of the information they obtained from the registrars. Accordingly, Plaintiffs have sufficiently pled that Defendants had constructive knowledge of the falsity of the information.

With all elements met, the Court looks next at the two affirmative defenses raised by Defendants: (1) that Plaintiffs' defamation claims pertaining to *Alien Invasion I* are barred by Virginia's statute of limitations; and (2) that Defendants wield qualified immunity for their statements under Virginia's anti-SLAPP statute.

***7** Virginia's statute of limitations for defamation is one year. Va. Code Ann. § 8.01–247.1 (West). The parties disagree over whether the defamation claims based on *Alien Invasion I*, which was published in September 2016, can be properly raised.[3] As noted in Dragulescu, "each of several communications to a third person by the same defamer is a separate publication," and "each successive publication of an old or preexisting defamatory statement gives rise to a new cause of action under Virginia law." 223 F. Supp. 3d at 508.

Defendants fail to rebut Plaintiffs' assertion that *Alien*

Invasion II is effectively a successive publication of an old or preexisting defamatory statement (i.e., *Alien Invasion I*). Given the textual, thematic, and formalistic parallels between the two publications, the Court finds that *Alien Invasion II* qualifies as a "republication" for purposes of Plaintiffs' defamation claim. Accordingly, the limitations period does not bar Plaintiffs' action with respect to either report.

Finally, Defendants' Anti-SLAPP defense also fails because Defendants do not wield qualified immunity due to their constructive knowledge of the falsity of the information pertaining to the named Plaintiffs. The relevant portion of Virginia's Anti-SLAPP statute reads:

> The immunity provided by this section shall not apply to any statements made with actual or constructive knowledge that they are false or with reckless disregard for whether they are false.

Va. Code Ann. § 8.01-223.2 (West). As discussed above, Plaintiffs sufficiently allege Defendants' awareness of the risk of the incorrectness of the voter registration data obtained from the county registrars. Accordingly, Plaintiffs' defamation claim can proceed.

IV. Conclusion

For these reasons, and for good cause shown, the Court hereby **DENIES** Defendants' Motion to Dismiss (Dkt. 30; 31). Defendants have fourteen (14) days from the date of this Order to file a responsive pleading.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2018 WL 3848404

Footnotes

1 The Complaint pleads LULAC's standing under the representational and organizational theories. See Compl. ¶ 72. The Court finds that LULAC lacks standing under the representational theory because it has failed to "establish [that] at least one *identified* member suffered or [will] suffer harm." Summers v. Earth Island Inst., 555 U.S. 488, 498 (2009) (emphasis added). Under the organizational theory, the Court expresses doubt over the traceability and redressability of LULAC's alleged injury. See Friends of the Earth, 204 F.3d 149, 154 (4th Cir. 2000). Further, there is an issue of material fact over whether LULAC has suffered a "concrete and demonstrable injury to [its] activities – with a consequent drain on [its] resources – constituting more than simply a setback to the organization's abstract social interests." See Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982); Goldstein v. Costco Wholesale Corp., 278 F. Supp. 2d 766, 769-70 (E.D. Va. 2003); see also Ass'n for Retarded Citizens v. Dallas County Mental Health & Mental Retardation Ctr. Bd. of Trustees, 19 F.3d 241,244 (5th Cir. 1994) ("The mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization.").

2 See Aaron-Andrew P. Bruhl, One Good Plaintiff Is Not Enough, 67 Duke L.J. 481, 497-503 (2017). The Court recognizes the undesirable outcomes of an overbroad application of the "One Good Plaintiff Rule," including improper awards of fees and costs, confusion over preclusive effects of judgments, excessively broad injunctions, and the inhibition of precedent development. Id. at 506.

3 Both parties recognize that Plaintiffs' defamation claim based upon *Alien Invasion II*, which was published in May 2017, is not barred by the limitations period.

End of Document

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United States District Court, E.D. Louisiana.

Travis SEALS, et al.
v.
Brandon MCBEE, et al.

CIVIL ACTION NO: 16-14837
|
Signed 07/31/2017

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SECTION: "H"

ORDER AND REASONS

JANE TRICHE MILAZZO, UNITED STATES DISTRICT JUDGE

***1** Before the Court is Plaintiffs' Motion for Partial Summary Judgment (Doc. 25). For the foregoing reasons, the Motion is GRANTED.

BACKGROUND

After an altercation with his neighbor, Plaintiff Travis Seals alleges that he was arrested at his home by deputies from the Tangipahoa Parish Sheriff's Office. During the arrest, Seals objected to the deputies' conduct, including the use of pepper spray, and threatened to make a lawful complaint regarding their conduct. Seals was charged with, among other things, public intimidation and retaliation in violation of Louisiana Revised Statutes § 14:122 for that threat. Section 14:122 makes it a crime to threaten a public official "with the intent to influence his conduct in relation to his position, employment, or duty." The charge was ultimately dismissed or refused.

Plaintiffs[1] argue that, on its face, § 14:122 makes it criminal to "threaten" to take lawful actions, such as oppose or challenge police action, write a letter to the newspaper, or to file a lawsuit. They argue that such statements are protected speech, and § 14:122 is therefore unconstitutionally overbroad in violation of the First Amendment. The Attorney General has intervened to defend this allegation of unconstitutionality. In the instant motion, Plaintiffs move for partial summary judgment on their claim that § 14:122 is an unconstitutional restriction on the freedom of speech, and they seek an injunction prohibiting further enforcement of the statute. The Attorney General has opposed this Motion and seeks summary judgment in its favor pursuant to Fed. Rule Civ. Pro. 56(f).

LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[2] A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[3]

In determining whether the movant is entitled to summary judgment, the Court views facts in the light most favorable to the non-movant and draws all reasonable inferences in his favor.[4] "If the moving party meets the initial burden of showing that there is no genuine issue of material fact, the burden shifts to the non-moving party to produce evidence or designate specific facts showing the existence of a genuine issue for trial."[5] Summary judgment is appropriate if the non-movant "fails to make a showing sufficient to establish the existence of an element essential to that party's case."[6] "In response to a properly supported motion for summary judgment, the non-movant must identify specific evidence in the record and articulate the manner in which that evidence supports that party's claim, and such evidence must be sufficient to

sustain a finding in favor of the non-movant on all issues as to which the non-movant would bear the burden of proof at trial."[7] "We do not ... in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts."[8] Additionally, "[t]he mere argued existence of a factual dispute will not defeat an otherwise properly supported motion."[9]

LAW AND ANALYSIS

***2** In this Motion, Plaintiffs seek a ruling that Louisiana's public intimidation law, § 14:122, is unconstitutional and an injunction preventing Defendants from further enforcement of the statute. The Attorney General opposes this Motion and seeks summary judgment in its favor pursuant to Fed. Rule Civ. Pro. 56(f).

In its totality, Louisiana Revised Statutes § 14:122 states that:

> A. Public intimidation is the use of violence, force, or threats upon any of the following persons, with the intent to influence his conduct in relation to his position, employment, or duty:
>
> (1) Public officer or public employee.
>
> (2) Grand or petit juror.
>
> (3) Witness, or person about to be called as a witness upon a trial or other proceeding before any court, board or officer authorized to hear evidence or to take testimony.
>
> (4) Voter or election official at any general, primary, or special election.
>
> (5) School bus operator.
>
> B. Retaliation against an elected official is the use of violence, force, or threats upon a person who is elected to public office, where:
>
> (1) The violence, force, or threat is related to the duties of the elected official.
>
> (2) Is in retaliation or retribution for actions taken by the elected official as part of his official duties.
>
> C. Whoever commits the crime of public intimidation or retaliation against an elected official shall be fined not more than one thousand dollars or imprisoned, with or without hard labor, for not more than five years, or both.

Plaintiffs' arguments primarily center on the constitutionality of the statute's prohibition on threats made with the intent to influence a public official.

A. Standing

At the outset, the Attorney General argues that Plaintiffs lack standing to raise a challenge to § 14:122. "To have standing, a plaintiff must demonstrate that he has been injured, that the defendant caused the injury, and that the requested relief will redress the injury."[10] "The plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical."[11] The Attorney General argues that Plaintiffs cannot show that they have sustained or are in danger of sustaining injury. It argues that a single past incident of unconstitutional conduct cannot create standing.

Claims regarding the First Amendment, however, have "unique standing issues because of the chilling effect, self-censorship, and in fact the very special nature of political speech itself."[12] "To satisfy standing requirements ... this type of self-censorship must arise from a fear of prosecution that is not imaginary or wholly speculative."[13] In *King v. Caldwell*, a court in this District found that the plaintiffs had standing to challenge the constitutionality of a statute making it a crime to make public statements regarding investigations of the Louisiana Board of Ethics.[14] The plaintiffs had been arrested for speaking with the media regarding a claim that they had made to the Louisiana State Board of Ethics in violation of Louisiana Revised Statutes § 42:1141, "which makes it a crime to breach the confidentiality of ethics complaints by making public statements concerning a private investigation or hearing of the Louisiana Board of Ethics."[15] The charges against the plaintiffs were nolle prossed. The court found that there was a credible threat of future prosecution in light of the history of enforcement in the case. It stated that the "contention that plaintiffs suffered no actual injury simply because the charges against them were dropped is specious at best."[16] "It is well established that a credible threat of future criminal prosecution will confer standing."[17]

***3** The facts at issue here are similar to those presented in *King*, and indeed, weigh even more toward a finding of standing. Here, there is a history of enforcement of the public intimidation law to criminalize threats of lawful action both in this matter and in others.[18] In addition, pursuant to Louisiana Code of Criminal Procedure article 572(A)(2), Plaintiff Seals could be prosecuted for the

speech at issue in this suit for up to four years following the incident.

The Attorney General argues that Plaintiffs' fear of prosecution is too speculative to confer standing. It argues that:

> "The Plaintiffs have not proven that there is a reasonable likelihood that one of them will be arrested, will then tell the arresting officer something perceived by the officer to constitute a threat, and then be charged with La. R.S. 14:122. Because this Court must presume that the Plaintiffs will act as law abiding citizens and 'will conduct their activities within the law and so avoid prosecution and conviction as well as exposure to the challenged course of conduct,' the Plaintiffs have no standing to establish entitlement to any injunctive relief."[19]

The Attorney General's argument, however, highlights exactly why standing in First Amendment challenges requires a unique analysis. Indeed, as Plaintiffs point out, "[a] free speech litigant who conducts his activities within the challenged law is one who shuts his mouth, self-censors, and declines to speak on matters of public concern for fear of prosecution."[20] Here, Plaintiffs would be forced to self-censor threats of lawful action in order to avoid future prosecution under § 14:122. "Controlling precedent of the Fifth Circuit establishes that a chilling of speech because of the mere existence of an allegedly vague or overbroad statute can be sufficient injury to support standing."[21] Accordingly, this Court finds that Plaintiffs have standing to challenge the constitutionality of § 14:122.

B. Constitutionality

Section 14:122 criminalizes certain speech based on its content, that is, whether or not the speech is a threat through which the speaker intends to influence a public officer. It is well settled that "[a] law that is content based on its face is subject to strict scrutiny."[22] Strict scrutiny "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest."[23] In addition, a content-based restriction on speech is "presumptively invalid, and the Government bears the burden to rebut that presumption."[24] Plaintiffs argue that the statute is overbroad and not narrowly tailored to accomplish its purpose.

"[A] law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep."[25] "[T]he first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers."[26]

***4** Section 14:122 states that, "Public intimidation is the use of violence, force, or threats upon [a public official], with the intent to influence his conduct in relation to his position, employment, or duty." This Court reads § 14:122 to prohibit all threats made with the intent to influence the behavior of a public official. Indeed, the statute's comments indicate that, "The words 'violence, force, or threats' should include threats of harm or injury to the character of the person threatened as well as actual or threatened physical violence."[27] Accordingly, on its face, § 14:122 criminalizes the comments at issue here as well as other threats to engage in lawful conduct such as, criticizing a police officer, writing a letter to the newspaper, filing a lawsuit, voting for an official's opponent, or filing an ethics complaint.

The Attorney General argues, however, that the statute should be read to include a requirement of corrupt intent. It contends that the public intimidation statute should be interpreted identically to the public bribery statute because, as the comments suggest, "the public intimidation section includes the same parties and requires the same purpose as [the public bribery] section. The principal difference in the two sections is the method used to accomplish the purpose."[28] The Attorney General argues that cases interpreting the public bribery statute have found that the statute requires a "corrupt intent." "Intent is corrupt when it is to influence 'official action to obtain a result which the party would not be entitled to as a matter of right.' "[29] Accordingly, the Attorney General argues that in order to violate Louisiana's public intimidation statute, "one must threaten a public employee in order to obtain a result to which the offender would not be entitled to as a matter of right."[30]

On its face, however, the statute says no such thing. "Courts in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language."[31] There is nothing ambiguous about the plain language of the statute before this Court. It unambiguously states that all threats made with the intent to influence a public official are criminal. "If the statute is clear and unambiguous, then it is to be applied as written."[32] Indeed, § 14:122 has been applied by Louisiana courts consistent with such an interpretation. In *State v. Mouton*, the Louisiana Third Circuit Court of Appeal affirmed the defendant's conviction under § 14:122 for threatening, during his arrest, to sue a police officer or have him fired. The *Mouton* court did not discuss a corrupt intent requirement. Accordingly, this Court

interprets § 14:122 according to its plain meaning—to criminalize all threats made with the intent to influence a public official.

This holding disposes of the Attorney General's argument that § 14:122 prohibits only speech that is not protected by the First Amendment, such as true threats, extortion, and speech integral to criminal conduct. Threats to take lawful, non-violent action are not "true threats" or any other category of speech that has not historically been protected by the First Amendment.[33] Accordingly, § 14:122 criminalizes both protected and unprotected speech.

***5** Having found that the speech at issue is constitutionally protected, the Court must now consider whether the statute is unconstitutional on its face. The Attorney General does little in the way of arguing that § 14:122 is constitutional as written or in overcoming the presumption of unconstitutionality. Instead, it campaigns for the reading rejected above. Although the Attorney General does not define the compelling state interest sought by § 14:122, this Court can assume that its purpose is to protect public officials and the other specifically enumerated persons from undue influence, intimidation, or violence preventing them from impartial performance of their duties. This Court finds, however, that the statute is not sufficiently narrowly tailored to achieve this purpose and is overbroad. A law is overbroad if it " 'does not aim specifically at evils within the allowable area of control ... but sweeps within its ambit other activities that constitute an exercise' of First Amendment rights."[34] Plaintiffs have shown that a substantial number of the applications of the statute at issue are unconstitutional. The law encompasses far more than true threats and sweeps within its ambit threats to engage in lawful activities. In addition, it criminalizes threats to defame the character of a public official—an act that has long been considered protected speech when done without actual malice.[35] Indeed, an entire class of protected speech is reached by the statute. Accordingly, this Court holds that § 14:122 is unconstitutionally overbroad insofar as the statute criminalizes speech protected by the First Amendment.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Summary Judgment is GRANTED. The Court hereby declares Louisiana Revised Statutes § 14:122 invalid insofar as it prohibits "the use of ... threats upon any of the following persons, with the intent to influence his conduct in relation to his position, employment, or duty." Defendants, Intervenor, and their officers, agents, servants, employees, and assigns are hereby enjoined from enforcing this provision, until further order of this Court. Counsel for Plaintiffs shall submit a proposed injunction and judgment within five working days of this Order.

All Citations

Not Reported in Fed. Supp., 2017 WL 3252673

Footnotes

1 Plaintiff Ali Bergeron was also arrested in the incident but was not charged under § 14:122.

2 Fed. R. Civ. P. 56(c) (2012).

3 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

4 *Coleman v. Houston Indep. Sch. Dist.*, 113 F.3d 528, 532 (5th Cir. 1997).

5 *Engstrom v. First Nat'l Bank of Eagle Lake*, 47 F.3d 1459, 1462 (5th Cir. 1995).

6 *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

7 *John v. Deep E. Tex. Reg. Narcotics Trafficking Task Force*, 379 F.3d 293, 301 (5th Cir. 2004) (internal citations omitted).

8 *Badon v. R J R Nabisco, Inc.*, 224 F.3d 382, 394 (5th Cir. 2000) (quoting *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994)).

9 *Boudreaux v. Banctec, Inc.*, 366 F. Supp. 2d 425, 430 (E.D. La. 2005).

10 *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 659 (5th Cir. 2006).

11 *City of Los Angeles v. Lyons*, 461 U.S. 95, 101–02 (1983).

12 *Carmouche*, 449 F.3d at 660.

13 *Id.*

14 *King v. Caldwell ex rel. Louisiana*, 21 F. Supp. 3d 651, 657 (E.D. La. 2014).

15 *Id.*

16 *Id.* at 655.

17 *Id.*

18 *See State v. Mouton*, 129 So. 3d 49, 54 (La. App. 3 Cir. 2013) (affirming the Defendant's conviction for public intimidation when he told officers they "would be sorry for arresting him. He's was going to sue us and he was going to get our jobs.").

19 Doc. 32 (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 103).

20 Doc. 35.

21 *Carmouche*, 449 F.3d at 660.

22 *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2228 (2015).

23 *Id.*

24 *United States v. Stevens*, 559 U.S. 460, 468 (2010).

25 *Id.* at 473.

26 *Id.*

27 La. Rev. Stat. § 14:122 (cmt).

28 *Id.*

29 *State v. Smith*, 212 So. 2d 410, 415 (La. 1968).

30 Doc. 32, p. 11.

31 *United States v. Rainey*, 757 F.3d 234, 241 (5th Cir. 2014).

32 *State v. Fussell*, 974 So. 2d 1223, 1232 (La. 2008).

33 " 'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003).

34 *Beckerman v. City of Tupelo, Miss.*, 664 F.2d 502, 507 (5th Cir. 1981).

35 *Davis v. Borskey*, 660 So. 2d 17, 23 (La. 1995), ("A public official plaintiff cannot recover for a defamatory statement relating to his or her official conduct, even if false, unless the public official proves actual malice by clear and convincing evidence."); *Garrison v. State of La.*, 379 U.S. 64, 78 (1964); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964).

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UNITED STATES,
v.
Douglass MACKEY, Defendant.

21-CR-80 (NGG)
|
Signed January 23, 2023

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MEMORANDUM & ORDER

NICHOLAS G. GARAUFIS, United States District Judge.

***1** The Government brings a single-count indictment (Dkt. 8) (the "Indictment") against Defendant Douglass Mackey under 18 U.S.C. § 241. The Indictment relates to Defendant Mackey's alleged participation in an online conspiracy to injure certain Twitter users' right to vote by spreading disinformation during the 2016 Presidential election. (*See* Compl. (Dkt 1) (the "Complaint") ¶ 3; Indictment.) Pending before the court is Defendant Mackey's Motion to Dismiss the Indictment for lack of venue, violation of due process, and an "as applied" First Amendment violation. (Mot. (Dkt. 43); *see also* Gov't Resp. in Opp. (Dkt. 45) (the "Opp.").) The court held oral argument at the request of the parties on October 26, 2022. (*See* Oct. 27, 2022 Minute Entry.) The court DENIES Defendant Mackey's motion for the following reasons.

I. BACKGROUND

A. Factual Background

The Government alleges in its Complaint that Defendant Mackey, a New York City resident at the time of the events in question, was a prolific far-right Twitter user who established a substantial Twitter following using the pseudonym "Ricky Vaughn." (*See* Compl. ¶¶ 4-8.) At the peak of his Twitter fame, Mr. Mackey's account had approximately 58,000 followers. (*Id.* at ¶ 11.) MIT Media Lab ranked "Ricky Vaughn" as #107 among top political influencers—ahead of, *e.g.*, NBC News (#114), Stephen Colbert (#119), and Newt Gingrich (#141). (*Id.*) Although Defendant Mackey was twice suspended from Twitter, he promptly returned to Twitter under a new Ricky Vaughn profile with a slightly different Twitter handle after each suspension.[1] (*Id.* at ¶¶ 12-14.)

The Government alleges that Mr. Mackey and his co-conspirators devised "memes[2]" and other social media posts intended to suppress Democratic voters through a coordinated disinformation campaign in the runup to the 2016 presidential election.[3] The scheme, as alleged, was simple enough. He and a group of other Twitter users allegedly workshopped hashtags[4] and images to dissuade "normies" and "shitlibs[5]" from voting for a candidate for president and, later, to trick that candidate's supporters into believing they could cast their ballots by sending a text message or posting on Facebook or Twitter. (*See generally id.*)

***2** Specifically, Mr. Mackey and his co-conspirators are alleged to have participated in private direct message[6] groups on Twitter called "Fed Free Hatechat," the "War Room," and "Infowars Madman," (*Id.* at ¶¶ 13, 17,) to discuss "how best to influence the Election" and "to create, refine and share memes and hashtags that members of the group would subsequently post and distribute." (*Id.* at ¶ 15.) Members of the group messaged about "memes" and Tweets that would "suggest[ ] that certain voters were hiding their desire to vote for a

Presidential candidate from one of the two main political parties," through "psyops[7]" intended to "make all these shitlibs think they're [sic] friends are secretly voting for" Donald Trump. (*Id.* at ¶ 16.) Other messages "relat[ed] plans to alter images of various celebrities in a manner that falsely suggested that the celebrities were supporting [Donald Trump's] candidacy" and suggested that if the Democrats were to win the presidency, women would be drafted into the military, with the stated intent of "mak[ing] the shitlib woman vote waver in this election." (*Id.* at ¶ 17-18.) In these conversations, one Twitter user also allegedly suggested the group work together on a guide to outline "by step by step, each major aspect of the ideological disruption toolkit." (*Id.* at ¶ 19 n.14.) The Complaint alleges that Defendant Mackey maintained "outsized influence" in the group due to his large Twitter following and general influence on the internet. (*Id.* at ¶ 19.)

With regard to the specific conduct underlying the indictment, the Government alleges that beginning in or around September 2016, Defendant Mackey and his co-conspirators conspired about, "formulated, created and disseminated information over social media that claimed, among other things, that supporters of [Hillary Clinton] ... could and should vote for [her] by posting a specific hashtag on Twitter or Facebook, or by texting [her] first name to a specific telephone text code." (*Id.* at ¶ 3.)

The Government alleges that Mackey and his co-conspirators took inspiration for this particular Tweet from a similar image used in the United Kingdom to falsely inform voters that they could cast their votes in the June 2016 referendum by posting Vote Remain on their Facebook or Twitter account with the hashtag "EUReferendum." (*Id.* at ¶ 21.) One member of Mackey's group, acknowledging the size of Mackey's following, suggested mimicking this format and offered to "take something on [to assist Mackey] if it's helpful." Mackey responded with agreement that he had "like the most loyal army on Twitter." (*Id.* ¶ 19 n.15.) The scheme, as alleged, aimed to cause Clinton supporters to believe they could cast their ballots by sending a text message or posting on social media and, as a result, fail to cast their vote for [Hillary Clinton] in the Election in a legally valid manner. (*Id.* at ¶¶ 3, 20, 32-33.)

The Government alleges that the conspirators exchanged several messages back and forth iterating on the best wording, formatting, content, and images to use throughout much of October 2016. (*Id.* at ¶ 22-27.) One conspirator chimed in with the advice to "make sure to use the [Clinton campaign's] latest color schemes." (*Id.* at ¶ 22.) Another expressed concern about Donald Trump voters "thinking this is legit and [staying] home," and suggested an adjustment to clarify the purported voting procedure pertained only to those voting for Hillary Clinton. (*Id.* at ¶ 26.)

The Government then alleges that on November 1, 2016, Defendant Mackey tweeted out a deceptive image featuring an "African American woman standing in front of an African Americans for [Hillary Clinton]' sign" and text that read "Avoid the Line. Vote from Home. Text '[Hillary]' to 59925[.] Vote for [Hillary Clinton] and be a part of history." (*Id.* at ¶ 32.) The deceptive image also included fine print stating "Must be 18 or older to vote. One vote per person. Must be a legal citizen of the United States. Voting by text not available in Guam, Puerto Rico, Alaska or Hawaii. Paid for by [Hillary Clinton] for President 2016." (*Id.*) Mr. Mackey then tweeted out a similar image, but with text in Spanish (along with the image described in paragraph 32 of the Complaint, the "Deceptive Tweets" or "Deceptive Images"). (*Id.* at ¶ 33.) That image included "a copy of the logo of Hillary Clinton's campaign, as well as a link to [Hillary Clinton's] campaign website" and made use of her campaign's "distinctive font" and hashtags. (*Id.*)

***3** According to the Complaint, at least 4,900 people texted the number. (*Id.* at ¶ 36.) Many of the unique telephone numbers to do so "belong[ed] to individuals located in the Eastern District of New York." (*Id.*)

The Complaint provides an explanation for Mackey's alleged intentions through his Tweets: on November 2, the day after he spread the Deceptive Images, he tweeted "Obviously, we can win Pennsylvania." (*Id.* at ¶ 31.) "The key is to drive up turnout with non-college whites, and limit black turnout." (*Id.*) Finally, on or about November 12, 2016, Defendant Mackey allegedly stated the following in a direct message exchange with another Twitter user: "... I posted a meme that told [Hillary Clinton] supporters they could text to vote. Lol". (*Id.* ¶ 30.)

B. Procedural Background

On January 22, 2021, an arrest warrant issued for Defendant Mackey pursuant to a 24-page criminal Complaint. (*See generally* Compl.; Arrest Warrant (Dkt. 2).) Three weeks later, a grand jury returned an indictment charging Mackey with a conspiracy to violate rights under 18 U.S.C. § 241. (*See* Indictment.) The Indictment reads in full:

> In or about and between September 2016 and November 2016, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant DOUGLASS MACKEY, also known as "Ricky Vaughn," together with others, conspired to injure, oppress, threaten and intimidate one or more persons in the free exercise and enjoyment of a right and privilege secured to them by the Constitution and laws of the United States, to wit: the right to vote.

(Indictment at 1-2.) Defendant Mackey was arraigned before Magistrate Judge Sanket J. Bulsara on March, 10, 2021. (Mar. 10, 2021 Minute Entry.) The Government provided discovery to the Defendant throughout the summer and fall of 2021. (Dkt. 22.) On January 10, 2022, Defendant Mackey moved for a Bill of Particulars. (BOP Mot (Dkt. 25).) In a Memorandum and Order dated May 13, 2022, this court denied that motion in part but granted it specifically as to the issue of venue. (May 13, 2022 Mem. & Order ("BOP M & O") (Dkt. 36).) The Government filed a responsive Bill of Particulars on May 27, 2022. ((BOP) (Dkt. 39).) The instant Motion to Dismiss the Indictment was fully briefed as of September 6, 2022, and the court held oral argument at the request of the parties on October 26, 2022. (*See* Oct. 27, 2022 Minute Entry.)

II. STANDARD OF REVIEW

Federal Rule of Criminal Procedure 7(c)(1) requires that an indictment contain a "plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). An indictment satisfies Rule 7(c)(1)—and thus the requirements of the Fifth and Sixth Amendments—if it " 'first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.' " *United States v. Stringer*, 730 F.3d 120, 124 (2d Cir. 2013) (quoting *Hamling v. United States*, 418 U.S. 87, 117 (1974)); *see also United States v. Lee*, 833 F.3d 56, 67-68 (2d Cir. 2016) (stating that an indictment's failure to allege an element of the charged offense is a constitutional violation).[8]

***4** To meet this standard, indictments typically "need do little more than to track the language of the statute charged and state the approximate time and place of the alleged crime." *United States v. Thompson*, 141 F. Supp. 3d 188, 194 (E.D.N.Y. 2015) (quoting *United States v. Vilar*, 729 F.3d 62, 80 (2d Cir. 2013) (alterations adopted)). Indictments generally do not "have to specify evidence or details of how the offense was committed." *United States v. Wey*, No. 15-CR-611 (AJN), 2017 WL 237651, at *5 (S.D.N.Y. Jan. 18, 2017) (citation omitted). Moreover, "[w]hen considering a motion to dismiss, the [c]ourt must treat the indictment's allegations as true." *Id.* at *5 (citing *United States v. Velastegui*, 199 F.3d 590, 592 n.2 (2d Cir. 1999)). Issues relating to factual sufficiency are generally not considered at this stage, with a limited exception for when a "full proffer of the evidence has been made." *United States v. Perez*, 575 F.3d 164, 166–67 (2d Cir. 2009). However, the interpretation of a federal statute and the facial sufficiency of an indictment are matters of law reviewable on a motion to dismiss an indictment. *United States v. Ahmed*, 94 F. Supp. 3d 394, 404-05 (E.D.N.Y. 2015). That said, "the dismissal of an indictment is an extraordinary remedy reserved only for extremely limited circumstances implicating fundamental rights." *United States v. De La Pava*, 268 F.3d 157, 165 (2d Cir. 2001) (citation and quotation marks omitted).

III. DISCUSSION

A. Venue

Defendant Mackey argues that the Indictment should be dismissed because venue is not proper in the Eastern District of New York, as Defendant Mackey did not commit overt acts in, engage in essential conduct in, or have substantial contacts with the district. (Mot. at 6-11). Mackey further argues that the Government's selection of this district "leads to the appearance of abuses, if not abuses." (*Id.* at 11-12). The Government counters that venue is proper because (1) Deceptive Images passed through the Eastern District of New York as they were electronically sent from Manhattan to Twitter's servers and beyond, (Opp. at 25) (2) Deceptive Images were viewed by Twitter users in the Eastern District following their distribution, (*id.*), (3) Deceptive Images may have been viewed in the Eastern District because they were "wittingly or unwittingly" retweeted into the district, (*id.* at 26), and (4) intended victims of the misinformation conspiracy were located in the Eastern District (*id.* at 28).

1. Standard of review for venue on a motion to dismiss

Courts in this Circuit have generally reserved judgment on criminal venue for trial. At the motion to dismiss stage, courts assess only the facial sufficiency of the indictment as to venue. *See United States v. Alfonso*, 143 F.3d 772, 776-77 (2d Cir. 1998) (holding that typically, dismissal of the indictment is premature if it relies on "inferences as to the proof that would be introduced by the government at trial"). There is, however, an exception to this rule. The "sufficiency of the evidence" may, in addition to the legal sufficiency of the indictment itself, be "addressed on a pretrial motion to dismiss the indictment" if "the government has made what can fairly be described as a full proffer of the evidence it intends to present at trial." *United States v. Perez*, 575 F.3d 164, 166–67 (2d Cir. 2009) (quoting *Alfonso*, 143 F.3d at 776–77); *see also United States v. Sampson*, 898 F.3d 270, 282 (2d Cir. 2018) (noting the Second Circuit had previously affirmed a pretrial evidentiary analysis "where the government had voluntarily submitted an affidavit containing the entirety of its proof"); *United States v. Mennuti*, 639 F.2d 107, 108 n.1 (2d Cir. 1981) (applying the exception later discussed in *Alfonso*).

"A full proffer of the evidence" has been made when the government has provided "a detailed presentation of the entirety of the evidence." *Id.* On May 13, 2022, this court granted a Bill of Particulars on the issue of venue. (BOP M & O.) The Government filed its Bill of Particulars on May 27, 2022. (Letter in Resp. to BOP M & O ("BOP") (Dkt. 39).) Although some caselaw suggests that a bill of particulars can function as a full proffer of the evidence, *see, e.g.*, *United States v. Laurent*, 861 F. Supp. 2d 71, 110 (E.D.N.Y. 2011) ("Compliance with this order [granting defendant's motion for a bill of particulars that required names of witnesses, summaries of testimony, and all relevant documents on the issue] will be sufficient to constitute a full proffer of the evidence [the government] intends to present at trial"), it did not do so here.

***5** When granting Defendant Mackey's motion for a bill of particulars, the court specifically granted the Government's application to reserve its rights to change its venue theory or offer additional evidence up to or at trial. (BOP M & O at 5 n.1.) ("The court is mindful that a bill of particulars should not 'foreclose the government from using proof it may develop as the trial approaches.' *United States v. Jimenez*, 824 F. Supp. 351, 363 (S.D.N.Y. 1993). Accordingly, the government was granted leave to amend its theory of venue should that theory change during discovery, motion practice, or while preparing for trial. *See* 1 Wright & Miller, Fed. Prac. & Proc. Crim. § 130 (4th ed.).") And, in its responsive Bill of Particulars, the Government stated once more that it "reserves the right to amend this bill of particulars as the case progresses toward trial." (BOP at 2.)

Moreover, the Bill of Particulars offered only a single sentence pertaining to each of the four theories of venue for which it intends to put forward evidence at trial. (*Id.* at 1-2.) This constitutes a "limited proffer" rather than a "full proffer" because it merely "summarizes, typically in a single sentence, the testimony ... and the physical evidence that the government expects to present to the jury." *United States v. Urso*, 369 F. Supp. 2d 254, 259–60 (E.D.N.Y. 2005). In light of that fact, the Government's bill may not become "a method for the defendant to frame an argument that the government's trial evidence concerning venue will be insufficient." *United States v. Griffith*, 515 F. Supp. 3d 106, 123 (S.D.N.Y. 2021) (citing *United States v. Murgio*, 209 F. Supp. 3d 698, 720-21 (S.D.N.Y. 2016)). Thus the court shall, at this stage, assess Defendant's motion to dismiss the indictment for improper venue only insofar as facial consideration of the indictment will allow. At trial, the Government will need to prove venue to the jury by the preponderance of the evidence, *United States v. Tzolov*, 642 F.3d 314, 318 (2d Cir. 2011), whether that evidence be circumstantial or direct. *United States v. Potamitis*, 739 F.2d 784, 791 (2d Cir. 1984).

2. Legal framework

a. Venue in a criminal conspiracy

Venue is proper for a crime in the district in which the crime was committed. *See* U.S. Const. amend. VI. B; Fed. R. Crim. P. 18; *see also* U.S. Const. art. iii, § 2, cl. 3. But "[t]he site of a crime's commission is not always readily determined. The commission of some crimes can span several districts." *United States v. Rommy*, 506 F.3d 108, 119 (2d Cir. 2007). Indeed, the Supreme Court has frequently made clear that venue is proper in any district "through which force propelled by an offender operates," *United States v. Johnson*, 323 U.S. 273, 275 (1944). Venue for a subset of crimes, known as "continuing offense[s]," is proper in "any district in which such offense was begun, continued, or completed." 18 U.S.C § 3237(a). The Second Circuit has long held that crimes of conspiracy—like crimes involving kidnapping, *United States v. Rodriguez-Moreno*, 526 U.S. 275, 279 (1999), or interstate commerce—qualify as continuing offenses. *See, e.g.*, *Rommy*, 506 F.3d at 119-20; *United States v. Ramirez-Amaya*, 812 F.2d 813, 816 (2d Cir. 1987).

b. The essential conduct test in the Second Circuit

When applying the Supreme Court's primary test for identifying criminal venue, the essential conduct test or *locus delicti* test, "a court must initially identify the conduct constituting the offense (the nature of the offense) and then discern the location of the commission of the criminal acts." *Rodriguez-Moreno*, 526 U.S. at 279. While some circuits had traditionally relied on a narrower "verb test," the Supreme Court in *Rodriguez-Moreno* cautioned against "appl[ying]" that test "rigidly" or "to the exclusion of other relevant statutory language" in discerning what criminal conduct has occurred and where. *Id.* at 280. In the Second Circuit, essential conduct, also known as conduct constituting the offense, has occurred any place where either "the conspiratorial agreement was formed," *United States v. Ramirez-Amaya*, 812 F.2d 813, 816 (1987), or any overt act was (1) committed "for the purpose of accomplishing the objectives of the conspiracy," *Tzolov*, 642 F.3d at 320, so long as it was (2) reasonably foreseeable that the overt act would occur in that location. *United States v. Svoboda*, 347 F.3d 471, 483 (2d Cir. 2003). Overt acts in furtherance of a conspiracy constitute essential conduct regardless of whether those acts were committed by a defendant, a co-conspirator, or an innocent non-conspirator caused to act by a conspirator. *United States v. Royer*, 549 F.3d 886, 896 (2d Cir. 2008) ("This includes not just acts by co-conspirators but also acts that the conspirators caused others to take[.]"); *see also United States v. Abdullaev*, 761 F. App'x 78, 84 (2d Cir. 2019) (Summary Order) ("We have repeatedly found venue proper where an out-of-district defendant causes an overt act to be committed by an innocent third party within the district of venue[.]"); *United States v. Naranjo*, 14 F.3d 145, 147 (2d Cir. 1994) (stating that the defendant "need not have been present in the district, as long as an overt act in furtherance of the conspiracy occurred there").

***6** The Second Circuit's foreseeability requirement necessitates "some sense of venue having been freely chosen by the defendant." *United States v. Kirk Tang Yuk*, 885 F.3d 57, 69 (2d Cir. 2018) (quoting *United States v. Davis*, 689 F.3d 179, 186 (2d Cir. 2012)). "Actual knowledge that an overt act was committed in the district of prosecution is not required, however: venue will lie if a reasonable jury could find that it was more probable than not that the defendant reasonably could have foreseen that part of the offense would take place in the district of prosecution." *Id.* at 69-70. The foresee ability requirement does not operate to artificially limit the number of districts in which venue can be properly laid. *See United States v. Rowe*, 414 F.3d 271, 279 (2d Cir. 2005) ("[The defendant] must have known or contemplated that the advertisement would be transmitted by computer to anyone the whole world over who logged onto the site and entered the chat room. It is clear that the chat room could be entered in this district and in fact was entered in this district.").

And, importantly for the Section 241 context, "venue is proper in any district in which an overt act in furtherance of the conspiracy was committed, even where an overt act is not a required element of the conspiracy offense." *Whitfield v. United States*, 543 U.S. 209, 218 (2005). For this reason, although several circuits have held that there is no overt act required for a Section 241 conspiracy, courts in the Second Circuit have treated conspiracy under this statute the same as other kinds of conspiracies for the purposes of venue. *See, e.g.*, *United States v. Castellano*, 610 F. Supp. 1359, 1390 (S.D.N.Y. 1985).

c. Telephonic and electronic communications as overt acts

The Second Circuit has held that a reasonable jury can find the sending or receipt of telephonic or electronic communications into or out of a given district to be overt acts in furtherance of a conspiracy, and thus sufficient to give rise to venue in that district. *See Rommy*, 506 F.3d at 122. "That an instrument of commerce or technology permits the conspirator to communicate with his listener while physically removed from him does not alter the fact that the conspirator has committed an overt act at the recipient's location." *Id.*; *see also Lange*, 834 F.3d at 70 ("[V]enue is also proper in the district where an electronic communication was received.").

Phone calls between conspirators in furtherance of a conspiracy can give rise to venue in the district where either person involved with the phone call is located. *Id.* Phone calls between a conspirator and an innocent non-conspirator can also give rise to venue in the district where either person involved with the phone call is located, regardless of who placed the call. *See Rommy*, 506 F.3d at 122-123; *see also Naranjo*, 14 F.3d at 146 (holding that telephone call from conspirator in Eastern District of New York to undercover agent in Southern District of New York established venue in Southern District); *United States v. Kenner*, No. 13-CR-607 (JFB) (AYS), 2019 WL 6498699, at *5 (E.D.N.Y. Dec. 3, 2019) ("Indeed, phone calls into or out of a district can establish venue in that district so long as they further the ends of the conspiracy.").

The Circuit has also held venue to be proper in districts where emails, faxes, text messages, or messages to subscribers that furthered the ends of the conspiracy were sent or received, whether by conspirators or non-conspirators. *See United States v. Russell*, No. 09-CR-968 (DLI), 2014 WL 2558761, at *6-7 (E.D.N.Y. June 5, 2014) (finding venue proper where government agent located in the Eastern District of New York exchanged emails with conspirator and conspirator's wife), *aff'd in relevant part, rev'd in part sub nom. Lange*, 834 F.3d 58; *United States v. Kim*, 246 F.3d 186, 192 (2d Cir. 2001) (finding venue based on sending and receiving faxes); *Royer*, 549 F.3d at 896 (finding venue based on "defendants' transmission of confidential information to the AP site subscribers in *the* Eastern District of New York"); *Kirk Tang Yuk*, 885 F.3d at 74 (finding venue based on communications including text messages). And, this Circuit has construed receipt of an electronic communication to include acts as simple as a non-conspirator accessing a chatroom. *See Rowe*, 414 F.3d at 279 (finding venue proper when "it [was] clear that the chat room ... in fact was entered in this district").

***7** Furthermore, "venue lies where a wire in furtherance of a scheme begins its course, continues or ends." *United States v. Rutigliano*, 790 F.3d 389, 397 (2015) (citing *United States v. Gilboe*, 684 F.2d 235, 239 (2d Cir. 1982)); *see also Kim*, 246 F.3d at 192-93 (noting that "[t]he fact that he was not in Manhattan when he caused the wire transmissions does not eliminate the connection between Kim's acts and the Southern District for the purposes of venue" while holding that "wire communications to and from Manhattan were essential to the continuing offense of causing fraudulent wires to be transmitted.").

Venue is also proper in any district through which electronic communications in furtherance of the conspiracy pass. *See United States v. Brown*, 293 F. App'x 826, 829 (2d Cir. 2008) (Summary Order) (affirming a district court holding that a wire transfer automatically routed through Manhattan was sufficient to find venue in the Southern District); Sept. 3, 2021 Redacted Op. (Dkt. 84-1), *United States v. Ng Chong Hwa*, No. 18-CR-538 (E.D.N.Y. Sept. 10, 2021) ("*Ng* Order") at 46 (extending this principle to include use of "Goldman's telecommunication facilities, which transited through the Eastern District of New York"). This principle builds on the Second Circuit's longstanding willingness to find venue for a conspiracy properly laid in districts through which conspirators themselves had merely passed. *See Tzolov*, 642 F.3d at 314 (2d Cir. 2011) ("[V]enue for a conspiracy may be laid in a district through which conspirators passed in order to commit the underlying offense."); *United States v. Duque*, 123 F. App'x 447, 449 (2d Cir. 2005) (Summary Order) (where flying over Jamaica Bay was sufficient to find venue in the Southern District); *Kirk Tang Yuk*, 885 F.3d at 71-72 (where "passing over the channel known as 'the Narrows' " was sufficient to find venue in the Southern District).

d. The substantial contacts test in the Second Circuit

In *United States v. Reed* in 1985, the Second Circuit set forth a "substantial contacts" test for determining criminal venue. 773 F.2d 477, 481 (2d Cir. 1985). This test weighed several factors including (1) "the site of the defendant's acts," (2) "the elements and nature of the crime," (3) "the locus of the effect of the criminal conduct," and (4) "the suitability of each district for accurate factfinding." *Id.* In a series of holdings throughout the 1990s, however, the Supreme Court—though not explicitly overturning the substantial contacts test—adopted a different test, the essential conduct test discussed at length above. *See generally Rodriguez-Moreno*, 526 U.S. 275; *United States v. Cabrales*, 524 U.S. 1 (1998).

Although the Second Circuit has since continued to at times supplement the Supreme Court's controlling essential conduct test with its own substantial contacts test, it now accords it less weight and has significantly narrowed the doctrine to better fit the Supreme Court's line of venue cases. The Circuit has, in particular, noted that the substantial contacts test from *Reed* is not a "formal constitutional test," and, rather, is intended to help courts in determining "whether a chosen venue is unfair or prejudicial to a defendant," "especially in those cases where the defendant's acts did not take place within the district selected as the venue for the trial." *United States v. Saavedra*, 223 F.3d 85, 93 (2d Cir. 2000). Lately, the Second Circuit has construed *Reed* as allowing the substantial contacts test to be automatically met if the defendant's acts in the district were themselves "a sufficient basis for establishing venue." *Tzolov*, 642 F.3d at 321. Where a case can be neatly decided on that prong, courts in the Second Circuit need not weigh other factors from *Reed*'s substantial contacts test. *Id.* Further, a court need only make the substantial contacts inquiry "if the defendant argues that his prosecution in the contested district will result in a hardship to him, prejudice him, or undermine the fairness of the trial." *Rutigliano*, 790 F.3d at 399; *see also Lange*, 834 F.3d at 75. When, however, "an overt act in furtherance of a criminal conspiracy has been committed in the district ... this supplemental inquiry

has no relevance." *Kirk Tang Yuk*, 885 F.3d at 70.

3. Application

***8** The Indictment is facially sufficient as to venue because a reasonable jury could find venue to be proper under any one of several theories put forward by the Government.

a. Venue based on overt acts in furtherance of the conspiracy

In the BOP and the Government's Opposition to the Motion, (*see* Opp. 22-31), the Government asserts that disinformation was spread, over Twitter, in furtherance of the conspiracy, "to and through the Eastern District of New York," through Tweets and retweets received in the district as well as when the "Deceptive Images passed through the Eastern District of New York as they were electronically sent from Manhattan to Twitter's servers and beyond." (BOP at 1; Opp. at 25.) The Government also asserts that as a result of acts committed by conspirators, the disinformation was viewed by Twitter users in the Eastern District of New York. (Opp. at 25.) Given that the instant charges under Section 241 allege a criminal conspiracy, *id.*, the *locus delecti* can be found anywhere that an act in furtherance of the charged Section 241 conspiracy has taken place. *See Kirk Tang Yuk*, 885 F.3d at 70.

A reasonable jury could find that the tweeting of deceptive images into the Eastern District was an "overt act" in furtherance of the alleged scheme to spread disinformation over Twitter in the hopes of injuring the right to vote, whether tweeted by Defendant Mackey or retweeted by a co-conspirator or innocent non-conspirator caused to act by members of the conspiracy. *See Abdullaev*, 761 F. App'x at 84 (Summary Order) ("We have repeatedly found venue proper where an out-of-district defendant causes an overt act to be committed by an innocent third party within the district of venue."); *see also Royer*, 549 F.3d at 895 (finding that venue would be proper in the district where innocent site subscribers acted). Defendant Mackey argues in his reply brief that because the Government has not presented past cases where criminal venue was established by Tweets, communications using Twitter cannot properly support a finding of venue. (Reply at 2.) So narrow a reading of the relevant case law would ignore the interpretative dynamism necessitated by the rapid technological change of our era. As more and more Americans choose to communicate via Twitter and other messaging platforms rather than by phone or email, the judiciary's understanding of how continuing crimes can be committed through electronic communications must keep pace and evolve. Although the cases discussed above did not deal directly with communications via Twitter, the Second Circuit's cases on phone calls, emails, text messages, faxes, chat room messages, and wire transfers as overt acts illustrate that the government can establish venue where such electronic communications were sent to or received by individuals in the venue district. Tweets are themselves electronic communications, so the Government may establish venue based on where Tweets are foreseeably received.

Similarly, venue would be properly laid in the Eastern District if the jury found by the preponderance of the evidence that deceptive images in furtherance of the charged conspiracy had foreseeably "passed through the Eastern District of New York as they were electronically sent from Manhattan to Twitter's servers and beyond." (Opp. at 25.) Venue is proper in any district through which electronic communications in furtherance of the conspiracy passed. *See Brown*, 293 F. App'x at 829; *Ng* Order at 46. There is no meaningful difference between automatic routings of funds or wire communications and the movement of electronic messaging over Twitter servers. If an electronic wire gives rise to venue in a district by merely passing through, so too do electronic Tweets.[9]

***9** If the Government proves at trial that the deceptive images were viewed in the Eastern District, and that such viewing (though innocent) was a foreseeable overt act furthering the ends of the conspiracy, it could also properly give rise to a finding of venue. A reasonable jury could find that logging onto Twitter and viewing the Deceptive Tweets was an overt act and that though the viewers were innocent third parties, their doing so unwittingly furthered the ends of the conspiracy against their right to vote. It is of no import that those viewing the tweets were unaware of the conspiracy, so long as the conspirators caused them to do so and their doing so furthered the objects of the conspiracy. *See Royer*, 549 F.3d at 896. Most significantly, innocent viewing of tweets was in no way "anterior and remote to" the criminal conduct. *United States v. Geibel*, 369 F.3d 682, 697 (2d Cir. 2004). Instead, these alleged acts were "crucial to the success of the scheme." *Royer*, 549 F.3d at 894.

Defendant Mackey argues that individuals accessing the

tweets in the Eastern District would not be engaging in sufficiently essential conduct for venue to be proper, relying heavily on a recent Third Circuit case, *United States v. Auernheimer*. 748 F.3d 525 (3d Cir. 2014). That case does not control in this district, however, and runs contrary to controlling case law in the Second Circuit. Moreover, the facts in *Auernheimer* are easily distinguishable. While both cases deal with "mass interconnectivity" over the internet, the defendant in *Auernheimer* was merely alleged to have unlawfully collected email addresses belonging to residents of the District of New Jersey. 748 F.3d at 533-534. There was no allegation that any communications were sent to or received in the District of New Jersey. *Id.* And there were no allegations that the holders of those email addresses themselves took any steps in furtherance of the conspiracy. *Id.*

Finally, a reasonable jury could hold, under any of these theories, that it was reasonably foreseeable that Tweets from a Manhattan-based Twitter personality with thousands of followers (Compl. 8-11) would reach or pass through a judicial district as large as the Eastern District of New York. Where, as here, "the use of modern communications facilities to execute a sophisticated criminal scheme inherently contemplates activities throughout" a large geographic area, conspirators should not then be able to escape the broad geographical scope stemming from the broad intentions of that scheme. *Royer*, 549 F.3d at 893.

b. Venue based on location of intended victims

The last of the Government's proffered theories of venue—that venue is proper because intended victims of the misinformation conspiracy were located in the Eastern District, (Opp. at 28)—presents a different legal question. Finding venue under this theory would require a holding that venue can be proper due to the effects of a conspiracy, even when no act was committed in the district where venue is sought. In support of this proposition, the Government (1) argues that effects-based venue is appropriate where, as here, there is no overt act element of the crime, and (2) cites to *Reed*'s inclusion of the effects of a conspiracy in the substantial contacts test. This court is not persuaded, however, that because some circuits have held there need not be *overt* acts in furtherance of a conspiracy for a conspiracy against rights to have taken place, venue is proper wherever the effects of a civil rights conspiracy were *intended* to be felt. Even if Defendant Mackey had conspired to send but never actually sent his Tweets, he and his co-conspirators would still have participated in conduct constituting the offense by forming the conspiracy to begin with, and there would therefore always be at least one judicial district in which venue is proper.

Furthermore, the substantial contacts test does not apply in this context, and its focus on effects-based venue is therefore irrelevant. *Kirk Tang Yuk*, 885 F.3d at 70 (stating that when "an overt act in furtherance of a criminal conspiracy has been committed in the district ... this supplemental inquiry has no relevance."). Finally, the substantial contacts test is used today as an additional check on fairness, not as a method for expanding venue. *See Saavedra*, 223 F.3d at 93. The test is intended to guard against "the two chief ills that the constitutional venue provisions are meant to guard against—bias and inconvenience[.]" *Rowe*, 414 F.3d at 279-280. Given that the most obvious place for venue to be proper, the Southern District of New York, lies just across the river from this venue, and that the residents of that district hold much the same political leanings as the residents of the Eastern District, those factors "are not substantially present in this case." *Id.* Defendant Mackey argues on reply that the Government should be unable to establish that venue lies in a given district purely because it is "the location of the intended victims" of a conspiracy. (Reply at 3-5.) This court agrees. Were this the only mode of contact with the district, venue would not be properly laid.

***10** However, given the several ways in which a jury *could* properly find venue, this court does not dismiss the Indictment for lack of venue.

B. Due Process

Defendant Mackey also argues for dismissal of the Indictment on the basis that it violates his due process rights. Mr. Mackey contends that he did not have sufficient warning that conspiring to tweet false voting instructions would constitute criminal conduct pursuant to Section 241. In support of this argument, Defendant Mackey reasons (1) that Section 241 was not intended to "expand criminal liability" and this prosecution does not sufficiently resemble prior prosecutions, (2) that the way the statute was written implies "injury" would not include the instant conduct, (3) that an examination of Department of Justice and Congressional materials implies this behavior was not intended to be criminalized by the statute, and (4) that the general rule of lenity in criminal cases should apply.

All of these theories are premised on the well-settled proposition that criminal defendants are entitled to "fair warning ... of what the law intends to do if a certain line is passed." *United States v. Lanier*, 520 U.S. 259, 266 (1997) (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)). At its core, the "principle is that no man shall be held criminally responsible for conduct that he could not reasonably understand to be proscribed." *Id.* (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964)). And the constitutional commitment to "[d]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *Id.*

Lanier states plainly that "[w]hen broad constitutional requirements have been 'made specific' by the text or settled interpretations, willful violators 'certainly are in no position to say that they had no adequate advance notice that they would be visited with punishment. They are not punished for violating an unknowable something." *Id.* at 267 (quoting *Screws v. United States*, 325 U.S. 91, 105 (1945) (alterations adopted)). Rather, the standard for fair warning in a criminal case is akin to the "clearly established" standard used to determine qualified immunity in civil cases. *Id.* at 271. Fair warning of possible prosecution under § 241 is provided to defendants "if, but only if, in light of pre-existing law the unlawfulness under the Constitution is apparent." *Id.* Drawing on qualified immunity case law, the Court held that "general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful." *Id.*

Lanier thus rejected the more stringent "fundamentally similar" standard put forth by the Sixth Circuit, pointing instead to past decisions in which the Court had "upheld convictions under § 241 or § 242 despite notable factual distinctions between the precedents relied on and the cases then before the Court" because "prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *Id.* at 269 (citing *United States v. Guest*, 383 U.S. 745, 759, n.17 (1966) (addressing imposition on the right to travel by private persons for the first time, where prior right to travel cases had focused on state action), *United States v. Saylor*, 322 U.S. 385 (holding that vote dilution violated § 241, where prior cases only addressed improper counts of the vote), and *United States v. Classic*, 313 U.S. 299, 321-324 (1941) (expanding vote counting cases into the primary election context)). In *United States v. Classic*, 313 U.S. 299 (1941), the Supreme Court offered guidance on when a § 241 prosecution violates due process by expanding criminal liability to a context not apparent from prior cases.

> ***11** [I]t is no extension of the criminal statute ... to find a violation of it in a new method of interference with the right which its words protect. For it is the constitutional right, regardless of the method of interference, which is the subject of the statute and which in precise terms it protects from injury and oppression.

Classic, 313 U.S. at 324.

The scope of criminal liability must also be examined within the context of the specific statute in question, and Section 241 functions differently from most federal criminal statutes. "Section 241 of Title 18 is an anomaly in the federal code of crimes ... and it is *sui generis* in the federal law of conspiracy. Ordinarily, a conspiracy is an agreement between two or more persons to do an unlawful thing by unlawful means. Yet it is not a substantive federal crime to do what Section 241 makes it a federal crime to conspire to do." *Crolich v. United States*, 196 F.2d 879, 880 (5th Cir. 1952).

Finally, it is irrelevant whether a defendant was actively thinking of their behavior in constitutional terms. "The fact that the defendants may not have been thinking in constitutional terms is not material where their aim was not to enforce local law but to deprive a citizen of a right and that right was protected by the Constitution. When they so act they at least act in reckless disregard of constitutional prohibitions or guarantees.' " *Screws v. United States*, 325 U.S. 91, 105 (1945); *see also United States v. Nathan*, 238 F.2d 401, 407 (7th Cir. 1956) ("[I]t is immaterial that the defendants were without knowledge of the constitutional rights of citizens. When they acted in concert to pollute the ballot box they acted in reckless disregard of such rights and must be held to the consequences.").

1. Prior Prosecutions

In order to properly assess whether fair warning was given to Defendant Mackey, this court must understand the scope of prior prosecutions under the statute. For a fair warning analysis, "the pre-existing law may be found in appellate as well as lower court decisions." *United States v. Melendez*, No. 03-80598 (AC), 2004 WL 162937 at *6 (E.D. Mich. Jan. 20, 2004). § 241's fair warning doctrine focuses most centrally on the *right* that has been

violated — in this case, the right to vote. A fulsome review of the federal courts' § 241 voting rights cases to date thus constitutes the court's best available tool for determining whether fair warning for the instant prosecution was given.

Section 241 was originally enacted as Section 6 of the Enforcement Act of 1870. Like other provisions of the Enforcement Act, Section 6's original focus was on enforcing reconstruction's promise of suffrage for southern Black men in the face of significant violence and pushback from the Ku Klux Klan, then in its heyday. Eric Foner, Reconstruction: America's Unfinished Revolution 1863-1877 454 (2005 ed.). As Congress and the Supreme Court retreated on the issue of reconstruction, bowing to political forces in the South, much of the Enforcement Act was struck down or repealed. *Id.* By the end of the era, only Section 6 and its sister provision Section 7, now Sections 241 and 242, remained in force. *Id.* at 454-55. From their start, these statutory provisions were largely about voting rights "secured ... by the constitution and laws of the United States of America." *Ex parte Yarbrough*, 110 U.S. 65 (1884) ("The Ku Klux Cases"); *see also United States v. Butler*, 25 F. Cas. 213, 220 (1877). Although "the source of this section in the doings of the Ku Klux and the like is obvious, and acts of violence obviously were in the minds of Congress" when legislating, the statute has since been used to prosecute a wide range of non-violent conspiracies entered into with the intent to injure, oppress, threaten, or intimidate free exercise of the right to vote as well as other constitutional and federal rights. *United States v. Mosley*, 238 U.S. 383, 387-88 (1915) ("§ 6 being devoted, as we have said, to the protection of all Federal rights from conspiracies against them, naturally did not confine itself to conspiracies contemplating violence[.]"). And, "in determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government, they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men." *Classic*, 313 U.S. at 316.

a. The evolution of election-related § 241 cases

***12** The first election-related § 241 case on record took place in 1877, when two election officials were prosecuted under the statute for conspiring to kill a Black man because he supported a Republican rather than a Democrat in a federal general election. *United States v. Butler*, 25 F. Cas. 213, 220 (D.S.C. 1877). But by the 1910s, the statute was also used to prosecute less violent conspiracies against voting rights. In 1911, local election officials were indicted for conspiring to make ballots intentionally confusing for one party's voters. *United States v. Stone*, 188 F. 836, 838-39 (D. Md. 1911). In 1915, officers of a county board of elections were indicted for conspiring to omit certain votes from the vote count. *United States v. Mosley*, 238 U.S. 383, 385 (1915).

In 1918, the Supreme Court cabined the growing doctrine slightly, holding in *United States v. Bathgate* that bribing voters was not an infringement on the right to vote under Section 241. 246 U.S. 220, 227 (1918). The Court reasoned first that it could not construe § 241 to cover conspiracies to bribe voters because Congress had made its wishes clear by expressly repealing a different section of the act which dealt specifically with bribery. *Bathgate*, 246 U.S. at 226. The Court further reasoned that the right to vote at issue under this statute was the *personal* right to vote rather than the general political right to vote; under the *Bathgate* scheme, although the vote count totals were manipulated, individuals maintained their personal right to vote. *Id.* at 226-27.[10]

But *Bathgate's* limitation of the statute was an anomaly. In the 1930s, the Department of Justice (the "DOJ") prosecuted an ever-broader range of voting rights cases under this statute, with the understanding that injuring the right to vote included both hampering a qualified voter's ability to cast their vote and failing to count a vote properly cast. *See United States v. Pleva*, 66 F.2d 529, 530 (2d Cir. 1933) (addressing election inspectors that conspired to tally the ballots incorrectly); *United States v. Buck*, 18 F. Supp. 213, 215 (W.D. Mo. 1937) (prosecuting election commissioners that conspired to injure voters' rights by counting certain votes for a different candidate); *United States v. Clark*, 19 F. Supp. 981 (W.D. Mo. 1937) (holding that changing votes after polls had been closed could also be prosecuted under this statute); *Walker v. United States*, 93 F.2d 383, 388 (8th Cir. 1937) (county election officials "conspired to count, record, and certify the ballots of voters [in a presidential election] falsely with fraudulent intent"); *Ryan v. United States*, 99 F.2d 864, 867-68 (8th Cir. 1938) (holding that a jury was correct in finding that ballots were falsified and other ballots were changed from Democratic to Republican by a certain ward's Republican Committee-woman).[11]

***13** In *United States v. Classic*, 313 U.S. 299 (1941), the Court made clear that it viewed the statute as flexible enough to be used in situations that were new but implicated the same rights, as both the nature of the right to vote *and* the most effective ways to oppress voters' rights naturally shifted over time. *United States v. Classic*,

313 U.S. 299 (1941). The Court considered an alleged conspiracy to miscount votes in a Louisiana primary election, where the power to elect a Louisiana representative to Congress had functionally shifted to the primary elections, as those primaries limited who citizens would be able to choose on the general election ballot. *Id.* at 308-09. The Court held that Section 241 could be used to prosecute interference with the right to vote in a Louisiana party primary election, although it was not technically a federal election, because that interference was actually interference with the broader right to vote, and was merely taking place "at the only stage of the election procedure when [voters'] choice is of significance ... [or] could have any practical effect on the ultimate result, the choice of the Congressman to represent the district." *Id.* at 314. In other words, § 241 could be violated at any stage that represented an "integral part of the procedure for the popular choice" and in any way that injured their "right to participate in that choice," regardless of whether the method for doing so was "one with which the framers were not familiar." *Id.* at 314, 316.

Throughout the 1940s, 50s and 60s, the Department of Justice continued to prosecute cases against those who used a variety of methods to injure or oppress the "personal right of the elector to cast his own vote and have it honestly counted." *Saylor*, 322 US. at 387; *see Klein v. United States*, 176 F.2d 184, 185 (8th Cir. 1949) (addressing conspiracy to hinder properly registered voters and cause unqualified voters to vote in the name of qualified voters); *United States v. Prichard*, 181 F.2d 326, 327 (6th Cir. 1950) (stuffing ballot boxes); *Crolich v. United States*, 196 F.2d 879, 880 (5th Cir. 1952) (stuffing ballot boxes); *United States v. Nathan*, 238 F.2d 401, 403 (7th Cir. 1956) ("pollution of the ballot box" by submitting ballots from fake voters); *Fields v. United States*, 228 F.2d 544, 547 (4th Cir. 1955) (discussing conspiracy to incorrectly fill out ballots on behalf of illiterate voters who thought they were receiving assistance in voting); *United States v. Skurla*, 126 F. Supp. 713, 715 (W.D.P.A. 1954) (considering situation where conspirators forged false ballots, "caused an incorrect tally of the votes cast to be returned" and paid people "to impersonate lawful voters and to cast illegal votes"); *United States v. Ellis*, 43 F. Supp. 321, 324 (W.D.S.C. 1942) ("[T]he right to vote in a Federal election comprehends and includes the right to register for a General Election."); *United States v. Chandler*, 157 F. Supp. 753, 754 (S.D. W. Va. 1957) (falsified absentee ballot voting).

Over the last fifty years, indictments under § 241 have continued to evolve in order to adequately address injuries to the right to vote, as modes of voting and would-be wrongdoers' corresponding methods for injuring those votes have shifted. Notably, a 1988 federal indictment under § 241 dealt with a relatively complex scheme to intentionally misdirect votes by absentee voters opposing the conspirators' preferred candidate. *United States v. Townsley*, 843 F.2d 1070, 1073-75 (8th Cir. 1988). In that case, the "Democratic Committeeman" for a ward organization in St. Louis had workers in that organization qualified as notaries. *Id.* at 1074. He then required those notaries to go to absentee voters' houses to notarize and retrieve their ballots, but to leave those ballots partially unsealed and bring them directly to his office. *Id.* The committeeman would then check each ballot and submit only those ballots in favor of his organization's candidate. *Id.* Although the circuit reversed the district court on an unrelated issue, it noted that the § 241 count of the indictment was sufficient to sustain a verdict. *Id.* at 1086. Similarly, in *United States v. Olinger*, a precinct captain was indicted under § 241 after he instructed election judges purporting to assist elderly and mentally ill voters to instead "punch 10" on each resident's computerized ballot, resulting in a vote for all Democrats on the ballot. *United States v. Olinger*, 759 F.2d 1293, 1297 (7th Cir. 1985).

***14** More recently, in *United States v. Tobin*, the Department of Justice prosecuted a defendant under § 241 for allegedly conspiring to "disrupt the telephone lines" through which voters could seek assistance from the state Democratic party or firefighters "to impede or prevent voters who needed transportation from getting to the polls," in order "to prevent voters from casting votes for Democratic candidates in the federal election." No. 04-CR-216-01 (SM), 2005 WL 3199672, at *1 (D.N.H. Nov. 30, 2005). Although the jury did not ultimately convict on the evidence presented, the district court found that defendant had fair warning and the indictment survived the corresponding motion to dismiss. *Id.* at *4 ("That a conspiracy or agreement to interfere with the free exercise of the right to vote would violate § 241 is established in the prior decisions of the Supreme Court. Fair warning is given by the statute and decisional law that such conduct is prohibited.").

In sum, the statute's historical usage shows that the indictment before the court today is the latest in a long line of electoral and voting rights prosecutions under 18 U.S.C. § 241. For more than a century, courts have held that this statute flexibly proscribes conspiracies to injure the right to vote in a variety of contexts and undertaken using a variety of mechanisms.

b. Physical Acts, Threatening or Intimidating Speech, and Independent Wrongful Conduct

Defendant Mackey is correct that many—but not all—of the cases above pertain to physical acts such as stuffing a ballot box or counting fraudulent votes. (*See* Mot. at 14.) These cases did not, however, *rely* on the physicality of the acts to reach their holdings. Indeed, many of those cases raised a similar question to the one before the court: whether the statute was "sufficiently broad in its scope to include the offense" charged. *Foss v. United States.*, 266 F. 881, 882 (9th Cir. 1920). Not once has a federal court's response to that question been defined by the offense's corporeal tangibility. *See e.g.*, *Saylor*, 322 U.S. at 388 (deciding that the statute included the charged offense based solely because there was a conspiracy "directed at the personal right of the elector to cast his own vote and to have it honestly counted"). Nor does the statute or the case law offer any reason why a court *would* rely on that fact.

It is also true, as Defendant Mackey claims, (*see* Mot. at 14), that some past cases involving potential violations of Section 241 have pertained to threatening or intimidating speech. *See, e.g.*, *United States v. Robinson*, 813 F.3d 251, 254 (6th Cir. 2016) ("[Defendant] ... coerced and threatened voters to get them to vote for her by absentee ballot."); *Butler*, 25 F. Cas. at 220. Once again, there is nothing in these cases indicating that threats or intimidation are the only kinds of speech through which the statute could be violated. "[T]he specific means chosen by the alleged conspirators to achieve their goal of suppressing the number of votes cast for Democrats ... is not significant in the fair warning context." *Tobin*, 2005 WL 3199672, at *3.

Finally, although many § 241 prosecutions involve some "independent wrongful conduct" that would itself constitute a substantive crime, that is certainly not required under the statute. For instance, in *Guinn v. United States*, 238 U.S. 347 (1915), the Supreme Court upheld a prosecution of Oklahoma state election officers who enforced the provisions of an amendment to the Oklahoma constitution that disenfranchised citizens whose lineal ancestors were illiterate as of January 1, 1866, as a conspiracy to violate the Fifteenth Amendment. *Id.* at 354. State officials enforcing their state's own constitution can hardly be said to have been engaging in "independent wrongful conduct," though a conspiracy to do so did, in fact, violate Section 241.

Given the above, it is clear that the lack of physical action, threat or intimidation, or "independent wrongful conduct" found in Mr. Mackey's alleged conspiracy has no bearing on the question of fair warning.

2. Definition of Injury within Section 241

***15** Next, Defendant Mackey invokes principles of statutory construction to argue that (1) the definition of "injury" in Section 241 does not include acts that "merely hinder or prevent" the free exercise of a constitutional right, (Mot. at 16-18) and (2) when read in connection to related statutes, the concept of "injury" in Section 241 necessitates some kind of forcible act, (Mot. at 14-16).

Specifically, Defendant Mackey posits that a comparison of the first and second clauses of Section 241 gives support to a limited definition of injury under the first clause of § 241 in accordance with the principle of *expressio unius est exclusio alterius.* The word "hinder" is expressly included in the list of verbs in the second clause of § 241 (relating to Klansmen in disguise on a highway), but not in the list of verbs in the first clause of § 241 (at issue here). 18 U.S.C § 241. This omission of "hinder" from the verb list, Defendant Mackey argues, expressly limits the reach of Section 241's first clause. But existing case law belies this conclusion. *See Lanier*, 520 U.S. at 266 (relying on the "general constitutional rule already identified in the decisional law" to find fair warning).

Federal courts have for decades defined "injury" to or "oppression" of rights as including behavior that "obstruct[s]," "hinder[s]," or "prevent[s]," *Klein*, 176 F.2d at 185; "frustrate[s]," *United States v. Weston*, 417 F.2d 181, 183 (1969); makes "difficult," *United States v. Stone*, 188 F. 836, 838 (D. Md. 1911); or "indirect[ly] rather than" "direct[ly] assault[s]," *Tobin*, 2005 WL 3199672 at *4, the free exercise of rights. In Stone, it was sufficient that officials conspired to "prepare[ ] and ... print[ ] and fold[ ] the official ballots in such form that any voter could easily vote for the Democratic candidate" but so that it would be "difficult" or "impossible" for many voters, particularly illiterate Black voters, to vote for the Republican candidate. *Stone*, 188 F. at 838. The court in *Stone* also explicitly defined a Section 241 injury as "some act which is intended to *prevent* some citizen or citizens from exercising their constitutional rights." *Stone*, 188 F. at 840 (emphasis added). As far back as 1884, the Supreme Court has held that "[w]henever the acts complained of are of a character to *prevent* [the free exercise of the relevant right], or *throw obstruction in the way of* exercising this right, and for the purpose and with intent to prevent it ... those acts come within the purview of the statute." *United States v. Waddell*, 112 U.S. 76, 80 (1884) (emphasis added). Thus, a reasonable jury could find that conduct that makes exercising the right to vote

more difficult, or in some way prevents voters from exercising their right to vote, could in fact constitute a Section 241 injury to that right.

Further, the Supreme Court in *Mosley* interpreted the relationship between § 241's first and second clauses differently from how Defendant Mackey urges. *See Mosley*, 238 U.S. at 387-88. When Congress amended the relevant statute just a few years prior, it reorganized the clauses—moving the more general language regarding injury to conspiracies first, while putting the other clause, about the Klan in disguise on the highway, second—to reflect the changing times. *Id.* The statutory provision now codified as Section 241

> had a general scope and used general words that have become the most important now that the Ku Klux have passed away. The change of emphasis is shown by the wording already transposed.... The clause as to going in disguise upon the highway has dropped into a subordinate place, and even there has a somewhat anomalous sound. The section now begins with sweeping general words.

***16** *Id.* at 388. In other words, the Supreme Court construed the "sweeping general words" of § 241's first clause as the broader part of the statute, and the second clause to be comparatively narrow in its scope; Defendant Mackey's interpretation would allow the narrower second clause to restrict the first.

Nor does the exclusion of the word "hinder" from the first clause, in itself, limit the scope of the fair warning given to potential violators like Mr. Mackey. As discussed above, federal courts have held that "hindering" is a method of "injuring" a right under the first clause of Section 241. *Klein*, 176 F.2d at 185. Moreover, Merriam Webster defines "to hinder" as "to make slow or *difficult* the progress of: hamper," or "to hold back: *prevent*, check." *See* Merriam-Webster.com Dictionary, *"Hinder"* (last visited Jan. 23, 2023), https://www.merriam-webster.com/dictionary/hinder.

The cases cited by Defendant Mackey for the proposition that Section 241 does not prohibit "merely inhibiting exercise of rights," (Mot. at 16), deal with—and cabin their holdings to—different verbs in the statute than the one under which the Government primarily seeks to prosecute Defendant Mackey—"threaten" and "intimidate" rather than "injure."[12] *See United States v. Lee*, 6 F.3d 1297, 1298-99 (8th Cir. 1993) (en banc) (Gibson, J., concurring); *United States v. Magleby*, 241 F.3d 1306, 1314 (10th Cir. 2001).

Defendant Mackey next argues that the definition of "injury" in Section 241 necessitates some kind of forcible act when read in connection with Section 245. (Mot. at 14.) But this betrays a fundamental misunderstanding of both the relationship between Section 241 and Section 245 and *United States v. Pacelli*, 491 F.2d 1108 (2d Cir. 1974), the case upon which he draws. Section 245 "made it unlawful to interfere with a number of specifically listed 'federally protected activities.' " *Id.* at 1113. But contrary to Defendant Mackey's argument (and unlike Section 241), that section explicitly prohibited injuring the exercise of the enumerated rights "*by force or threat of force.*" 18 U.S.C. § 245(b). Section 241 does nothing of the sort. And *Pacelli* explicitly rejected any contention that Section 245's limitations should be understood to amend or otherwise limit the scope of Section 241: the Second Circuit specifically found "no basis in the new statute or in its history warranting a departure from the rule against amendments by implication," *Id.* at 1115, and thus held that the federal courts' past construction of Section 241 would remain untouched. Congress's purpose in enacting Section 245 was to "draft a law effectively dealing with racial violence only," with no "intention to strip the national government of its existing ability under § 241 to protect" rights. *Id.* at 1114-15. Thus, Section 245's requirement of some "forcible act" has no bearing on what is protected under Section 241.

***17** In fact, as discussed above, courts have very explicitly held § 241 to apply to a whole host of acts that do not include the use of force or violence, *see*, *e.g.*, *Saylor*, 322 U.S. at 385 (holding that vote dilution violated the right to vote under § 241 though prior cases had not dealt only with the violations through improper counts of the vote), *Classic*, 313 U.S. at 299 (expanding vote counting cases into the primary election context), and the Second Circuit explicitly left those holdings intact after the passage of the related but distinct Section 245.[13]

Taken together, the decisional and statutory law does not provide support for a finding that Mr. Mackey lacked fair warning that a conspiracy to prevent, hinder, or inhibit the free exercise of the right to vote, without the use of force, could violate Section 241.

3. DOJ and Congressional Materials

There is no requirement that, in order to give Mr. Mackey fair warning that his conduct violated Section 241, the Department of Justice needed to publish materials detailing his exact method of allegedly violating the statute as an example of misconduct under § 241. Moreover, the publications cited in Defendant's Motion do not narrow the scope of what might constitute criminal

activity under Section 241. (*See* Mot. at 21-22.) Indeed, the language these publications offer explaining the contours of what could violate the statute going forward can easily be construed to include the conduct at issue here. The 2017 Guide to Federal Prosecution of Election Offenses lays out examples of "private schemes"[14] that align with this case and the cases discussed above: "(1) voting fraudulent ballots in mixed elections, and (2) thwarting get-out-the-vote or ride-to-the-polls activities of political factions or parties through such methods as jamming telephone lines or vandalizing motor vehicles." Dep't of Just, Federal Prosecution of Election Offenses 36-37 (2017).

***18** Defendant Mackey also invokes Congress's repeated decision not to pass the Deceptive Practices and Voter Intimidation Prevention Act, a bill seeking to criminalize election interference by misinformation which has been regularly introduced in Congress since 2005, as evidence that Defendant Mackey's conduct was (at least arguably) not already covered by Section 241. *See, e.g.*, S. 1975, 109th Congress, First Session; S. 4069, 109th Congress, Second Session; S. 453, 110th Congress, First Session; S. 1840, 117th Congress. Without explicitly saying so, Defendant Mackey is arguing that this statute should be interpreted according to the extrinsic canon known as the "Rejected Proposal Rule." William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 Mich. L. Rev. 67, 69 (1988) ("[T]he 'rejected proposal rule' ... posits that proposals rejected by Congress are an indication that the [existing] statute cannot be interpreted to resemble the rejected proposals.").

Here, however, there is sufficient case law as to the scope of Section 241 that this court need not resort to extrinsic canons relating to subsequent legislative history in order to determine fair warning. Even if the court did choose to consider this related legislative history, however, it would not reach Defendant Mackey's conclusion: the reality is that members of Congress often have political reasons for introducing legislation or suggesting further clarification of an existing rule, such as posturing for cameras or satisfying important constituencies.[15]

4. Rule of Lenity

Mr. Mackey also brings forth a more general argument that the rule of lenity counsels in favor of dismissing the Indictment because the question of fair warning is, in his view, a close one. But the rule of lenity counsels courts "to favor a more lenient interpretation of a criminal statute when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute." *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 16 (2011). Section 241 is unambiguous, and thus the court does believe the rule of lenity applies.

5. Conclusion

In sum, this court finds that the record of historical prosecutions of conspiracies to injure the right to vote, combined with a reasonable reading of the statute itself, constituted ample fair warning for Defendant Mackey that his alleged conduct would violate Section 241.

C. First Amendment

Finally, Mr. Mackey argues that the Indictment should be dismissed because Section 241 is, as applied in the instant prosecution, unconstitutional under the First Amendment.[16] The court disagrees. Defendant Mackey argues that, although Section 241 is facially constitutional, he cannot be prosecuted thereunder for his Deceptive Tweets because they are examples of election deception, a type of pure speech protected by the First Amendment at its fullest. Controlling case law and the values undergirding the Supreme Court's First Amendment jurisprudence do not support this outcome.

***19** This case is about conspiracy and injury, not speech. (*See* Opp. at 15-16 (collecting cases and arguing that "the language [Defendant Mackey] used is akin to verbal acts," which fall outside the scope of the First Amendment, "rather than protected ... speech.").) As previously stated, § 241 does not require an overt act, *see Crolich*, 196 F.2d at 880, nor is it restricted to specific methods used to effectuate the alleged conspiracy against rights. As applied within the Indictment, this law is used to prosecute a conspiracy to trick people into staying home from the polls—conduct effectuated through speech—not a crime particular to the utterances made to effect that aim.

To the extent that the conduct allegedly used to affect a conspired-about injury *does* implicate the First Amendment, the appropriate analysis is one of how the First Amendment interacts with verifiably factually false utterances made to "gain a material advantage" in the context of election procedures. *United States v. Alvarez*, 567 U.S. 709, 723 (2012).[17,18] False speech raises unique

First Amendment concerns, and depending on the context of the false speech, may fall into categories historically exempted from First Amendment protection or warrant intermediate, not strict, scrutiny. *Id.* at 717 (Kennedy, J, plurality); *id.* at 730-31 (Breyer, J., concurring in the judgment). Under either approach, this prosecution passes constitutional muster, and Defendant Mackey's remaining contention—that his speech is protected as satire—is a question of fact reserved for the jury.

1. False Speech—Legal Framework[19]

a. The Alvarez *plurality—categorical approach and strict scrutiny*

***20** In some instances, including in the plurality in *Alvarez*, the Supreme Court has employed a historical-categorical approach to determining when utterances are unprotected by the First Amendment, even where the statute in question is content-based. *See Alvarez*, 567 U.S. at 717. Under that approach, "content-based restrictions have been permitted, as a general matter, only when confined to the few historic and traditional categories of expression long familiar to the bar." *Id.* (collecting cases and defining the relevant categories as obscenity, fraud, defamation, fighting words, child pornography, speech integral to criminal conduct, true threats, advocacy intended to incite imminent lawless action, and "speech presenting some grave and imminent threat the government has the power to prevent"). Under this approach, utterances can primarily be deemed unprotected or "proscribable" when they fall into one of these historically excepted categories; in any other context, the government action is analyzed pursuant to a strict scrutiny framework. *R.A.V. v. City of St. Paul Minn.*, 505 U.S. 377, 383-84 (1992).

New categories may—albeit extremely rarely—be added to this list "[B]efore exempting a category of speech from the normal prohibition on content-based restrictions, however, the Court must be presented with persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription." *Alvarez*, 567 U.S. at 722.

If the speech does not fall into one of these categories (or meet the criteria for identifying a previously-unrecognized category), the court will typically apply strict scrutiny. In order to pass muster under a strict scrutiny analysis, the regulation must be "narrowly tailored to serve a compelling state interest." *Picard v. Magliano*, 42 F.4th 89, 103 (2d Cir. 2022). To determine whether a regulation is narrowly tailored, a "court should ask whether the challenged regulation is the least restrictive means among available, effective alternatives." *Ashcroft v. Am. C.L. Union*, 542 U.S. 656, 666 (2004).

Note, however, that the *Alvarez* plurality does not go so far as to say that the application of strict scrutiny would necessarily be the correct course for all instances of content-based falsity. *Alvarez*, 567 U.S. at 721-22 ("[T]here are instances in which the falsity of speech bears upon whether it is protected. Some false speech may be prohibited even if analogous true speech could not be. This opinion does not imply that any of these targeted prohibitions are somehow vulnerable. But it also rejects the notion that false speech should be in a general category that is presumptively unprotected."). Instead, the plurality takes great pains to highlight the aspects of that case which rendered strict scrutiny appropriate. *Alvarez*, 567 U.S. at 722-23 (expressing concern about the statute "control[ling] and suppress[ing] all false statements on this one subject in almost limitless times and settings.... without regard to whether the lie was made for the purpose of material gain").

b. The Alvarez *concurrence—intermediate scrutiny for factually verifiable falsity*

Justice Breyer's concurrence agreed with the plurality that strict scrutiny should be applied to *some* types of regulation of false speech, particularly to "[l]aws restricting false statements about philosophy, religion, history, the social sciences, [and] the arts." *Alvarez*, 567 U.S. at 732-33 (Breyer, J., concurring in the judgment). But the concurrence opted to apply intermediate scrutiny in *Alvarez*, stating that "[t]he dangers of suppressing valuable ideas are lower where ... the regulations concern false statements about easily verifiable facts that do not concern such subject matter." *Id.* at 732. When it comes to "false statements about easily verifiable facts," the *Alvarez* concurrence argued that intermediate scrutiny should be applied. *Id.* The concurrence notes too that false speech can be prohibited in instances where the lie is likely to make "a specific harm [ ] more likely to occur." *Id.* at 736. To conduct this intermediate scrutiny analysis, a court must "ask whether it is possible substantially to achieve the Government's objective in less burdensome ways" that for instance, "insist upon a showing that the false statement caused specific harm or at least was

material," apply only in "contexts where such lies are most likely to cause harm," or involve "information dissemination" rather than restriction of speech. *Id.* at 738.

c. Controlling law from Alvarez

***21** Where, as in *Alvarez*, "a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977). First, the *Alvarez* concurrence controls with regard to its rejection of the strict historical categorical approach, where exceptions to First Amendment protection are limited solely to the enumerated historical exceptions, as the plurality only secured four votes for that point. *Alvarez*, 567 U.S. at 730. Although the historical categories test can inform this court's analysis, it does not exclusively control.

Second, there are several areas of agreement between the two opinions. False speech relating to history, philosophy, and so forth can be debatable and difficult to verify and should therefore be afforded full First Amendment protection. *Alvarez*, 567 U.S. at 732-33 (Breyer, J., concurring in the judgment). As one court described it, both *Alvarez* opinions contrasted a "bar stool braggadocio" with one making a false statement for a "material purpose," thus creating a materiality requirement of sorts for the types of false statements that are susceptible to government regulation. *United States v. Chappell*, 691 F.3d 388, 398 (4th Cir. 2012) (explaining that this distinction was discussed approvingly by the *Alvarez* plurality *and* central to the concurrence's holding). Additionally, there is genuine agreement that statutes that prohibit falsities in order to "protect the integrity of government processes" (*e.g.*, perjury statutes, laws barring lying to government officials, and those "prohibit[ing] falsely representing that one is speaking on behalf of the Government,") are properly within the government's regulatory authority. *Alvarez*, 567 U.S. at 720-21; *see also id.* at 734-35 (Breyer, J., concurring) (stating that it is permissible to regulate false speech that creates a "particular and specific harm by interfering with the functioning of a government department"). Both opinions support the idea that "restrictions on false factual statements that cause legally cognizable harm tend not to offend the Constitution." *Animal Legal Def. Fund v. Kelly*, 9 F.4th 1219, 1232 (10th Cir. 2021) (citing *Alvarez*, 567 U.S. at 719 and *id.* at 734-36 (Breyer, J., concurring in the judgment)). And finally, a regulation would improperly proscribe a false statement if it did not contain at least an implicit requirement that the statement be *knowingly* or *intentionally* false. *Alvarez*, 567 U.S. at 719; *id.* at 732 (Breyer, J., concurring in the judgment) ("I would read the statute favorably to the Government as criminalizing only false factual statements made with knowledge of their falsity and with the intent that they be taken as true").

d. Political speech

Defendant Mackey argues that his deceptive Tweets constitute protected political speech. A vibrant political discourse is a prerequisite to this nation's successful maintenance of a thriving democracy.

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 346 (1995). For this reason, courts have long hesitated to uphold restrictions on political speech. *See e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 349 (2010) ("If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech."); *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (overturning a ban on party primary endorsements on the basis that "debate on the qualifications of candidates is integral to the operation of the system of government established by our Constitution"); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) (holding that the First Amendment protects statements about candidates). Content-based restrictions of *political* speech have thus been consistently subject to strict scrutiny, *see e.g.*, *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (holding that a matching funds provision substantially burdened political speech in a public forum and thus must be subjected to strict scrutiny), and *Alvarez*—which did not address political speech—did not impact that approach. *See 281 Care Comm. v. Arneson*, 766 F.3d 774, 782-83 (8th Cir. 2014) (concluding that *Alvarez* did not alter the level of scrutiny applied to political speech regulation); *see also Massachusetts v. Lucas*, 472 Mass. 387, 396 (2015) ("[W]e find it doubtful that the concurring opinion of two

justices in *Alvarez* abrogated the well-established line of First Amendment precedent holding that content-based restrictions of political speech must withstand strict scrutiny.")

***22** Courts have, on the other hand, been deferential to government regulation of speech that is not *political* in nature and is instead related to politics only in so far as it proscribes the procedures governing elections. *See, e.g.*, *Burdick v. Takushi*, 504 U.S. 428, 441 (1992) (holding that a ban on write-in ballots did not violate the First Amendment because "the right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system"). Although in dicta in an unrelated case, the Supreme Court recently made this differentiation explicit: "[w]e do not doubt that the State may prohibit messages intended to mislead voters about voting requirements and procedures." *Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1899 n.4 (2018).

2. False Speech—Application

The Government correctly argues that Defendant Mackey's Deceptive Tweets are most accurately characterized as a vehicle or means for illegal conduct, and that the statute—even as applied—is targeting that aspect of Mr. Mackey's behavior, rather than a free-floating crime of speech. Treason is still treason if it is spoken aloud. Conspiracy is still criminal if it is communicated verbally. A supervisor who publicly orders a subordinate to discriminate has violated anti-discrimination laws, despite acting through their utterances. The instant prosecution is a continuation of that commonsense understanding of the relationship between crime and speech, present throughout so much of the doctrinal history.

To the extent that Mr. Mackey's Deceptive Tweets should be doctrinally examined as speech, they are proscribable false utterances subject to an intermediate scrutiny analysis. Indeed, for the reasons set forth below, this prosecution regarding Mr. Mackey's Deceptive Tweets survives under the analysis for false speech set forth in *Alvarez.*

Although the *Alvarez* plurality and concurrence fail to reach agreement on the precise line between the types of false speech regulations that are examined under strict scrutiny and those which are less protected, *Alvarez*'s logic illustrates that strict scrutiny is not required in the instant case. Like Mr. Alvarez's claims that he held the Congressional Medal of Honor, *Alvarez*, 567 U.S. at 713, Mr. Mackey's claims that Democrats could vote for President by text were indubitably false, with "no room to argue about interpretation or shades of meaning." *Id.* at 716. But unlike Mr. Alvarez's claims, Mr. Mackey's tweets do not even arguably constitute "pure speech." *Id.* at 715. This prosecution targets only false speech intentionally used to injure other individuals' attempt to exercise their constitutionally guaranteed right to vote, and to secure an outcome of value to Mr. Mackey—an advantage in a Presidential election for his preferred candidate—despite Mr. Mackey's knowledge that the statements in his tweets were false.

Defendant Mackey is alleged to have designed the Deceptive Images so that they would be mistaken for messages from the Hillary Clinton campaign. (*See* Compl. at ¶¶ 22-33.) In that sense, this case is analogous to impersonation and false pretenses cases considered since *Alvarez* by the Fourth, Eighth, and Tenth Circuits, all three of which differentiated between instances in which false utterances constituted protected speech (requiring a strict scrutiny analysis) versus unprotected speech (requiring only intermediate scrutiny). *See Animal Legal Def. Fund v. Reynolds*, 8 F.4th 781, 787 (8th Cir. 2021); *Kelly*, 9 F.4th at 1232; *Chappell*, 691 F.3d at 396-97. In *Reynolds*, the court held that under *Alvarez*, an Iowa statute prohibiting "access to an agricultural production facility by false pretenses" was "consistent with the First Amendment because it prohibits exclusively lies associated with a legally cognizable harm—namely, trespass to private property." *Reynolds*, 8 F.4th at 785-86. The instant statute as applied meets that standard, in that the Government seeks to prosecute only lies associated with the "legally cognizable harm" resulting from criminal conspiracy to injure voting rights. This same case makes great hay of the need for a "materiality" element. *Id.* at 788. As stated above, the nature of this application of Section 241—which implicates a conspiracy to "injure"—renders a materiality requirement inherently present for any successful prosecution. 18 U.S.C. § 241.

***23** Defendant Mackey correctly asserts that even under *Alvarez*, a finding that the Deceptive Tweets constituted political speech would require the application of strict scrutiny to the regulation. But Defendant Mackey's argument that the instant utterances should be categorized as political speech is unavailing. Political speech is, to be sure, "at the heart of American constitutional democracy" and the area where the First Amendment's "constitutional guarantee has its fullest and most urgent application." *Brown v. Hartlage*, 456 U.S. 45, 53 (1982) (prohibiting an application of a law that would prohibit candidates from

participating in "the unfettered interchange of ideas for the bringing about of political and social changes desired by people."). But the definition of political speech cannot be one of unlimited scope. The Court's political speech cases have uniformly involved speech and expressive conduct relating to the *substance* of what is (or may be) on the ballot—policy issues, party preference, candidate credentials, candidate positions, putative facts about issues covered by ballot questions, and the like. *See e.g.*, *John Doe No. 1 v. Reed*, 561 U.S. 186, 194-95 (2010) ("[T]he expression of a political view implicates a First Amendment right."); *Citizens United*, 558 U.S. at 349–50; *McIntyre*, 514 U.S. at 346 ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution."). The instant application of Section 241 does not attempt to regulate speech about the substance of what is on the ballot. Instead, it attempts to protect access to the ballot.[20]

While it is possible that regulation of election misinformation or disinformation could, under other circumstances, be unconstitutional as impermissible proscriptions of political speech, this prosecution targets "speech that harms the election process," rather than speech about a candidate or a candidate's views.[21] *See generally* David S. Ardia & Evan Ringel, *First Amendment Limits on State Laws Targeting Election Misinformation*, 20 First Amend. L. Rev. 291, 298 (2022) (differentiating between the two in arguing that "[s]tatutes that target defamatory speech or speech that harms the election process, is fraudulent, or that intimidates voters are likely to be permissible, while statutes that target other types of speech that have not traditionally been subject to government restriction will face an uphill battle in demonstrating that they are constitutional."). If Defendant Mackey had tweeted false statements about Hillary Clinton's policy positions, for instance, a different analysis would be necessary. But the issue at bar is whether Tweets telling one candidate's supporters that they can vote by text or Tweet, therefore making "false statements about election procedures, such as the day the election will be held, the proper place to cast one's vote, or voting requirements" are proscribable utterances. James Weinstein, *Free Speech and Domain Allocation: A Suggested Framework for Analyzing the Constitutionality of Prohibitions of Lies in Political Campaigns*, 71 Okla. L. Rev. 167, 222 (2018); *see also* Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections?*, 74 Mont. L. Rev. 53, 70 (2013) (quoting Professor Eugene Volokh's statement that "narrower bans on, say, knowingly false statements about when or where people should vote ... might be constitutional" under *Alvarez*). Indeed, regulation of such speech regarding election procedures properly falls into the very different category of false speech regarding the efficient administration of government processes, which even Kennedy's plurality in *Alvarez* acknowledges has often been upheld by courts. *Alvarez*, 567 U.S. at 727-28.

***24** Thus, this court will follow Justice Breyer's lead on the appropriate mode of analysis for false speech that is entitled to less than complete First Amendment protection and apply intermediate scrutiny. *Alvarez*, 567 U.S. at 731-32 (Breyer, J., concurring in the judgment). Intermediate scrutiny requires that there be a "fit" between § 241 as applied and the government's interest in regulating the utterances in question. *Id.* The Court has made clear time and time again that the United States has a compelling interest in maintaining the integrity of election procedures. *See, e.g.*, *Hartlage*, 456 U.S. at 53; *Anderson v. Celebrezze*, 460 U.S. 780, 804 (1983); *Mansky*, 138 S. Ct. at 1890 n.4; *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (stating that the state interest in "protect[ing] the right to vote in an election conducted with integrity and reliability" is a "compelling one[ ]"). This compelling interest undoubtedly includes making sure voters have accurate information about how, when, and where to vote. Prosecutions such as the one before this court are one of the few tools at the Government's disposal for doing so. Counter speech, a typical mode of countering false speech, is unlikely to be of much use in the context of tweets spread across the far reaches of the internet in the days and hours immediately preceding an election.

And the prosecution is narrowly tailored to serve this interest. Section 241's intent requirement ensures that accidental misinformation will not be criminalized. Further, permitting § 241 to be used for a narrow set of prosecutions regarding conspiracies to make verifiably false utterances about the time, place, or manner of elections that would injure the right to vote is unlikely to encourage selective prosecutions or chill broad categories of constitutional speech. For these reasons, the instant regulation as applied constitutes a sufficiently tailored approach to further a compelling government interest, and thus survives intermediate scrutiny.

Even if the plurality's holding in *Alvarez* wholly bound this court, this court would still find the instant application of the statute constitutional. The utterances in question—Mr. Mackey's Deceptive Tweets—fit into two of the categories of speech historically excepted from full First Amendment protection, and may even fall under a historical but heretofore unrecognized category.

First, the Deceptive Tweets are merely a single element

within a course of criminal conduct. As discussed above, the core unlawful act in this case is the formation of a conspiracy to injure a right. The Deceptive Tweets are simply the *means* through which the injury was conspired to take place. *See Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949) (stating that "[i]t rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as integral part of conduct in violation of a valid criminal statute" and upholding a statute primarily aimed at criminalizing a type of industry collusion, but which also had the collateral impact of prohibiting otherwise lawful protest). Since then, the Supreme Court has employed this exception in a broad range of circumstances where the speech in question was secondary to the core conduct being criminalized. In 1968, the Court held that a statute prohibiting draft card burning fell within this category and was thus proscribable despite the obvious expressive conduct involved. *See generally United States v. O'Brien*, 391 U.S. 367 (1968). The Court also made this category the basis for its holding that child pornography was proscribable content despite the First Amendment. *New York v. Ferber*, 458 U.S. 747, 761 (1982) ("The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation.") Similarly, Defendant Mackey's alleged *conspiracy* to prevent individuals from exercising their right to vote was criminal. That properly criminalizing that conspiracy has, in this circumstance, the collateral effect of prohibiting certain false utterances does not change the fact that those false utterances are merely an element within a broader course of criminal conduct.

***25** Second, the Deceptive Tweets implicate the fraud exception. The Court's historical decisions indicate that statutes regulating (and criminalizing) fraud do not violate the First Amendment. This exception can be attributed to the particulars of history, but it can also be understood as acknowledging the irrelevance of fraudulent acts to the values protected by the First Amendment, such as the free exchange of ideas, the furtherance of deliberative democracy, the ability to hold institutions accountable, and the import of personal expressive fulfillment. Regardless of its justification, fraud is not covered speech under the First Amendment. Although the Supreme Court has not clearly defined fraud for First Amendment purposes, under New York law the "elements of a common law fraud claim are a material false representation, an intent to defraud thereby, and reasonable reliance on the representation, causing damage." *Chevron Corp. v. Donziger*, 871 F. Supp. 2d 229, 255 (S.D.N.Y. 2012). The Government plans to prove that Mr. Mackey's Deceptive Images contained material false representations intended to defraud Hillary Clinton voters, upon which the Government alleges there was reasonable reliance injuring the right to vote. Thus, Mr. Mackey's Deceptive Tweets, though far from the typically commercial instance of fraud, implicate the Court's fraud exception.

Third, the *Alvarez* plurality left room for the rare occasion in which another historical category could appropriately be recognized. For this to be warranted, a court must be presented with "persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription." *Alvarez*, 567 U.S. at 722. Indeed, the *Alvarez* plurality appears to essentially describe one such category without naming it—that of false speech injuring the "integrity of Government processes." *Id.* at 720-21. *Alvarez*'s designation of this historical category of proscribable speech, along with the dearth of First Amendment values underlying these types of false statements, provides persuasive evidence that related restrictions on content have a long and valid history. Under this additional category, the instant prosecution survives First Amendment analysis.

3. Satire

Defendant Mackey also argues that his Deceptive Tweets constitute protected satire. It is well settled that "parody and satire are deserving of substantial freedom—both as entertainment and as a form of social and literary criticism," and are thus protected by the First Amendment. *Cliffs Notes, Inc. v. Bantam Doubleday Dell Publ'g Grp., Inc.*, 886 F.2d 490, 493 (2d Cir. 1989) (emphasis in original omitted); *see also Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 57 (1988) ("[T]his claim cannot, consistently with the First Amendment, form a basis for the award of damages when the conduct in question is the publication of a caricature such as the ad parody involved here."). The question of whether a reasonable listener or reader would understand the false statements as satire or as factual assertions is one best left, at least initially, to the jury. *See, e.g., Falwell v. Flynt*, 797 F.2d 1270, 1273-74 (4th Cir. 1986), *rev'd sub nom. on other grounds Hustler Mag., Inc. v. Falwell*, 485 U.S. 46 (1988) (noting that the jury determined "the parody was not reasonably believable"); *Burck v. Mars, Inc.*, 571 F. Supp. 2d 446, 455 (S.D.N.Y. 2008) ("Whether the M & M Cowboy characters were parodies of The Naked Cowboy, however, raises factual questions that are not for the Court to decide at this stage of the litigation."); *see*

also *FIH, LLC v. Found. Cap. Partners LLC*, 920 F.3d 134, 141 (2d Cir. 2019) (stating that issues which present "a nettlesome and fact intensive ... question of fact" are "for the jury rather than a question of law for the court"). Importantly, "the test ... is not whether some actual readers were misled, but whether the hypothetical reasonable reader could be (after time for reflection)." *Farah v. Esquire Mag.*, 736 F.3d 528, 537 (D.C. Cir. 2013). Contextual factors to consider could include whether the "prominent indicia of satire" were present, including "humorous or outlandish details," "stylistic elements" indicating it was "not serious," and the "substance" itself. *Id.* at 538-39.

Defendant Mackey's argument that the Indictment should be dismissed because the underlying speech is satire is unavailing. The question of whether the Deceptive Tweets were satire is an issue of fact best left to the jury.[22] If the jury finds that the Deceptive Tweets were satire, Defendant Mackey must be acquitted. At this time, however, it is inappropriate to conclude that Defendant Mackey engaged in protected satire as a matter of law.[23] This court shall not substitute for the judgment of a jury its own judgment as to whether the reasonable listener or reader would have interpreted Mr. Mackey's tweets as earnest directions for voting or an online farce.

4. Conclusion

***26** For these reasons, the court finds the instant application of Section 241 cannot, at this stage, be held unconstitutional pursuant to the First Amendment.

IV. CONCLUSION

For the foregoing reasons, the court DENIES Defendant Mackey's (Dkt. 43) Motion to Dismiss the Indictment.

SO ORDERED.

All Citations

Slip Copy, 2023 WL 363595

Footnotes

1 The Government alleges that Defendant Mackey used the Twitter handle @Ricky_Vaughn99 from January 12, 2014 through October 5, 2016, the Twitter handle @TheRickyVaughn from October 8, 2016 through November 2, 2016, and the Twitter handle @ReturnofRV from November 3, 2016 through November 14, 2016. (Compl. ¶ 5.)

2 Merriam Webster defines a "meme" as "an amusing or interesting item (such as a captioned picture or video) or genre of items that is spread widely online especially through social media." *See* Merriam-Webster.com Dictionary, *"Meme"* (last visited Jan. 22, 2023), https://www.merriam-webster.com/dictionary/meme.

3 Throughout the Complaint and motion briefing, the Government refers to Hillary Clinton as "The Candidate" and "Candidate 1," rather than by name. The Government also refers to Donald Trump as "Candidate 2," and chooses not to mention the Democratic and Republican political parties by name. Because the candidates and parties involved are readily apparent to any observer with a passing familiarity with the U.S. political landscape, this court has no reason to believe that using proper names will be prejudicial to either party, The court has thus opted to use the 2016 presidential candidates' and political parties' proper names throughout this opinion, rather than the Government's preferred pseudonyms.

4 Merriam Webster defines a hashtag as a "a word or phrase preceded by the symbol # that classifies or categorizes the accompanying text (such as a tweet)." *See* Merriam-Webster.com Dictionary, *"Hashtag"* (last visited Jan. 22, 2023), https://www.merriam-webster.com/dictionary/hashtag. The court notes that on Twitter and other social media platforms hashtags also serve as a link between different posts that have used the same hashtag, and can thus be used as a tool to increase the reach of a Tweet to not only those viewing the social media creator's specific account, but also those searching the broader hashtag.

5 The court was not previously familiar with the term "shitlib," but assumes given the context that it is a perjorative word for those who identify as liberal rather than conservative.

6 Twitter users can send two different types of messages: direct messages, which can be viewed only by the sender and the user or users to whom those messages are sent, and Tweets, which are posted publicly and can be viewed by any user with access to the posting user's Twitter feed.

7 Merriam Webster defines "psyops" as "military operations usually aimed at influencing the enemy's state of mind through noncombative means (such as distribution of leaflets)." *See* Merriam-Webster.com Dictionary, "*Psyops*" (last visited Jan. 22, 2023), https://www.merriam-web-ster.com/dictionary/psyops. The court is not aware of any evidence that Mackey or his co-conspirators were participating in actual military operations, and thus assumes that they were using this term colloquially to analogize their efforts to "influence [Hillary Clinton voters'] minds" to similar efforts by military combatants.

8 When quoting cases, unless otherwise noted, all citations and internal quotation marks are omitted, and all alterations are adopted.

9 Note, however, that it is not sufficient for the Government to merely prove that the communication was "likely to have passed through" the Eastern District, *See United States v. Brennan*, 183 F.3d 139, 144 (2d Cir. 1999) (finding lack of venue where it was alleged that mail was "likely to have passed through" a district). Instead, the Government must actually prove at trial, by a preponderance of the evidence, that the tweets physically passed through the district.

10 This part of the *Bathgate* decision was later called into question by *United States v. Saylor*, 322 U.S. 385 (1944). That case allowed a prosecution of election officials for ballot stuffing on the theory that it "prevent[ed] an honest count by the return board of the votes lawfully cast," indicating the statute does in fact apply to generalized vote dilution, *Id.* at 389. Later cases cite *Saylor* for the proposition that vote dilution is a cognizable theory of injury to rights under Section 241. *See, e.g.*, *Crolich v. United States*, 196 F.2d 879, 881 (5th Cir. 1952).

11 Defendant Mackey appears to argue that the Second Circuit's decision in *United States v. Kantor*, 78 F.2d 710 (1935), precludes his prosecution. *Kantor* held that "there was no injury to qualified voters" when the scheme effected votes at a general (both state and federal) election, and the government put forth no evidence that any injured voters intended to vote for candidates for federal office. *Id.* at 711. But *Kantor* addressed an evidentiary issue: the government had failed to show the injury was to the right to vote in *federal* elections, *id.*; although the November 2016 election in New York was a general election, Defendant Mackey's alleged scheme was directed at voters in the presidential election, many of whom, according to the government attempted to vote for president by text. Further, in 1944, the Supreme Court considered another Section 241 prosecution related to a conspiracy regarding a general election, and found no issue. 322 U.S. 385, 389-90 (1944).

12 Although the Indictment, tracking the statutory language of 18 U.S.C. § 241, includes the full list of verbs—to injure, oppress, threaten and intimidate—the Government has stated their belief that the word "injury" most fully captures the effects of the conduct at issue. (May 6, 2022 Tr. (Dkt. 47) at 1647 ("THE COURT: Which of the four words in the statute most closely – most closely addresses the conduct that you say is illegal? MR. PAULSEN: I believe the first, Your Honor the first, injury.").)

13 The court notes that in a since-overturned 2006 opinion, the Second Circuit held, using the categorical approach, that Section 241 was a crime of violence for the purposes of 18 U.S.C. 924(c). *United States v. Acosta*, 470 F.3d 132, 137 (2d Cir. 2006). *See also United States v. Ivezaj*, 568 F.3d 88 (2d Cir. 2009). This holding did rest on a finding that "physical force is perhaps the most obvious way to injure, threaten, or intimidate," and that the statute therefore met the "substantial risk of force" standard set forth by the residual clause. *Acosta*, 470 F.3d at 136. The Circuit did not, however, find that a Section 241 necessarily entailed a use of

force. The statute's lack of a minimum conduct requirement actually led the Supreme Court to overturn the "residual clause" of 924(c) in *U.S. v. Davis.* 139 S. Ct. 2319, 2326 ("[T]he imposition of criminal punishment can't be made to depend on a judge's estimation of the degree of risk posed by a crime's imagined 'ordinary case.' "). In short, despite its now defunct holding that § 241 constituted a crime of violence, the Circuit never actually held that all instances of conspiracy under § 241 would involve schemes that required the use of force.

14 The document defines a private scheme as "a pattern of conduct that does not involve the necessary participation of a public official acting under color of law, but that can be shown to have adversely affected the ability of qualified voters to vote in elections in which federal candidates were on the ballot." Dep't of Just., Federal Prosecution of Election Offenses 37 (2017).

15 Although this is also a general weakness of the rejected proposal rule, it is particularly persuasive in the context of election interference, which has been a hot-button issue over the period in question.

16 The defense styles this argument as one that, "[i]f Section 241 can fairly be interpreted to cover the Tweeted Memes in this case, it is unconstitutionally *overbroad* as applied." (Mot. at 22.) (Emphasis added.) The court is puzzled by this framing. "A party alleging overbreadth claims that although a statute did not violate his or her First Amendment Rights, it would violate the First Amendment rights of hypothetical third parties if applied to them." *Farrell v. Burke*, 449 F.3d 470, 498 (2d Cir. 2006) (citing *Broad-rick v. Oklahoma*, 413 U.S. 601, 612 (1973)). Defendant Mackey's legal arguments all rest on the statute's unconstitutionality as it pertains to the specific facts of his case, not to the facts of a hypothetical third party's case. For this reason, the court addresses the statute's constitutionality as applied, rather than through a First Amendment overbreadth analysis.

17 *Alvarez* did not contain a majority opinion: four Justices joined the plurality opinion, while two concurred only in the judgment and another three dissented. *Alvarez*, 567 U.S. at 712. This opinion relies on the analysis about which the plurality and concurrence agree. *See Marks v. United States*, 430 U.S. 188, 193 (1977).

18 *Alvarez* addressed a *facial* challenge to the Stolen Valor Act, while the instant challenge is to a statute *as-applied*. However, the precedent still controls. "An as-applied challenge ... 'requires an analysis of the facts of a particular case to determine whether the application of a statute, even one constitutional on its face, deprived the individual to whom it was applied of a protected right.' " *Picard*, 42 F.4th at 101 (quoting *Field Day, LLC v. County of Suffolk*, 463 F.3d 167, 174 (2d Cir. 2006)); *see also C.R. Corps v. Pestana*, No. 21-CV-9128 (VM), 2022 WL 2118191, at *4 (S.D.N.Y. June 13, 2022). Indeed, "with an as-applied challenge, Plaintiffs need not challenge the legitimacy of the [statute] in the abstract; they need only address the [statute] with respect to their own activities." *Upsolve, Inc. v. James*, No. 22-CV-627 (PAC), 2022 WL 1639554, at *6 (S.D.N.Y. May 24, 2022). And, in as-applied First Amendment challenges, the question of content regulation becomes a question of whether the case at bar "show[s] a content-based application" of the law in question. *Butler v. City of New York*, 559 F. Supp. 3d 253, 270 (S.D.N.Y. 2021).

19 The court has opted to conduct the below *Alvarez* analysis under the assumption that the speech in question is content-based. Whether government action regarding speech is content-based implicates a dynamic area of the law. *See Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015) ("Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose"); *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464 (2022) (noting that "restrictions on speech may require some evaluation of the speech and nonetheless remain content neutral"); *see also Picard v. Magliano*, 42 F.4th 89, 102 (2d Cir. 2022). The court is far from certain that this prosecution is actually content-based under the law, but as the result is the same, the analysis that follows assumes the *Alvarez* analysis is necessary.

20 Defendant Mackey emphasizes that "caustic" and "offensive" political speech, as well as the associational right to gather for such speech, is protected by the First Amendment. Thus, Mr. Mackey argues, the objectively offensive message exchanges between Mr. Mackey and his alleged co-conspirators were protected. (Mot. at 25-26 (citing *Hill v. Colorado*, 530 U.S. 703, 716 (2000);

Thornhill v. Alabama, 310 U.S. 88 (1940), *Clingman v. Beaver*, 544 U.S. 581, 586 (2005)).) But the court understands the Complaint to be providing the exchanges in question (those referring to Democrats as "shitlibs," (Compl. ¶ 18) or emphasizing the importance of limiting the number of Black voters (*id.* at ¶ 31), and so forth) as background and context for the conversational environment in which the Deceptive Tweets were ultimately conspired about and formulated, rather than as acts to be regulated or criminalized in of themselves. As the court does not view the Indictment as pertaining to those exchanges, this line of Defendant Mackey's argument is irrelevant.

21 As noted in Section I.A of this Order, the alleged Deceptive Tweets made false statements as to how Hillary Clinton voters could cast their votes. (*See* Compl. at ¶ 32) ("Avoid the Line. Vote from Home. Text '[Hillary]' to 59925[.] Vote for [Hillary Clinton] and be a part of history").

22 Mr. Mackey's more general arguments about the nature of communications on Twitter also go to the question of satire and will similarly be left to the jury. (*See* Mot. at 23) (arguing that "Twitter is a no-holds-barred free-for-all" and all Tweets should he understood as "hyperbole," "satire" or "ridicule").

23 The court notes that the Complaint lays out alleged facts which seriously undermine the claim that Defendant Mackey was engaging in satire. Defendant Mackey's private conversations with co-conspirators reference the need to suppress Democratic turnout in the upcoming election and brainstorm ways they can contribute to that goal (Compl. ¶¶ 17-18, 31); discuss using the official color scheme and logo of the Clinton campaign to ensure the images were believable (*id.* at ¶¶ 22-23); and expound on how they plan to react in a manner that "make[s] it more believable" to the target audience (*id.* at ¶ 25).

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
CIVIL ACTION NO.

FILED
FEB. 27 1992

UNITED STATES OF AMERICA,
Plaintiff

v.

NORTH CAROLINA REPUBLICAN PARTY; HELMS FOR SENATE COMMITTEE; JEFFERSON MARKETING, INC.; COMPUTER OPERATIONS AND MAILING PROFESSIONALS, INC.; DISCOUNT PAPER BROKERS, INC.; CAMPAIGN MANAGEMENT, INC.; EDWARD LOCKE; DOUGLAS DAVIDSON,
Defendants.

91-161-CIV-5-F

CONSENT DECREE

I. INTRODUCTION

The United States filed this action to enforce provisions of the Civil Rights Act of 1957 and the Voting Rights Act of 1965 that prohibit the intimidation of voters, 42 U.S.C. 1971(b) and 42 U.S.C. 1973i(b). The United States alleges that the defendants, North Carolina Republican Party ("NCGOP"), Helms for Senate Committee, et al, conducted a postcard mailing in connection with the November 6, 1990 general election in North Carolina for the purpose of intimidating black voters and discouraging them from participating in the November 6, 1990 election, and that the postcard mailing had the effect of intimidating such voters. Defendants admit that an independent contractor of the Defendant NCGOP, Defendant Edward Locke, conducted a postcard mailing in connection with the November 6, 1990 general election but deny that the mailing had either the intent or effect of intimidating black voters or

EXHIBIT 526

discouraging them from participating in the election or otherwise violated any state of federal law. Defendants also deny that the disputed mailing was "conducted" by any of the other defendants.

Following the notice to the defendants of the United States' decision to file this lawsuit, the parties engaged in good-faith negotiations in an effort to resolve the claims raised in the complaint without resort to costly and protracted litigation. The decree shall not be construed as an admission by the defendants of any of the allegations in the complaint. Nor shall the decree be construed as an admission of any wrongdoing or liability by any of the defendants. The decree is final and binding on all parties to this action, including all principals, agents and successors in interest of defendants, as well as any person acting in concert with any of the defendants.

II. JOINT STIPULATION OF THE PARTIES

For purposes of this action only, the parties stipulate to the following statements:

1. "Ballot security" effort means all activities, programs or other efforts to prevent or remedy voter fraud or which otherwise are intended to inform voters of their eligibility to participate in an election and/or to inform voters of the penalties which attend voter fraud. Ballot security programs shall not include:

(a) Activities encouraging citizens to register or to vote to the extent that such activities do not form the

basis in whole or in part of an effort to challenge or cause to be challenged registered voters; or

(b) Poll observer activities permitted and/or authorized by state law, to the extent that such activities do not involve the use of any information obtained from any other ballot security effort.

2. In October and November, 1990, a ballot security program was conducted in connection with the November 6, 1990 general election in North Carolina. Approximately 125,000 postcards were mailed to selected voters throughout the State of North Carolina through two separate mailings, a bulk-rate mailing and a first-class mailing.

3. The text of the postcard reads as follows:

> If you moved from your old precinct over 30 days ago, contact the County Board of Elections for instructions for voting on Election Day.
>
> When you enter the voting enclosure, you will be asked to state your name, residence and period of residence in that precinct. <u>You must have lived in that precinct for at least the previous 30 days or you will not be allowed to vote</u>.
>
> It is a Federal crime, punishable by up to five years in jail, to knowingly give false information about your name, residence, or period of residence to an Election Official.

4. N.C. Gen. Stat. Section 163-72.3 states, "a registered voter who has moved from one precinct to another within the same county more than thirty days before a primary or general election but who has not submitted a change of address report. . . nevertheless may vote" under the procedures set forth in N.C. Gen. Stat. 163-72.3.

5. Under Article VI, Section 2 of the Constitution of the State of North Carolina, "[r]emoval from one precinct, ward, or other election district to another in this State shall not operate to deprive any person of the right to vote in that precinct, ward, or other election district from which that person has moved until 30 days after the removal."

6. Pursuant to N.C. Gen. Stat. Section 163-150, "a person seeking to vote shall enter the voting enclosure at the voting place through the appropriate entrance and shall at once state his name and place of residence to one of the judges of the election."

Based upon the stipulated facts and the consent of the parties, it is hereby ORDERED, ADJUDGED and DECREED that:

1. The defendants, their officers, agents, employees, successors in interest, and persons acting in concert with any of the defendants, are enjoined from engaging in any activity or program which is designed, in whole or in part, to intimidate, threaten, coerce, deter, or otherwise interfere with a qualified voter's lawful exercise of the franchise or which, based on objective factors, would reasonably be expected to have that effect.

This provision does not apply to activities solely designed to promote or sell a service or product unrelated to voting.

2. The defendants, their officers, agents, employees, successors in interest, and persons acting in concert with

any of the defendants, are enjoined from engaging in any ballot security program directed at qualified voters in which the racial minority status of some or all of such voters is a factor in the decision to target those voters.

3. The defendants, their officers, agent, employees, successors in interest, and any persons acting in concert with defendants, shall not engage in any ballot security program unless and until such program has been determined by this Court to comply with the provisions of this decree and applicable federal law. Applications by any of the defendants for review of a proposed ballot security effort by this Court shall be made following twenty days notice to the Department of Justice. Such notice shall include a complete description of the proposed ballot security program, including the basis for selecting persons to receive any communication related to ballot security, the purpose(s) to be served by the program, and the reasons the program complies with this decree and other applicable federal law.

4. For purposes of this decree, "ballot security program" shall mean all activities, programs or other efforts to prevent or remedy voter fraud or which otherwise are intended to inform voters of their eligibility to participate in an election and/or to inform voters of the penalties which attend voter fraud. Ballot security programs shall not include:

(a) Activities encouraging citizens to register or to vote to the extent that such activities do not form the basis in whole or in part of an effort to challenge or cause to be challenged registered voters; or

(b) Poll observer activities permitted and/or authorized by state law, to the extent that such activities do not involve the use of any information obtained from any other ballot security effort.

5. The defendants shall have a continuing obligation to take all reasonable steps to advise their officers, agents, employees, successors in interest and all persons acting in concert with them of the provisions of this decree.

6. The Court shall retain jurisdiction of this action to enforce provisions of this decree until December 1, 1996, at which time this decree and all of its provisions shall be terminated, unless the Court determines it is necessary to extend any of the requirements imposed by this decree, in which case those specific requirements shall be extended.

ENTERED the 27th day of FEBRUARY, 1992.

s/ JAMES C. FOX
UNITED STATES DISTRICT JUDGE

AGREED AND CONSENTED TO:

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA, Plaintiff, v. NORTH CAROLINA REPUBLICAN PARTY; HELMS FOR SENATE COMMITTEE; JEFFERSON MARKETING, INC.; COMPUTER OPERATIONS AND MAILING PROFESSIONALS, INC.; DISCOUNT PAPER BROKERS, INC.; CAMPAIGN MANAGEMENT, INC.; EDWARD LOCKE; DOUGLAS DAVIDSON, Defendants.	COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

COMPLAINT

The United States of America alleges that:

1. This action is brought by the Attorney General on behalf of the United States, pursuant to Sections 11(b) and 12(d) of the Voting Rights Act of 1965, 42 U.S.C. 1973i(b) and 1973j(d), and Section 131(c) of the Civil Rights Act of 1957, 42 U.S.C. 1971(b).

2. This Court has jurisdiction pursuant to 42 U.S.C. 1973j(f) and 28 U.S.C. 1345.

3. Defendant North Carolina Republican Party is a political party organized, operating and functioning as an official political party in the State of North Carolina. The North

Carolina Republican Party's headquarters are located in Raleigh, North Carolina.

4. Defendant Helms for Senate Committee was the authorized principal campaign committee of Senator Jesse A. Helms for his 1990 campaign for United States Senate from North Carolina. The Helms for Senate Committee's headquarters are located in Raleigh, North Carolina.

5. Defendant Computer Operations and Mailing Professionals, Inc., is a business corporation with its principal place of business in Raleigh, North Carolina formed in 1985 under and by virtue of the laws of the State of North Carolina.

6. Defendant Campaign Management, Inc., is a business corporation with its principal place of business in Raleigh, North Carolina formed in 1985 under and by virtue of the laws of the State of North Carolina.

7. Defendant Discount Paper Brokers, Inc., is a business corporation with its principal place of business in Raleigh, North Carolina formed in 1978 under and by virtue of the laws of the State of North Carolina.

8. Defendant Jefferson Marketing, Inc., is a business corporation with its principal place of business in Raleigh, North Carolina formed in 1978 under and by virtue of the laws of the State of North Carolina. Computer Operations and Mailing Professionals, Inc., Campaign Management, Inc., and Discount Paper Brokers, Inc. are wholly-owned subsidiaries of Jefferson Marketing, Inc.

9. Defendant Edward Locke is a consultant who was retained by and served as an agent of the Defendant Helms for Senate Committee and/or the Defendant North Carolina Republican Party to coordinate a so-called ballot security program in 1990.

10. Defendant Douglas Davidson served as an employee of Defendant Campaign Management, Inc., from 1986 to shortly after the November 6, 1990 general election. During the 1990 campaign, he served as an agent of both the Defendant Helms for Senate Committee and the Defendant North Carolina Republican Party. He also had supervisorial and managerial control over the personnel and resources of Campaign Management, Inc., Computer Operations and Mailing Professionals, Inc. and Discount Paper Brokers, Inc., during the 1990 campaign.

11. In the summer of 1990, representatives of Defendant Helms for Senate Committee and Defendant North Carolina Republican Party discussed whether to conduct a so-called ballot security program, a set of activities purportedly designed to combat and deter election fraud, in conjunction with the November 6, 1990, general election and to finance the program with funds from the North Carolina Republican Party (hereinafter referred to as "1990 ballot security program").

12. In mid-October 1990, the North Carolina State Board of Elections released voter registration figures showing that the statewide black voter registration had increased 10.6 percent between April and October 1990, compared to a 5.3 percent

increase among white registered voters throughout the State during the same period.

13. In mid-October 1990, a poll conducted by the Charlotte Observer was released which showed that the Democratic candidate for United States Senate, Harvey B. Gantt, had an eight-percentage point advantage over the Republican candidate, incumbent Senator Jesse A. Helms.

14. In mid-October 1990, contemporaneous with the release of the voter registration figures referred to in paragraph 12 and the poll showing Mr. Gantt with an advantage in the United States Senate race referred to in paragraph 13, Defendant Locke was contacted by representatives of Defendant Helms for Senate Committee and Defendant North Carolina Republican Party to discuss his availability to coordinate the 1990 ballot security program.

15. On or about October 16 and 17, 1990, Defendant Locke attended a series of meetings at which the 1990 ballot security program was discussed. Among those attending such meetings were Defendant Davidson, Mr. Peter Moore, the campaign manager of the Defendant Helms for Senate Committee, Mr. Thomas Farr, an attorney who had been involved in past ballot security efforts on behalf of Senator Helms and/or the Defendant North Carolina Republican Party, and Mr. Mark Stephens, President of Defendant Jefferson Marketing, Inc.

16. During the meetings referred to in paragraph 15 above, some of the participants formulated a tentative outline for the

1990 ballot security program, which included a mailing targeted to voters who may have changed residences.

17. Representatives of Defendant Helms for Senate Committee and/or Defendant North Carolina Republican Party agreed to retain Defendant Locke to coordinate the ballot security program. The Defendant Helms for Senate Committee and/or the Defendant North Carolina Republican Party agreed that Defendant Locke would be paid a sum of $2500 plus expenses for his services.

18. At the time the 1990 ballot security program was being formulated, defendants and defendants' agents, officers and employees expected voting in the Helms-Gantt contest to be racially polarized with most whites voting for Senator Helms and blacks overwhelmingly supporting Mr. Gantt.

19. For purposes of Defendant Locke's work on the 1990 ballot security program, Defendant Helms for Senate Committee provided Defendant Locke with an office within the Helms for Senate Committee headquarters in Raleigh. Defendant Helms for Senate Committee also provided Defendant Locke with the assistance of a paid employee of the Defendant Helms for Senate Committee for his work on the 1990 ballot security program.

20. On or about October 22, 1990, Defendant Locke and Defendant Davidson met with Mr. Jack Hawke, Chairman of the Defendant North Carolina Republican Party during the 1990 election season and Ms. Effie Pernell, Executive Director of the Defendant North Carolina Republican Party, and discussed the proposed activities of the 1990 ballot security program.

21. On October 26 and 29, 1990, as part of the ballot security program, at least 81,000 postcards containing the following language were mailed first-class with "address correction requested" to selected voters throughout the State of North Carolina [hereinafter "first-class mailing"]:

Voter Registration Bulletin

If you moved from your old precinct over 30 days ago, contact the County Board of Elections for instructions for voting on Election day.

When you enter the voting enclosure, you will be asked to state your name, residence and period of residence in that precinct. You must have lived in that precinct for at least the previous 30 days or you will not be allowed to vote.

It is a Federal crime, punishable by up to five years in jail, to knowingly give false information about your name, residence, or period of residence to an Election Official.

Paid for by N.C. Republican Party

The return address on the postcard was that of the Defendant North Carolina Republican Party.

22. The first-class mailing was sent to households with at least one registered Democrat in at least 86 selected precincts throughout the State of North Carolina. The postcards were mailed to the address under which the voter(s) in the selected households were registered according to voter registration lists maintained by Defendant Jefferson Marketing, Inc., and/or its defendant subsidiaries, and utilized by Defendant North Carolina Republican Party and Defendant Helms for Senate Committee.

23. According to the voter registration files used as a database for the first-class postcard mailing, black voters

constituted approximately 94 percent of the registered voters within the targeted precincts.

24. The voters targeted to receive the first-class mailing were selected, in part, based upon race.

25. On October 29, 1990, at least 44,000 postcards containing the identical text as the postcard reflected in paragraph 21 were mailed bulk rate to selected voters throughout the State of North Carolina [hereinafter "bulk-rate mailing"]. The bulk-rate mailing postcard did not contain the disclaimer "Paid for by the N.C. Republican Party." The absence of a disclaimer from the postcard for this mailing reflected a deliberate decision.

26. The bulk-rate mailing was sent exclusively to black voters throughout the State of North Carolina, regardless of political party affiliation. The targeted black voters were selected based upon data concerning the addresses of registered voters in North Carolina provided to the defendant organizations by a mass mailing business concern. The data purported to identify more than 260,000 registered voters who had current addresses different from the addresses contained in voter registration lists maintained by Defendant Jefferson Marketing, Inc., and/or its defendant subsidiaries, and utilized by Defendant North Carolina Republican Party and Defendant Helms for Senate Committee. No postcards were mailed to the over 220,000 white registered voters so identified. The postcards were mailed to the targeted black voters at the alternative address provided

to the defendant organizations, not to the address under which they were registered.

27. Of the black voters who were identified as having changed residences by the data described in paragraph 26, at least 22,000 such voters were identified as having new addresses which were within the county in which they were registered to vote.

28. The voters targeted to receive the bulk-rate mailing were selected, in part, based upon race.

29. The text of the postcard, which is set forth in paragraph 21, falsely informed voters who were eligible to vote in the November 6, 1990 election that they were not eligible to vote in that election. Contrary to the text of the postcard:

A. Voters who move out of the precinct in which they are registered and into another precinct within the county in which they are registered more than 30 days prior to an election are still eligible to vote in that election; and

B. Voters who move out of the precinct in which they are registered to any other precinct in the State of North Carolina within 30 days of an election are eligible to vote in that election.

30. The text of the postcard, which is set forth in paragraph 21, falsely informed voters that they would be asked at the polling place to state the length of time they have lived at their residence.

31. The false information described in paragraphs 29 and 30, was included in the text of the postcard to misinform and confuse the targeted voters and others concerning their eligibility and right to vote in the November 6, 1990 election.

32. The statement in the postcard setting forth federal criminal penalties for election fraud was included in the text of the postcard to induce fear and apprehension in the minds of the targeted voters and others concerning their eligibility and right to vote in the November 6, 1990 election.

33. Upon the return of undeliverable postcards to the Defendant North Carolina Republican Party, an effort was undertaken to compile lists of voters whose cards were returned with the intent of using such lists as a basis to encourage the challenge of voters on election day. Employees of the Defendants Helms for Senate Committee, North Carolina Republican Party, Campaign Management, Inc., Computer Operations and Mailing Professionals, Inc., and Discount Paper Brokers, Inc., were all involved in the effort to compile such voter lists from the returned cards. This effort was terminated shortly before the election and subsequent to the initiation of an investigation of the 1990 ballot security program by the United States Department of Justice.

34. On October 31, 1990, and subsequent thereto, Mr. Hawke, in his official capacity as Chairperson of Defendant North Carolina Republican Party, advised the news media that the postcard mailing was a legitimate component of the Party's ballot

security program. Such statements were made by Mr. Hawke after he knew or should have known that the postcard contained false and/or misleading information and that the targeting criteria were, in part, based upon race.

35. Defendant Helms for Senate Committee, no later than five days before election day, knew or should have known that the postcard contained false and/or misleading information and that the targeting criteria were, in part, based upon race.

36. On October 31 and November 1, 1990, an effort was made by Mr. Calvin Kervin, President of Defendant Discount Paper Brokers, Inc., and others to remail a group of the first-class postcards that had been mailed to selected voters in Mecklenburg County, after it was discovered that a computer error had caused many of the postcards to such voters to be misaddressed. This effort was undertaken contemporaneous with press accounts reporting that the postcard contained false and misleading information and that state and county election officials had issued press releases correcting the false information conveyed in the postcard.

37. On November 15, 1990, Defendant Locke was paid in full by the Defendant North Carolina Republican Party for his services and the expenses he incurred in assisting in the coordination and implementation of the 1990 ballot security program in connection with the November 6, 1990 general election.

38. Defendant Locke, in his capacity as an agent of the Defendant Helms For Senate Committee and/or Defendant North

Carolina Republican Party, and Defendant Davidson, in his capacity as an agent of the Defendant Helms for Senate Committee and/or Defendant North Carolina Republican Party, and as a principal and/or employee of the Defendants Campaign Management, Inc., Computer Operations and Mailing Professionals, Inc., Discount Paper Brokers, Inc., and Jefferson Marketing, Inc. (and possibly other agents, officers and/or employees of the defendant organizations), played a significant role in establishing the criteria for selecting the voters to be sent the postcards and/or in developing the text that appeared on both versions of the postcard.

39. Defendants North Carolina Republican Party, Helms for Senate Committee, Campaign Management, Inc., Computer Operations and Mailing Professionals, Inc., Discount Paper Brokers, Inc., Jefferson Marketing, Inc., actively participated through its officers, employees and agents in the 1990 ballot security program, including the postcard mailing described above in connection with the November 6, 1990 general election.

40. Black citizens of the State of North Carolina have experienced a long history of discrimination against them on account of their race in voting and other areas, such as education, housing, employment and public accommodations.

41. The socioeconomic status of the State of North Carolina's black citizens is markedly lower than the socioeconomic status of the state's white population. The depressed socioeconomic status of the black population of the

State of North Carolina is related to the effects of past discrimination on account of race. These effects of past discrimination may have the tendency to exacerbate the pernicious effect of practices designed to discourage eligible black voters from exercising their right to vote.

42. The postcard mailing, as described above, was undertaken, at least in part, to influence the election contest for United States Senate on November 6, 1990 between Senator Jesse A. Helms and Mr. Harvey B. Gantt, and in part, to influence future election contests.

43. A purpose of the postcard mailing, as described above, was to intimidate and/or threaten black voters in an effort to deter such voters from exercising their right to vote in the November 6, 1990 general election and future election contests in North Carolina.

44. The postcard mailing, as described above, had the effect of intimidating and/or threatening voters concerning their right to vote in the November 6, 1990, general election and future election contests in North Carolina.

45. The postcard mailing, as described above, had a reasonable tendency to intimidate and/or threaten black voters and others concerning their right to cast a ballot in the November 6, 1990 general election and future election contests in North Carolina.

46. The defendants' actions, as described above, constitute intimidating and/or threatening conduct against black voters, or

an attempt to intimidate and/or threaten black voters, for purposes of interfering with the right to vote in the November 6, 1990 general election in North Carolina in violation of 42 U.S.C. 1971(b).

47. The defendants' actions, as described above, constitute intimidating and/or threatening conduct against black voters and other voters in violation of Section 11(b) of the Voting Rights Act of 1965, 42 U.S.C. 1973i(b).

48. Unless enjoined by order of this Court, defendants will continue to engage in actions prohibited by 42 U.S.C. 1971(b) and 42 U.S.C. 1973i(b).

WHEREFORE, the United States prays that this Court enter an order:

(1) Declaring that the defendants' actions as described above constituted an act of intimidation and/or a threat, or an attempt to intimidate and/or threaten, primarily black voters for purposes of interfering with their right to vote, in violation of 42 U.S.C. 1971(b);

(2) Declaring that the defendants' actions as described above constituted intimidating and/or threatening conduct to black voters or other voters, or an attempt to intimidate and/or threaten black voters concerning their right to vote, in violation of Section 11(b) of the Voting Rights Act of 1965, 42 U.S.C. 1973i(b);

(3) Enjoining the defendants, their officers, agents, employees, and all persons in active concert with them, from

undertaking activities which are designed to intimidate, threaten, or coerce voters concerning their right to vote in an election or which are designed to in any way interfere with or discourage the lawful exercise of the franchise; and

(4) Enjoining the defendants, their officers, agents, employees, and all persons in active concert with them, from assisting in or participating in any ballot security program unless the program has been determined by this Court to comply with federal law.

Plaintiff further prays that this Court grant such additional relief as the interests of justice may require, together with the costs and disbursements of this action.

DICK THORNBURGH
Attorney General

By: /s/ John R. Dunne

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131786179

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

THE STATE OF OHIO
Plaintiff

JOHN BURKMAN
Defendant

Case No: CR-20-654013-A

Judge: JOHN D SUTULA

INDICT: 2913.05 TELECOMMUNICATIONS FRAUD
3599.01 BRIBERY
2913.05 TELECOMMUNICATIONS FRAUD
ADDITIONAL COUNTS...

JOURNAL ENTRY

DEFENDANT IN COURT WITH COUNSEL BRIAN D JOSLYN. PROSECUTING ATTORNEY(S) JAMES GUTIERREZ PRESENT.
COURT REPORTER PRESENT.
DEFENDANT FULLY ADVISED IN OPEN COURT OF HIS/HER CONSTITUTIONAL RIGHTS AND PENALTIES.
DEFENDANT RETRACTS FORMER PLEA OF NOT GUILTY AND ENTERS A PLEA OF GUILTY TO TELECOMMUNICATIONS FRAUD 2913.05 A F5 AS CHARGED IN COUNT(S) 15 OF THE INDICTMENT.
REMAINING COUNTS ARE NOLLED.
COURT ACCEPTS DEFENDANT'S GUILTY PLEA.
THE DEFENDANT IS REFERRED TO THE COUNTY PROBATION DEPARTMENT FOR A PRE-SENTENCE INVESTIGATION AND REPORT.
ORIGINAL BOND CONTINUED.
STATE OF OHIO ORDERED TO NOTIFY VICTIM OF DATE & TIME OF SENTENCING.
SENTENCING SET FOR 11/29/2022 AT 12:00 PM.

10/24/2022
CPKAO 10/24/2022 15:39:42

Judge Signature Date

FILED
2022 OCT 25 P 3:31
CLERK OF COURTS
CUYAHOGA COUNTY

PVER
10/24/2022

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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

THOMAS A DASCHLE,	*	CIV 04-4177
Plaintiff,	*	
vs.	*	TEMPORARY RESTRAINING ORDER
JOHN THUNE; SOUTH DAKOTA REPUBLICAN PARTY; and JOHN DOES 1-200,	*	
Defendants.	*	

Under the principles of *Bush v. Gore*, 531 U.S. 98 (2000), the Court finds that the Plaintiff Thomas A. Daschle has standing to bring the present action. The action shows that Plaintiff Daschle is suing on his behalf as well as on behalf of persons who are unable to protect their own rights, that being Native Americans, to vote in this South Dakota General Election. See also *Oti Kaga, Inc. v. South Dakota Housing Authority*, 342 F.3d 871, 881-82 (8th Cir. 2003), and cases cited therein.

Oral testimony, photographs, and arguments were presented by the Plaintiff and the Defendants concerning today's events in a hearing from 8:00 P.M. until 11:30 P.M. this evening. Due to the fact that the General Election voting commences at 7:00 A.M. tomorrow morning, the Court cannot prepare a more detailed opinion.

After receiving evidence on behalf of Plaintiff and Defendants in the form of oral testimony as well as photographs, the Court applies the four factor tests from *Dataphase Systems, Inc. v. CL Systems, Inc.*, 540 F.2d 109 (8th Cir. 1981), and concludes that there clearly is the threat of irreparable harm to the Movant in that if Native Americans are improperly dissuaded from voting, those voters normally simply disappear and there is no identifying most of them and even if

identified, they can't vote later. The harm that will be inflicted upon the Movant is far greater than any injury granting the temporary restraining order will cause Defendants. The Movant and the Native American voters whose rights are asserted by the Movant will suffer the irreparable harm described above while Defendants are only being required to follow the law. The Court does find that the Movant is more likely to succeed on the merits of the equal protection claim and the claims under 42 U.S.C. § 1973i(b) and 42 U.S.C. § 1985(3), as the Court finds that there was intimidation particularly targeted at Native American voters in Charles Mix County by persons who were acting on behalf of John Thune. The Eighth Circuit has ruled that injunctive relief is available under § 1985(3). *See Brewer v. Hoxie School District*, 238 F.2d 91 (8th Cir. 1956). Whether the intimidation was intended or simply the result of excessive zeal is not the issue, as the result was the intimidation of prospective Native American voters in Charles Mix County. This is a small Native American population within which word travels quickly. Finally, the public interest is served by having no minority denied an opportunity to vote. Accordingly,

IT IS ORDERED that a Temporary Restraining Order is entered against Joel C. Mandelman and all other Defendant John Does acting on behalf of John Thune in Charles Mix County prohibiting them from following Native Americans from the polling places and directing that they not copy the license plates of Native Americans driving to the polling places, or being driven to the polling places, and further directing that the license plates of Native Americans driving away from the polling places also not be recorded.

Dated this 2nd day of November, 2004.

BY THE COURT:

Lawrence L. Piersol
Chief Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: _____
DEPUTY

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THE STATE OF OHIO,)
) SS: JOHN SUTULA, J.
COUNTY OF CUYAHOGA.)

IN THE COURT OF COMMON PLEAS
CRIMINAL DIVISION

THE STATE OF OHIO, Plaintiff,	)	
-v-	)	Case No. CR-654013-A CR-654013-B
JACOB WOHL AND JOHN BURKMAN Defendants.	)	C/A No. N/A

\- - - -

DEFENDANT'S TRANSCRIPT OF PROCEEDINGS

\- - - -

APPEARANCES:

MICHAEL O'MALLEY, ESQ.,
Prosecuting Attorney,
by: JAMES GUTIERREZ, ESQ., Assistant County Prosecutor,

On behalf of the Plaintiff;

MARK WIECZOREK, ESQ.,

On behalf of the Defendant Wohl,

BRIAN JOSLYN, ESQ.

On behalf of the Defendant Burkman.

Mary E. Schuler, RMR
Official Court Reporter
Cuyahoga County, Ohio

THE STATE OF OHIO,)
) SS: JOHN SUTULA, J.
COUNTY OF CUYAHOGA.)

IN THE COURT OF COMMON PLEAS
CRIMINAL DIVISION

THE STATE OF OHIO, Plaintiff,	
-v-	Case No. CR-654013-A CR-654013-B
JACOB WOHL AND JOHN BURKMAN, Defendants.	C/A No. N/A

- - - -

DEFENDANT'S TRANSCRIPT OF PROCEEDINGS

- - - -

BE IT REMEMBERED, that at the September 2022 term of said Court, to-wit, commencing on Monday, October 24, 2022, this cause came on to be heard before the Honorable John D. Sutula, in Courtroom No. 23-B, Courts Tower, Justice Center, 1200 Ontario Avenue, Cleveland, Ohio, upon the indictment filed heretofore.

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MONDAY MORNING SESSION, OCTOBER 24, 2022

PLEA

THE COURT: We're here in Case Number 654013, the State of Ohio vs. Jacob Wohl and John Burkman. Each is charged in a 15-count indictment. Count 1 against each defendant -- let's put it this way. Counts 1, 3, 5, 7, 9, 11, 13 and 15 against each defendant are all telecommunications fraud charges each in violation of Revised Code Section 2913.05.

Against both defendants Counts 2, 4, 6, 8, 10, 12, 14, are all bribery charges each in violation of Revised Code Section 29 -- I'm sorry 3599.01.

Since all these acts allegedly occurred on or after July 1, 1996, the applicable law is the criminal code for the State of Ohio as modified by Senate Bill 2 and its subsequent amendments.

Present is Mr. Wohl along with his counsel Mark Wieczor --

MR. WIECZOREK: Wieczorek.

THE COURT: I'll believe you.

MR. WIECZOREK: Thank you, your Honor.

THE COURT: And Mr. Burkman is present along with his counsel Brian Joslyn.

Representing the interests of the State is Assistant County Prosecutor James Gutierrez.

Mr. Gutierrez.

MR. GUTIERREZ: Thank you, your Honor. May it please the Court.

Judge, you are correct in the indictment and the number of counts.

Judge, it's my understanding at this time both defendants wish to withdraw their previous not guilty pleas and enter a guilty plea to Count number 15 which covers all the calls the 3400 calls that were made in Cuyahoga County. That is telecommunication fraud. That is a felony of the fifth degree. Carries a possible six months to 12 months in jail and a $2,500 fine or both.

It's my understanding at this time that both defendants have agreed to pay the maximum fine, Judge, regarding that.

There have been no threats or promises made to these defendants concerning this plea and no threats or promises made to these defendants concerning the sentence.

Thank you, your Honor.

THE COURT: Thank you.

Mr. Wieczorek --

MR. WIECZOREK: Yes, Judge.

THE COURT: -- for Mr. Wohl?

MR. WIECZOREK: Thank you, your Honor. That is correct. We offer a guilty plea to Count 15 with the understanding that the matter be set for sentencing sometime out and a PSI be ordered.

THE COURT: Have you spoken to your client about his constitutional rights?

MR. WIECZOREK: I have, your Honor.

THE COURT: All right.

And Mr. Joslyn as to Mr. Burkman?

MR. JOSLYN: Yes, the same, your Honor. I've advised him of his constitutional rights, the maximum penalties. My understanding is we'd be proceeding forward today with an order for PSI and set up for sentencing.

THE COURT: Mr. Wohl and Mr. Burkman, I'll be asking you a series of questions. Always answer in order. Keep your voice up. I don't want to have to remind you.

Do you understand?

DEFENDANT WOHL: Yes, sir.

DEFENDANT BURKMAN: Yes, your Honor.

THE COURT: State your name and age, please.

DEFENDANT WOHL: My name is Jacob Wohl and I am 24 years old.

DEFENDANT BURKMAN: My name is John Burkman, your Honor. I'm 56 years old.

THE COURT: What's the highest level education you attained in school?

DEFENDANT WOHL: High school.

DEFENDANT BURKMAN: Law school.

THE COURT: Do you have the ability to read and write?

DEFENDANT WOHL: Yes, your Honor.

DEFENDANT BURKMAN: Yes, your Honor.

THE COURT: Are you currently under the influence of any drugs, alcohol or medication that would adversely affect your ability to understand what is happening or to enter into a plea?

DEFENDANT WOHL: No, your Honor.

DEFENDANT BURKMAN: No, your Honor.

THE COURT: Have any threats or promises been made to you to induce you to change your plea?

DEFENDANT WOHL: No, sir.
DEFENDANT BURKMAN: No.
THE COURT: Do you in fact understand what is happening today's?
DEFENDANT WOHL: Yes.
DEFENDANT BURKMAN: Yes, your Honor.
THE COURT: Are each of you satisfied with the services of your lawyer?
Mr. Wohl, are you satisfied with Mr. Wiecz --
MR. WIECZOREK: Wieczorek.
THE COURT: Wieczorek?
DEFENDANT WOHL: Yes. Very much so, your Honor.
THE COURT: Mr. Burkman, are you satisfied with Mr. Joslyn?
DEFENDANT BURKMAN: Yes, very much, your Honor. Thank you.
THE COURT: Are either of you on community-control sanctions, probation, post-release control or parole?
DEFENDANT WOHL: No.
DEFENDANT BURKMAN: No, your Honor.
THE COURT: Are you a citizen of the United States?

DEFENDANT WOHL: Yes, your Honor.

DEFENDANT BURKMAN: Yes, your Honor.

THE COURT: Mr. Wohl and Mr. Burkman, even though your lawyers have already explained your rights to you, I must be satisfied that you understand your rights.

Do each of you understand that you're presumed innocent in this case and that by entering a plea of guilty to the amended indictment that you admit to the truth of those facts and your full guilt?

DEFENDANT WOHL: Yes, your Honor.

DEFENDANT BURKMAN: Yes, your Honor.

THE COURT: Do each of you understand that you have a right to trial, your choice of either a jury trial or to the Court at which time the State must prove you guilty and that you're giving up that right?

DEFENDANT WOHL: Yes.

DEFENDANT BURKMAN: Yes, your Honor.

THE COURT: Do you understand you have the right to confront and cross-examine witnesses the State must bring forth at a trial of your case and that you're giving up that right?

DEFENDANT WOHL: Yes.

DEFENDANT BURKMAN: Yes, your Honor.
THE COURT: Do you understand you have a right to subpoena witnesses to testify in your favor at a trial of your case and that you're giving up that right?
DEFENDANT WOHL: Yes.
DEFENDANT BURKMAN: Yes, your Honor.
THE COURT: Do you understand you have the right to have the State prove you guilty beyond a reasonable doubt at the trial of your case and that you're giving up that right?
DEFENDANT WOHL: Yes.
DEFENDANT BURKMAN: Yes, your Honor.
THE COURT: Do you understand you have the right not to testify at the time of the trial in your case which no one may use against you and that you're giving up that right?
DEFENDANT WOHL: Yes.
DEFENDANT BURKMAN: Yes, your Honor.
THE COURT: And do you understand that the Court could proceed with judgment and sentence you immediately after your plea?
DEFENDANT WOHL: Yes, your Honor.
DEFENDANT BURKMAN: Yes, your Honor.
THE COURT: All right. Thank you.

Based upon the statements of the prosecuting attorney and your lawyers, I believe it is your intention to plead guilty in the following manner, that each of you would plead guilty to Count 15, this is a telecommunications fraud charge in violation of Revised Code Section 2913.05.

This is a felony of the fifth degree. A felony of the fifth degree is punishable by time of incarceration in prison in monthly increments of between six and 12 months inclusive and/or a fine of up to $2,500. Do you understand?

DEFENDANT WOHL: Yes, your Honor.

DEFENDANT BURKMAN: Yes, your Honor.

THE COURT: Now, if the Court imposes a prison term upon the completion of that term the State of Ohio Adult Parole Authority will administer post-release control pursuant to Revised Code Section 2965.28 for a period of time of up to two years at the discretion of the Adult Parole Authority.

If you were to fail to meet the terms and conditions of any post-release control supervision imposed upon you, then the Adult Parole Authority can modify and/or extend your supervision and make it more restrictive, incarcerate you for up to

one-half the original sentence imposed by the Court, charge you with a new offense called escape, another felony where you face additional prison time, and if you were to commit a new crime while under the post-release control you, could face the maximum penalties under the law for the new crime committed plus a prison term of the greater of one year or the remaining time on your post-release control, which must run consecutive to any new time that you receive.

Do you understand?

DEFENDANT WOHL: Yes, sir.

DEFENDANT BURKMAN: Yes, your Honor.

THE COURT: Each of you may be eligible for earned days of credit under the circumstances specified under Revised Code Section 2967.193. To earn the credit, it's not automatic, you may only do so by productive participation in educational, vocational or substance abuse treatment programs or prison industrial employment for up to eight percent of your stated term.

Do you understand?

DEFENDANT WOHL: Yes, your Honor.

DEFENDANT BURKMAN: Yes, your Honor.

THE COURT: You could be placed under

a community-control sentence for up to five years and if you violate the terms of that sentence, break another law or leave the state without permission, you could receive a more extended sentence including prison time.

Do you understand?

DEFENDANT WOHL: Yes, your Honor.

DEFENDANT BURKMAN: Yes, your Honor.

THE COURT: Now, there's some talk about the maximum penalties on -- for fines here. However, you know the sentencing is up to the Court. Do you understand that?

DEFENDANT WOHL: Yes, your Honor.

DEFENDANT BURKMAN: Yes.

THE COURT: The Court is not bound by any agreement that you have with the State as to what sentencing is. That's a final decision for the Court to make. Do you understand?

DEFENDANT WOHL: Yes, your Honor.

DEFENDANT BURKMAN: Yes, your Honor.

THE COURT: Both counsel understand that also?

MR. WIECZOREK: Understood Judge.

MR. JOSLYN: Yes, your Honor.

THE COURT: All right. Thank you.

Now, if you enter a plea of guilty, the Court can impose on you court costs, any mandatory fines, require the payment of any restitution, supervision fees and costs of confinement.

If you fail to timely pay court costs and fees as ordered or according to an approved schedule, then the Court could order you to perform up to 40 additional hours of court community work service per month at the current rate of $9 per hour until such time as the judgment is paid or the default in the schedule is brought back into compliance. Each completed hour of court community work service will reduce the outstanding balance and the hourly rate could change.

Do you understand?

DEFENDANT WOHL: Yes, your Honor.

DEFENDANT BURKMAN: Yes, your Honor.

THE COURT: Have any threats or promises been made to either of you other than what has been stated in open court and on the record today in your case?

DEFENDANT WOHL: No, your Honor.

DEFENDANT BURKMAN: No, your Honor.

THE COURT: Do each of you understand

there is no promise of a particular sentence?

DEFENDANT WOHL: Yes, your Honor.

DEFENDANT BURKMAN: Yes, your Honor.

THE COURT: All right. Thank you.

Counsel, have I complied with the requirements of Criminal Rule 11?

MR. WIECZOREK: Yes, your Honor.

MR. JOSLYN: Yes, your Honor.

MR. GUTIERREZ: Yes, your Honor.

THE COURT: All right. Thank you.

Let the record reflect that the Court is satisfied that Mr. Wohl and Mr. Burkman have both been informed of their constitutional rights, that each understands the nature of the charges, the effect of a plea and the maximum penalties which may be imposed in their individual cases.

The Court further finds that Mr. Wohl's and Mr. Burkman's pleas will be made knowingly, voluntarily and intelligently.

Mr. Wohl and Mr. Burkman, how do each of you plead to Count 15, telecommunications fraud in violation of Revised Code Section 2913.05, a felony of the fifth degree for each of you?

DEFENDANT WOHL: Guilty, your Honor.

DEFENDANT BURKMAN: Guilty, your

Honor.

THE COURT: Thank you. I accept your pleas of guilty and find you guilty thereon. I'll dismiss Counts 1 through 14 for each of you.

You both will be referred to the probation department for a presentence investigation report and you'll be brought back for sentencing.

And I understand we talked about a Zoom hearing for sentencing on November 29 of this year at 11:00.

MR. JOSLYN: Yes, your Honor.

MR. WIECZOREK: May I approach, your Honor?

THE COURT: Yes, you may.

Do you know where to go?

MR. WIECZOREK: Yes, sir. Seventh floor. Good to see you, sir.

MR. JOSLYN: Thank you.

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(Thereupon, Court was adjourned.)

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TUESDAY MORNING SESSION, NOVEMBER 29, 2022

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(The following proceedings were conducted by Zoom)

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THE COURT: We're here in the case of the State of Ohio versus Jacob Wohl and John Burkman. This is Case No. 654013. This is a sentencing hearing.

On a previous day in court each Defendant pled guilty to one count of telecommunications fraud in violation of Revised Code Section 2913.05.

This is a felony of the fifth degree for each of them. That felony of the fifth degree is punishable by time of incarceration in prison in monthly increments of between 6 and 12 months inclusive and/or a fine of up to $2500 each.

If the Court imposes a prison term, upon the completion of that term, the State of Ohio Adult Parole Authority will administer post release control pursuant to Revised Code Section 2967.28 for a period of time of up to two years at the discretion of the Adult Parole Authority.

If either Defendant were to fail to meet the terms and conditions of any post release control imposed upon them, then the Adult Parole Authority can modify and/or extend that person's supervision and make it more restrictive, incarcerate that person for up to one half of the original term imposed by the Court, charge him with a new offense called escape, another felony where he would face additional prison time, and if you were to commit a new crime while under the post release control, you could face the maximum penalties under the law for the new crime committed plus a prison term of the greater of one year or the remaining time on the post release control which must run consecutive to any new time that he receives.

Now, if sentenced to prison, each Defendant may be eligible for earned days of credit under the circumstances specified in Revised Code Section 2967.193. To earn the credit, it's not automatic, you may only do so by productive participation in educational, vocational, or substance abuse treatment programs, or prison industrial employment, for

up to eight percent of the stated term.

Prior to coming out on the bench today I had the opportunity to review the entire case file for each Defendant, Revised Code Section 2929.11 for the principles and purposes of sentencing, Revised Code Section 2929.12 for the seriousness and recidivism factors, and Revised Code Section 2929.13 and other Revised Code Sections for felony sentencing of the fifth degree, and each of the two PSIs that I have, one for each Defendant.

Present is Mr. Wohl by way of Zoom, along with his counsel, Mark Wieczorek.

MR. WIECZOREK: Wieczorek, your Honor.

THE COURT: I'm sorry. And Mr. Burkman is present by way of his counsel, Brian Joslyn.

Now, everybody is appearing by way of Zoom hook-up here. Each Defendant has the right to be present here in the courtroom. The Zoom hook-up is being done for their convenience. They both reside out of state in the Washington, D.C. area, and this is done

for their convenience. And they waive any defects in proceeding as such?

MR. JOSLYN: Yes, Judge.

MR. WIECZOREK: Yes, your Honor.

THE COURT: Each Defendant does, in fact, know they have the right to be present in the courtroom, and you are waiving that right voluntarily?

MR. JOSLYN: Yes, your Honor.

MR. WIECZOREK: Yes, your Honor.

THE COURT: Present representing the interest of the State is Assistant County Prosecutor James Gutierrez. Mr. Gutierrez.

MR. GUTIERREZ: Thank you, your Honor. May it please the Court. Judge, this case, you read the PSI report which kind of help outlines exactly what went on here.

I want to read for the record what the robocall actually was. This was perpetrated within Cuyahoga County. Actually, I believe 3400 calls actually reached somebody. I think 6800 calls were attempted in this county, but 3400 made it into the county.

Judge, actually if you want to look at this case, it actually worked because there was less turnout in the black community in 2020 than there was in 2016. Whether this call had an effect, it sure didn't help. I want to read the call for the record and for the Court.

It starts out, "Hi. This is Tamika Taylor." Now, at this point in time, Judge, Breonna Taylor was a shooting down I believe in Kentucky, but Tamika actually is Breonna Taylor's mother. I don't believe Tamika Taylor actually has the last name of Taylor, but they used that term in there just to start off.

It says, "Hi. This is Tamika Taylor from Project 1599," which I believe is the address of co-defendant Burkman in Maryland, your Honor. "The Civil Rights Organization founded by Jack Burkman and Jacob Wohl." Judge, there's no Civil Rights Organization by these guys. "Mail-in voting sounds great, but did you know that if you vote by mail, your personal information will be part of a public database that will be used by police

departments to track down old warrants, and be used for credit card companies to collect outstanding debts? The CDC is even pushing to use records for mail-in voting to track people for mandatory vaccines. Don't be finessed into giving your private information to the mail. Stay safe, and beware of vote by mail."

Judge, all that is false. There is not one kernel of truth into what they said in that particular recording. This is targeted at the black community; specifically, the vulnerable people in that community who may have outstanding warrants, who may have debts. This had some chilling effect, your Honor. That's what the State contends.

Judge, I wanted to bring to the Court's attention exactly what they did. And I know they pled out to telecommunication fraud because that's exactly what this was, your Honor.

I know they're felonies of the fifth degree, your Honor. And I understand there is a presumption of probation in these particular circumstances. But, Judge, I wanted to let the Court know exactly what these two

individuals did.

I thought what was enlightening from a PSI report which you reviewed, Judge, is that I believe Mr. Wohl indicated that they did this for a political stunt, to get attention for profit. That's exactly what this was, Judge. It was just a stunt. Nothing more, nothing less.

But it had an effect. It had an effect in Cuyahoga County. And because of these, I should say, times that we're in, hyper-partisan, hyper-political type of times we're in, this did not help. It did not help anybody. And it sure didn't help the black communities that this call was put towards, Judge.

I know the Defense agreed to pay the maximum fine of $2500, your Honor, but I would suggest to this Court that some type of sanction is appropriate regarding probation.

At the end of the day, Judge, we would leave the ultimate decision of the sentencing to the wise discretion of this Court.

Thank you, your Honor.

THE COURT: All right. Thank you. Mr. Wieczorek, do you have anything to say?

MR. WIECZOREK: Thank you, your Honor. May it please the Court. I'm in possession of the presentence investigation which incorporates eight pages. We would ask that the Court take those and make those part of the record. There are no subtractions, additions, or corrections.

We would just point out a few things on Page 6. Your Honor, my client has a very good job. He is making over $150,000 a year.

In addition to that, on Page 8, we would point out that his risk of recidivism is marked as low. He has no other criminal convictions on his record at this point. Mind you, he does have other issues pending in other states.

We do accept responsibility and accountability for his actions. I think he is genuinely remorseful. That's been documented in the PSI, your Honor. He was candid and transparent and, once again, took responsibility and accountability for his

actions. He tendered a guilty plea to the one count as the State has indicated.

We would ask that the Court take into consideration House Bill 86, and just impose a term of probation. We submit on that.

Thank you, Judge.

THE COURT: Thank you. Mr. Joslyn.

MR. JOSLYN: Thank you, your Honor. Similarly, I am in possession of the presentence report, and have read and reviewed it, and I believe it is complete and accurate.

Your Honor, similarly as well, my client has no prior criminal history. I think he's at least, in terms of my communications with him, showed a true amount of sincere remorse for his conduct in this case.

Obviously, given his age and his significant number of years living a law-abiding life, this is unfortunate for him now to find himself with a felony conviction which, obviously, will adversely affect him in any endeavors that he might get in the future.

Your Honor, I do believe that community control is an appropriate outcome in

this case. The presentence report indicates a very low risk of recidivism. And I don't think there is even, from I guess the supervision standpoint, probably little to supervise for him. But, of course, a punishment needs to be rendered, and we ask the Court to impose the recommended fine the prosecutor and Defense counsel agreed to.

Thank you.

THE COURT: You understand that's just a recommendation to the Court, and the Court has full sentencing discretion?

MR. JOSLYN: Yes. My client is aware of that as well. We informed them of that.

THE COURT: Mr. Wohl, do you have anything to say?

DEFENDANT WOHL: Your Honor, I would just echo, of course, what we said in the assessment by the probation office, and really express my absolute regret and shame over all of this. And I ask the Court to issue a sentence in the spirit of fairness, and defer to the Court really on all of that, your Honor.

THE COURT: And Mr. Burkman?

DEFENDANT BURKMAN: Thank you, your Honor. I would just echo Mr. Wohl's sentiments. I think the same.

Thank you.

THE COURT: I'm 71 years old, born in 1951. During my lifetime all but two of the major advantages of the civil rights and voting movement has occurred. The only two that occurred prior to my lifetime is the integration of the Armed Forces and the integration of major league baseball. Since 1951, all the other advancements.

There have been hiccups here. And we have had brave individuals attempting to bring the rights of all Americans to deprived individuals in the southern states at the risk of their lives. They went in the face of unbridled bigotry and hatred to bring the right to vote to individuals down in the South.

In '64, three voting rights activists were murdered by individuals in power down in Mississippi, and I see this case as much in the same vein. In the 58 years since that

case happened, there are still people going out there trying to prevent people of color from voting. To try to use intimidation and scare tactics, maybe it's just a little different scale, but it's the same thing.

Mr. Burkman, I understand you're a lawyer; is that correct? I didn't hear that.

DEFENDANT BURKMAN: Yes, your Honor, I am. Yes, sir.

THE COURT: Still, you did this type of act. I think it's a betrayal of your oath as an attorney to uphold the Constitution of the United States. I think it's a despicable thing which you guys have done.

I'm only limited here by the nature of the crime that you pled guilty to. I'm going to place each of you on 24 months of community control under basic supervision.

Now, I understand that you live in the Arlington, Virginia or Washington, D.C. area. You both make substantial amounts of money. You're each going to have electronic home monitoring curfew from 8 p.m. to 8 a.m. for 180 days. You're going to perform court

community work service of 500 hours at a voter registration drive, and at low and middle income potential voters, and not run by any church organization.

This will be done in the Washington, D.C. area. And each of you are to be involved in a different organization, not the same one. These 500 hours are to be completed by June 1st, 2024. You're both to obtain and maintain verifiable employment. Have random drug testing. You will pay costs and fees plus a fine of $2500.

Since I've ordered you to pay costs, fees, and a fine, if you fail to do so, or pay according to an approved schedule, then the Court can order you to perform up to 40 additional hours of court community work service per month at the current rate of $9 per hour until such time as that judgment is paid or the default in the schedule is brought back into compliance. Each completed hour of court community work service will reduce the outstanding balance, and the hourly rate can change.

Mr. Gutierrez, is there anything

further?

MR. GUTIERREZ: Nothing, your Honor. Thank you.

THE COURT: Mr. Joslyn, anything further?

MR. JOSLYN: No, your Honor. Thank you.

THE COURT: Mr. Wieczorek, anything further?

MR. WIECZOREK: No, Judge. Thank you.

THE COURT: Thank you.

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(Proceedings were concluded.)

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C E R T I F I C A T E

I, Lisa Hrovat, Official Court Reporter for the Court of Common Pleas, Cuyahoga County, Ohio, do hereby certify that as such reporter I took down in stenotype all of the proceedings had in said Court of Common Pleas in the above-entitled cause; that I have transcribed my said stenotype notes into typewritten form, as appears in the foregoing Transcript of Proceedings; that said transcript is a complete record of the proceedings had in the trial of said cause and constitutes a true and correct Transcript of Proceedings had therein.

Lisa Hrovat, RPR
Official Court Reporter
Cuyahoga County, Ohio