IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

ERIC CERVINI, WENDY DAVIS, DAVID GINS, and TIMOTHY HOLLOWAY, Plaintiffs, v. ELIAZAR CISNEROS, HANNAH CEH, JOEYLYNN MESAROS, ROBERT MESAROS, DOLORES PARK, and JOHN and JANE DOES, Defendants.	Civil Action No. 1:21-cv-565-RP Judge Robert Pitman

BRIEF OF *AMICUS CURIAE* CAMPAIGN LEGAL CENTER ACTION
IN SUPPORT OF PLAINTIFFS' BRIEF IN OPPOSITION
TO DEFENDANTS' MOTIONS TO DISMISS

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INTRODUCTION

Congress enacted the Ku Klux Klan ("KKK") Act in 1871 to address the "wave of counterrevolutionary terror" that swept over the Reconstruction Era.[1] At the behest of elected officials and prominent political figures in the postbellum South, violent white mobs banded together to target their political opponents—newly empowered Black voters, their allies, and the candidates they supported—with oppressive fury. The KKK's attacks were as widespread as they were vicious. Southern state governments either acquiesced to this chaos or were too overwhelmed to counteract it, and the federal government lacked the tools to ensure free political advocacy and protect the proper functioning of the democratic process in the aftermath of the Civil War. The KKK Act, codified in part at 42 U.S.C. § 1985, was the answer.

The KKK Act remains the answer for addressing political violence today. On October 30, 2020, Defendants engaged in a highway ambush by surrounding and then terrorizing and slamming into the vehicles of supporters of an opposing federal political candidate. Using this coordinated "Trump Train" intimidation tactic and riding under the banner of Confederate battle flags, advocates of one presidential campaign attempted to overcome their political adversaries not through robust debate but with raw violence. This use of threats and physical force in an effort to cow the supporters of an opposing political campaign shakes the foundation of our democratic process. And it amounts to a modern-day iteration of precisely the political violence that Congress sought to prevent with the KKK Act. The statute's protections of supporters and advocates of federal candidates apply just as forcefully here as they did in their original context 150 years ago.

STATEMENT OF INTEREST

Amicus curiae Campaign Legal Center Action ("CLC Action") and its affiliate Campaign

[1] Eric Foner, Reconstruction: America's Unfinished Revolution 425 (2d ed. 2014); *see also McCord v. Bailey*, 636 F.2d 606, 615 (D.C. Cir. 1980) (summarizing history).

Legal Center (CLC) are nonpartisan, nonprofit organizations that have, collectively, been working for more than fifteen years to advance democracy through law. *Amicus* CLC Action and its affiliate have litigated numerous voting rights cases in federal courts, including as arguing counsel for the plaintiffs in the United States Supreme Court in *Gill v. Whitford*, 138 S. Ct. 1916 (2018) and *Husted v. A. Philip Randolph Institute*, 138 S. Ct. 1833 (2018), and as counsel for plaintiffs in *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc) (challenging Texas's photo ID law), and *Jones v. DeSantis*, 975 F.3d 1016 (11th Cir. 2020) (en banc) (challenging Florida's felony disenfranchisement law). CLC has filed *amicus curiae* briefs in every major voting rights case before the Supreme Court in recent years, including *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021), *Cooper v. Harris*, 137 S. Ct. 1455 (2017), *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016), and *Shelby County v. Holder*, 570 U.S. 529 (2013).

CLC also submitted *amicus curiae* briefs in recent district court cases involving claims under 42 U.S.C. § 1985(1)[2] and 42 U.S.C. § 1985(3).[3] *Amicus* CLC Action has a demonstrated interest and expertise in the interpretation of laws, such as Section 1985(3), that protect voting rights, voters and campaign workers, and the proper functioning of the democratic process.

ARGUMENT

Amicus CLC submits this brief to clarify several issues related to the interpretation and application of the support-or-advocacy clauses of 42 U.S.C. § 1985(3). Specifically, CLC Action seeks to explain why—based on the plain meaning of the text, relevant precedent, legislative history, and other sources—Defendants' alleged violent conspiracy to attack and intimidate supporters of a presidential campaign fits squarely within those clauses. Defendants' attempts to

[2] *Blassingame v. Trump*, No. 2:21-cv-858 (D.D.C. 2021); *Thompson v. Trump*, No. 2.21-cv-400 (D.D.C. 2021); *Swalwell v. Trump*, No. 2:21-cv-586 (D.D.C. 2021).
[3] *Cockrum v. Donald J. Trump for President, Inc.*, No. 3:18-cv-00484 (E.D. Va. 2018); *LULAC v. Public Interest Legal Foundation*, No. 1:18-cv-00423 (E.D. Va. 2018).

muddy the plain application of the support-or-advocacy clauses by improperly narrowing their scope and conflating case law related to other clauses of the KKK Act must be rejected.

The Court should reject Defendants' arguments for multiple reasons. First, Congress deliberately designed Section 1985(3) to broadly address political violence in all its forms. Defendants' cramped reading of the statute that erroneously conflates two distinct sets of provisions should be rejected.[4] Second, Plaintiffs' allegations are sufficient to state a cause of action under Section 1985(3) because they properly assert a factual basis for the substantive rights that the support-or-advocacy clauses create, including the right to be free from political intimidation, and they are not required to establish state action nor racial animus. Third, Congress had ample authority to enact Section 1985(3) under the Thirteenth and Fourteenth Amendments, as well as the Elections Clause, Necessary and Proper Clause, and Guarantee Clause; Defendant Park's strained arguments challenging Congress's authority are unfounded. Finally, the First Amendment does not immunize Defendants from liability for their involvement in the conspiracy.

I. Section 1985(3) is deliberately broad and must be interpreted accordingly.

Congress broadly designed the KKK Act to address the dire threat that anti-democratic, white supremacist groups posed to the proper functioning of the democratic process after the Civil War. In 1871, President Ulysses S. Grant explicitly appealed to Congress to pass legislation that would equip the federal government to address the severe "condition of affairs [that] now exists" in the postbellum South that "render[ed] life and property insecure" in the country. *Cong. Globe*, 42d Cong., 1st Sess. 236, 244 (1871) (all legislative history included in Ex. B). Congress compiled an extensive record detailing the rampant terror and intimidation that swept the country during the

[4] Defendant Cisneros's argument that a claim under Section 1985(3) is outside the Court's subject matter jurisdiction, Cisneros MTD at 1-2, is a non-starter; claims brought under the KKK Act—a federal statute—are clearly within this Court's federal question jurisdiction. *See* 28 U.S.C. § 1331.

Reconstruction Era, *see, e.g.*, *id.* 245-48, 320-21, 369, 374, 428, 436, with one leading lawmaker summarizing that "lawless bands of men, amounting to hundreds, . . . have been roaming over the country independent and unchallenged, committing these atrocities, without fear of punishment, cheered by their neighbors, and despising your laws and your authority;" and concluding that "[w]e are called upon to legislate in regard to these matters," *see id.* at 820 (Sen. Sherman). Congress answered this call by enacting the KKK Act, "creat[ing] a broad remedy to address [its] broad concerns" of attacks on American democracy, *see McCord*, 636 F.2d at 615.

This broad remedy vindicates violations of the KKK Act in a range of modern contexts that are distinct from the statute's historical origin. *See, e.g.*, *Stern v. U.S. Gypsum, Inc.*, 547 F.2d 1329, 1335 (7th Cir. 1977) (construing the KKK Act in a new context and concluding that "Congress surely may use the lesson of a particular historical period as the catalyst for a law of more general application" for the future). But here, the mob violence and intimidation targeted at political supporters that drove Congress to pass the KKK Act are legally indistinguishable from Defendants' coordinated attack on the Biden campaign on October 30, 2020. Indeed, the picture of that day is remarkably reminiscent of historical political violence, and it is just as unlawful for renegade groups brandishing Confederate battle flags to take to a public highway to ambush the supporters of an opposing political candidate in 2020 as it was in 1871. Congress's sweeping statutory design thus applies with equal force to address the injuries that Defendants caused. The text, structure, and legislative history of Section 1985(3) confirm this application, and as with all "Reconstruction civil rights statutes," the Court should "accord [the statute] a sweep as broad as [its] language." *Griffin v. Breckenridge*, 403 U.S. 88, 97 (1971) (citation omitted); *accord Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1747 (2020) (instructing "courts [to] apply the broad rule" when the text so dictates).

A. Section 1985(3)'s broad text creates robust substantive rights to protect voters and campaign workers engaged in the democratic process.

Congress's broad intent is manifest in the plain text of Section 1985(3), which represents a comprehensive federal protection against political violence. Although "[t]he length and style" of the statute "make[s] it somewhat difficult to parse[,]" "its meaning becomes clear" if "its several components are carefully identified," *Kush v. Rutledge*, 460 U.S. 719, 724 (1983), and broken down by each clause separated by a semi-colon:

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

42 U.S.C. § 1985(3) (emphases added).

Reviewing Section 1985(3)'s clauses this way clarifies that the first four clauses set out separate substantive protections, and the fifth provides the cause of action and remedy for violations of each of those separate protections. The first two clauses include a common phrase: "equal protection of the laws." These Section 1985(3) equal protection clauses prohibit conspiracies to deprive persons of equal protection of the laws (clause one) and to hinder state

authorities from securing equal protection (clause two). Clauses three and four, by contrast, include the phrase "support or advocacy" but say nothing of equal protection. These so-termed support-or-advocacy clauses of the statute prohibit conspiracies to use violence or intimidation to prevent any citizen from supporting or advocating for federal candidates (clause three) or to injure any citizen on account of their support or advocacy (clause four). As noted, clause five provides the cause of action for any parties injured "in person or property" by the prohibited conspiracy to recover damages from any of the co-conspirators.

The Supreme Court has recognized that Section 1985(3)'s equal protection clauses diverge from other parts of the statute and has declined to apply interpretations limiting the coverage of the first two clauses to the KKK Act more generally. *See Kush*, 460 U.S. at 724-26; *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 267 (1993) (specifying that the *Griffin* analysis concerns "the first clause of § 1985(3)"); *see also Griffin*, 403 U.S. at 102 n.9 (carefully noting that its reasoning applied to claims "under the portion of § 1985(3) before" the Court—the equal protection clauses).[5] This distinction also applies to differentiate the support-or-advocacy clauses, which are designed to protect "the right to support candidates in federal elections" rather than to safeguard equal protection of rights derived from a separate source. *Kush*, 460 U.S. at 726.

The equal protection clauses are distinct because they require examining the conspirators' purpose and endorse equality in a plaintiff's existing rights. These clauses "provide[] no substantive rights [them]sel[ves]," *Great American Fed. S. & L. Ass'n v. Novotny*, 442 U.S. 366,

[5] *See also* Ben Cady & Tom Glazer, *Voters Strike Back: Litigating Against Modern Voter Intimidation*, 39 N.Y.U. REV. L. & SOC. CHANGE 173, 203-04 (2015) (summarizing differences between the Section 1985(3) clauses); Richard Primus & Cameron O. Kistler, *The Support-or-Advocacy Clauses*, 89 FORDHAM L. REV. 145, 154 (2020) (same); Note, *The Support or Advocacy Clause of § 1985(3)*, 133 HARV. L. REV. 1382, 1387 (2020) (same).

372 (1979), but simply vindicate the deprivation of either "equal privileges and immunities" or "equal protection of the laws" that have their substantive basis "found elsewhere," *United Bhd. of Carpenters Local 610 v. Scott*, 463 U.S. 825, 833 (1983). Given that many relevant constitutional rights that could underlie an equal protection clauses claim require state action,[6] plaintiffs often (but not always) must "prove that the State was somehow involved in or affected by the conspiracy." *Carpenters*, 463 U.S. at 833. Additionally, because equality is the touchstone of claims under Section 1985(3)'s first and second clauses, plaintiffs must establish "class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin*, 403 U.S. at 96-97. Thus, under the test established in *Griffin* and its progeny, plaintiffs pursuing a Section 1985(3) *equal protection clauses* claim must allege: (1) a violation of an independent right, such as First Amendment rights to free speech or association; (2) a "racial, or perhaps otherwise class-based" deprivation of that right; and (3) often state action. *Id.* at 102; *Carpenters*, 463 U.S. at 834-35.[7]

The *Griffin* test does not apply to a claim under Section 1985(3)'s support-or-advocacy clauses. Rather, the Section 1985(3) support-or-advocacy clauses provide far broader protections that are "something more and something different" because they effectuate "the specific attention of Congress which has provided a specific remedy for interference by private individuals" of the rights of voters to give their support or advocacy for federal candidates. *Paynes v. Lee*, 377 F.2d

[6] Some exceptions exist, such as a claim of conspiracy to deprive individuals of their Thirteenth Amendment rights, which does not require a showing of state action. *Griffin*, 403 U.S. at 104-05.

[7] Although the *Novotny* decision imprecisely described this *Griffin* test as the "criteria for measuring whether a complaint states a cause of action under § 1985(3)," *id.* at 372, it did not at all discuss the support-or-advocacy clauses, *see id.* at 370-72. Neither did the dissent, which discussed only the meaning of the "equal privileges and immunities under the laws" portions of Section 1985(3). *See id.* at 388-90 (White, J., dissenting). Indeed, much of the confusion concerning the jurisprudence involving Section 1985(3) stems from courts referencing the general section number as a shorthand for a particular provision because Congress's arcane drafting conventions from 1871 breaks down the statute's distinct provisions into separate clauses rather than citable subsections. *See* Primus & Kistler, *supra* n.5, at 184-89.

61, 64 (5th Cir. 1967). The support-or-advocacy clauses "relate[] to institutions and processes of the Federal Government" and broadly protect its electoral system, lacking the textual limits applicable to claims under the equal protection clauses. *See Kush*, 460 U.S. at 724. Instead of speaking in terms of "purpose" to deprive "equal protection of the laws, or of equal privileges and immunities under the laws," the support-or-advocacy clauses expansively protect "any citizen" from any conspiracy that uses "force, intimidation, or threat" to prevent the citizens' "support or advocacy" of a federal candidate or injure them on account of that support or advocacy. 42 U.S.C. § 1985(3). Because of these textual differences, "there is no suggestion" that the equal protection clauses' limiting requirements to prove discrimination involving a separate substantive right that potentially demands state action would apply to "any other portion of § 1985," including the support-or-advocacy clauses. *Kush*, 460 U.S. at 726; *see also Bray*, 506 U.S. at 267.

The support-or-advocacy clauses instead offer far-reaching substantive protections that enforce Congress's extensive "power to protect the elections on which its existence depends from violence[.]" *Ex Parte Yarbrough (The Ku Klux Cases)*, 110 U.S. 651, 658 (1884). As discussed in further detail *infra* Part II, the support-or-advocacy clauses establish their own statutory rights that do not compel proof of state action or class-based animus. Their elements, instead, require plaintiffs to establish (1) the Defendants participated in a conspiracy;[8] (2) to use intimidation, force, or threats against citizens; (3) to obstruct their support or advocacy of a federal candidate. Binding precedent supports this reading of the support-or-advocacy clauses, *see Paynes*, 377 F.2d

[8] Accepting the pleaded facts as true, *amicus* CLC Action examines the Section 1985(3) framework without discussing the elements of a conspiracy. However, we note that the records of the events in question and communications leading up to those events speak for themselves. *See, e.g.*, Kate McGee, Jeremy Schwartz, and Abby Livingston, "Biden camp cancels multiple Texas events after a 'Trump Train' surrounded a campaign bus," TEXAS TRIBUNE (Oct. 31, 2020), https://www.texastribune.org/2020/10/31/biden-trump-texas-bus/ (last accessed Sept. 9, 2021).

at 63-64, and the Court should follow the established path of recent district courts interpreting the statute in this manner. *See, e.g.*, *Nat'l Coal. on Black Civic Participation v. Wohl*, 498 F. Supp. 3d 457, 486 & n.30 (S.D.N.Y. 2020); *LULAC v. Pub. Int. Legal Found.*, No. 1:18-CV-00423, 2018 WL 3848404, at *5 (E.D. Va. Aug. 13, 2018); *Ariz. Democratic Party v. Ariz. Republican Party*, No. 16-cv-03752, 2016 WL 8669978, at *5 n.4 (D. Ariz. Nov. 4, 2016); *accord Allen v. City of Graham*, No. 1:20-CV-997, 2021 WL 2223772, at *8 (M.D.N.C. June 2, 2021).

B. Historical and statutory context reinforces that the support-or-advocacy clauses are broad.

The historical backdrop in 1871, the statutory context of the KKK Act as a whole, and the history of prior failed legislation to protect voters and campaign workers from attack all further reinforce the expansive application of the Section 1985(3) support-or-advocacy clauses.

The historical backdrop of the KKK Act confirms that the purpose of Section 1985(3) was to fully protect citizens from attacks on their political support or advocacy. "[S]tatutes are construed by the courts with reference to the circumstances existing at the time of the passage." *United States v. Wise*, 370 U.S. 405, 411 (1962); *see also Whitman v. Am. Trucking Associations*, 531 U.S. 457, 471 (2001) (ruling that a statute must be "interpreted in its statutory *and historical context*" (emphasis added)). Immediately following the Civil War, the federal government undertook a broad effort to bring Black voters into the political process and safeguard that participation from attack. By 1870, Congress had passed the Thirteenth, Fourteenth, and Fifteenth Amendments to abolish slavery and its badges and incidents; guarantee due process, equal protection of the laws, and punish voting deprivations with reduced congressional representation; and outlaw race discrimination in voting. These Reconstruction Amendments, along with local organizing efforts by groups including the Union League and the Republican Party, led to a period of widespread electoral success for newly enfranchised Black voters, their allies in the South, and

their desired Republican candidates. Foner, *supra* n.1, at 291-307. This coalition briefly enjoyed electoral success in nearly all Southern governorships and legislatures while also electing Black representatives to Congress for the first time. *Id.* at 353. But the KKK and similar militant groups responded to these electoral victories with a sustained campaign of violence, threats, and intimidation. *See, e.g.*, *id.* at 425-44. The Klan's violence was politically motivated—designed to overcome Black Republicans and their white Republican allies with force when they could not defeat them at the ballot box. The KKK and like groups effectively functioned as "a military force serving the interests of the Democratic party, the planter class, and all those who desired the restoration of white supremacy." *Id*. at 425. To address this pervasive political violence problem and fulfill Congress's "idealistic determination that the gains of the Civil War not be surrendered," *Oregon v. Mitchell*, 400 U.S. 112, 254 (1970) (Brennan, J., dissenting in part and concurring in part), Congress devised the support-or-advocacy clauses to be a broad solution.

The expansive reach of the KKK Act's other provisions also establishes that Congress sought to fully safeguard participants in the political process from mob violence and intimidation in all forms. *See King v. Burwell*, 576 U.S. 473, 492 (2015) (provisions "must be read in their context and with a view to their place in the overall statutory scheme" (citation omitted)); *see also Griffin*, 403 U.S. at 98 (stating that the Court's "construction of Section 1985(3) is reinforced when examination is broadened to take in its companion statutory provisions"). For example, the KKK Act established a then-unprecedented private right of action for violations of constitutional rights (now codified, as amended, at 42 U.S.C. § 1983), and dramatically expanded protections for federal government officials performing their federal duties. *See* KKK Act of Apr. 20, 1871, Ch. 22, § 1, 17 Stat. 13 (Ex. C) (private right of action), § 2, 17 Stat. at 13-14 (federal official protections). The 1871 Congress also reached even further by authorizing President Grant to

engage the military to confront the massive private lawlessness in the South, permitting the temporary suspension of the writ of habeas corpus, and empowering courts to remove potential jurors because of their perceived support of the KKK. *See id.* § 3, 17 Stat. at 14 (military authorization), § 4, 17 Stat. at 14-15 (habeas suspension), § 5, 17 Stat. at 15 (juror qualification). This wide-ranging statutory scheme confirms that, in drafting Section 1985(3), Congress legislated at the height of its power to release the KKK's stranglehold on the South and protect voters and candidates' ability to freely engage in the democratic process. *See* Foner, *supra* n.1, at 455. Section 1985(3)'s comprehensive support-or-advocacy provisions played a key role in pursuing this goal.

Moreover, the history of Congress's prior enactments to protect against extremist groups also "underscores the . . . nature of" Section 1985(3)'s expansive coverage. *See Ross v. Blake*, 136 S. Ct. 1850, 1857 (2016); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) (reaffirming "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination" (citation omitted)). The KKK Act was the third in a series of increasingly stringent Enforcement Acts designed to stop the severe threats to the Nation's democracy that prior legislation failed to address or left gaps, such as in the Civil Rights Act of 1866. *See* Foner, *supra* n.1, at 454-55. These prior laws fell short in protecting voters and campaign workers, an increasingly important objective in 1871 that was necessary to achieve the ultimate goal of restoring democratic order in the South. *See id.* at 455-59. Congress designed Section 1985(3) to correct these shortcomings in existing law. Accordingly, the support-or-advocacy clauses should be interpreted to have the expansive reach that their language requires.

C. Legislative history favors reading the support-or-advocacy clauses broadly.

The Section 1985(3) legislative history also provides "clear evidence of congressional intent" to enact a broad statute that would fully protect supporters of federal candidates from violent conspiracies. *See Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011). This legislative

history of the support-or-advocacy clauses reveals Congress's clear concern that stopping the KKK's politically motivated violence was urgently needed to preserve American democracy. *See* Mark Fockele, *A Construction of Section 1985(c) in Light of Its Original Purpose*, 46 U. Chi. L. Rev. 402, 407-11 (1979) (detailing legislative history).[9] The leading Committee Report for the bill puts this core objective beyond doubt, concluding that "[i]t is clearly established . . . [t]hat the Ku-Klux organization does exist, has a political purpose, is comprised of members of the democratic or conservative party, [and] has sought to carry out its purpose by murders, whippings, intimidations, and violence." *Id*. at 408 (quoting H.R. Rep. No. 1, 42d Cong., 1st Sess. xxx-xxxi). Congress understood that the KKK's goal was "to reestablish Democratic hegemony in the South" through political violence rather than fair electoral success, and knew that a narrow statutory prohibition would fail to ward off this dire threat to democracy. *See id.* As one member put it, "[i]f political opponents can be marked for slaughter by secret bands of cowardly assassins who ride forth with impunity to execute the decrees upon the unarmed and defenseless, it will be fatal alike to the Republican party and civil liberty." *Cong. Globe*, at 321 (Rep. Stoughton).

In sum, Section 1985(3)'s language is vast, and its statutory context, history, and purpose confirm its expansive application. To read it fairly is to read it broadly, and the Court should interpret the Section 1985(3) support-or-advocacy clauses in accordance with the statute's wide sweep and Congress's firm intent to protect the proper functioning of the democratic process against political violence and intimidation.

II. Section 1985(3) applies to the conspiracy conduct alleged in the Complaint.

The Section 1985(3) support-or-advocacy clauses prohibit Defendants' alleged conspiracy. First, the clauses provide substantive rights to protect citizens from conspiracies to obstruct,

[9] For more on the KKK Act legislative history, *see* Note, *The Support or Advocacy Clause of § 1985(3)*, *supra* n.5, at 1389-92.

through intimidation or other means, their support or advocacy for federal candidates. Second, Plaintiffs need not establish state action to state their claim because the support-or-advocacy clauses prohibit private conspiracies and that prohibition is firmly grounded within Congress's constitutional authority. Third, Plaintiffs have no obligation to allege discrimination because the Section 1985(3) support-or-advocacy clauses, unlike the statute's equal protection clauses, do not require Plaintiffs to prove that racial or other class-based animus motivated the conspiracy.

A. The Section 1985(3) support-or-advocacy clauses provide their own substantive rights, including to be free from intimidation.

As explained above, the Section 1985(3) support-or-advocacy clauses establish their own substantive protections against conspiracies to prevent any citizens from supporting or advocating for federal candidates, or to injure citizens in person or property on account of such support or advocacy. Unlike the statute's equal protection clauses, claims under the support-or-advocacy clauses do not ask plaintiffs to identify a discriminatory violation of a separate constitutional or statutory right. These parts of Section 1985(3) *themselves* give Plaintiffs substantive rights to be free from conspiracies using violence or intimidation to hinder their support for a federal candidate. *See Paynes*, 377 F.2d at 63-64 (holding that Section 1985(3)'s support-or-advocacy clauses provide their own substantive rights); *LULAC*, 2018 WL 3848404, at *4-6 (same). Thus, as Judge Wisdom concluded in analyzing the analogous voter intimidation protections in the Civil Rights Act of 1957, "[t]he inquiry . . . is not whether the defendants have transgressed the Constitution. It is whether they have violated the statute" that here provides its own substantive rights against intimidation. *United States v. McLeod*, 385 F.2d 734, 740 (5th Cir. 1967).

Plaintiffs have properly invoked their statutory rights and allege sufficient facts to establish that the "Trump Train" conspiracy and its effects on Plaintiffs amount to "intimidation" as that term is used in the support-or-advocacy clauses. *See* Compl. ¶¶ 129-35, 141. Although the methods

of political intimidation may change over time and require adapting the KKK Act to new contexts, *see, e.g.*, *LULAC*, 2018 WL 3848404, at *4, the conduct here requires no such adaption because this case is a modern mirror image of the political violence Congress sought to address in 1871. "Today, almost 150 years later, the forces and conflicts that animated Congress's adoption of the Ku Klux Klan Act . . . are playing out again." *Nat'l Coal. on Black Civic Participation*, 498 F. Supp. 3d at 464. And these attacks—reminiscent of the tactics and even symbolism that marked the Reconstruction-era political violence—amount to "contemporary means of" the same "voter intimidation [that] may be more detrimental to free elections than the approaches taken for that purpose in past eras, and hence call for swift and effective judicial relief." *Id.*

At least three sources confirm that the meaning of "intimidation" in Section 1985(3) covers Defendants' alleged conspiracy: contemporaneous dictionary definitions of the term at the time of the statute's enactment; the interpretation of "intimidation" in other federal civil rights statutes; and the U.S. Department of Justice's guidance on the meaning of the term. Using these and other sources, courts have broadly interpreted "intimidation" to encompass a wide range of conduct, from physical violence to emotional distress to other forms of coercion, that places the targeted person(s) in fear. Plaintiffs' allegations fit this accepted broad understanding of intimidation in Section 1985(3). *See* Compl. ¶¶ 2, 4, 8-10, 96, 116-18, 129-35, 141.

To begin, dictionary definitions support that the alleged conspiracy amounts to intimidation. The 1867 Webster's Dictionary defined "intimidate" as "[t]o make fearful; to inspire with fear.—S[yn]. [t]o dishearten; dispirit; abash; deter; frighten; terrify," Noah Webster, *An American Dictionary of the English Language* 555 (1867) (Ex. D), and numerous additional Reconstruction Era dictionaries attributed similar meaning to the word. *See, e.g.*, Cady & Glazer, *supra* n.5, at 196 (detailing definitions). Critically, this definition of "intimidate" does not address

the methods of intimidation, whether physical violence, psychological injury, or otherwise. The term instead focuses on the reaction that the conspirators' conduct induces in the targeted person(s), which adheres to "the most commonly understood 'dictionary' definition of 'intimidate'" meaning "to place a person in fear." *See United States v. Hicks*, 980 F.2d 963, 973 (5th Cir. 1992). This can be done through conduct that is "without . . . a direct or even veiled threat." *Id.* Thus, the meaning of "intimidate" as it has been understood from the Reconstruction Era to today focuses on the state of mind that the perpetrator implants in the victim(s), and Plaintiffs sufficiently allege they were intimidated under this accepted definition.

The use of "intimidation" in related federal statutes also supports this meaning. The term is identically used in 42 U.S.C. § 1985(2), a KKK Act provision that bars conspiracies to intimidate parties or witnesses in connection with legal proceedings. In interpreting that section, courts have held that the conspiracy victim's emotional harm, not merely physical injury or distress, gives rise to a claim for witness intimidation. *See McAndrew v. Lockheed Martin Corp*., 206 F.3d 1031, 1034 (11th Cir. 2000); *Silverman v. Newspaper & Mail Deliverers' Union of N.Y. and Vicinity*, No. 97-cv-040, 1999 WL 893398, at *4 (S.D.N.Y. Oct. 18, 1999). The *Silverman* court, for example, explained that although the KKK Act sought "to address physical intimidation," this "was not the only goal of the statute." *Id*. Section 1985(2)'s use of "intimidation" meant the provision was "also designed to address improper interference with the judicial process" apart from physical attacks, and plaintiffs could bring a claim alleging other types of interference "with the witness' ability to give 'free, full and truthful testimony' in federal court." *Id*. This expansive definition of intimidation informs the meaning of its identical usage in the support-or-advocacy clauses.

"Intimidation" used in related civil rights statutes likewise favors this reading. *See* Cady & Glazer, *supra* n.5, at 193-202 (summarizing civil rights cases interpreting "intimidate" or

"intimidation"). Courts in this Circuit have construed "intimidation" in the analogous Civil Rights Act of 1957 to encompass emotional harassment and other types of coercion beyond threats or actual physical violence.[10] Similarly, 42 U.S.C. § 3617 makes it unlawful to "intimidate, threaten, or interfere with" a person's enjoyment or exercise of fair housing rights, which numerous courts have held covers intimidation that does not involve direct physical violence or threats.[11] And Section 131(b) of the Civil Rights Act prohibits intimidation that interferes with the right to vote in federal elections, 52 U.S.C. § 10101(b), which courts have held includes intimidation through emotional distress and non-physical coercion.[12] These interpretations reveal that the term "intimidation" used in civil rights statutes reaches a wide range of conduct to protect people from violations of their rights, and the Section 1985(3) support-or-advocacy clauses are no exception.

Finally, the Court may look to the Department of Justice's definition of voter intimidation to understand its meaning in the support-or-advocacy clauses. According to 2007 guidance, intimidation is conduct designed to "deter or influence voting activity through threats to deprive voters of something they already have, such as jobs, government benefits, or, in extreme cases, their personal safety." Craig C. Donsanto & Nancy L. Simmons, Public Integrity Section, U.S.

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[10] *See, e.g.*, *McCleod*, 385 F.2d at 740-41 (finding baseless arrests and unjustified prosecutions were intimidation); *United States v. Clark*, 249 F. Supp. 720, 728 (S.D. Ala. 1965) (same); *U.S. by Katzenbach v. Original Knights of Ku Klux Klan*, 250 F. Supp. 330, 341, 355 (E.D. La. 1965) (finding that Klansmen purposefully going to locations where they expected Black Americans to be exercising their civil rights was unlawful intimidation).

[11] *See, e.g.*, *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*, 388 F.3d 327, 330 (7th Cir. 2004) (scrawling a racial slur on plaintiffs' property); *People Helpers, Inc. v. City of Richmond*, 789 F. Supp. 725, 733 (E.D. Va. 1992) (excessive investigations of a rental property).

[12] *See United States v. Beaty*, 288 F.2d 653, 656 (6th Cir. 1961) (white landowners evicted and refused to deal in good faith with Black tenant farmers for the purpose of interfering with their voting rights, giving rise to a voter intimidation claim); *United States v. Bruce,* 353 F.2d 474 (5th Cir. 1965) (white landowners ordered Black defendant who was active in promoting voter registration to stay off their property, preventing him from reaching business clients); *United States v. Deal*, 6 Race Rel. L. Rep. 474 (W.D. La. 1961) (white business owners refused to engage in business transactions with Black farmers who attempted to register to vote).

Dep't of Justice, *Federal Prosecution of Election Offenses* 54 (2007).[13] Plaintiffs' allegations make clear that Defendants conspired to deter them from advocating for their candidate by depriving them of their sense of personal safety—a clear case of intimidation under this accepted meaning.

These authorities resolve any doubt that the facts alleged here amount to intimidation under any conceivable definition of that term, and indeed are reminiscent of the precise factual context in which Congress designed this particular statute to operate to prevent political violence.

B. Support-or-advocacy claims do not require state action.

Plaintiffs correctly state their Section 1985(3) claims against the private individuals involved in the "Trump Train" conspiracy, and nothing in the support-or-advocacy clauses requires proof of state involvement. Defendants' contrary arguments are detached from Section 1985(3)'s text and history. The suggestion that the statute could be unconstitutional if it does not require state action is also meritless because Congress has ample constitutional authority to protect against private conspiracies that undermine their own elections and the proper functioning of government.

Nothing in the Section 1985(3) support-or-advocacy clauses text requires state action. Unlike other KKK Act provisions, which ask plaintiffs to sue a "person [acting] under color of [law] of any State," 42 U.S.C. § 1983, or identify a deprivation of "the equal protection of the laws" that may separately require state action, 42 U.S.C. § 1985(3) (equal protection clauses), the support-or-advocacy clauses are not so limited. The text only requires plaintiffs to establish that "two or more *persons*" (not acting under color of any law), "conspire[d] to prevent by force, intimidation, or threat, *any citizen* . . . from giving his *support or advocacy*" (not requiring a separate substantive right). 42 U.S.C. § 1985(3) (emphases added). The language that compels state action in other KKK Act provisions is absent from the support-or-advocacy clauses.

[13] Available at https://www.justice.gov/sites/default/files/criminal/legacy/2013/09/30/electbook-0507.pdf (last accessed September 9, 2021).

The legislative history also reveals that Congress designed Section 1985(3) without a state action requirement because the problem it sought to address centered on the violence of private vigilante groups who were not overtly acting on behalf of the government. *Cf.* Foner, *supra* n.1, at 432-44 (describing close relationship between KKK and government officials). As a secretive and ostensibly non-governmental group, Congress knew that the KKK sought to "encourage crimes of the most frightful nature to carry elections," and believed it had to wholly "suppress them" to "restore order, fair-dealing, equality, and peace, to secure free elections." *Id.* State action was not part of that calculation. Indeed, Congress was concerned that these outside forces were undermining the government, not part of it. *Cong. Globe*, at 486 (Rep. Cook) ("Any combination of men who shall conspire to prevent me from advocating the election of any qualified person to any office under the Government of the United States . . . is an offense against the Government of the United States."). Nothing in the text or history of the support-or-advocacy clauses supports the atextual suggestion that Congress sought to require state actors to be involved in the conspiracy.

Congress's sweeping constitutional authority over its elections empowers it to enact the support-or-advocacy clauses without a state action limit. *See* Nicholas Stephanopoulos, *The Sweep of the Electoral Power*, 36 Const. Comment 1, 35 (2021). Defendant Park's contrary arguments, *see* Park MTD at 8-14, overlook that, in addition to the Fourteenth Amendment, the support-or-advocacy clauses are anchored in the Thirteenth Amendment, the Elections Clause, the Necessary and Proper Clause, and the Guarantee Clause. Indeed, The KKK Act's text forecloses Defendants' effort to limit the statute because it states the bill was "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, *and for other purposes*." 17 Stat. at 13 (emphasis added). Defendants erroneously understate Congress's extensive authority over its elections and impermissibly read the words "for other purposes" out of the statute.

These "for other purposes" are not empty words. *See Loughrin v. United States*, 573 U.S. 351, 358 (2014) (courts must "give effect" to "every clause and word of a statute" (citation omitted)). They provide that Congress enacted the KKK Act using additional constitutional bases that do not require enforcement statutes to contain state action elements. First, the Thirteenth Amendment warrants reading the support-or-advocacy clauses without a state action requirement because it empowers Congress to enact legislation targeting private actions that preserve "the badges and the incidents of slavery." *Griffin*, 403 U.S. at 105. "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation," as it did in the KKK Act. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968). The Elections Clause and the Necessary and Proper Clause in Article I also provide independent constitutional grounding for Congress to enact the KKK Act under its extensive "power to protect the elections on which its existence depends[] from violence[.]" *Ex Parte Yarbrough*, 110 U.S at 658; *accord United States v. Goldman*, 25 F. Cas. 1350, 1354 (C.C.D. La. 1878) (holding that the KKK Act is rooted in the Elections Clause). The Elections "Clause's substantive scope is broad" and Congress's power under it is "paramount." *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 8 (2013) (citation omitted). These clauses authorize Congress to prevent private attacks and "protect . . . the man who votes from personal violence or intimidation, and the election itself from corruption[.]" *Ex Parte Yarbrough*, 110 U.S. at 661; *see also Smiley v. Holm*, 285 U.S. 355, 366 (1932) (the Elections Clause authority includes the "protection of voters," unconditioned by state action).

The Guarantee Clause is likewise a "plenary" and "bountiful source of power [for Congress], which cannot be called into question." *Cong. Globe*, 40th Cong., 3d. Sess. 903 (1869) (Sen. Sumner). It authorizes Congress to protect the "right of the people to choose their own officers for governmental administration," *Duncan v. McCall*, 139 U.S. 449, 461 (1891), and there is no

requirement that state officials be responsible for the deprivation of that right. *See Texas v. White*, 74 U.S. 700, 721, 727 (1868) (specifying that "[t]he government *and the citizens of the State*, refusing to recognize their constitutional obligations, assumed the character of enemies" and had infringed the right to a republican form of government, which Congress has the authority to guarantee for the "people or political community" of the state "as distinguished from a government" (emphasis added)).[14] Thus, Congress has extensive authority to enact the support-or-advocacy clauses without requiring proof of state action. Because the text and history of the KKK Act contain no indications that state action is required, Plaintiffs need not plead it.

C. Support-or-advocacy claims do not examine class-based discrimination.

Claims under Section 1985(3)'s support-or-advocacy clauses also do not require proof that racial or other class-based animus motivated the prohibited conspiracy. Defendants' contrary arguments—relying on inapposite cases concerning the statute's distinct equal protection clauses—run headlong into the provisions' plain text, binding precedent on the proper interpretation of Section 1985, the weight of recent persuasive authority, legislative history, and interpretations of similar provisions of the KKK Act.

First, the support-or-advocacy clauses' plain text establishes that proof of discrimination is not an element of Section 1985(3) claims enforcing those provisions.[15] Although the Section 1985(3) equal protection clauses speak in terms of protecting "equal" rights and evaluating the "purpose" driving the conspiracy, 42 U.S.C. § 1985(3), the support-or-advocacy clauses lack this "critical language," *see Kush*, 460 U.S. at 720. As the *en banc* Fifth Circuit concluded, it was these

[14] *See also* Gabriel J. Chin, *Justifying A Revised Voting Rights Act: The Guarantee Clause and the Problem of Minority Rule*, 94 B.U. L. REV. 1551, 1565-70 & n.115 (2014).

[15] The lack of an animus requirement also does not take the support-or-advocacy clauses outside the bounds of Congress's constitutional authority because the Elections Clause, Necessary and Proper Clause, and the Guarantee Clause do not limit Congress to preventing discrimination. *See supra* Part II.B.; *see also* Stephanopoulos, *supra*, at 7-11; Primus & Kistler, *supra* n.5, at 164-70.

provisions' purpose-centered text and "the presence of the word 'equal' which allowed the Court" in *Griffin* "to limit the application of the" Section 1985(3) equal protection clauses; "[b]y focusing on that word, the justices discerned that the purpose to deprive another of the equal protection of the laws must be class-based." *McLellan v. Mississippi Power & Light Co*., 545 F.2d 919, 924 (5th Cir. 1977) (en banc); *see also Griffin*, 403 U.S. at 102 (repeatedly emphasizing the word "equal" to require proof of discrimination). Thus, "*Griffin*'s animus requirement rested on 'the "equal protection" language' of § 1985(3)," *Bray*, 506 U.S. at 281 n.13, which the support-or-advocacy clauses text omits. Instead, the support-or-advocacy clauses simply prohibit any conspiracy, irrespective of its motivation, that uses "force, intimidation, or threat" to prevent "any citizen . . . from giving his support or advocacy" to a federal candidate or "to injure any citizen in person or property on account of such support or advocacy." 42 U.S.C. § 1985(3). Because the support-or-advocacy clauses "contain no language requiring that the conspirators act with intent to deprive their victims of the equal protection of the laws," there is no textual basis to interpret those provisions to require discrimination. *Kush*, 460 U.S. at 725.

Second, binding precedent also compels interpreting the support-or-advocacy clauses to exclude a class-based animus element. As noted above, the Supreme Court has repeatedly emphasized that the animus requirement applies to Section 1985(3) equal protection clauses claims but does not extend to other parts of the statute absent a textual basis to do so. *Kush*, 460 U.S. at 724-26; *see also Bray*, 506 U.S. at 267, 281 n.13;[16] *Griffin*, 403 U.S. at 102 & n.9. Even preceding these decisions, the Fifth Circuit in *Paynes* distinguished the support-or-advocacy clauses from the equal protection clauses, holding that plaintiffs must only show that the conspiracy hindered their

[16] Defendant Park's reliance on *Bray* for support, Park MTD at 9-10, is misplaced. The Court explicitly stated that the racial animus analysis it conducted was for an alleged "violation of the *first clause* of § 1985(3)," which is not at issue here. *Bray*, 506 U.S. at 267-68 (emphasis added).

"right to be free from threatened harm" while engaging in the political process "and the right to be protected from violence for an attempted exercise of a voting right[.]" 377 F.2d at 64. Although the factual summary in *Paynes* noted that the conspirators were "two unknown white men" and the plaintiffs were Black, *id.* at 63, the court made no use of those facts in resolving the case and did not discuss discrimination as a component of the analysis, *see id.* at 64-65. Moreover, all of the purportedly contrary Fifth Circuit authority Defendants cite either concern the distinct *equal protection clauses* of Section 1985(3)[17] or have been subsequently overruled,[18] and are therefore irrelevant to resolving the meaning of the support-or-advocacy clauses.

Third, persuasive authority supports that Section 1985(3) support-or-advocacy claims do not require proof of discrimination. Numerous district courts have recently construed the statute and reached precisely this conclusion. *See, e.g.*, *Nat'l Coal. on Black Civic Participation*, 498 F. Supp. 3d at 486 & n.30; *LULAC*, 2018 WL 3848404, at *5; *Ariz. Democratic Party*, 2016 WL 8669978, at *5 n.4. In *LULAC*, for example, the district court analyzed the Supreme Court's combined reasoning in *Kush v. Rutledge*, *Griffin v. Breckenridge*, and *Bray v. Alexandria Women's*

[17] *See, e.g.*, *Cantu v. Moody*, 933 F.3d 414, 419 (5th Cir. 2019) ("The *relevant text* of § 1985(3) criminalizes only conspiracies that involve depriving someone of 'equal protection of the laws' or 'equal privileges and immunities under the laws.' . . . *This kind of conspiracy* requires some form of class-based discrimination." (citations omitted) (emphases added)); *Horaist v. Doctor's Hosp. of Opelousas*, 255 F.3d 261, 271 (5th Cir. 2001) (citing only equal protection clauses cases); *Bryan v. City of Madison, Miss.*, 130 F. Supp. 2d 798, 813 (S.D. Miss. 1999) ("[T]he conspiracy must have as its purpose not only the deprivation of equal protection of the laws, but also a racial or other class-based discriminatory motivation."), *aff'd* 213 F.3d 267 (5th Cir. 2000); *Galloway v. State of La.*, 817 F.2d 1154, 1158 (5th Cir. 1987) (defendants "conspired to deprive . . . equal protection of the laws"); *Daigle v. Gulf State Utils. Co., Local Union No. 2286*, 794 F.2d 974, 978 & n.2 (5th Cir. 1986) (noting the "pertinent part" of Section 1985(3) "prohibits private conspiracies to deprive persons of equal protection of the laws"); *McLellan*, 545 F.2d at 933 (concerning "*equal protection* of the laws within the meaning of [§ 1985(3)]" (emphasis added)).

[18] *See Mitchell v. Johnson*, No. 07-40996, 2008 WL 3244283, at *3 (5th Cir. Aug. 8, 2008) (noting that *Kimble v. D.J. McDuffy, Inc.*, 648 F.2d 340 (5th Cir. 1981), and *Deubert v. Gulf Fed. Sav. Bank*, 820 F.2d 754 (5th Cir. 1987) were overruled); *Newberry v. East Texas State University*, 161 F.3d 276, 281 n.2 (5th Cir. 1998) (involving equal protection claim and relying on overruled cases).

Health Clinic to conclude that the support-or-advocacy clauses "do[] not require allegations of a race or class-based, invidiously discriminatory animus." 2018 WL 3848404, at *6.[19] The same legal framework governs Plaintiffs' claims and requires the same conclusion here.

The legislative history and historical context of the statute likewise reinforce that Congress intended the support-or-advocacy clauses to not require race discrimination. Although the statute in its original context had the effect of preventing the KKK's attacks mostly targeting recently enfranchised Black citizens, Congress designed its protections to extend to "all the thirty-eight millions of the citizens of this nation" at that time. *Cong. Globe*, at 484 (Rep. Wilson). Race was not the focus of the support-or-advocacy clauses because, as Representative Coburn summarized, the KKK's "reign of terror" is "exactly, as they say, political." *Id.* at 460. Allied white voters who supported Black citizens and sought to elect Republicans—pejoratively called "scalawags" by Southern racists—did not "escape the violence" of the KKK's intimidation campaigns. *See* Foner, *supra* n.1, at 427-28. As Representative Roberts summarized: "These acts of violence are not directed against colored citizens only . . . . [T]he victims whose property is destroyed, whose persons are mutilated, whose lives are sacrificed, are always Republicans. They may be black or white . . . but only Republicans." *Cong. Globe*, at 412-13. Thus, Congress wrote the KKK Act to protect supporters of political candidates apart from their race because "[b]e they white or black, they must have free speech, a free ballot, and a safe home." *Id.* at 414.

Moreover, other KKK Act provisions that are more textually aligned with the support-or-advocacy clauses similarly diverge from the Section 1985(3) equal protection clauses by not

[19] Even courts that have erroneously limited other aspects of the support-or-advocacy clauses, such as by requiring state action (at odds with the statute's text and history), have agreed that plaintiffs are not "required to show class-based animus as part of [their] support and advocacy claim." *See, e.g.*, *Federer v. Gephardt*, 363 F.3d 754, 760 (8th Cir. 2004) (applying *Kush*, 460 U.S. at 725).

requiring proof of discrimination. For instance, Section 1985(1), concerning conspiracies to threaten federal officials, and Section 1985(2), prohibiting conspiracies against witnesses and jurors in a judicial proceeding, do not have equality or purpose-focused language. 42 U.S.C. §§ 1985(1); 1985(2). As such, courts have routinely interpreted those provisions to not contain a discrimination element. *See Canlis v. San Joaquin Sheriff's Posse Comitatus*, 641 F.2d 711, 717 (9th Cir. 1981) (Section 1985(1) claim); *Stern*, 547 F.2d at 1339 (same); *Kush*, 460 U.S. at 724-27 (Section 1985(2) claim); *McCord*, 636 F.2d at 614 & n.12 (same). Thus, the Section 1985(3) equal protection clauses are the outlier in the KKK Act apparatus because those clauses explicitly reference equality and purpose; the support-or-advocacy clauses do not have that language, and like other similar KKK Act provisions, Plaintiffs are not required to prove discrimination.

III. The First Amendment does not shield Defendants from liability.

Defendants' cursory First Amendment arguments, *see* Cisneros MTD 1-2; Park MTD at 17, are also unfounded. Although the First Amendment protects Defendants' freedom of speech, it does not provide a license to intimidate political opponents. *See Virginia v. Black*, 538 U.S. 343, 362-63 (2003); *see also United States v. Stevens*, 559 U.S. 460, 493 (2010) (stating that "[t]he First Amendment protects freedom of speech, but it most certainly does not protect violent criminal conduct, even if engaged in for expressive purposes"). Defendants chose to express their political views not through heated debate or peaceful counterprotest but by forming a violent conspiracy to ambush and intimidate supporters of an opposing candidate on a Texas highway. This choice takes their conduct outside the bounds of free speech guarantees. The First Amendment simply "does not protect activities that are violent or physically injurious, including threats of force and certain physical obstructions, such as blockades of pedestrian traffic." *United States v. Bird*, 124 F.3d 667, 683 (5th Cir. 1997); *accord Cameron v. Johnson*, 390 U.S. 611, 617 (1968) (ruling a prohibition on picketing "engaged in a manner which obstructs or unreasonably interferes with ingress or

egress to or from [a] courthouse . . . does not abridge constitutional liberty"). Likewise, even if the conspirators meant Plaintiffs no physical harm, "[t]he threat of severe nonbodily harm can engender as much fear and disruption as the threat of violence," and is undeserving of First Amendment protection. *Nat'l Coal. on Black Civic Participation*, 498 F. Supp. 3d at 479.

That the Defendants sought to score a political point through their conspiracy makes no difference for First Amendment purposes and instead further establishes that their conduct is precisely what the KKK Act seeks to address. *See supra* Part I. The District Court in *Daschle v. Thune* reached the same conclusion when faced with relatively similar factual circumstances. The court ruled that the alleged conspiracy, which involved following and intimidating Native American voters outside polling places, was not First Amendment protected irrespective of the conspirators' expressive goals. TRO at 2, *Daschle v. Thune*, No. 04-cv-4177 (D.S.D. Nov. 2, 2004) (Ex. E). It held that "[w]hether the intimidation [wa]s intended or merely the result of excessive zeal" was not pertinent because "the result was the intimidation." *Id*. Here, too, Defendants' alleged conspiracy resulted in intimidation. *See supra* Part II.A. And, as in *Daschle*, the mere fact that this intimidating conduct was rooted in a desire to advocate for Defendants' favored candidate, as they assert, does not mean it warrants First Amendment protection.

Thus, what Defendants call "zealous advocacy" is instead an unlawful conspiracy under Section 1985(3). Their intimidation effort "inflicts harm upon the broader public's interest in selecting elected officials through a free and fair process," *Nat'l Coal. on Black Civic Participation*, 498 F. Supp. 3d at 488, and the First Amendment does not sanction their choices to participate in the conspiracy merely because they had political motivations for doing so.

CONCLUSION

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

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Respectfully submitted,

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