

Remedying Intimidating Voter Disinformation Through § 1985(3)’s Support-or-Advocacy Clauses

MICHAEL WEINGARTNER*

The 2020 election cycle witnessed the continued shift of voter intimidation from the polling place to cyberspace. As social media and online tools provide bad actors with an unprecedented ability to spread disinformation aimed at intimidating voters and keeping them from the polls, there has been a renewed focus on federal voter intimidation laws as a source of redress. While two of these laws—section 131(b) of the Civil Rights Act of 1957 and section 11(b) of the Voting Rights Act—are limited to injunctive relief and attorney’s fees, 42 U.S.C. § 1985(3), a provision of the Ku Klux Klan Act of 1871, goes further and provides for compensatory and punitive damages along with several procedural advantages for victims of conspiracies to prevent voters from giving their “support or advocacy” to federal candidates. This Article provides a novel analysis of the application of the support-or-advocacy clauses to voter disinformation and argues that, despite certain obstacles, plaintiffs should embrace the clauses as a potentially powerful weapon against modern-day voter intimidation.

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INTRODUCTION

In the lead-up to the 2020 election, voting rights advocates and election officials prepared for what many feared would be a wave of voter intimidation at the polls.¹ And with good reason: during the first presidential debate, then-President Donald Trump had urged his supporters to “go into the polls and watch very carefully,”² and directed members of the Proud Boys, a militant white-supremacist group, to “stand back and stand by.”³ The next day, the Trump campaign announced plans to organize more than 50,000 “poll watchers”⁴ as groups in swing states began recruiting armed security forces to monitor polling places on Election Day.⁵ Anticipating the

¹ See, e.g., Danielle Silva, *Trump’s Call for Supporters to Watch Polls ‘Very Carefully’ Raises Concerns of Voter Intimidation*, NBC NEWS (Sept. 30, 2020, 5:26 PM), <https://www.nbcnews.com/news/us-news/trump-s-call-supporters-watch-polls-very-carefully-raises-concerns-n1241613> [https://perma.cc/8UUV-LPB5]; Danny Hakim, Stephanie Saul, Nick Corasaniti & Michael Wines, *Trump Renews Fears of Voter Intimidation as G.O.P. Poll Watchers Mobilize*, N.Y. TIMES (Nov. 3, 2020), <https://www.nytimes.com/2020/09/30/us/trump-election-poll-watchers.html>.

² See Silva, *supra* note 1.

³ See Sheera Frenkel & Annie Karni, *Proud Boys Celebrate Trump’s ‘Stand By’ Remark About Them at the Debate*, N.Y. TIMES (Jan. 20, 2021), <https://www.nytimes.com/2020/09/29/us/trump-proud-boys-biden.html>.

⁴ See Amy Gardner, Joshua Partlow, Isaac Stanley-Becker & Josh Dawsey, *Trump’s Call for Poll-Watching Volunteers Sparks Fear of Chaos and Violence on Election Day*, WASH. POST (Sept. 30, 2020, 8:21 PM), https://www.washingtonpost.com/politics/trumps-call-for-poll-watching-volunteers-sparks-fear-of-chaos-and-violence-on-election-day/2020/09/30/76ce0674-0346-11eb-b7ed-141dd88560ea_story.html (describing the Trump campaign’s announcement and its “Army for Trump” website seeking to recruit poll watchers).

⁵ See, e.g., Joshua Partlow, *Former Special Forces Sought by Private Security Company to*

worst, poll workers trained to address potential unrest⁶ and voter-protection groups mobilized their own response.⁷ By all accounts, it seemed like polling places were shaping up to be a warzone.

But when election day arrived—not so much. Voting-rights groups reported far fewer instances of voter intimidation than expected,⁸ and while some intimidation occurred,⁹ it was nothing akin to the “army” of poll watchers promised by the Trump campaign.¹⁰ So, what happened? One

Guard Polling Sites in Minnesota, Company Says, WASH. POST (Oct. 9, 2020, 12:44 PM), https://www.washingtonpost.com/politics/private-security-minnesota-election/2020/10/09/89766964-0987-11eb-991c-be6ead8c4018_story.html (describing a job posting seeking “people with ‘Tier 1 and Tier 2’ Special Operations experience” to work before and during the election); Carrie Levine & Matt Vasilogambros, *Election Officials Prepare for Voter Intimidation Threat*, THE CTR. FOR PUB. INTEGRITY (Oct. 15, 2020), <https://publicintegrity.org/politics/elections/ballotboxbarriers/election-officials-prepare-for-voter-intimidation-threat/> [<https://perma.cc/DBK8-E6R2>] (discussing voting rights groups’ “monitoring efforts . . . in north and south Georgia to recruit potentially armed ‘concerned citizens’ to watch the polls”).

⁶ See, e.g., Martin E. Comas, *Election Supervisors Train Poll Workers in Case of Disruptions, Violence*, ORLANDO SENTINEL (Oct. 12, 2020, 12:42 PM), <https://www.orlandosentinel.com/news/seminole-county/os-ne-elections-security-training-poll-workers-20201009-rketg37w25dglwkeomydoo3i-story.html> [<https://perma.cc/ADZ5-QQJA>] (discussing trainings for poll clerks in Florida).

⁷ See, e.g., Alex Isenstadt & Natasha Korecki, *Trump Campaign Ready to Unleash Thousands of Poll Watchers on Election Day*, POLITICO (Oct. 8, 2020), <https://www.politico.com/news/2020/10/08/trump-election-poll-watching-427008> [<https://perma.cc/9M9C-W8RD>] (discussing efforts of attorneys and voter-assistance groups to expand voter protection efforts).

⁸ See, e.g., Masood Farivar, *US Voting Goes Smoothly, Despite Pre-Election Anxiety*, VOA NEWS (Nov. 3, 2020, 11:50 PM), <https://www.voanews.com/2020-usa-votes/us-voting-goes-smoothly-despite-pre-election-anxiety> [<https://perma.cc/FFF9-RX92>] (discussing lower-than-expected reports of voter intimidation).

⁹ See, e.g., Erik Ortiz, *Voter Intimidation Lawsuit Filed After Police Use Pepper-Spray at North Carolina March*, NBC NEWS (Nov. 3, 2020, 10:42 AM), <https://www.nbcnews.com/politics/2020-election/voter-intimidation-lawsuit-filed-after-police-use-pepper-spray-north-n1245944> [<https://perma.cc/EX7Q-FKVN>] (describing a voter-intimidation suit filed against an officer who pepper sprayed voters at a get-out-the-vote rally in North Carolina); Kimberly Johnson, *Armed Man Arrested at Charlotte Polling Site: CMPD*, PATCH (Nov. 3, 2020, 4:38 PM), <https://patch.com/north-carolina/huntersville/s/hauud/armed-man-arrested-charlotte-polling-site-cmpd> [<https://perma.cc/FBY2-6AZ4>] (describing an incident where a man was arrested after twice going to a polling place with an unconcealed handgun); Holly DeMuth, *The Trouble We’ve Seen*, NYCITY NEWS SERV. (Nov. 3, 2020), <https://www.nycitynewsservice.com/2020/11/voting-site-problems-new-york-city-electionland/> [<https://perma.cc/QJ4R-YCA4>] (describing an incident in Brooklyn where a man driving a truck with pro-Trump signs flags verbally harassed voters and poll workers); Katie Shepherd, *A Miami Cop Wore a Trump Mask to Vote, Inflaming Democrats: ‘This is City Funded Voter Intimidation,’* WASH. POST (Oct. 21, 2020, 5:24 AM), <https://www.washingtonpost.com/nation/2020/10/21/miami-cop-trump-mask/> (describing an incident in which a police officer voted early while wearing his uniform and a pro-Trump face mask).

¹⁰ See, e.g., Jessica Huseman, *So Far, Trump’s “Army” of Poll Watchers Looks More Like a Small Platoon*, PROPUBLICA (Nov. 2, 2020, 12:31 PM), <https://www.propublica.org/>

explanation is that in-person intimidation is a less effective strategy in a year where over a hundred million voters cast their ballots either early or by mail.¹¹ Another is that in-person intimidation is not particularly interesting, especially for those expecting to find voter fraud.¹²

A more troubling explanation is that voter intimidation simply moved from the polling place to cyberspace. Indeed, while things were quiet at the polls in 2020, social media and other electronic channels were awash with disinformation designed to intimidate voters and keep them from the polls. In August, for instance, thousands of voters, many of them in predominately Black neighborhoods, received an automated phone call from a woman identifying herself as “Tamika Taylor from Project 1599, a civil rights organization.”¹³ “Tamika” had called to warn voters that while “[m]ail-in voting sounds great,” registering to do so would result in their personal information being used to track down old arrest warrants, collect on outstanding credit card debt, and even subject them to mandatory vaccinations.¹⁴ None of this was true, of course—the call had been orchestrated by Jacob Wohl and Jack Burkman,¹⁵ a pair of conservative activists with a history of attempting to spread lies and conspiracy theories and who had expressed their intention of interfering in the 2020 election.¹⁶ Many recognized the call as disinformation, but others were understandably concerned and found themselves forced to choose between the possible risks of voting by mail, the certain risks of in-person voting during the COVID-19 pandemic, or not voting at all.¹⁷

article/so-far-trumps-army-of-poll-watchers-looks-more-like-a-small-platoon [https://perma.cc/5LKF-6AVJ] (“[T]he poll-watching army that the Trumps have tried to rally hasn’t materialized.”).

¹¹ See, e.g., Michael McDonald, *2020 General Election Early Vote Statistics*, U.S. ELECTIONS PROJECT, (Nov. 23, 2020, 4:21 PM), <https://electproject.github.io/Early-Vote-2020G/index.html> [https://perma.cc/4RKU-B7EU] (providing detailed statistics for early voting by mail and in person).

¹² See Huseman, *supra* note 10 (quoting one expert describing poll watching as being “like watching paint dry[.] . . . If you’re waiting for the busloads of fraud to arise, and what you get is small American-flag-waving democracy, you begin to go out of your head. It’s like sitting in a field waiting for the UFOs and the UFOs never show up. And then you’re just sitting in a field, which is fine for a couple hours, but polls are open about 15 hours a day”).

¹³ Complaint at 7–8, *Nat’l Coal. on Black Civic Participation v. Wohl*, 498 F. Supp. 3d 457 (S.D.N.Y. 2020) (No. 20-cv-8668) [hereinafter Wohl Complaint].

¹⁴ *Id.*

¹⁵ *Id.* at 4–5.

¹⁶ See, e.g., Manuel Roig-Franzia & Beth Reinhard, *Meet the GOP Operatives who Aim to Smear the 2020 Democrats—But Keep Bungling It*, WASH. POST (June 4, 2019), https://www.washingtonpost.com/lifestyle/style/meet-the-gop-operatives-who-aim-to-smear-the-2020-democrats--but-keep-bungling-it/2019/06/04/5b70f000-7691-11e9-bd25-c989555e7766_story.html; Jane Coaston, *Jacob Wohl, the Trump Internet Activist Cashing In on Conspiracy Theories, Explained*, VOX.COM (Apr. 30, 2019, 4:55 PM), <https://www.vox.com/policy-and-politics/2019/3/2/18245176/jacob-wohl-trump-cpac-conservatism-ilhan-omar-grift> [https://perma.cc/2E3L-VUKV].

¹⁷ See Wohl Complaint, *supra* note 13, at 11–14 (describing plaintiffs’ feelings of intimidation).

This sort of intimidation is not new. Over the past several decades, voter disinformation—the intentional manufacture and dissemination of false or misleading information—has been a persistent method to intimidate voters and prevent them from casting a ballot.¹⁸ This disinformation has spread through flyers, mailings, robocalls, and spam emails.¹⁹ Today, social media and other online platforms provide bad actors an unprecedented ability to broadcast and target disinformation.²⁰

Nearly every state has laws criminalizing at least some types of false statements regarding voting or elections.²¹ Indeed, Jacob Wohl and Jack Burkman were criminally charged for their actions.²² Federal law likewise criminalizes both voter intimidation and conspiracies to deprive any person of a federal right, including the right to vote.²³ Civil enforcement may also be available in limited circumstances. For example, because Wohl and Burkman’s scheme also violated the Telephone Consumer Protection Act,²⁴ the Federal Communications Commission proposed a \$5.1 million civil penalty against the pair.²⁵

¹⁸ See *Deceptive Practices 2.0: Legal and Policy Responses* 3, COMMON CAUSE, THE LAWS.’ COMM. FOR CIV. RTS. UNDER LAW & THE CENTURY FOUND. (2008) [hereinafter *Deceptive Practices 2.0*], <https://www.commoncause.org/wp-content/uploads/2018/03/0064.pdf>.

¹⁹ See *id.* (discussing instances of disinformation); Gilda R. Daniels, *Voter Deception*, 43 IND. L. REV. 343, 344, 346, 348 (2010) (same); *Deceptive Election Practices and Voter Intimidation, The Need for Voter Protection* 1–3, COMMON CAUSE, LAWS.’ COMM. FOR CIV. RTS. UNDER LAW (2012) (same); *Voting Challenges 2010*, BRENNAN CTR. FOR JUST. 23–34 (last visited Sept. 28, 2021), <https://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/National%20Press%20Club%20PPT%20Media%20Webinar%20FINAL%20with%20notes.pdf> [https://perma.cc/F6AC-42XU] (same).

²⁰ See, e.g., Ian Vandewalker, *Digital Disinformation and Vote Suppression*, BRENNAN CTR. FOR JUST. (Sept. 2, 2020), <https://www.brennancenter.org/our-work/research-reports/digital-disinformation-and-vote-suppression> [https://perma.cc/947L-GMAY] (discussing the ability of online platforms to “reach huge numbers of people instantaneously and anonymously” and to “surgically focus on certain demographics”).

²¹ See *Deceptive Practices 2.0*, *supra* note 18, at 5–10.

²² See Mark Gillispie, *2 Conservative Hoaxers Charged in Ohio for Robocalls*, AP NEWS (Oct. 27, 2020), <https://apnews.com/article/election-2020-voting-fraud-and-irregularities-arrests-michigan-elections-1821753daa38131d623da2f2248ac0e5> [https://perma.cc/V7S3-8SHC].

²³ See 18 U.S.C. § 594 (making it unlawful to intimidate, threaten, or coerce any person to interfere with their right to vote in a federal election); 18 U.S.C. § 241 (making it unlawful for two or more persons “to conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States”).

²⁴ 47 U.S.C. § 227(b)(1)(A)(iii); accord 47 CFR § 64.1200(a)(1)(iii).

²⁵ See John M. Burkman, EB-TCD-21-00032652, 2021 WL 3776700, at *1 (FCC Aug. 24, 2021) (notice of apparent liability for forfeiture). The TCPA, however, is designed to combat illegal robocalls, and so does not apply to disinformation or intimidation carried out through other means. See generally 47 U.S.C. § 227(b)(1) (prohibiting illegal uses of “automatic telephone dialing system[s]”).

But criminal prosecution and civil enforcement are imperfect solutions to combat voter disinformation. One reason is that enforcement of voter-intimidation laws by public officials will often implicate political considerations that may caution against calling into question a recent election.²⁶ Another is that enforcement—tracking down perpetrators, amassing evidence, and proving *mens rea* in criminal cases—is costly, and most incidents of voter disinformation do not have a large enough impact on an election to justify expending limited prosecutorial and enforcement resources, particularly after an election has already passed.²⁷ Accordingly, most instances of voter disinformation go unaddressed by authorities.²⁸

More fundamentally, even if robust criminal prosecution and civil enforcement could deter future disinformation, they would do nothing to address the harms suffered by voters who are intimidated and prevented from casting a ballot. Civil remedies, however, have the potential to provide this redress. Two federal voter-intimidation statutes, section 131(b) of the Civil Rights Act of 1957²⁹ and section 11(b) of the Voting Rights Act of 1965,³⁰ were developed during the Civil Rights Era and provide for both injunctive relief and attorney’s fees. While section 131(b) has been limited by courts, scholars have recently argued that section 11(b) offers an opportunity to enjoin intimidating voter disinformation and to help define the sorts of misleading communications that constitute voter intimidation.³¹ Recent legislative efforts, including the For the People Act passed earlier this year by the House of Representatives, have likewise focused on injunctions and attorney’s fees to remedy voter intimidation.³²

Injunctive relief, however, is forward-looking and cannot remedy intimidation that has already occurred. An award of attorney’s fees is also not a sufficient financial incentive for victims of intimidation to file suit after an election. Recently, however, some plaintiffs have turned to an even

²⁶ See Note, *The Support or Advocacy Clause of § 1985(3)*, 133 HARV. L. REV. 1382, 1385 (2020) (noting that, because enforcement of voter intimidation laws is “dependent in part upon political conditions,” private enforcement may be “especially important”).

²⁷ See PUB. INTEGRITY SECTION, U.S. DEP’T OF JUST., FEDERAL PROSECUTION OF ELECTION OFFENSES 50 (Richard C. Pilger ed., 8th ed. 2017), <https://www.justice.gov/criminal/file/1029066/download> (observing that “a number of factors make it difficult to prosecute” election offenses).

²⁸ See *Deceptive Practices 2.0*, *supra* note 18, at 3 (noting that disinformation “often goes unaddressed by authorities and the perpetrators are virtually never caught”).

²⁹ Civil Rights Acts of 1957, Pub. L. No. 85-315, § 131, 71 Stat. 634, 637 (codified as amended at 52 U.S.C. § 10101(b)).

³⁰ § 11(b), 79 Stat. 437, 443 (1965) (codified as amended at 52 U.S.C. § 10307(b)).

³¹ See Ben Cady & Tom Glazer, *Voters Strike Back: Litigating Against Modern Voter Intimidation*, 39 N.Y.U. REV. L. & SOC. CHANGE 173 (2015); see also *id.* at 192 n.122 (noting that courts are split as to whether § 131(b) provides a private right of action).

³² See For the People Act of 2021, H.R. 1, 117th Cong. § 1302 (2021).

older federal statute, § 1985(3) of the Ku Klux Klan Act,³³ which provides compensatory and punitive damages to victims of conspiracies designed to prevent people from giving their “support or advocacy” to federal political candidates.³⁴ Indeed, after Jacob Wohl and Jack Burkman were indicted criminally, a group of impacted voters brought a civil suit seeking damages under this statute.³⁵

This Article explores the potential for § 1985(3)’s support-or-advocacy clauses to redress modern voter intimidation, deter bad actors, and provide an incentive to plaintiffs to bring suit. Part I begins by providing a brief overview of the history of voter intimidation and the use of disinformation tactics, including how modern-day voter intimidation employs social media and other communications technologies to intimidate voters and spread disinformation on an unprecedented scale. Part II then turns to section 131(b) of the Civil Rights Act of 1957 and section 11(b) of the Voting Rights Act, which provide for injunctive relief and an award of attorney’s fees and explores the limitations of these provisions that prevent them from effectively deterring bad actors or providing complete redress to victims of voter intimidation. Next, Part III explores the history and application of the support-or-advocacy clauses to conclude that these clauses create an independent substantive right to be free from politically motivated violence and intimidation. Finally, Part IV examines § 1985(3)’s statutory elements and offers a roadmap for would-be plaintiffs seeking to bring support-or-advocacy claims. It also considers the constitutional limits on challenges to disinformation under the First Amendment.

I. ONLINE DISINFORMATION AS VOTER INTIMIDATION

One of the primary ways that disinformation prevents people from voting is through intimidation and fear. Historically, intimidation has been a common tool for voter suppression. Following Reconstruction, white supremacist groups like the Ku Klux Klan used intimidation and outright violence to discourage Black voters and their political allies from voting.³⁶ Voter intimidation persisted through Jim Crow and the Civil Rights Era, with Black voters and their supporters facing threats, violence, and

³³ 42 U.S.C. § 1985(3).

³⁴ See *Forsberg v. Pefanis*, 634 F. App’x 676, 680 (11th Cir. 2015) (holding that § 1985(3) permits punitive damages even in the absence of compensatory damages).

³⁵ See Wohl Complaint, *supra* note 13, at 21.

³⁶ See, e.g., ALEXANDER KEYSSAR, *THE RIGHT TO VOTE* 84 (2d ed. 2009) (discussing political violence and voter intimidation by southern whites in response to the enfranchisement of Black citizens following the Fifteenth Amendment); RAYMOND W. LOGAN, *THE BETRAYAL OF THE NEGRO: FROM RUTHERFORD B. HAYES TO WOODROW WILSON* 57 (1954) (“[T]he fear of potential, and in some instances actual, intimidation prevented most Negroes from voting in the South. . . .”); Cady & Glazer, *supra* note 31, at 185 (stressing that this violence was political in nature and that “violence and harassment was also directed at white Republicans and Union sympathizers”).

economic coercion.³⁷ Although the passage of federal civil rights laws and the Voting Rights Act of 1965 helped reduce overtly racist voter intimidation efforts,³⁸ voter intimidation continued through less overt means.³⁹

One such means has been to indirectly intimidate would-be voters under the guise of preventing election fraud or illegal voting. In 1981, for instance, the Republican National Committee hired off-duty police officers to patrol voting precincts in minority neighborhoods while wearing “National Ballot Security Task Force” armbands, prompting a lawsuit that led to a consent decree that did not expire until 2018.⁴⁰ Likewise, since 2010, various “ballot security groups” have engaged in intimidating conduct in minority precincts, such as following voters to the polls, photographing voters’ license plates, and challenging voters’ eligibility.⁴¹ These efforts are effective because the physical presence of potentially armed groups creates an implicit threat that voters may be accused of attempting to vote illegally.⁴²

Voter disinformation builds on this tradition by seeking to create the same fear of harm, violence, or government retribution on a broader scale without requiring perpetrators to be physically present. One approach is to spread disinformation that police or immigration officials will be present at polling sites. In 2004, for instance, flyers in minority neighborhoods in Milwaukee falsely informed voters that “you can only vote once a year. And if you’re found guilty of anything, even a traffic ticket, that you cannot vote in the presidential election. And that if you violate any of these laws, you can get 10 years in prison and your children can be taken away from you.”⁴³

³⁷ See, e.g., KEYSSAR, *supra* note 36, at 207–09 (discussing intimidation by southern authorities and noting that Black voters “who were adamant about registering could lose their jobs, have loans called due, or face physical harm”).

³⁸ See Cady & Glazer, *supra* note 31, at 177 (noting that “overtly racist intimidation dramatically declined after the federal government enacted new civil rights laws and began enforcing them aggressively”).

³⁹ See PEOPLE FOR THE AM. WAY. FOUND. & NAACP, THE LONG SHADOW OF JIM CROW: VOTER INTIMIDATION AND SUPPRESSION IN AMERICA TODAY 19 (2004) (discussing the transition from violence to “more subtle” tactics).

⁴⁰ See Vann R. Newkirk II, *The Republican Party Emerges from Decades of Court Supervision*, THE ATLANTIC (Jan. 9, 2018), <https://www.theatlantic.com/politics/archive/2018/01/the-gop-just-received-another-tool-for-suppressing-votes/550052/>.

⁴¹ See Cady & Glazer, *supra* note 31, at 177–78; Mariah Blake, *The Ballot Cops*, ATLANTIC MONTHLY, Oct. 23, 2012, at 64 (describing the conduct of “True the Vote” volunteers during a 2012 special election in Wisconsin).

⁴² See Cady & Glazer, *supra* note 31, at 177–78.

⁴³ See Pam Fessler, *Democrats Want Law Against Voter Deception*, NPR (June 8, 2007, 11:43 AM), <https://www.npr.org/templates/story/story.php?storyId=10863213> [<https://perma.cc/7M8Y-L58Q>]; see also PEOPLE FOR THE AM. WAY FOUND. & NAACP, *supra* note 39, at 9–10 (discussing how in 1998 a South Carolina state representative sent thousands of mailers to predominately black neighborhoods warning voters that “this

Similarly, in 2016, doctored photos circulated online depicting Immigration and Customs Enforcement (ICE) agents arresting voters and, in 2018, flyers distributed in Milwaukee warned that voters who lacked documentation could “risk immediate detainment.”⁴⁴ Most recently, on the eve of the 2020 election, a WeChat campaign falsely informed Chinese-Americans that the U.S. Department of Homeland Security would be dispatched to polling places.⁴⁵

Another approach is to tell voters that voting or registering to vote will result in government or private actors using their personal information to track them. In 2006, for example, a congressional candidate mailed 14,000 letters to registered voters with Hispanic surnames informing them that if they voted, their information would be collected and potentially used by immigration authorities.⁴⁶ Additionally, in 2018 North Dakota Democrats published a Facebook advertisement falsely warning voters that if they voted, they could lose their out-of-state hunting licenses.⁴⁷ And in 2020, Jacob Wohl and Jack Burkman’s robocall falsely informed voters that their information would be used to pull arrest warrants, collect on credit card debt, and track voters for mandatory vaccines.⁴⁸

During the 2020 election, the COVID-19 pandemic, coupled with then-President Trump’s call to members of the Proud Boys, provided new ways to scare voters away from the polls. On Super Tuesday, for example, a Twitter campaign falsely warned seniors that COVID-19 had been reported at polling locations,⁴⁹ and in October, voters in Alaska and Florida received messages claiming to be from the Proud Boys that threatened voters with retribution if they did not vote for President Trump.⁵⁰ On Election Day,

election is not worth going to jail” and how during the 1993 New York City mayoral race flyers were placed in predominately Hispanic neighborhoods warning voters that immigration authorities would be monitoring voting sites).

⁴⁴ See Blake Peterson, *ICE, Dispelling Rumors, Says It Won’t Patrol Polling Places*, PROPUBLICA (Nov. 2, 2018, 4:13 PM), <https://www.propublica.org/article/ice-dispelling-rumors-says-it-wont-patrol-polling-places> [<https://perma.cc/87LX-BXFC>].

⁴⁵ See Joe Fitzgerald Rodriguez & Shannon Lin, *Misinformation Image on WeChat Attempts to Frighten Chinese Americans Out of Voting*, PROPUBLICA (Nov. 2, 2020), <https://www.propublica.org/article/misinformation-image-on-wechat-attempts-to-frighten-chinese-americans-out-of-voting> [<https://perma.cc/AT7A-DTX7>].

⁴⁶ *United States v. Tan Duc Nguyen*, 673 F.3d 1259, 1261 (9th Cir. 2012).

⁴⁷ See Kevin Roose, *We Asked for Examples of Election Misinformation. You Delivered*, N.Y. TIMES (Nov. 4, 2018), <https://www.nytimes.com/2018/11/04/us/politics/election-misinformation-facebook.html>.

⁴⁸ See Wohl Complaint, *supra* note 13, at 7–8.

⁴⁹ See Adam Rawnsley, *Sick: Trolls Exploit Coronavirus Fears for Election Fun*, THE DAILY BEAST (Mar. 3, 2020, 7:34 PM), <https://www.thedailybeast.com/trolls-exploit-coronavirus-fears-for-super-tuesday-fun> [<https://perma.cc/7GNM-PJKU>].

⁵⁰ Philip Ewing, *U.S. Blames Iran for Threatening Election Emails, Says Russia May Interfere Too*, NPR (Oct. 21, 2020, 8:33 PM), <https://www.npr.org/2020/10/21/926445682/u-s-blames-iran-for-threatening-election-emails-says-russia-may-interfere-too>

robocalls went out to over three million voters with a cryptic warning to “stay safe and stay home.”⁵¹

Viewing this sort of disinformation through the lens of voter intimidation offers several advantages for victims. First, it helps distinguish false speech, which is protected under the First Amendment, from intimidation and threats, which are not.⁵² Second, it recognizes not only that victims of voter intimidation are deprived of the chance to cast their ballot but also that they suffer emotional harms when they are made to feel that their life or liberty is at risk.⁵³ Last, it opens the possibility to seek redress through federal voter intimidation laws.

II. INJUNCTIVE RELIEF AND ATTORNEY’S FEES: § 131(B) AND § 11(B)

Voting rights were a central focus of the Civil Rights Movement of the 1950s and 1960s.⁵⁴ But while activists focused on eliminating legal barriers to the ballot, such as literacy tests and poll taxes, organized groups and local governments turned to intimidation and violence to keep Black voters from the polls.⁵⁵ In response, Congress enacted the Civil Rights Act of 1957, aimed at eliminating “public and private interference with the right to vote on racial grounds.”⁵⁶ Section 131(b) of the Act prohibited public and private actors alike from intimidating, threatening, or coercing “any other person for the purpose of interfering with the right of such other person to vote.”⁵⁷ In practice, however, section 131(b) was often ineffective due to courts’ disagreements over whether the law provided a private right of action⁵⁸ and

[<https://perma.cc/Z4N8-8A88>] (describing threatening emails sent by Iranian operatives posing as members of the Proud Boys).

⁵¹ See Jack Gillum & Jeremy B. Merrill, *Robocalls Told at Least 800,000 Swing State Residents to “Stay Home” on Election Day. The FBI Is Investigating*, PROPUBLICA (Nov. 3, 2020, 6:17 PM), https://www.propublica.org/article/robocalls-told-at-least-800-000-swing-state-residents-to-stay-home-on-election-day-the-fbi-is-investigating?utm_medium=social&utm_source=twitter#1011344 [<https://perma.cc/P5AC-MCHZ>].

⁵² See, e.g., *Virginia v. Black*, 538 U.S. 343, 359 (2003) (citing *Watts v. United States*, 394 U.S. 705, 708 (1969) and *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)); *United States v. Alvarez*, 567 U.S. 709, 717–18 (2012).

⁵³ See Wohl Complaint, *supra* note 13, at 11–14.

⁵⁴ See KEYSSAR, *supra* note 36, at 206–07.

⁵⁵ See *id.* at 207 (“Those who were adamant about registering could lose their jobs, have loans called due, or face physical harm. More than a few were killed.”).

⁵⁶ *South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966).

⁵⁷ 52 U.S.C. § 10101(b).

⁵⁸ See Sherry Swirsky, *Minority Voter Intimidation: The Problem that Won’t Go Away*, 11 TEMP. POL. & CIV. RTS. L. REV. 359, 371 (2002) (“Courts applying [section 131(b)] have reached conflicting conclusions on whether it reaches conduct by private individuals, which elections it covers, how much evidence of intimidation it requires, whether it may be enforced by private litigants, and if so, whether a private litigant must first exhaust state election board administrative remedies. Such inconsistency has posed an obstacle to meaningful enforcement of the provision.” (citations omitted)).

the difficulty of meeting the law's racial animus⁵⁹ and purpose⁶⁰ requirements.

The failure of the 1957 Act spurred President Lyndon Johnson and Attorney General Nicholas Katzenbach to push for the enactment of the Voting Rights Act of 1965. Section 11(b) of the Voting Rights Act prohibits voter intimidation in much broader terms than section 131(b). Section 11(b) provides a private right of action and lacks a purpose requirement.⁶¹ Likewise, because section 11(b) does not require intent, it also does not require a showing of racial animus.⁶²

Although section 11(b) improved on section 131(b), neither has been employed more than a handful of times.⁶³ One reason for this is that both sections provide relief only in the form of an injunction⁶⁴ or a potential award of attorney's fees.⁶⁵ This means plaintiffs must identify perpetrators and file suit quickly enough for an injunction to make a difference—a task that is all but impossible if the intimidation occurs, as is often the case, close to or even on Election Day. But even where a suit is filed in time, courts may struggle to craft effective injunctions that are not overbroad or that do not burden lawful speech.⁶⁶ Litigation is also expensive, and injunctive relief does not provide an incentive to sue, particularly after an election has passed.⁶⁷ Likewise, although attorney's fees are an important source of revenue for organizational plaintiffs, without added incentive, these groups

⁵⁹ See, e.g., *Brooks v. Nacrelli*, 331 F. Supp. 1350, 1352 (E.D. Pa. 1971), *aff'd*, 473 F.2d 955 (3d Cir. 1973); *Gremillion v. Rinaudo*, 325 F. Supp. 375, 378 (E.D. La. 1971); *Powell v. Power*, 320 F. Supp. 618, 621 (S.D.N.Y. 1970), *aff'd*, 436 F.2d 84 (2d Cir. 1970); *Cameron v. Johnson*, 262 F. Supp. 873, 884 (S.D. Miss. 1966), *aff'd*, 390 U.S. 611 (1968).

⁶⁰ See *Voting Rights: Hearings on H.R. 6400 Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 89th Cong. 11 (1965) (statement of Att'y Gen. Katzenbach) ("But perhaps the most serious inadequacy [of § 131(b)] results from the practice of district courts to require the Government to carry a very onerous burden of proof of 'purpose.'").

⁶¹ *Id.* ("[N]o subjective 'purpose' need be shown, in either civil or criminal proceedings, in order to prove intimidation . . .").

⁶² See *Cady & Glazer*, *supra* note 31, at 202–03 (discussing the lack of either an intent or a racial-motivation requirement under § 11(b)).

⁶³ See *id.* at 238–43 (listing cases in which claims have been brought under § 11(b) or § 131(b)).

⁶⁴ See 52 U.S.C. § 10101(c) (authorizing injunctive relief in § 131(b) claims); *United States v. Original Knights of the Ku Klux Klan*, 250 F. Supp. 330, 334 (E.D. La. 1965) (granting injunctive relief under § 11(b)); *James v. Humphreys Cnty. Bd. of Election Comm'rs*, 384 F. Supp. 114, 132 (N.D. Miss. 1974) (granting injunctive relief under § 11(b)).

⁶⁵ 52 U.S.C. § 10310(e) provides for an award of attorney's fees in "any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment." It remains unclear how this would apply to a voter intimidation case, as the issue has never been litigated. See *Cady & Glazer*, *supra* note 31, at 208 n.227.

⁶⁶ See, e.g., *Rodriguez v. Robbins*, 715 F.3d 1127, 1133 (9th Cir. 2013) ("An overbroad injunction is an abuse of discretion."); *Waldman Pub. Corp. v. Landoll, Inc.*, 43 F.3d 775, 785 (2d Cir. 1994) ("[A]n injunction should not impose unnecessary burdens on lawful activity.").

⁶⁷ See *Cady & Glazer*, *supra* note 31, at 179.

are likely to pursue litigation with a wider impact, such as challenges to state election laws.⁶⁸

Recent legislative efforts have not addressed these shortcomings. The For the People Act, for instance, creates a much broader private cause of action for victims of voter intimidation and disinformation but still only provides for injunctive relief and attorney's fees.⁶⁹ To deter would-be perpetrators and provide redress for victims, more potent incentives are needed. One option is compensatory and punitive damages, which have the potential to deter bad actors, incentivize plaintiffs to sue, and provide meaningful relief long after an election has ended. For this reason, plaintiffs have recently turned to an older voter intimidation statute, one which provides for an award of damages: the Ku Klux Klan Act of 1871.

III. DAMAGES: § 1985(3) OF THE KU KLUX KLAN ACT AND THE SUPPORT-OR-ADVOCACY CLAUSES

After the Civil War, the Reconstruction Amendments formally enfranchised African-American men.⁷⁰ As a result, African-Americans enjoyed an unprecedented degree of political and electoral success: "Fifteen African-Americans were elected to the United States House of Representatives and two to the United States Senate from previously confederate states."⁷¹ Groups of southern whites, including the Ku Klux Klan and other domestic-terror groups,⁷² retaliated with a widespread campaign of violence against Black voters and their political allies.⁷³ In response, President Grant called upon Congress to enact legislation to secure the promise of the Reconstruction Amendments and restore order in

⁶⁸ *See id.*

⁶⁹ *See* For the People Act of 2021, H.R. 1, 117th Cong. § 1302.

⁷⁰ *See* Eric Foner, *The Supreme Court and the History of Reconstruction—and Vice-Versa*, 112 COLUM. L. REV. 1585, 1586–87 (2012) ("Reconstruction represented a remarkable repudiation of the prewar tradition that defined the United States as a 'white man's Government'; it created for the first time an interracial democracy in which rights attached to persons not in their capacity as members of racially defined groups but as members of the American people.").

⁷¹ Gilda R. Daniels, *A Vote Delayed Is a Vote Denied: A Preemptive Approach to Eliminating Election Administration Legislation that Disenfranchises Unwanted Voters*, 47 U. LOUISVILLE L. REV. 57, 62 n.24 (2008).

⁷² The Ku Klux Klan was the best known of the various terrorist organizations operating in the South at this time. Others included the Knights of the White Camelia and the White League. *See, e.g.,* GEORGE C. RABLE, BUT THERE WAS NO PEACE: THE ROLE OF VIOLENCE IN THE POLITICS OF RECONSTRUCTION 71, 132 (1984).

⁷³ *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 425–27 (1988); *see also* Daniel E. Durden, Note, *Republicans as a Protected Class?: Harrison v. KVAT Food Management, Inc. and the Scope of Section 1985(3)*, 36 AM. U. L. REV. 193, 196–97 (1986); Mark Fockele, Comment, *A Construction of 1985(c) in Light of Its Original Purpose*, 46 U. CHI. L. REV. 402, 409–10 (1979); Rable, *supra* note 72, at 105.

the South.⁷⁴ The result was the Civil Rights Act of 1871, also known as the Ku Klux Klan Act.⁷⁵

The Ku Klux Klan Act sought to eliminate both state and private interferences with rights. Section 1 of the Act created a federal right of action for violations of constitutional rights under color of state law⁷⁶ and survives today as 42 U.S.C. § 1983. Meanwhile, section 2 provides for both criminal punishment and civil liability where private actors conspire to deprive people of their rights;⁷⁷ these provisions exist today as part of 42 U.S.C. § 1985(3). Section 1985(3) also provides a private right of action for damages for any party injured either by a conspiracy to deny the equal protection of the laws—the equal-protection clause⁷⁸—or by a conspiracy “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” to a candidate in a federal election—the support-or-advocacy clauses.⁷⁹ The support-or-advocacy clauses protect a potentially wide range of expressive and political activity related to federal elections, and on their face, provide a remedy for victims of voter intimidation conspiracies.

The scope and application of the support-or-advocacy clauses, however, remain uncertain. These clauses have lain dormant for much of the twentieth century,⁸⁰ and plaintiffs have only recently turned to them as a potential source of redress.⁸¹ To make matters worse, some courts have used

⁷⁴ See CONG. GLOBE, 42d Cong., 1st Sess. 244 (1871); see also *Keating v. Carey*, 706 F.2d 377, 385, 387 (2d Cir. 1983) (stressing that the Act was part of Congress’s efforts to end Klan violence and restore civil order).

⁷⁵ Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1985(3)).

⁷⁶ See CONG. GLOBE, *supra* note 74, at 317.

⁷⁷ See *id.*

⁷⁸ See 42 U.S.C. § 1985(3) (“If two or more persons . . . conspire . . . for the purpose of depriving . . . any person or class of persons of the equal protection of the laws . . . the party so . . . deprived may have an action for the recovery of damages . . .”).

⁷⁹ *Id.*

⁸⁰ See Richard Primus & Cameron O. Kistler, *The Support-or-Advocacy Clauses*, 89 FORDHAM L. REV. 145, 146 n.3 (2020) (noting that “there may be as few as three reported cases since 1900 in which a federal appellate court clearly adjudicated a question under the support-or-advocacy clauses”); see also Note, *supra* note 26, at 1383 (“Despite its early provenance, very few cases have been brought under the Support or Advocacy Clause.”); Ken Gormley, *Private Conspiracies and the Constitution: A Modern Vision of 42 U.S.C. Section 1985(3)*, 64 TEX. L. REV. 527, 546 (1985) (“From the date of enactment in 1871 until 1920, not a single case involving section 1985(3) appeared in the *Federal Reporter*.”).

⁸¹ In addition to the suit against Wohl and Burkman, two other recent cases have addressed efforts to seek redress under the support-or-advocacy clauses, with opposite results. Compare *League of United Latin Am. Citizens v. Pub. Int. Legal Found.*, 2018 WL 3848404, at *6 (E.D. Va. 2018) (holding that the clauses provide a substantive right to sue for damages), with *Cockrum v. Donald J. Trump for President, Inc.*, 365 F. Supp. 3d 652, 664–65 (E.D. Va. 2019) (holding that the support-or-advocacy clauses did not create a substantive right and thus could not be used to seek damages absent the violation of some other federal right).

“§ 1985(3)” as a shorthand when applying the statute’s equal-protection clause, thus conflating it with the distinct support-or-advocacy clauses.⁸² As a result, courts are split as to several key doctrinal questions, including whether the support-or-advocacy clauses create an independent substantive right to be free from intimidation when giving support or advocacy to federal candidates or whether they simply provide remedies for deprivations of rights existing elsewhere.⁸³ If the former, then § 1985(3) has real potential to redress the harms caused by voter intimidation. If the latter, then § 1985(3) would add little, if anything, to the existing remedial framework.⁸⁴

Because the interpretations of § 1985(3) and the support-or-advocacy clauses are so critical to their remedial utility, this Part explores both their history and application. Although few cases have been brought under the support-or-advocacy clauses, recent scholarship has unearthed this history and illustrated how these clauses establish an independent substantive right to be free from violence and intimidation while engaging in the political process.⁸⁵

A. LEGISLATIVE HISTORY

It cannot be understated that the Ku Klux Klan Act was enacted to protect against politically motivated violence and intimidation. Both the House⁸⁶ and Senate⁸⁷ debates are replete with references to violence aimed

⁸² See Primus & Kistler, *supra* note 80, at 177–78, 189 (discussing the conflation of these two clauses by courts).

⁸³ See *id.* at 146–47 (noting this open question).

⁸⁴ See *id.* at 148 (noting that if the support-or-advocacy clauses “are merely remedial, they add little to the universe of civil rights law. Plaintiffs alleging violations of the First and Fifteenth Amendments can sue under other remedial statutes such as §1983. But if the support-or-advocacy clauses are substantive, they offer separate and powerful weapons for defending the integrity of elections”).

⁸⁵ See Primus & Kistler, *supra* note 80, at 158; see also Note, *supra* note 78, at 1382.

⁸⁶ See CONG. GLOBE, *supra* note 74, at 391 (remarks of Sheriff R. H. Gleen, York Cnty., S.C.) (noting that, in addition to violence against blacks, “[t]he white Republican of the South is also hunted down and murdered or scourged for his opinion’s sake”); *id.* at 426 (remarks of Rep. George McKee) (noting that “the dead and the wounded, the maimed and the scourged, are all, all Republicans”); *id.* at 437 (remarks of Rep. Clinton Cobb) (noting that “every victim of Ku Klux Klan outrage has been a Republican”); *id.* at 413 (remarks of Rep. Ellis Roberts) (noting that “the victims whose property is destroyed, whose persons are mutilated, whose lives are sacrificed, are always Republicans” regardless of whether they are “black or white”).

⁸⁷ *Id.* at 702 (remarks of Sen. George Edmunds) (arguing that the Klan’s “systematic plan . . . is not to leave in any of those States a brave white man who dares to be a Republican or a colored man who dares to be a voter”); *id.* at app. 252 (remarks of Sen. Oliver Morton) (arguing that the Klan’s goal was “to drive those who are supporting the Republican party to abandon their political faith or to flee from the State”); *id.* at 654 (remarks of Sen. Thomas Osborn) (“The men who vote with the party who were opposed to the rebellion and who suppressed it, that stand by, support, and trust the majority of this Senate, or who

at Black voters and white southern Republicans who supported Republican candidates.⁸⁸ The question of how to do so, however, consumed several days of debate in Congress.⁸⁹ As originally written, section 2 of the Act provided both criminal and civil penalties for conspiracies “to do any act in violation of the rights, privileges, or immunities of any person.”⁹⁰ Many members of Congress, however, felt that this sweeping language exceeded Congress’s authority⁹¹ and amended the law to cover only deprivations of equal protection, a move authorized by the Fourteenth Amendment.⁹²

It was only after this debate that the support-or-advocacy clauses were introduced.⁹³ Notably, the support-or-advocacy clauses do not contain any limiting language: they apply to all conspiracies to prevent a person from giving their “support or advocacy”—a potentially sweeping term—to any candidate for federal office.⁹⁴ Despite this broad language, the support-or-advocacy clauses received almost no debate relative to the equal-protection provision.⁹⁵ One possible explanation is that members of Congress had no

accept a petty office from a Republican Administration, are in much of the country continually in imminent peril for their lives.”).

⁸⁸ The Congressional record is also supplemented by copious documentary evidence and the report of the Senate Select Committee to Investigate Alleged Outrages in the Southern States. *See id.* at 441–51 (remarks of Rep. Benjamin Butler) (outlining documentary evidence showing evidence against whites, blacks, Republicans, carpetbaggers, and others); S. REP. NO. 42-1, at 19–21 (1871) (describing multiple instances of politically motivated violence in the South). Moreover, numerous court decisions have discussed Congress’s intent to address politically motivated violence. *See, e.g.,* Keating v. Carey, 706 F.2d 377, 386–88 (2d Cir. 1983); Scott v. Moore, 640 F.2d 708, 715–21 (5th Cir. 1981), *rev’d sub nom.* United Bhd. of Carpenters v. Scott, 463 U.S. 825, 830 (1983); Means v. Wilson, 522 F.2d 833, 838 (8th Cir. 1975), *cert. denied*, 424 U.S. 958 (1975); Stevens v. Rifkin, 608 F. Supp. 710, 722–26 (N.D. Cal. 1984).

⁸⁹ *See generally* CONG. GLOBE, *supra* note 74, at 366–522.

⁹⁰ CONG. GLOBE, *supra* note 74, at app. 138.

⁹¹ *See id.* at 138–39, 412; *see also* Janis L. McDonald, *Starting from Scratch: A Revisionist View of 42 U.S.C. 1985(3) and Class-Based Animus*, 19 CONN. L. REV. 471, 481 (1987); Steven F. Shatz, *The Second Death of 42 U.S.C. Section 1985(3): The Use and Misuse of History in Statutory Interpretation*, 27 B.C. L. REV. 911, 914 (1986).

⁹² *See* CONG. GLOBE, *supra* note 74, at 478 (amendment offered by Rep. Shellabarger); *id.* at 522 (House accepts the amendment).

⁹³ *See id.* at 704, 724.

⁹⁴ 42 U.S.C. § 1985(3).

⁹⁵ The entire debate over the support-or-advocacy clauses is as follows:

MR. EDMUNDS. I move after the word “laws,” in line forty-three of section two on page 3, to insert these words: Or by force, intimidation, or threats to prevent any citizen of the United States lawfully entitled to vote from giving his support or advocacy, in a lawful manner, toward or in favor of the election of any lawfully qualified person as an elector of President or Vice President of the United States, or as a member of the Congress of the United States, or to injure any such citizen in his person or property on account of such support or advocacy.”

MR. TRUMBULL. There ought not to be any objection to that, I think.
The VICE PRESIDENT. The question is on this amendment of the Senator from

doubt as to their authority to regulate federal elections. Article I, Section 4 of the Constitution provides that “Congress may at any time by Law make or alter” regulations prescribing “[t]he Times, Places and Manner of holding Elections for Senators and Representatives”⁹⁶

As Richard Primus and Cameron Kistler observe, the Supreme Court has affirmed that the Elections Clause authorizes Congress to “protect . . . the man who votes, from personal violence or intimidation, and the election itself from corruption and fraud.”⁹⁷ Moreover, as Primus and Kistler explain, any other source of authority would make little sense for a Congress seeking to combat political violence in the South.⁹⁸ The First Amendment, for instance, only applied to government actors and had not yet been incorporated against the states in 1871; thus, it could not have protected people against either the discriminatory actions of state and local governments or private actors such as the Klan.⁹⁹ Likewise, the Fifteenth Amendment, which prohibits racial discrimination in voting, could not support prohibitions against conspiracies to prevent the much broader category of “support or advocacy.”¹⁰⁰ Nor, for that matter, could it have helped protect white Republicans who were also targeted by the Klan. Rooting the support-or-advocacy clauses in the Constitution’s Elections Clause both supplies the necessary constitutional authority and provides strong evidence that the clauses create an independent substantive right—and remedy—for voters.

So, why the confusion? As Primus and Kistler explain, one reason is that the Ku Klux Klan Act’s provisions have been recodified over the years.¹⁰¹ The support-or-advocacy clauses originally were included as part

Vermont.

Mr. CASSERLY. That is a new amendment, and rather a long one, and I should like to have it read again. Am I correct in understanding that it comes from the committee?

The VICE PRESIDENT. The Senator from Vermont stated that it did not come from the committee, but from a conference of members of the committee, the committee not having agreed upon it in a regular committee meeting. The amendment will be read, at the request of the Senator from California.

The Chief Clerk read the amendment.
The amendment was agreed to.

CONG. GLOBE, *supra* note 74, at 704.

⁹⁶ U.S. CONST. art. I, § 4, cl. 1; *see* Cady & Glazer, *supra* note 31, at 186–87 (“[G]iven how heavily debated the inclusion of the equal protection language was, its absence from the voter intimidation provision indicates that Congress never doubted its authority to directly regulate interference in federal elections.”).

⁹⁷ *Ex parte Yarbrough*, 110 U.S. 651, 661 (1884); *see* Primus & Kistler, *supra* note 80, at 166–68 (describing *Ex parte Yarbrough* in detail).

⁹⁸ *See* Primus & Kistler, *supra* note 80, at 160–62; Note, *supra* note 26, at 1392–93.

⁹⁹ *See* Primus & Kistler, *supra* note 80, at 160–61.

¹⁰⁰ *See id.* at 170–72.

¹⁰¹ *Id.* at 151 (“The support-or-advocacy clauses have been recodified more than once since their initial enactment.”).

of section 2 of the Ku Klux Klan Act along with the equal-protection clause and a bevy of other clauses prohibiting conspiracies to overthrow the federal government, to levy war against the United States, to prevent the execution of federal law, to steal federal property, to impede the work of federal officers, and to interfere with witnesses in federal court proceedings.¹⁰² Read in this context, it is clear that the support-or-advocacy clauses are part of a concerted effort to protect federal governance.¹⁰³ Congress, however, has recodified federal statutes twice since then—once in 1874 and then again in the 1920s¹⁰⁴—resulting in the various civil liability clauses of the original section 2 being combined into what is now 42 U.S.C. § 1985 and divided into three subsections: § 1985(1), which covers conspiracies to interfere with federal officers; § 1985(2), which covers conspiracies to interfere with federal judicial proceedings; and § 1985(3), which includes the equal-protection clause and the support-or-advocacy clauses.¹⁰⁵ Read in this arrangement, the support-or-advocacy clauses may seem more closely related to the equal-protection clause, particularly as they are only separated by a mere semicolon.¹⁰⁶ Why these clauses were lumped together is beside the point—the Supreme Court has emphasized that recodification did not alter the Act’s substance.¹⁰⁷ However, this regrouping has produced a great deal of doctrinal confusion and the mistaken conflation by the lower courts of the equal-protection and support-or-advocacy clauses.¹⁰⁸

B. APPLYING THE SUPPORT-OR-ADVOCACY CLAUSES

The Supreme Court has never squarely interpreted the civil component of the support-or-advocacy clauses. In *Ex parte Yarbrough*, however, the Court did uphold the clauses’ criminal component as a constitutional exercise of Congress’s authority under the Elections Clause.¹⁰⁹ The Court

¹⁰² Act of Apr. 20, 1871, ch. 22, 17 Stat. 13–14 (codified as amended in scattered sections of 18 and 42 U.S.C.).

¹⁰³ See Primus & Kistler, *supra* note 80, at 153 (noting, for example, that “[t]here is no constitutional right to be a federal officer, but any person injured as a result of a conspiracy to deter someone from acting as a federal officer would have an action under section 2”).

¹⁰⁴ See *id.* at 153–57 (discussing these reorganizations in greater detail).

¹⁰⁵ 42 U.S.C. § 1985(3).

¹⁰⁶ *Id.*

¹⁰⁷ See *Kush v. Rutledge*, 460 U.S. 719, 724 (1983).

¹⁰⁸ See Primus & Kistler, *supra* note 80, at 157 (noting the failure of lower courts “to appreciate this difference between most of § 1985’s clauses, which protect federal governance functions, and § 1985’s equal protection clauses, which address a different concern”).

¹⁰⁹ See *Ex parte Yarbrough*, 110 U.S. 651, 662 (1884); *id.* at 658 (noting that the Elections Clause grants Congress the “power to protect the elections on which its existence depends from violence and corruption”). In the original codification of the Ku Klux Klan Act, the support-or-advocacy clauses provided for both criminal punishment and civil liability. Primus & Kistler, *supra* note 80, at 153. When the federal statutes were recodified in 1874, however, these provisions were split up into the new codification’s criminal and civil components, respectively. *Id.* This recodification, however, did not amend the underlying

has also interpreted § 1985(3)'s civil equal-protection clause on a number of occasions. In these decisions, the Court has imposed several limitations, such as class-based animus or state-action requirements. But while the Court has on multiple occasions explained that these limitations are confined to the equal-protection clause,¹¹⁰ lower courts have nonetheless mistakenly applied these same limits to cases brought under the support-or-advocacy clauses.¹¹¹

The Supreme Court first interpreted § 1985(3)'s equal-protection clause in *Collins v. Hardyman*.¹¹² There, a group of communists alleged a conspiracy to use violence to disrupt their political meetings.¹¹³ Because the defendants were private actors, however, the Court rejected the claim, holding that in most cases, a claim under this provision required state action.¹¹⁴ Twenty years later, the Court narrowed *Hardyman* to its facts and held in *Griffin v. Breckenridge* that the plain text of § 1985(3) covered private conspiracies as well.¹¹⁵ While the Court eliminated the state-action requirement, it remained concerned that the equal-protection clause might sweep too broadly if wholly unrestrained¹¹⁶ and so imposed a new limitation, construing the equal-protection clause to require a showing of "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action."¹¹⁷

Eight years later, the Court in *Great American Federal Savings & Loan Ass'n v. Novotny* imposed another limitation by holding that § 1985(3)'s equal-protection clause "provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates."¹¹⁸ *Novotny*'s holding derives from the equal-protection clause's text, which explicitly

law, and because both the criminal and civil provisions related to the same text, the Court's analysis in *Ex parte Yarbrough* applies with equal force to the civil component of the clauses. *See id.* at 154. For a thorough discussion of *Ex parte Yarbrough*, see generally *id.* at 169–76.

¹¹⁰ *See Kush*, 460 U.S. at 726 (explaining that "[t]here is no suggestion" that a requirement of discrimination should apply "to any other portion of § 1985," and that its reasoning with respect to the equal-protection clause "does not apply to the portions of the statute that prohibit interference with federal officers, federal courts, or federal elections"); *Griffin v. Breckenridge*, 403 U.S. 88, 99 (1971) (discussing only "the portion of § 1985(3) now before us").

¹¹¹ *See infra* notes 130–137 and accompanying text.

¹¹² 341 U.S. 651, 661 (1951).

¹¹³ *See id.* at 653–54.

¹¹⁴ *See id.* at 661–62. The Court recognized that the original purpose of the Act was to target the Ku Klux Klan—a private group—but reasoned that a conspiracy as large and powerful as the Klan could come within the statute despite the state action requirement. *See id.* at 662.

¹¹⁵ 403 U.S. 88, 96–97, 101 (1971).

¹¹⁶ *Id.* at 101–02 (noting the "constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law").

¹¹⁷ *Id.* at 102.

¹¹⁸ 442 U.S. 366, 372 (1979).

refers to “the equal protection of the *laws*, or of equal privileges and immunities under the *laws*.”¹¹⁹ Thus, to show a violation, it is necessary to point to a right established under some other law.¹²⁰

In *Griffin*, for instance, the plaintiffs alleged violations of the right to be free of the badges and incidents of slavery under the Thirteenth Amendment and the right to interstate travel under the Fourteenth Amendment.¹²¹ In *Novotny*, however, the plaintiff alleged a conspiracy to deprive him of his workplace rights under Title VII.¹²² As the Court explained, because Congress had already established a remedy for Title VII violations, those rights could not form the basis for a claim under § 1985(3)’s equal-protection clause.¹²³ Likewise, in *United Brotherhood of Carpenters, Local 610 v. Scott*, the Court held that First Amendment rights could not form the basis for a claim under § 1985(3)’s equal-protection clause because the First Amendment only provides a right against state actors.¹²⁴

While the limitations set out in *Griffin*, *Novotny*, and *Scott* pose significant obstacles to § 1985(3)’s equal-protection clause, the Supreme Court has made it clear that these limitations do not apply to other parts of § 1985. In *Kush v. Rutledge*, for instance, the Court rejected the argument that *Griffin*’s animus requirement extended to § 1985(2) because there was no “equal protection” language to support it and because the equal-protection clause’s “legislative background does not apply to the portions of the statute that prohibit interference with federal officers, federal courts, or *federal elections*.”¹²⁵ Likewise, text, history, and precedent suggest that the Court’s reasoning in cases limiting § 1985(3)’s equal-protection clause do not apply to the support-or-advocacy clauses. In *Hardyman* and *Griffin*, the Court was concerned that an unrestrained equal-protection clause could result in a constitutionally questionable general federal conspiracy tort.¹²⁶ The support-or-advocacy clauses, however, are already limited to conspiracies that prevent a specific range of activities—support or advocacy—and only in the context of federal elections.¹²⁷ Likewise, nothing in the text of the support-or-advocacy clauses suggests the need to point to a predicate right, meaning the reasoning in *Novotny* and *Scott* does

¹¹⁹ 42 U.S.C. § 1985(3) (emphasis added).

¹²⁰ See Primus & Kistler, *supra* note 80, at 181 (“The language makes the provision parasitic on the substance of other laws. Whether a conspiracy aims to deny someone the equal protection of the laws depends, within this framework, on what protections the substantive law offers.”).

¹²¹ See *Griffin*, 403 U.S. at 105–06.

¹²² See *Novotny*, 442 U.S. at 368–69.

¹²³ *Id.* at 375–76.

¹²⁴ 463 U.S. 825, 830, 833 (1983).

¹²⁵ 460 U.S. 719, 726 (1983) (emphasis added); see *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 281 n.13 (1993) (discussing the link between the equal-protection provision’s text and the animus requirement).

¹²⁶ See *Collins v. Hardyman*, 341 U.S. 651, 659 (1951); *Griffin*, 403 U.S. at 102.

¹²⁷ 42 U.S.C. § 1985(3).

not apply.

As Primus and Kistler explain, however, the Supreme Court has not always been clear when interpreting § 1985(3)'s equal-protection clause. While *Ex parte Yarbrough* identified the Elections Clause as the source of authority for the support-or-advocacy clauses¹²⁸ and *Griffin* expressly noted that its holding was confined to the equal-protection clause,¹²⁹ *Novotny* and *Scott* interpreted the equal-protection clause using “§ 1985(3)” as a shorthand.¹³⁰ As a result, lower courts have applied the Court's equal-protection-clause limits to cases arising under the support-or-advocacy clauses.

Courts in several circuits, for instance, consider voting-related claims under the equal-protection clause and thus incorporate all of *Griffin*, *Novotny*, and *Scott*'s limits.¹³¹ The Eighth Circuit has applied both the equal-protection and support-or-advocacy clauses to conspiracies related to voting, but it has limited its view of the right protected by the support-or-advocacy clauses to the casting of a ballot and has held that more general claims of support or advocacy derive from the First Amendment and thus require state action.¹³² The Fifth Circuit, however, has recognized that the support-or-advocacy clauses provide an independent substantive right. In *Paynes v. Lee*, the court explained that the Ku Klux Klan Act had created a “Federal right . . . to recover damages for interfering with Federal voting rights.”¹³³ The court construed that right as not only the right to cast a ballot but also “the right to be free from threatened harm and the right to be protected from violence for an attempted exercise of a voting right.”¹³⁴

Two recent cases have addressed the support-or-advocacy clauses'

¹²⁸ See *Ex parte Yarbrough*, 110 U.S. 651, 662 (1884).

¹²⁹ See *Griffin*, 403 U.S. at 99 (stressing that the Court's opinion was confined to “the portion of § 1985(3) now before us”).

¹³⁰ See *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 368 (1979) (“In the case now before us, we consider the scope of 42 U.S.C. § 1985(3)”); *United Bhd. of Carpenters, Local 610 v. Scott*, 463 U.S. 825, 827 (1983) (describing the claim as one “made available by 42 U.S.C. § 1985(3)”).

¹³¹ See, e.g., *Keating v. Carey*, 706 F.2d 377, 386–88 (2d Cir. 1983) (applying the equal-protection clause to Republicans as a protected class); *Cameron v. Brock*, 473 F.2d 608, 609–10 (6th Cir. 1973) (applying the equal-protection clause where plaintiffs were a defined class, a First Amendment right was violated, and state action was present); *Richardson v. Miller*, 446 F.2d 1247, 1249 (3d Cir. 1971) (applying the equal-protection clause to a conspiracy to prevent the expression of political support).

¹³² See *Gill v. Farm Bureau Life Ins. Co.*, 906 F.2d 1265, 1270 (8th Cir. 1990) (holding that “[t]he independent constitutional right relating to federal elections . . . is limited . . . to cast[ing] a ballot and hav[ing] it honestly counted”); *Federer v. Gephardt*, 363 F.3d 754, 760 (8th Cir. 2004) (holding that a support-or-advocacy claim based on “the assertion of a First Amendment type right vindicating advocacy and association” requires a showing of state action (quoting *Gill*, 906 F.2d at 1270)).

¹³³ 377 F.2d 61, 64 (5th Cir. 1967).

¹³⁴ *Id.*

applicability to voter intimidation conspiracies, with mixed results. In *League of United Latin American Citizens (LULAC) v. Public Interest Legal Foundation (PILF)*, voters brought a support-or-advocacy claim in the Eastern District of Virginia against an organization that published the names, addresses, and phone numbers of voters it claimed were illegally registered.¹³⁵ The court denied a motion to dismiss, holding that a claim under the support-or-advocacy clauses “does not require allegations of a race or class-based, invidiously discriminatory animus or violation of a separate substantive right.”¹³⁶ A year later, in *Cockrum v. Donald J. Trump for President, Inc.*, voters attempted to bring a support-or-advocacy claim—again in the Eastern District of Virginia—against the Trump campaign, which they alleged had unlawfully obtained their personal information.¹³⁷ Here though, the court conflated the equal-protection and support-or-advocacy clauses and held that *all* of § 1985(3) was “purely remedial” and that plaintiffs could not proceed on what was essentially a First Amendment claim without showing state action.¹³⁸

The most recent case to consider the support-or-advocacy clauses is the one currently pending against Jacob Wohl and Jack Burkman. In *National Coalition on Black Civic Participation v. Wohl*, the district court granted a temporary restraining order against Wohl and Burkman after finding that the plaintiffs were likely to succeed on their support-or-advocacy claim.¹³⁹ In doing so, the court explicitly distinguished the support-or-advocacy clauses from the equal-protection clause¹⁴⁰ and observed that “[o]ne key distinction” between the two is that “[w]hile the Equal Protection Clause . . . requires a violation of a separate constitutional right, the Support or Advocacy Clause gives rise to an independent substantive right.”¹⁴¹ While the case is still pending and several hurdles remain before plaintiffs might receive damages, *Wohl* provides the clearest articulation of the potential for the support-or-advocacy clauses to provide redress to victims of voter intimidation.

IV. THE SCOPE AND LIMITS OF SUPPORT-OR-ADVOCACY CLAIMS

The text, history, and doctrine surrounding the support-or-advocacy clauses strongly suggest that they create an independent substantive right to be free from politically motivated violence and intimidation. However, even assuming the substantive nature of the support-or-advocacy clauses, their

¹³⁵ No. 18-cv-00423, 2018 WL 3848404, at *1 (E.D. Va. Aug. 13, 2018).

¹³⁶ *Id.* at *6. The case later reached a settlement. See Justin Levitt, *LULAC v. PILF Settle Two Different Lawsuits*, ELECTION L. BLOG (July 17, 2019, 5:17 PM), <https://electionlawblog.org/?p=106405> [<https://perma.cc/A5NK-EHTJ>].

¹³⁷ 365 F. Supp. 3d 652, 654–55 (E.D. Va. 2019).

¹³⁸ See *id.* at 663–65.

¹³⁹ See 498 F. Supp. 3d 457, 487–89 (S.D.N.Y. 2020).

¹⁴⁰ *Id.* at 486.

¹⁴¹ *Id.* at 486 n.30 (citation omitted).

scope and application are subject to significant statutory and constitutional limits. First, an act of disinformation must meet § 1985(3)'s statutory elements. Second, § 1985(3) must be applied consistently with the First Amendment to ensure protected speech is not chilled by the threat of civil liability. This Part considers each in turn.

A. THE ELEMENTS OF A SUPPORT-OR-ADVOCACY CLAIM

Before considering any constitutional issues, a court must first determine if an act of disinformation falls within the support-or-advocacy clauses.¹⁴² For an act to violate the clauses, plaintiffs must show (1) a conspiracy between two or more persons (2) to prevent by “force, intimidation or threat” (3) a citizen who is lawfully entitled to vote (4) from giving their support or advocacy (5) to a qualified candidate in a federal election.¹⁴³ In addition, to recover, a plaintiff must demonstrate that they have been “injured in . . . person or property” or deprived of their rights within the meaning of § 1985(3).¹⁴⁴ Each of these requirements limits the scope of the clauses and imposes a burden of proof on plaintiffs.

1. CONSPIRACY

Courts addressing the first requirement, the existence of a conspiracy, apply principles of civil conspiracy law, which vary between jurisdictions.¹⁴⁵ The two most important elements of a civil conspiracy are an “agreement” between the parties to commit some wrongful act and an “overt act” in furtherance of that unlawful objective.¹⁴⁶ In most cases of intimidation, the “overt act” requirement will be met by the intimidating act itself.¹⁴⁷

The “agreement” requirement, however, poses several challenges for plaintiffs. First, it is unsettled whether under § 1985(3) conspirators must only agree to commit a wrongful act (such as spreading false information online) or if they must enter into an agreement with the subjective intent to prevent lawful voters from giving their support or advocacy. Cases

¹⁴² See, e.g., *Gomez v. United States*, 490 U.S. 858, 864 (1989) (“It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question.”).

¹⁴³ 42 U.S.C. § 1985(3).

¹⁴⁴ *Id.*

¹⁴⁵ See, e.g., *Cady & Glazer*, *supra* note 31, at 206.

¹⁴⁶ See *id.*; see also *Conspiracy*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining conspiracy as “[a]n agreement by two or more persons to commit an unlawful act, coupled with an intent to achieve the agreement’s objective, and (in most states) action or conduct that furthers the agreement”).

¹⁴⁷ See, e.g., *Nat’l Coal. on Black Civic Participation v. Wohl*, 498 F. Supp. 3d 457, 487 (S.D.N.Y. 2020) (finding the “overt act” requirement met by the placing of intimidating robocalls).

addressing both § 1985(3)'s equal-protection¹⁴⁸ and support-or-advocacy¹⁴⁹ clauses have suggested at least some intent requirement. However, an intent requirement is not insurmountable, particularly where perpetrators conspire over the internet and thus produce a record of their agreement and intent. In *Wohl*, for instance, Wohl and Burkman admitted to spreading disinformation with the intent to “hurt Democrats.”¹⁵⁰ Likewise, in 2021, federal prosecutors indicted an internet troll named Douglass Mackey after discovering copious online evidence of a 2016 disinformation campaign through which Mackey spread fake images that had appeared to come from the Hillary Clinton campaign and encouraged her supporters to vote via text message.¹⁵¹

Proving a conspiracy to violate civil rights is also complicated by the intracorporate conspiracy doctrine, which instructs that “an agreement between or among agents of the same legal entity, when the agents act in their official capacities, is not an unlawful conspiracy.”¹⁵² The doctrine arose in the context of the Sherman Act’s prohibitions on conspiracies “in restraint of trade” between different corporations.¹⁵³ Two decades later, the Seventh Circuit applied the doctrine for the first time to § 1985(3)’s equal-protection clause.¹⁵⁴ In *Dombrowski v. Dowling*, the court dismissed a claim alleging a conspiracy by a building manager and his employer in part because the conspiracy requirement was not met where “the challenged conduct is essentially a single act of discrimination by a single business entity.”¹⁵⁵ In the decades since *Dombrowski*, a majority of federal circuits have followed suit and applied the intracorporate conspiracy doctrine to

¹⁴⁸ See, e.g., *Polidi v. Bannon*, 226 F. Supp. 3d 615, 623 (E.D. Va. 2016) (“[A] plaintiff asserting a § 1985 conspiracy must allege an agreement or a meeting of the minds by defendants to *violate the claimant’s constitutional rights*.”) (emphasis added) (internal quotation marks omitted).

¹⁴⁹ See, e.g., *Means v. Wilson*, 522 F.2d 833, 840 n.5 (8th Cir. 1975) (“[W]here the complaint alleges a conspiracy motivated by *intent to deprive plaintiffs . . . of their right to vote*, the ‘constitutional shoals’ of interpreting the statute as a general federal tort law have been circumnavigated.”) (emphasis added)).

¹⁵⁰ *Wohl*, 498 F. Supp. 3d at 487.

¹⁵¹ See Press Release, U.S. Dep’t of Just., Social Media Influencer Charged with Election Interference Stemming from Voter Disinformation Campaign (Jan. 27, 2021), <https://www.justice.gov/opa/pr/social-media-influencer-charged-election-interference-stemming-voter-disinformation-campaign> [<https://perma.cc/PEK4-SL9R>].

¹⁵² *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1867 (2017) (citing *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 769–71 (1984)).

¹⁵³ See *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 914 (5th Cir. 1952) (holding that “it is the general rule that the acts of the agent are the acts of the corporation” and that “[a] corporation cannot conspire with itself any more than a private individual can”); Note, *Intracorporate Conspiracies Under 42 U.S.C. § 1985(c)*, 92 HARV. L. REV. 470, 479–80 (1978) (“Prior to *Nelson Radio*, courts routinely held that intracorporate agreements and actions could constitute a conspiracy rendering both the corporation and its officials liable. This rule prevailed in the antitrust as well as the criminal and tort contexts, and was generally not debated.”) (footnote omitted)).

¹⁵⁴ See *Dombrowski v. Dowling*, 459 F.2d 190, 196 (7th Cir. 1972).

¹⁵⁵ *Id.*

§ 1985(3)'s equal-protection clause, with occasional narrow exceptions.¹⁵⁶ The Supreme Court has not taken a position either way,¹⁵⁷ though it has acknowledged that “different considerations” might apply in the civil rights context than in the antitrust context.¹⁵⁸

Indeed, while the intracorporate conspiracy doctrine might serve the Sherman Act's unique purposes,¹⁵⁹ most courts have declined to apply it where it would be at odds with a law's purpose, such as with criminal conspiracies.¹⁶⁰ It is peculiar, then, that a majority of courts apply the doctrine to civil rights conspiracies.¹⁶¹ Several courts and commentators have argued that shielding corporations from conspiracy liability would frustrate the Ku Klux Klan Act's purpose.¹⁶² The Act's history demonstrates that its target was the collective action of the Klan and similar domestic-terror groups.¹⁶³ At a minimum, then, the Act should not be construed in a

¹⁵⁶ See *Bowie v. Maddox*, 642 F.3d 1122, 1130–31 (D.C. Cir. 2011) (discussing the circuit split and exceptions).

¹⁵⁷ See *Ziglar*, 137 S. Ct. at 1868 (“To be sure, this Court has not given its approval to this doctrine in the specific context of § 1985(3).” (citing *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 372 n.11 (1979))).

¹⁵⁸ *Id.*

¹⁵⁹ See *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 769–71 (1984) (discussing how failure to apply the intracorporate conspiracy doctrine might frustrate the Sherman Act's goals); *United States v. Hartley*, 678 F.2d 961, 971 (11th Cir. 1982) (“Antitrust litigation is a peculiar form of legal action Section one's reference to conspiracies ‘in restraint of trade’ implies a requirement of multiple entities; whereas section two's prohibition of monopolies aims at a single conglomerate. If section one's conspiracy charge was satisfied by a single corporate entity, it would arguably render section two meaningless.”).

¹⁶⁰ See Catherine E. Smith, *(Un)Masking Race-Based Intracorporate Conspiracies Under the Ku Klux Klan Act*, 11 VA. J. SOC. POL'Y & L. 129, 148 & n.99 (2003) (collecting cases).

¹⁶¹ Notably, most federal courts reject the intracorporate conspiracy doctrine in cases of criminal civil rights conspiracies under 18 U.S.C. § 241. See *United States v. S & Vee Cartage Co.*, 704 F.2d 914 (6th Cir. 1983) (holding that in the criminal context a corporation may be convicted of conspiring with its officers); see also Shaun P. Martin, *Intracorporate Conspiracies*, 50 STAN. L. REV. 399, 445 (1998) (“[C]ivil rights laws must be interpreted broadly, whereas penal statutes must be construed narrowly. It would make no sense to find intracorporate conduct to be criminally, but not civilly, actionable.” (footnote omitted)).

¹⁶² See, e.g., *Novotny v. Great Am. Fed. Sav. & Loan Ass'n*, 584 F.2d 1235, 1256–59 (3d Cir. 1978) (en banc), *vacated on other grounds*, 442 U.S. 366 (1979); *Washington v. Duty Free Shoppers*, 696 F. Supp. 1323, 1326 (N.D. Cal. 1988) (“[T]he intracorporate conspiracy doctrine should not be extended to [§ 1985(3)] because its rationale does not apply in the civil rights context.”); see also Smith, *supra* note 160, at 148–65 (arguing that immunizing a single corporation's internal agreements to discriminate on the basis of race undermines the purpose of the Ku Klux Klan Act); Jennifer Martin Christofferson, Note, *Obstacles to Civil Rights: The Intracorporate Conspiracy Doctrine Applied to 42 U.S.C. § 1985(3)*, 1995 U. ILL. L. REV. 411, 411, 514–15 (1995).

¹⁶³ See Smith, *supra* note 158, at 161 (noting that the Ku Klux Klan Act was “specifically tailored to address the systemic and multifaceted ways in which civil rights violations were committed” and that “Congress sought to eliminate any collective action designed to deny Blacks and other citizens their basic rights”); Ken Gormley, *Private Conspiracies and the*

way that shields such groups from liability. Even the *Dombrowski* court stressed that “[a]gents of the Klan certainly could not carry out acts of violence with impunity simply because they were acting under orders from the Grand Dragon.”¹⁶⁴ But white supremacist groups can, and often do, incorporate,¹⁶⁵ and there is no reason to treat these any differently than unincorporated terror groups.¹⁶⁶

These same arguments apply with equal force to conspiracies under the support-or-advocacy clauses. As with racial discrimination, there is no legitimate reason for voter intimidation nor is there any benefit to immunizing collective action.¹⁶⁷ Organized entities such as campaigns, political parties, non-profits, and corporations also frequently carry out voter intimidation.¹⁶⁸ Indeed, Wohl and Burkman carried out their intimidation through their lobbying firm, a limited liability company.¹⁶⁹ But the intracorporate conspiracy doctrine should not be applied to the support-or-advocacy clauses in particular for an additional reason: the text of § 1985(3). The equal-protection clause imposes liability for conspiracies that “either directly or indirectly” deprive others of rights,¹⁷⁰ a broad proscription that may include some internal business decisions akin to those

Constitution: A Modern Vision of 42 U.S.C. § 1985(3), 64 TEX. L. REV. 527, 530–31 (1985) (“There was little question concerning the immediate purpose of the statute—it was designed to solidify the country’s reconstruction after the Civil War and bring under control acts of hatred and violence by Klansmen in the former Confederate States.”).

¹⁶⁴ *Dombrowski*, 459 F.2d at 196; *accord Saville v. Houston Cnty. Healthcare Auth.*, 852 F. Supp. 1512, 1539 (M.D. Ala. 1994) (“Surely, members of the Ku Klux Klan could not avoid the strictures of § 1985(3) simply by incorporating themselves.”).

¹⁶⁵ See Smith, *supra* note 160, at 172 n.227 (noting that, as of 2004, “[t]he majority of states have at least one white supremacist organization incorporated”).

¹⁶⁶ See *Novotny*, 584 F.2d at 1257 (“If, as seems clear under § 1985(3), the agreement of three partners to use their business to harass any blacks who register to vote constitutes an actionable conspiracy, we can perceive no function to be served by immunizing such actions once a business is incorporated.”); *Stathos v. Bowden*, 728 F.2d 15, 21 (1st Cir. 1984) (“Where ‘equal protection’ is at issue, however, one cannot readily distinguish in terms of harm between the individual conduct of one enterprise and the joint conduct of several. Nor can one readily identify desirable social conduct as typically engaged in jointly by the officers of a single enterprise.”); *Duty Free Shoppers*, 696 F. Supp. at 1326 (“There is no reason to believe that discrimination by an individual business is less harmful than discrimination by multiple businesses, or that discrimination by a single business deserves to be protected because it confers any benefit on society.”).

¹⁶⁷ See *Stathos*, 728 F.2d at 21 (holding that one cannot readily identify “desirable social conduct” in either individual or joint discrimination); *Rebel Van Lines v. City of Compton*, 663 F. Supp. 786, 792 (C.D. Cal. 1987) (“Racial discrimination can never further any ‘business purpose’ of a governmental entity.”).

¹⁶⁸ See Note, *supra* note 26, at 1400–01 (observing that “[m]odern voter intimidation and suppression efforts are often driven by private actors, including political campaigns and their affiliates,” and describing several examples).

¹⁶⁹ Wohl Complaint, *supra* note 13, at 5.

¹⁷⁰ 42 U.S.C. § 1985(3).

the intracorporate conspiracy doctrine protects in the antitrust context.¹⁷¹ The support-or-advocacy clauses, however, target only conspiracies to use “force, intimidation, or threat.”¹⁷² This sort of conduct does not encompass any legitimate business decision, and it most closely resembles criminal conspiracies, where courts have routinely declined to apply the intracorporate conspiracy doctrine.¹⁷³

Despite these obstacles, § 1985(3)’s conspiracy requirement also provides several procedural advantages to plaintiffs. First, conspiracy allows for liability of those who planned, funded, or encouraged an underlying act of intimidation, even if they did not carry it out themselves.¹⁷⁴ Second, where a court has personal jurisdiction over at least one conspirator, a conspiracy cause of action may support the exercise of long-arm jurisdiction over non-resident conspirators as well.¹⁷⁵ Third, proving a conspiracy allows for an exemption from the hearsay rules for any statement made “in furtherance of the conspiracy.”¹⁷⁶ Finally, where a conspiracy under § 1985(3) can be shown, section 6 of the Ku Klux Klan Act—now codified at 42 U.S.C. § 1986—also provides for a separate cause of action—and damages—against any person who had knowledge of the conspiracy and the power to prevent it but who neglected to do so.¹⁷⁷ This additional provision has the potential to enable plaintiffs to reach beyond conspirators and seek redress from those who fund, support, or enable intimidating disinformation as well.¹⁷⁸

¹⁷¹ See *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 769 (1984) (“[C]oordination may be necessary if a business enterprise is to compete effectively.”); see also *Travis v. Gary Cmty. Mental Health Ctr.*, 921 F.2d 108, 110 (7th Cir. 1990) (explaining that, like the Sherman Act, “§ 1985 aims at preserving independent decisions by persons or business entities”). But see *Smith*, *supra* note 160, at 150–51 (discussing the *Travis* decision and concluding that it “is fundamentally flawed because § 1985(3)’s objectives do not parallel those of the Sherman Act and antitrust law”).

¹⁷² 42 U.S.C. § 1985(3).

¹⁷³ See *supra* note 160 and accompanying text.

¹⁷⁴ See Michael Finch, *Governmental Conspiracies to Violate Civil Rights: A Theory Reconsidered*, 57 MONT. L. REV. 1, 12 (1996) (describing § 1985(3) as creating a form of “concerted-action” liability).

¹⁷⁵ See, e.g., *Trexor v. Bd. of Regents*, 711 F.2d 1387, 1393 (7th Cir. 1983); see also Jack Figura, *No Consensus on Conspiracy Theory of Personal Jurisdiction*, LAW360 (Jan. 31, 2018, 11:51 AM), <https://www.law360.com/articles/1007340/no-consensus-on-conspiracy-theory-of-personal-jurisdiction> (discussing conspiracy-based jurisdiction in state and federal courts).

¹⁷⁶ FED. R. EVID. 801(d)(2)(E); see also *Bourjaily v. United States*, 483 U.S. 171, 176 (1987) (holding that a co-conspirator statement may be admitted where the proponent demonstrates the existence of the conspiracy by a preponderance of the evidence).

¹⁷⁷ Ku Klux Klan Act of 1871, ch. 22, § 6, 17 Stat. 13, 15 (codified as amended at 42 U.S.C. § 1986).

¹⁷⁸ Section 1986 has been most often applied to conspiracies under § 1985(3)’s equal-protection provision. See, e.g., *Park v. City of Atlanta*, 120 F.3d 1157, 1159–63 (11th Cir. 1997); *Washington v. Duty Free Shoppers*, 696 F. Supp. 1323, 1327–28 (N.D. Cal. 1988). The application and scope of § 1986 to conspiracies under the support-or-advocacy clauses is less developed and is part of the Author’s future research agenda.

2. USE OF FORCE, INTIMIDATION, OR THREAT

The second requirement—that conspirators agree to use “force, intimidation or threat” to prevent voters from casting a ballot—raises a question of scope. While the text would apply to the sort of direct threats of violence carried out by the Reconstruction Era Klan, intimidation via online voter disinformation is another matter. Ben Cady and Tom Glazer, writing on section 11(b)’s analogous “intimidate, threat, or coercion” requirement, have argued in meticulous detail that the text, history, and broader use of the term “intimidate” across multiple areas of federal law strongly support a broad reading¹⁷⁹ that extends “not only [to] physical and economic coercion of voters, but also [to] a broader range of conduct that is intended to force prospective voters to vote against their preferences, or refrain from voting, through activity reasonably calculated to instill some form of fear.”¹⁸⁰ This reading would cover any disinformation that puts would-be voters in fear of violence, arrest, prosecution, or disease. Moreover, as the court in *Wohl* held, there is no reason to interpret these terms differently under § 1985(3) than under the Voting Rights Act.¹⁸¹

But there is a wide range of voter disinformation that seeks to prevent people from casting a ballot without intimidating them. Disinformation may be used to confuse or deceive voters into voting incorrectly or at the wrong place or time; in 2020, for example, one disinformation campaign told voters that, due to COVID-19 restrictions, Democrats would vote on November 3 (the correct date), and Republicans would vote the following day.¹⁸² Another campaign falsely warned voters that signing a mail-in ballot, a requirement in many states, would invalidate the ballot.¹⁸³ Disinformation can also discourage a specific candidate’s supporters by spreading demoralizing lies or falsely claiming premature victory on Election Day. Section 1985(3) does not provide redress for those harmed by disinformation, nor do sections 131(b) or 11(b). Although several federal bills have been proposed to combat election disinformation more broadly, none have yet been enacted.¹⁸⁴

¹⁷⁹ See Cady & Glazer, *supra* note 31, at 193–202.

¹⁸⁰ *Id.* at 201 (internal quotation marks omitted) (quoting U.S. DEP’T OF JUSTICE, FEDERAL PROSECUTION OF ELECTION OFFENSES 54 (2007)).

¹⁸¹ See Nat’l Coal. on Black Civic Participation v. Wohl, 498 F. Supp. 3d 457, 487 (S.D.N.Y. 2020).

¹⁸² See Pam Fessler, *Robocalls, Rumors and Emails: Last-Minute Election Disinformation Floods Voters*, NPR (Oct. 24, 2020, 7:00 AM) <https://www.npr.org/2020/10/24/927300432/robocalls-rumors-and-emails-last-minute-election-disinformation-floods-voters> [<https://perma.cc/YMA9-5TKB>].

¹⁸³ See *id.*

¹⁸⁴ See, e.g., Voter Empowerment Act, H.R. 1275, 116th Cong. (2019); Voter Empowerment Act, S. 549, 116th Cong. (2019); For the People Act, H.R. 1, 116th Cong. (2019); For the People Act, S. 949, 116th Cong. (2019); Deceptive Practices and Voter

3. TARGETING OF LAWFULLY ENTITLED VOTERS

The third requirement, that the alleged conspiracy target lawful voters, is satisfied by any disinformation that directly addresses voters or the voting process. The *Wohl* robocall, for instance, was sent to eligible voters and, by its own message, targeted those planning to vote.¹⁸⁵ But consider disinformation falsely warning that ICE agents would be patrolling polling places looking for ineligible voters. The message might be intimidating but on its face targets only non-voters who fall outside § 1985(3)'s text. The history of voter intimidation, however, provides strong evidence that even disinformation ostensibly targeted at non-voters may nonetheless be used to instill fear in lawful voters, fear that they may be mislabeled.¹⁸⁶ Where it can be proved by direct or circumstantial evidence that conspirators targeted lawful voters, the requirements of § 1985(3) would be met.

Another question is whether non-voters who suffer harm because of disinformation are entitled to relief. In *Wohl*, for instance, all the named plaintiffs were lawful voters.¹⁸⁷ But others may have suffered emotional harm even if they never intended to vote. Likewise, false warnings about COVID-19 or government officials may have kept non-voters from leaving their homes or going near polling places, resulting in harms unrelated to the right to vote. This collateral damage is reminiscent of those non-voters, including women and children, who were harmed by the Klan's widespread campaign of violence and intimidation during Reconstruction.¹⁸⁸ Accordingly, § 1985(3) provides a cause of action to any person harmed because of a conspiracy targeting voters:

Intimidation Prevention Act, H.R. 6607, 115th Cong. (2018); *see also* Chelsea Mihelich, *Prosecuting Vote Suppression by Misinformation*, CTR. FOR THE ADVANCEMENT OF PUB. INTEGRITY 9 & n.81–84 (2019) https://web.law.columbia.edu/sites/default/files/microsites/public-integrity/files/voter_suppression_final.pdf [perma.cc/DP46-GQS8] (last visited Oct. 14, 2021) (listing various proposed bills concerning federal deceptive practices).

¹⁸⁵ *See Wohl*, 498 F. Supp. 3d at 488.

¹⁸⁶ *See supra* notes 40–45 and accompanying text.

¹⁸⁷ *See Wohl*, 498 F. Supp. 3d at 488.

¹⁸⁸ As the congressional debate reflects, the Klan and other domestic-terror organizations targeted a wide range of victims including some, such as women and children, who could not vote. *See, e.g.*, CONG. GLOBE, 42d Cong., 1st Sess. 413 (1871) (remarks of Rep. Roberts) (emphasizing that victims of politically-motivated violence “may be black or white; they include those who wore the blue and those who wore the gray; new-comers and life-long residents, but only Republicans. Stain the door lintels with the mark of opposition to reconstruction . . . and the torch may kindle the roof that covers women and children; the scourge may fall upon shoulders that stoop with weakness and with age; the bullet may pierce the breast without warning”). Accordingly, the debate focused on protecting more than just voters. *See, e.g., id.* at app. 190 (statement of Rep. Buckley) (“[The Act] is not intended to be partisan in its beneficent operations. It is not to protect Republicans only in their property, but Democrats as well, not the colored only, but the whites also; yes *even women and children*, all races and classes, will be benefitted alike . . .”) (emphasis added).

[I]n 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. . . .¹⁸⁹

Nowhere does § 1985(3) require that the person injured be a member of the class being discriminated against or the intended target of the conspiracy.¹⁹⁰

Indeed, courts have recognized § 1985(3) claims brought by plaintiffs who were not the target of the alleged conspiracy. In *Novotny*, for instance, the plaintiff was a male employee who alleged that his employers had conspired to “deny female employees equal employment opportunity”¹⁹¹ in violation of Title VII of the Civil Rights Act¹⁹² and that he had been fired in retaliation for speaking out.¹⁹³ Though the plaintiff was not the target of the conspiracy, the Third Circuit held that he nonetheless had standing to sue because he had been injured by the conspiracy.¹⁹⁴ Although the Supreme Court vacated the Third Circuit’s decision on the grounds that a § 1985(3) claim could not be brought to vindicate rights under Title VII, it did not disturb the Third Circuit’s holding as to the plaintiff’s ability to recover.¹⁹⁵ More recently, following racially-motivated violence at the 2017 “Unite the Right” rally in Charlottesville, Virginia, a group of counterprotesters brought a § 1985(3) equal-protection claim against the rally organizers, alleging a conspiracy to deprive Black individuals of their Thirteenth Amendment rights.¹⁹⁶ The district court permitted claims to be brought by both Black and white plaintiffs who had been harmed as a result of acts made in furtherance of the conspiracy.¹⁹⁷

¹⁸⁹ 42 U.S.C. § 1985(3).

¹⁹⁰ See, e.g., Phillip K. Gebhardt, *A Survey of Organizational and Supervisory Liability Under 42 U.S.C. Section 1983 and 42 U.S.C. Section 1985(3)*, 46 MO. L. REV. 371, 399 (1981).

¹⁹¹ *Novotny v. Great Am. Fed. Sav. & Loan Ass’n*, 584 F.2d 1235, 1237 (3d Cir. 1978).

¹⁹² 42 U.S.C. § 2000e-2.

¹⁹³ *Novotny*, 584 F.2d at 1237–38.

¹⁹⁴ *Id.* at 1244–45; see also *Richardson v. Miller*, 446 F.2d 1247, 1249 (3d Cir. 1971) (noting that § 1985(3) covers private conspiracies to deny equal rights).

¹⁹⁵ See *Great Am. Fed. Sav. & Loan Ass’n v. Novotny*, 442 U.S. 366, 369–70 (1979). Indeed, Justice White’s dissenting opinion argued that the plaintiff’s case should have gone forward precisely because his injury was “distinct and separate from the injury inflicted upon the female employees” and because “damages available to a [plaintiff] suing under § 1985(3) are not dependent upon the amount of injury caused [to] persons deprived of ‘equal privileges and immunities under the laws,’ but upon the gravity of the separate injury inflicted upon the person suing.” *Id.* at 390 (White, J., dissenting).

¹⁹⁶ See *Sines v. Kessler*, 324 F. Supp. 3d 765 (W.D. Va. 2018).

¹⁹⁷ See *id.* at 780–81, 795.

The reasoning in these cases applies with equal force to claims brought under the support-or-advocacy clauses, where politically motivated violence and intimidation have the potential to harm individuals beyond the specific voters targeted. It also serves § 1985(3)'s purpose of combating unlawful conspiracies through civil enforcement.¹⁹⁸ Thus, although at least some lawful voters must be the target of a conspiracy to state a claim under § 1985(3), the law's remedial scope extends to non-voters harmed by intimidation as well.

4. SUPPORT OR ADVOCACY

The fourth requirement, which is that the conspiracy must seek to prevent a lawful voter from "giving his support or advocacy" to a candidate, presents another question of scope. Voting is protected. Not only does the text of the support-or-advocacy clauses specifically refer to those qualified to vote and to federal elections, but the Supreme Court in *Ex parte Yarbrough* upheld the clauses' criminal components in a case brought based on a denial of the right to vote.¹⁹⁹ Likewise, casting a ballot and other actions necessary to voting are also covered.²⁰⁰ Moreover, as the *Wohl* court observed, modern voting methods, such as mail-in voting, are protected as well.²⁰¹

Primus and Kistler note, however, that the term "support or advocacy" likely encompasses activity beyond voting.²⁰² Indeed, a year before § 1985(3) was enacted, Congress passed the Civil Rights Act of 1870, which imposed liability on those who conspired to prevent "any citizen from doing any act required to be done to qualify him to vote or from voting at any election."²⁰³ That Congress later chose the more expansive language of "Support or Advocacy" suggests that Congress intended broader protection.²⁰⁴ Indeed, after the Ku Klux Klan Act was passed, courts

¹⁹⁸ Consider other areas of law in which Congress has provided a private right of action to those harmed by unlawful conspiracies without any requirement that they be the target of said conspiracy. *See, e.g.*, 15 U.S.C. § 15(a) (providing a private right of action to any person harmed in their business or property by a conspiracy to violate the antitrust laws); 18 U.S.C. § 1964(c) (providing a private right to action to any person harmed in their business or property by a violation of the Racketeer Influenced and Corrupt Organizations Act, including conspiracy).

¹⁹⁹ *See Ex parte Yarbrough*, 110 U.S. 651, 656–57 (1884).

²⁰⁰ *See, e.g.*, *Paynes v. Lee*, 377 F.2d 61, 64 (5th Cir. 1967) ("The right to be free from threatened harm and the right to be protected from violence for an attempted exercise of a voting right are no less protected than the right to cast a ballot on the day of election.").

²⁰¹ *See Nat'l Coal. on Black Civic Participation v. Wohl*, 498 F. Supp. 3d 457, 488 (S.D.N.Y. 2020) ("[M]ail-in voting is clearly a lawful, voting-related activity.").

²⁰² *See Primus & Kistler, supra* note 80, at 162.

²⁰³ *Id.* at 163; Civil Rights Act of 1870, Ch. 114, 16 Stat. 140, 141 (1870) (repealed 1894).

²⁰⁴ *See Primus & Kistler, supra* note 80, at 163 ("Given that Congress in 1870 chose language protecting voting in particular but in 1871 chose language referring to support

interpreted the term “support or advocacy” as it appeared in the Act’s criminal component broadly. In *United States v. Goldman*,²⁰⁵ a federal court in Louisiana held that under section 5520, “defendants could conspire to prevent the advocacy and support, in a lawful manner, by the voters . . . without knowing by what means that advocacy and support were to be carried on, and even before the means were agreed upon by the persons by whom the support and advocacy were to be given.”²⁰⁶ This passage contemplates multiple forms of support and advocacy beyond simply voting.²⁰⁷ Likewise, in *United States v. Butler*,²⁰⁸ a federal court in South Carolina drew a clear distinction between the elements required under section 5520 and those required under section 5508, which prohibited conspiracies to “injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States.”²⁰⁹ Although a violation of section 5520 could be shown by proof of a conspiracy to injure another “because of his having given support and advocacy,” the court was clear that this was “not enough” to show a violation of section 5508, which requires a conspiracy “to interfere with [the] right and privilege of voting.”²¹⁰

The term “support or advocacy” is thus broader than simply voting, though precisely how broad remains an open question. Although it is not necessary here to consider the full sweep of the term “support or advocacy,”²¹¹ we can imagine several intimidating acts which, although not quite voter intimidation, would nonetheless affect a voter’s right to express support for a federal candidate:

- A Twitter campaign falsely claims that a terrorist group plans to patrol Black neighborhoods looking for yard signs supporting a Democratic Senate candidate.
- Close to an FEC filing deadline, a robocall falsely warns voters that if they donate to the Republican presidential candidate, their

and advocacy, it makes little sense to read the clauses enacted in 1871 as vehicles for asserting a predicate right to vote.”); *see also* *Kush v. Rutledge*, 460 U.S. 719, 724 (1983) (describing the support-or-advocacy clauses as protecting “the right to support candidates in federal elections” rather than “the right to vote”).

²⁰⁵ 25 F. Cas. 1350 (C.C.D. La. 1878) (No. 15,225).

²⁰⁶ *Id.* at 1352.

²⁰⁷ *See* Primus & Kistler, *supra* note 80, at 163 n.97 (noting that if the support-or-advocacy clauses reached only voting, “the passage [in *Goldman*] would make no sense”).

²⁰⁸ 25 F. Cas. 213 (C.C.D. S.C. 1877) (No. 14,700).

²⁰⁹ 70 Rev. Stat. § 5508 (1875).

²¹⁰ *Butler*, 25 F. Cas. at 223–24.

²¹¹ *See* Primus & Kistler, *supra* note 80, at 189–92 (discussing the potential application of the support-or-advocacy clauses beyond the voting context and arguing that, although a broader interpretation would expand federal jurisdiction, such an extension is supported by § 1985(3)’s text and history).

credit information will be used by banks to collect on old debts.

- A Facebook meme circulates that falsely informs voters that ICE agents plan to infiltrate an upcoming political rally for a congressional candidate to find undocumented persons.

Section 1985(3)'s text suggests that all these acts, if accompanied by a conspiracy, would constitute a violation. In addition, the history of § 1985(3) and the Klan's campaign of terror also suggest that Congress may have considered electoral intimidation—not just voter intimidation—in enacting the support-or-advocacy clauses. Thus, although § 1985(3) at a minimum covers direct efforts to scare voters away from the polls, it should reach much further.

5. FEDERAL ELECTIONS

The final requirement limits the support-or-advocacy clauses to federal elections. In practice, however, many state and local elections are held concurrently with federal elections, with voters often going to the same polling place and using the same ballot.²¹² Thus, where a voter is protected in casting their ballot for president, they are also protected in casting their ballot for mayor. In theory, a defendant might argue that they were only trying to interfere with a local election. In practice, however, such an argument may be little more than a pretext easily defeated by circumstantial evidence, particularly given that it is unlikely that any sufficiently coordinated effort would be undertaken solely to impact local politics.

6. INJURY

Like the other components of § 1985, the support-or-advocacy clauses require a plaintiff to show that they have been “injured in [their] person or property, or deprived of having and exercising any right or privilege of a citizen of the United States” to recover for damages “occasioned by such injury or deprivation.”²¹³ These terms define the types of injuries for which victims of intimidating disinformation may recover.

The term “injury in person or property” encompasses at a minimum bodily harm and property damage. The Supreme Court, however, has read these terms more broadly. In *Haddle v. Garrison*, the Court considered this language in the context of § 1985(2), which provides a similar cause of action for victims of conspiracies to interfere with federal judicial proceedings.²¹⁴ There, the plaintiff alleged that the defendants had conspired to have him fired in retaliation for obeying a federal grand jury

²¹² See Cady & Glazer, *supra* note 31, at 212.

²¹³ 42 U.S.C. § 1985(3).

²¹⁴ 525 U.S. 121 (1998).

subpoena and to deter him from testifying in a federal criminal trial.²¹⁵ The defendants argued that, because the plaintiff's employment was at-will, he had no constitutionally protected property interest in his continued employment.²¹⁶ The Court rejected this argument, stressing that "[n]othing in the language or purpose of . . . § 1985(2), nor in its attendant remedial provisions, establishes such a requirement."²¹⁷ Rather, the Court explained, because "[t]he gist of the wrong at which § 1985(2) is directed is not deprivation of property, but intimidation or retaliation," such a property interest was not necessary.²¹⁸ Instead, the Court held that § 1985(2) covers interference with at-will employment because such claims for contractual interference "ha[ve] long been a compensable injury under tort law."²¹⁹ Because both sections 1985(2) and 1985(3) refer to this exact remedial language,²²⁰ the term "injury in person or property" as it applies to voter intimidation and disinformation is best understood as "refer[ring] to principles of tort law," for the types of injuries which may give rise to a claim.²²¹

With this in mind, victims of voter intimidation may recover not only for bodily injury and property damage but also for any other harms traditionally understood as compensable under tort law. Emotional distress, for example, is a well-established harm under tort law, and one inflicted by intimidation.²²² A voter who is dissuaded from voting by mail and must take off from work to go to the polls may also suffer harm in the form of lost wages or childcare costs.

The most obvious harm suffered by victims of voter intimidation is, of course, the deprivation of the right to vote. This, too, has long been understood to be compensable under tort law, with a common law tradition dating back to *Ashby v. White*, decided in 1703 by the House of Lords in England.²²³ The plaintiff in *Ashby* had won a tort action for a denial of his right to vote before having the jury award of two hundred pounds set aside by the intermediate court of appeals because he had suffered no costs himself.²²⁴ The House of Lords reversed and adopted without discussion the dissenting opinion written below by Chief Justice Holt, who had reasoned that "[t]he right of voting . . . is a thing of the highest importance, and so great a privilege, that it is a great injury to deprive the plaintiff of it," even

²¹⁵ See *id.* at 122.

²¹⁶ See *id.* at 123.

²¹⁷ *Id.* at 125.

²¹⁸ *Id.* at 125–26.

²¹⁹ *Id.* at 126.

²²⁰ See 42 U.S.C. § 1985(3).

²²¹ 525 U.S. at 127.

²²² See Wohl Complaint, *supra* note 13, at 11–14.

²²³ *Ashby v. White* (1703) 92 Eng. Rep. 126 (KB).

²²⁴ See *id.*

if that deprivation “does not cost the party one farthing.”²²⁵ The precedent set in *Ashby* crossed the Atlantic, where it was followed by state and federal courts throughout the nineteenth century, including both before and after the Ku Klux Klan Act was passed.²²⁶ In the early 1900s, the Supreme Court invoked the principles embedded in *Ashby* to recognize the availability of damages in actions for deprivations of the right to vote,²²⁷ including those brought by Black plaintiffs under the Fifteenth Amendment.²²⁸ In *Nixon v. Herndon*, for instance, the Supreme Court held that a Black man could proceed with an action for \$5,000 in compensatory damages against an election official who refused to let him vote, emphasizing that the principle that “private damage may be caused by such political action and may be recovered for in a suit at law hardly has been doubted for over two hundred years, since *Ashby v. White*.”²²⁹ Indeed, just this last Term, the Supreme Court reaffirmed *Ashby*’s lasting influence in *Uzuegbunam v. Preczewski*.²³⁰

This long tradition makes clear that a victim of voter intimidation may recover for a range of harms, from bodily injury and property harm to emotional distress and costs incurred due to intimidation, as well as for the deprivation of the right to vote itself. Thus, although other elements of § 1985(3) may make bringing a successful support-or-advocacy claim challenging, the broad potential for damages to deter bad actors and to make victims whole should give hope and incentive to would-be plaintiffs.

B. THE FIRST AMENDMENT

Like other anti-intimidation statutes, § 1985(3) implicates the First Amendment to the extent that it can be violated by speech—in this case, voter disinformation. But although defendants may raise a First Amendment

²²⁵ *Id.* at 136–37.

²²⁶ *See, e.g.,* *Custis v. Lane*, 17 Va. 579, 584 (Va. 1813); *Jenkins v. Waldron*, 11 Johns. 114, 120–21 (N.Y. 1814); *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 701 n.b (1819); *Swift v. Chamberlain*, 3 Conn. 537, 543 (Conn. 1821); *Weckerly v. Geyer*, 11 Serg. & Rawle 35, 39–40 (Pa. 1824); *Cunningham v. Bucklin*, 8 Cow. 178, 184–85 (N.Y. 1828); *Webb v. Portland Mfg. Co.*, 29 F.Cas. 506, 508 (D. Me. 1838); *Carter v. Harrison*, 5 Blackf. 138, 138–39 (Ind. 1839); *Thacker v. Hawk*, 11 Ohio 376, 378 (Ohio 1842); *Jeffries v. Ankeny*, 11 Ohio 372, 374 (Ohio 1842); *Rail v. Potts*, 27 Tenn. 225, 229–30 (Tenn. 1847); *Reed v. Conway*, 20 Mo. 22, 44 (Mo. 1854); *South v. State of Maryland for use of Pottle*, 59 U.S. 396, 403 (1855); *Morgan v. Dudley*, 18 B.Mon. 693, 695–696 (Ct. App. Ky. 1857); *Curry v. Cabliss*, 37 Mo. 330, 335 (Mo. 1866); *Goetcheus v. Matthewson*, 16 Sickels 420, 439–40 (Ct. App. N.Y. 1875); *Keenan v. Cook*, 12 R.I. 52, 54 (R.I. 1878); *Edes v. Boardman*, 58 N.H. 580, 590–91 (N.H. 1879); *Duffies v. Duffies*, 745 N.W. 522, 523 (Wis. 1890).

²²⁷ *Swafford v. Templeton*, 185 U.S. 487 (1902); *Wiley v. Sinkler*, 179 U.S. 58 (1900).

²²⁸ *See Nixon v. Herndon*, 273 U.S. 536 (1927); *Myers v. Anderson*, 238 U.S. 368 (1915).

²²⁹ 273 U.S. at 540; *see generally* *Wayne v. Venable*, 260 F. 64 (8th Cir. 1919) (permitting a white man to recover \$2,000 against Arkansas election officials who had denied him the right to vote).

²³⁰ *See* 141 S. Ct. 792, 799–800 (2021).

defense, support-or-advocacy claims will pass constitutional muster, both because they are content-neutral regulations of conduct rather than speech and because they are limited to intimidation, which is not protected under the First Amendment.

On their face, the support-or-advocacy clauses do not regulate speech but rather conduct—intimidation, force, and threats. Although the clauses may also be violated by speech acts, they do not proscribe speech based on its content.²³¹ Rather, like other voter intimidation statutes, the support-or-advocacy clauses prohibit intimidating speech regardless of its message or viewpoint.²³² Moreover, as the Supreme Court has recognized, protecting elections is a compelling government interest sufficient to justify incidental burdens on speech.²³³

The support-or-advocacy clauses also prohibit only intimidating speech, and the Supreme Court has held that the First Amendment does not protect “true threats,” including intimidation.²³⁴ Whether an act of intimidation may be proscribed, however, raises several questions. First, must a conspirator intend their communication as a threat? Most federal circuits say no and instead apply an objective test that asks only “whether a reasonable observer would perceive the threat as real.”²³⁵ Only two circuits require that a speaker subjectively intend their speech to be taken as a threat.²³⁶ In the Supreme Court’s most recent true threats case, *Elonis v. United States*, the Court did not resolve this split, though it did hold that a negligence standard was

²³¹ Compare *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992) (striking down an ordinance proscribing “fighting words” based on their viewpoint), with *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993) (upholding a content-neutral penalty enhancement for hate crimes because it was based solely on discriminatory motive).

²³² Cf. 18 U.S.C. § 245(b) (making it a crime to use “force or threat of force [to] willfully injure[], intimidate[], or interfere[] with . . . any person because” that person is voting or working for the federal government); 52 U.S.C. § 10101(b) (providing that no person “shall intimidate, threaten, [or] coerce . . . for the purpose of interfering with” a person’s right to vote).

²³³ See, e.g., *John Doe #1 v. Reed*, 561 U.S. 186, 197 (2010); *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (plurality opinion).

²³⁴ *Virginia v. Black*, 538 U.S. 343 (2003).

²³⁵ *United States v. Jeffries*, 692 F.3d 473, 479 (6th Cir. 2012); accord *United States v. Clemens*, 738 F.3d 1, 10–12 (1st Cir. 2013); *United States v. Martinez*, 736 F.3d 981, 986–88 (11th Cir. 2013); *United States v. Turner*, 720 F.3d 411, 420 (2d Cir. 2013); *United States v. White*, 670 F.3d 498, 508 (4th Cir. 2012); *United States v. Mabie*, 663 F.3d 322, 332–33 (8th Cir. 2011); *United States v. O’Dwyer*, 443 F. App’x 18, 20 (5th Cir. 2011); *United States v. Stewart*, 411 F.3d 825, 828 (7th Cir. 2005); *United States v. Kosma*, 951 F.2d 549, 557 (3d Cir. 1991).

²³⁶ *United States v. Cassel*, 408 F.3d 622, 633 (9th Cir. 2005); *United States v. Heineman*, 767 F.3d 970, 982 (10th Cir. 2014) (“[W]e adhere to the view that *Black* required the district court in this case to find that Defendant intended to instill fear before it could convict him of violating [the criminal threat statute].”).

inappropriate for a criminal conviction.²³⁷ But § 1985(3) and the support-or-advocacy clauses are civil, meaning the appropriate standard—objective or subjective—is unclear.

That said, much of the disinformation discussed thus far is only effective insofar as it tends to intimidate. There is no reason to falsely tell someone that ICE agents are at the polling places *except* to intimidate them. As such, where two or more persons have conspired—or, in other words, agreed—to employ such disinformation, even the higher subjective standard would seem to be met.

Second, must the threat be one of violence? In *Virginia v. Black*, the Supreme Court held that “[t]rue threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence.”²³⁸ This language suggests that threats of non-violent and non-physical harms may also be proscribed consistent with the First Amendment, a position taken by several federal circuits.²³⁹ In *Wohl*, all of the harms threatened—arrests, debt collections, and mandatory vaccinations—were non-violent, but the district court nonetheless held that the defendants could be held liable.²⁴⁰

Third, must a speaker threaten to carry out the harm themselves? In most cases of disinformation, the speaker does not intend to actually carry out the harm. Often the speaker claims that some other entity—the police, creditors, or a deadly virus—will cause the harm. Again, the Supreme Court’s holding in *Black* is instructive: in that case, the Court upheld a restriction on cross burnings as true threats even though no express message was communicated.²⁴¹ Accordingly, courts do not require that a threat take the form of “if you try to vote, I will hurt you” and recognize a myriad of ways a speaker can intimidate others.²⁴² Thus, although suits under the support-or-advocacy clauses are likely to face First Amendment challenges, it is likely that at least the more clear and brazen efforts at intimidation may still be redressed.

²³⁷ 575 U.S. 723, 738 (2015) (stressing that, while a negligence standard is common in tort law, it “is inconsistent with ‘the conventional requirement for criminal conduct—awareness of some wrongdoing’” (quoting *Staples v. United States*, 511 U.S. 600, 606–07 (1994))).

²³⁸ 538 U.S. at 359.

²³⁹ See, e.g., *United States v. Turner*, 720 F.3d 411, 420 (2d Cir. 2013).

²⁴⁰ See *Nat’l Coal. on Black Civic Participation v. Wohl*, 498 F. Supp. 3d 457, 480 (S.D.N.Y. 2020) (“The Court accordingly does not interpret the First Amendment as prohibiting the government from restricting speech that communicates threats of nonviolent or nonbodily harm.”).

²⁴¹ *Black*, 538 U.S. at 354, 357, 363.

²⁴² See, e.g., *United States v. Turner*, 720 F.3d 411, 422 (2d Cir. 2013).

CONCLUSION

In 1871, the Ku Klux Klan's campaign of terror against Black voters and their political allies spurred Congress to take bold steps to ensure that voters would be free to participate in the political process, free from fear and violence. In the 1950s and 1960s, Congress recognized the need to protect voters from subtle and indirect intimidation. Today, as voter intimidation shifts from the polling place to cyberspace, it is more important than ever to use federal voter intimidation laws to combat intimidation, provide relief to victims, and protect our democracy.

While Congress considers new legislative approaches to voter intimidation and disinformation, the support-or-advocacy clauses continue to offer an underexplored and potentially powerful tool to combat modern-day intimidation via disinformation. Although the scope and application of the support-or-advocacy clauses remain unclear, emerging scholarship and cases such as *Wohl* illustrate how they can operate to provide relief to victims of intimidation and disinformation. Plaintiffs should thus embrace the support-or-advocacy clauses as part of their efforts to protect voters and the democratic process. Doing so carries with it numerous benefits. First, that § 1985(3) provides for damages makes filing lawsuits a viable approach for victims and provides a powerful deterrent for would-be intimidators, particularly where disinformation and intimidation are carried out on a large scale. Second, because combatting voter intimidation benefits society as a whole, an impact-litigation strategy may help bolster election integrity and restore waning faith in the democratic process. Finally, the support-or-advocacy clauses, like other federal voter intimidation laws, are relatively underdeveloped, meaning strategic litigation can help define unlawful conduct and develop a new body of law to combat intimidation and disinformation. As the 2020 election illustrated, voter intimidation is an old problem that continues to evolve. If our elections are to remain free and open, so too must our response.