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July 14, 2020

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No. 20-50407 Texas Democratic Party, et al v. Greg Abbott, Governor of TX, et al
USDC No. 5:20-CV-438

Dear Ms. Homer and Mr. Kistler,

The following pertains to your brief electronically filed on July 14, 2020. The following corrections must be made within 14 days.

Caption on the brief does not agree with the caption of the case in compliance with FED. R. APP. P. 32(a)(2)(C). Caption must exactly match the Court's Official Caption (See Official Caption below)

The brief content is out of order and must be rearranged. Specifically, the Certificate of Service must be moved to appear before the Certificate of Compliance, see 5TH CIR. R. 28.3.

Sincerely,

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Case No. 20-50407

TEXAS DEMOCRATIC PARTY; GILBERTO HINOJOSA; JOSEPH DANIEL CASCINO; SHANDA MARIE SANSING; BRENDA LI GARCIA,

Plaintiffs - Appellees

v.

GREG ABBOTT, GOVERNOR OF THE STATE OF TEXAS; RUTH HUGHS, Texas Secretary of State; KEN PAXTON, Texas Attorney General,

Defendants - Appellants

No. 20-50407

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TEXAS DEMOCRATIC PARTY; GILBERTO HINOJOSA; JOSEPH DANIEL CASCINO; SHANDA MARIE SANSING; BRENDA LI GARCIA,

Plaintiffs-Appellees,

v.

GREG ABBOTT, GOVERNOR OF THE STATE OF TEXAS; RUTH HUGHS, Texas Secretary of State, KEN PAXTON, Attorney General of Texas,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Texas, San Antonio Division

BRIEF FOR AMICUS CURIAE THE PROTECT DEMOCRACY PROJECT IN SUPPORT OF PLAINTIFFS URGING REMAND ON THE VOTER INTIMIDATION CLAIM

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AMICUS CURIAE'S IDENTITY, INTERESTS & AUTHORITY TO FILE

The Protect Democracy Project, Inc., is a nonpartisan, nonprofit organization dedicated to preventing our democracy from declining into a more authoritarian form of government. It engages in litigation and other advocacy to protect free and fair elections and to ensure that all Americans are able to exercise their constitutional right to vote. It has litigated extensively on voting rights, election administration, and voter intimidation and the particular threat that poses to a functioning democracy.

Plaintiffs and defendants have consented to Amicus Curiae The Protect Democracy Project, Inc. filing this brief.

CORPORATE DISCLOSURE STATEMENT

The Protect Democracy Project, Inc., is a nonprofit organization with no parent corporation and in which no person or entity owns stock.

STATEMENT PURSUANT TO FED. R. APP. P. 29(A)(4)(E)

No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than the amicus curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

INTRODUCTION

Defendants-appellants ask this Court to review the district court's rulings on multiple legal issues, including the federal statutory prohibitions on voter intimidation. Congress has repeatedly enacted robust tools for protecting voters against intimidation, whether perpetrated by private or governmental actors. In this case, unfortunately, the parties and the district court have all possibly used the wrong legal standard for plaintiffs' voter intimidation claim. This confusion is understandable, given that it isn't clear under which of the several relevant statutes plaintiffs-appellees have raised their claim. Given the confusion, if the Court decides to vacate the preliminary injunction and remand for further proceedings (as plaintiffs have requested in the alternative[1]), this Court should remand the voter intimidation claim so that plaintiffs—who are correct that state law enforcement activities can violate federal voter intimidation law—have a fair opportunity to amend their complaint to clarify this claim, and the district court has the opportunity to issue a decision applying the correct legal standard. Amicus curiae takes no position on the other claims in this case.

[1] Plaintiffs "seek affirmance of the [preliminary injunction] based on their Twenty-Sixth Amendment claims. Plaintiffs will continue to pursue permanent relief on other claims as well, but if the Court will not affirm the preliminary injunction on Twenty-Sixth Amendment grounds, it should vacate the injunction and return the case to the District Court for further proceedings." Pls.' Br. 4 n.1.

It appears that plaintiffs have raised a claim under 42 U.S.C. § 1985(3), which prohibits conspiracies to violate civil rights. But there are four clauses of Section 1985(3)—two of which prohibit conspiracies to deny "equal protection" of the law on the basis of a protected class (clauses 1 and 2), and one of which explicitly prohibits "intimidation" of any voter, regardless of discrimination based on a protected class (clause 3)—and neither the parties nor the district court specify which clause they believe is relevant here. Of course, there are different elements of a claim under these clauses—meaning that the parties' and the district court's failure to specify the relevant clause could result in applying the wrong law.

Moreover, the parties and the district court have referenced two entirely different statutes prohibiting voter intimidation—Section 131(b) of the Civil Rights Act of 1957 and Section 11(b) of the Voting Rights Act of 1965—even though plaintiffs (apparently) have not raised a claim under either. And defendants' brief to this Court on Section 11(b) misstates the law. The Court should not reach any issue regarding those statutes, because there are none presented in this case. But if the Court does consider those statutes, it should not follow defendants' invitation to err.

ARGUMENT

This Court Should Ensure That Plaintiffs' Voter Intimidation Claim Is Analyzed According To The Correct Standard

The parties, the district court, and the motions panel have all (seemingly) used the wrong standard for plaintiffs' voter intimidation claim—at times, even citing the

wrong statutes. Plaintiffs have requested that the Court affirm the preliminary injunction on the basis of the Twenty-Sixth Amendment claim only, and if not affirming on that basis, vacate the preliminary injunction and remand for further proceedings. Pls.' Br. 4 n.1. Given plaintiffs' request, this Court should not reach the merits of plaintiffs' voter intimidation claim—it should either affirm the preliminary injunction on the basis of the Twenty-Sixth Amendment claim only, or it should vacate and remand. If this Court vacates the preliminary injunction, it should remand the voter intimidation claim with instructions that plaintiffs be permitted to amend their claim and the district court use the proper legal standard to decide the claim. In light of the extensive confusion on the voter intimidation claim in the record, we explain the legal framework at hand.

A. The Relevant Voter Intimidation Statutes & The Confusion In This Case

There are three relevant federal statutes prohibiting voter intimidation: Section 2 of the Ku Klux Klan Act of 1871 (42 U.S.C. § 1985(3)), Section 131(b) of the Civil Rights Act of 1957 (52 U.S.C. § 10101(b)), and Section 11(b) of the Voting Rights Act of 1965 (52 U.S.C. § 10307(b)). All three statutes prohibit voter intimidation—including prohibiting state law enforcement officials from using their powers to intimidate voters—but all three employ different legal standards.

There is substantial confusion in this case about which of these three federal statutes are at issue, and the relevant legal standards for each. Plaintiffs cited 42

U.S.C. § 1985(3) in their complaint, ROA.95—but Section 1985(3) has four clauses, each with different elements, and plaintiffs didn't specify the relevant clause. Only clause 3 references voter intimidation explicitly. Plaintiffs, however, quoted the elements of a claim under clauses 1 and 2, which are different than the elements of a claim under clause 3. Plaintiffs also quoted Section 11(b) of the Voting Rights Act in their brief in the district court (but did not cite it in their complaint)—which of course, is an entirely separate statute. *Compare* ROA.112 (citing § 11(b)) *and* ROA.124 (same) *with* ROA.124 (citing § 1985(3)). To add to the confusion, defendants, in their brief in the district court, described the elements of a claim under Section 131(b) of the Civil Rights Act, while also citing Sections 1985(3) and Section 11(b), ROA.552-53, but the elements of claims under these three statutes are all different.

Perhaps as a result of this less-than-ideal situation, the district court then cited Section 11(b), but analyzed plaintiffs' claim using the legal standard for clauses 1 and 2 of Section 1985(3), while also quoting the text of clause 3 of Section 1985(3). *Compare* ROA.2087-88 (citing § 11(b)) *with* ROA.2121-22 (citing § 1985(3)). The motions panel, in its order staying the preliminary injunction, cited Section 1985(3) and quoted the elements of a claim under clauses 1 and 2 (but not clause 3), and did not mention either Section 131(b) or Section 11(b). *Texas Democratic Party v. Abbott*, 961 F.3d 389, 410 (5th Cir. 2020).

The discussion below therefore aims to provide this Court with clarity in sifting through the various legal authorities referenced by the briefing and prior decisions in this case.

1. Section 2 of the Klan Act of 1871 (42 U.S.C. § 1985(3))

Clause 3 of Section 1985(3) explicitly prohibits voter intimidation. All four clauses in what is now Section 1985(3) originated in Section 2 of the Klan Act of 1871. *See* Act of April 20, 1871, ch. 22, § 2, 17 Stat. 13, 13-14. Section 2 of the Klan Act originally contained nearly two dozen provisions creating both civil and criminal liability for persons who conspired to interfere with effective federal governance. Over time, repeated recodifications of the federal code have resulted in the original clauses of Section 2 of the Klan Act being separated and recombined multiple times and in multiple ways. *See* Richard Primus & Cameron O. Kistler, *The Support-or-Advocacy Clauses*, FORDHAM L. REV. 7-15 (Forthcoming 2020).[2] In the modern federal code, four clauses—two "equal protection" clauses and two "support or advocacy" clauses—are now codified in 42 U.S.C. § 1985(3). The text of Section 1985(3) is as follows, broken into clauses for clarity:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another,
>
> > [1] for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or

[2] *Available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3547579.

> [2] for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or
>
> if two or more persons conspire
>
> [3] to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or
>
> [4] to injure any citizen in person or property on account of such support or advocacy
>
> in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3) (brackets and line breaks added).

For clarity's sake, we refer to clauses 1 and 2 as the "equal protection" clauses, and clauses 3 and 4 as the "support or advocacy" clauses.

As is clear from the text, the "equal protection" clauses don't specifically reference voter intimidation (unlike clause 3). (Voter intimidation that falls within the text—such as actions "depriving . . . any person . . . of the equal protection of the laws," *id.* § 1985(3) clause 1—could, of course, be actionable under these clauses.) Nor do clauses 1 and 2 create substantive causes of action on their own; instead, they provide vehicles for enforcing rights found elsewhere. *Great Am. Fed. Sav. & Loan*

Ass'n v. Novotny, 442 U.S. 366, 376 (1979) (describing the portion of § 1985(3) concerning "equal protection of the laws or equal privileges and immunities under the laws" as "purely remedial," that is, "providing a civil cause of action when some otherwise defined federal right . . . is breached by a conspiracy in the manner defined by the section."). Thus, to successfully prove a claim under clauses 1 and 2, a plaintiff must generally demonstrate the required elements of a constitutional claim for an equal protection violation: intentional discrimination based on a protected class, and state action.[3]

Accordingly, to state a claim under the "equal protection" clauses of Section 1985(3), a plaintiff must allege facts demonstrating "(1) a conspiracy; (2) for the purpose of depriving a person of the equal protection of the laws; and (3) an act in furtherance of the conspiracy; (4) which causes injury to a person or a deprivation of any right or privilege of a citizen of the United States." *Jackson v. Texas*, 959 F.3d 194, 200 (5th Cir. 2020). This is the standard that the parties, the district court, and the motions panel relied on, and all of the cases cited in the record for the elements of a Section 1985(3) claim contain claims under only clauses 1 and 2. *See* Defs.' Br. 42 (citing *Hilliard v. Ferguson*, 30 F.3d 649, 652-53 (5th Cir. 1994) (raising only claims based on a "conspiracy to deprive members of his class [of] . . . to equal protection,"

[3] Some equal protection claims under clauses 1 and 2, however, do not require a showing of state action when the underlying right is assertible against private parties. *See, e.g.*, *Griffin v. Breckenridge*, 403 U.S. 88, 105-06 (1971) (Thirteenth Amendment and right of interstate travel).

id. at 651); ROA.2121 (citing the same); Defs.' Br. 42 (citing *Cantú v. Moody*, 933 F.3d 414, 419 (5th Cir. 2019) (quoting only clauses 1 and 2)).

Claims under the "support or advocacy" clauses, however, have different elements than claims under the "equal protection" clauses. This makes sense: these clauses were passed under different constitutional authority (the Elections Clause[4]), have different statutory text, and are targeted at different concerns (proscribing conspiracies that interfere with federal elections). As the Supreme Court explained in *Kush v. Rutledge*, it's improper to import equal protection elements into the clauses of Section 1985 that proscribe conspiracies to interfere with federal functions that do not contain the equal protection language. 460 U.S. 719, 725 (1983) (explaining that "there is no suggestion" that the equal protection language should apply to "any other portions of § 1985")[5]; *see also Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 267 n.13 (1993) (noting the centrality of the equal protection language to *Kush*'s holding); *McCord v. Bailey*, 636 F.2d 606, 614 & n.12 (D.C. Cir. 1980) (holding that no showing of class-based animus is required where the text "does not demand a denial of 'equal

[4] U.S. CONST. art. I., § 4, cl. i; *see Ex parte Yarbrough*, 110 U.S. 651, 660-67 (1884); *United States v. Goldman*, 25 F. Cas. 1350, 1353-54 (C.C.D. La. 1878). *Yarbrough* and *Goldman* analyzed the constitutionality of Section 5520 of the Revised Statutes, which was the statutory provision creating criminal liability for violating the "support or advocacy" clauses. *See* Rev. Stat. § 5520 (2d ed. 1878); *see also id.* § 1980 (civil enforcement provision for the support-or-advocacy clauses). Section 5520 was repealed in 1894. *See* Act of Feb. 8, 1894, ch. 25, § 1, 28 Stat. 36, 37.

[5] Note that there are clauses with the equal protection language in both Section 1985(3) and Section 1985(2).

protection of the laws"'). Thus, there cannot be a class-based animus requirement for the "support or advocacy" clauses for the simple reason that the clauses lack the statutory text that gives rise to that requirement.

Moreover, this Court has already recognized that the "support or advocacy" clauses, unlike the "equal protection" clauses, create independent, substantive causes of action—they are not simply vehicles to enforce rights found elsewhere in the constitution. This Court explained in *Paynes v. Lee*, 377 F.2d 61 (5th Cir. 1967), that while "[t]he Fourteenth Amendment" is "only a protection against the encroachment upon enumerated rights by or with the sanction of a State," the "interference with a Federally protected right to vote is something more and something different." *Id.* at 63-64. Thus, "Congress . . . has provided a specific remedy" for that harm by creating "a Federal right . . . to recover damages for interfering with Federal voting rights[.]" *Id.* That right is not dependent on any violation of the Constitution's Equal Protection Clause. *Id.*

To be sure, other courts have taken the contrary view that the "support or advocacy" clauses are merely devices to enforce the First Amendment. *See, e.g.*, *Federer v. Gephardt*, 363 F.3d 754, 760 (8th Cir. 2004). Those cases are wrongly decided because not only do they improperly make clauses 3 and 4 of Section 1985(3) redundant with clauses 1 and 2, but they also rely on an anachronism. When the Klan Act was passed in 1871, First Amendment rights could only be asserted against the *federal* government, and not against *state* governments. It wasn't until a half-century

later that the Supreme Court held that the First Amendment applied to state governments as well. *See Stromberg v. California*, 283 U.S. 359 (1931) (incorporating the First Amendment's free speech clause against the states). Thus, if cases like *Federer* are correct, then the "support or advocacy" clauses of the Klan Act would have only provided a remedy against the federal government, and not the state governments, when it was originally passed. That seems unlikely: such an interpretation would give a plaintiff a cause of action against General William Tecumseh Sherman (a federal officer) but not against Nathan Bedford Forrest (the first Grand Wizard of the Klan), thus defeating the key purpose of the Act—to provide a legal remedy against the Klan. Cases from near the time that the Klan Act was passed confirm that the Act created causes of action against defendants other than federal officials. *See Goldman*, 25 F. Cas. at 1351-53 (Reconstruction-era case recognizing a properly alleged claim under the criminal equivalent of what is now Section 1985(3) clause 3, with no examination of whether the defendant was a federal officer and observing that the right to provide "support or advocacy" under the statute is broader than merely the act of voting); *see also* Primus & Kistler, *supra*, at 18-22; Note, *The Support or Advocacy Clause of § 1985(3)*, 133 HARV. L. REV. 1382, 1399-1400 (2020) (concluding that this Court's view in *Paynes* that the "support or advocacy" clauses provide substantive causes of action is correct).

Thus, to state a claim under clause 3, a plaintiff must allege facts demonstrating the elements identified in the text: (1) a conspiracy, (2) to prevent by force,

intimidation, or threat, (3) any citizen from giving his or her "support or advocacy" to a candidate for federal office, and (4) an act in furtherance of that conspiracy. *See League of United Latin Am. Citizens - Richmond Region Council 4614 v. Pub. Interest Legal Found.*, No. 1:18-CV-00423, 2018 WL 3848404, at *5 (E.D. Va. Aug. 13, 2018) ("*LULAC*").[6]

It is not clear, based on the record in this case, under which clause of Section 1985(3) plaintiffs asserted their claim. Although plaintiffs' claim fits most obviously under clause 3, in their complaint and briefing, plaintiffs cited the elements of the "equal protection" clauses. ROA.95 ¶ 105 (citing 42 U.S.C. § 1985(3)); ROA.95 ¶ 107 (describing a conspiracy "for the purpose of" depriving a person of "equal protection of the laws[.]"). The district court quoted clause 3—the only clause that explicitly references voter intimidation—while listing the elements of clauses 1 and 2. ROA.2121. And the motions panel likewise quoted the standard for clauses 1 and 2. *Texas Democratic Party*, 961 F.3d at 410.

This panel should remand this claim to the district court (consistent with plaintiffs' request) so that plaintiffs can clarify which claim they are bringing under

[6] The statute encompasses intimidation in the context of voter registration as well. *See Paynes*, 377 F.2d at 64; *cf. United States v. McLeod*, 385 F.2d 734, 740 (5th Cir. 1967) ("The right to vote encompasses the right to register.").

Section 1985(3).[7] This Court should also instruct the district court to apply the proper legal standard to the claim at issue—depending on whether that claim is under the "equal protection" clauses or the "support or advocacy" clauses.[8]

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[7] The district court would need to grant plaintiffs leave to amend their complaint. However, leave to amend should be freely granted, especially in a scenario like this one where the facts have substantially changed, given the Texas Supreme Court's opinion. Here, it's to both parties' benefit, and no one's detriment, for such leave to be granted. Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave when justice so requires").

[8] The motions panel was likely correct that, as currently pleaded, plaintiffs' claim does not survive the intracorporate conspiracy doctrine. *Texas Democratic Party*, 961 F.3d at 410. Under that doctrine, the Attorney General cannot conspire with his own staff, because they are all part of the same corporate entity. *See Benningfield v. City of Houston,* 157 F.3d 369, 378 (5th Cir. 1998); *Dombrowski v. Dowling*, 459 F.2d 190, 196 (7th Cir. 1972). However, should plaintiffs amend their complaint, they might avoid this doctrine. The facts that plaintiffs have alleged elsewhere in the complaint could indicate that the defendant Attorney General conspired with the other defendants in different governmental offices; plaintiffs might also be in possession of facts regarding a conspiracy with non-governmental actors. *See* ROA.82-83 ¶¶ 26-31.

It's worth noting, however, that this doctrine has little support in text or history, and might be ripe for revisiting *en banc* at an appropriate time. The modern intracorporate conspiracy doctrine originated in antitrust law, in this Court's opinion in *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 913 (5th Cir. 1952). There, the Court explained that because the acts of the corporate agent are imputed to the corporation for the purposes of corporate law, a corporation can't conspire with itself in the form of its own agent. *Id.* The Seventh Circuit then imported the doctrine into civil rights law in *Dombrowski*, without significant analysis of whether the same logic from antitrust law should apply in civil rights law. 459 F.2d at 196. In fact, the Seventh Circuit explained that the doctrine is limited in the context of Section 1985(3), because "[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." *Id.* at 196. Which is perhaps why the doctrine has been nearly universal condemned by scholars in the context of Section 1985(3), especially where the defendants are government actors. *See, e.g.*, Michael Finch, *Governmental Conspiracies to Violate Civil Rights: A Theory Reconsidered*, 57 MONT. L. REV. 1, 37 (1996); Catherine E. Smith, *(Un)masking Race-Based Intracorporate Conspiracies Under The Ku Klux Klan Act*, 11

Continued on next page.

2. Section 131(b) of the Civil Rights Act of 1957 (52 U.S.C. § 10101(b))

To add to the confusion, both plaintiffs and defendants cite two other statutes in their briefing to the district court and to this Court: Section 131(b) of the Civil Rights Act of 1957, and Section 11(b) of the Voting Rights Act of 1965. But neither of those statutes are at issue. Plaintiffs (seemingly) haven't raised a claim under either one, and claims under both of these statutes have different elements than claims under either the "support or advocacy" clauses or the "equal protection" clauses of Section 1985(3).

Section 131(b) reads:

> No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for [federal office] . . . at any general, special, or primary election held solely or in part for the purpose of selecting or electing any such candidate.

52 U.S.C. § 10101(b).[9]

VA. J. SOC. POL. & LAW 129 (2004); Allen Page, *The Problems with Alleging Federal Government Conspiracies Under 42 U.S.C. § 1985(3)*, 68 EMORY L.J. 563 (2019). After all, it seems unlikely that a Congress that also gave the president the power to suspend *habeas corpus* and call out the army, navy, and militia in the very same statute, *see* Sections 3-4 of the Klan Act, Act of April 20, 1871, ch. 22, §§ 3-4, 17 Stat. 13, 14-15, was particularly concerned about ensuring that the Klan's corporate formalities were respected. But for now, this doctrine remains binding in this circuit.

[9] Formerly 42 U.S.C. § 1971(b).

By its explicit terms, Section 131(b) forbids voter intimidation and includes a *mens rea* requirement. As the text says, intimidation or threats or coercion "*for the purpose of* interfering" with a voter's right to vote as he or she chooses, is forbidden. 52 U.S.C. § 10101(b) (emphasis added). Thus, Section 131(b) "essentially requires proof of two ultimate facts: (1) that there was an intimidation, threat, or coercion, or an attempt to intimidate, threaten or coerce, and (2) that the intimidation was for the purpose of interfering with the right to vote." *United States v. McLeod*, 385 F.2d 734, 740 (5th Cir. 1967) (internal quotation marks omitted).

Historically, courts, including this one, applied Section 131(b) to many types of voter intimidation, including voter intimidation by law enforcement. *See, e.g.*, *McLeod*, 385 F.2d 734; *United States v. Wood*, 295 F.2d 772, 781-82 (5th Cir. 1961) (arrest and prosecution of voting rights organizer violates § 131(b)); *United States v. Clark*, 249 F. Supp. 720, 728 (S.D. Ala. 1965) (arrest and prosecution of black voters and voting rights organizers violates § 131(b)); *United States v. Edwards*, 333 F.2d 575, 576 (5th Cir. 1964) (considering whether police officer's assault of a Black man who was with two other Black men who were waiting in line to register to vote violated § 131(b)); *cf. Olagues v. Russoniello*, 797 F.2d 1511, 1522 (9th Cir. 1986) (considering whether prosecutor's investigation of voters who requested bilingual ballots violated § 11(b), although applying incorrect standard).

3. Section 11(b) of the Voting Rights Act of 1965 (52 U.S.C. § 10307(b))

Section 11(b) of the Voting Rights Act is nearly identical to Section 131(b) of the Civil Rights Act of 1957, except that it omits the *mens rea* requirement of Section 131(b). Section 11(b) states:

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

52 U.S.C. § 10307(b).[10]

This statute explicitly forbids voter intimidation (like both Section 131(b) and Section 1985(3) clause 3). But unlike Section 131(b), it conspicuously omits the phrase "for the purpose of" that was included in the earlier statute. As one court explained: "The text of § 11(b), unlike § 131(b), plainly omits 'for the purpose of,' suggesting § 11(b)'s deliberately unqualified reach." *LULAC*, 2018 WL 3848404, at *4. Section 11(b) thus prohibits all actions that have the effect of intimidating any reasonable person from registering or voting; no showing "of specific intent or racial animus is required." *Id.*; *see also* Ben Cady & Tom Glazer, *Voters Strike Back: Litigating Against Modern Voter Intimidation*, 39 N.Y.U. REV. L. & SOC. CHANGE 173, 204 (2015) ("Section 11(b) does not require a plaintiff to make any showing with regard to the defendant's intent.").

[10] Formerly 42 U.S.C. § 1973i(b).

The legislative history confirms what the text makes plain: that Congress intentionally declined to incorporate a *mens rea* requirement into Section 11(b). As Attorney General Nicholas Katzenbach explained, a motivating factor behind the creation of Section 11(b) was to eliminate the *mens rea* requirement of Section 131(b), which was a key weakness of that section: "Since many types of intimidation, particularly economic intimidation, involve subtle forms of pressure, this treatment of the purpose requirement has rendered the statute largely ineffective." *Hearing on the Voting Rights Act of 1965 Before the H. Judiciary Comm.*, 89th Cong. 12 (1965) (Statement by Att'y Gen. Katzenbach).[11] Thus, "no subjective 'purpose' need be shown, in either civil or criminal proceedings, in order to prove intimidation under [Section 11(b)]. Rather, defendants would be deemed to intend the natural consequences of their acts." *Id.*[12]

Because the statutes are otherwise nearly identical, courts routinely look to one when applying the other. *Cf. Northcross v. Bd. Of Ed. Of Memphis City Schs.*, 412 U.S. 427, 428 (1973) (holding that where a statutory term has similar language to a previously enacted statute, and where the two provisions share a common purpose, the term should be interpreted in light of the previously enacted statute). This has

[11] *Available at* https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/03-18-1965.pdf.

[12] The House Report accompanying the Voting Rights Act explicitly adopts this reasoning, noting that, under Section 11(b), "no subjective purpose or intent need be shown." H.R. Rep. No. 89-439, 1965 U.S.C.C.A.N. 2437, 2462 (1965).

occasionally led to confusion, and some courts have erroneously applied the "for the purpose of" requirement from Section 131(b) to Section 11(b). *See Olagues*, 797 F.2d at 1522 (erroneously requiring a showing of intent under Section 11(b)); *Willingham v. Cty. of Albany*, 593 F. Supp. 2d 446, 462 (N.D.N.Y. 2006) (similar); *Pincham v. Illinois Judicial Inquiry Bd.*, 681 F. Supp. 1309, 1317 (N.D. Ill. 1988) (similar). However, this interpretation is contrary to the text, context, and legislative history of this statute, and is therefore wrong.

Although these two statutes are not actually at issue in this case, defendants make two arguments regarding Section 11(b) in their briefing. Unfortunately, both are wrong. To be sure, this Court should not render an advisory opinion on either of these issues, because plaintiffs have not raised a claim under Section 11(b). But if it does address those issues, it should reject both of defendants' arguments.

Defendants invite this Court to follow the Ninth Circuit's mistake and import the *mens rea* requirement from Section 131(b) into Section 11(b). Defendants in fact cite this Court's decision in *United States v. McLeod*, 385 F.2d 734, 740 (5th Cir. 1967) in support of their argument—but that case involved Section 131(b), *not* Section 11(b). For the reasons explained above, this Court should not make the same error as its sister court.

More puzzlingly, defendants argue that there is no private right of action to enforce the Voting Rights Act. This assertion is wrong. The Supreme Court has routinely recognized an implied cause of action to enforce the multiple sections of the

Voting Rights Acts. *See Allen v. St. Bd. Of Elects.*, 393 U.S. 544, 557 & n.23 (1969) (Section 5); *Morse v. Republican Party of Virginia*, 517 U.S. 186, 230-34 (1996) (opinion of Stevens, J.) (Section 10); *id.* at 240 (Breyer, J., concurring in the judgment) (Section 10); *id.* at 232 (opinion of Stevens, J.) (implied an implied cause of action for Section 2); *id.* 240 (Breyer, J., concurring in the judgment) (same). As a result, courts have also routinely considered claims by private parties to enforce Section 11(b) itself. *See, e.g.*, *Olagues*, 797 F.2d at 1522; *LULAC*, 2018 WL 3848404, at *3-4; *Ariz. Democratic Party v. Ariz. Republican Party*, No. 16-3752, 2016 WL 8669978, at *4 (D. Ariz. 2016); *Daschle v. Thune*, No. 04-CV-4177, Dkt. No. 6, at 1-2 (D.S.D. Nov. 2, 2004).

B. Law Enforcement Actions Can Constitute Voter Intimidation Under Any of These Three Statutes

Amicus curiae takes no position on whether defendants in this case engaged in unlawful voter intimidation, and this Court should remand for further proceedings on that claim, rather than reaching the issue. However, if this Court reaches the voter intimidation issue, it should not adopt defendants' erroneous legal arguments.

Contrary to defendants' suggestion (Defs.' Br. 43), a law enforcement official's actions can constitute voter intimidation under any of these three statutes. This Court has a long history of so holding. For example, in the seminal case of *United States v. McLeod*, 385 F.2d 734 (5th Cir. 1967), this Court explained how law enforcement actions can unlawfully intimidate voters in violation of Section 131(b). In that case, the local sheriff's department engaged in a series of actions that, together, constituted

a pattern of voter intimidation. *Id.* at 740. This Court explained, "[i]t is difficult to imagine anything short of physical violence which could have a more chilling effect on a voter registration drive than the pattern of baseless arrests and prosecutions revealed in this record." *Id.* at 740-41.[13] This Court further relied on, among other evidence, voter registration statistics to "demonstrate the effectiveness of the intimidation": after the arrests began, attendance at voter registration drives dramatically dropped. *Id.* at 741.

That case is consistent with numerous others that all explain that law enforcement actions—even threats by law enforcement to enforce existing laws—can constitute unlawful voter intimidation. *See, e.g.*, *Wood*, 295 F.2d at 781-82 (arrest and prosecution of voting rights organizer violates § 131(b)); *Clark*, 249 F. Supp. at 728 (arrest and prosecution of black voters and voting rights organizers violates § 131(b)).

And this Court has also explained how a state official's authority to enforce the law does not exempt him or her from federal law's prohibitions against unlawful voter

[13] This follows from the text of Sections 11(b) and 131(b), which, unlike some other anti-intimidation provisions, *do not* contain a text limiting the prohibition to intimidation by force or threat of force. *See New York v. Horelick*, 424 F.2d 697, 703 (2d Cir. 1970) (Friendly, J.). Unsurprisingly, then, this Court and others have interpreted Section 131(b) and/or Section 11(b) to apply to a wide range of conduct beyond violence. *See, e.g.*, *United States v. Bruce*, 353 F.2d 474, 476-77 (5th Cir. 1965) (selective invocation of trespass laws against individuals registering to vote); *United States v. Beaty*, 288 F.2d 653, 656 (6th Cir. 1961) (cancelation of contracts or rental agreements); *LULAC,* 2018 WL 3848404, at *4 (defamation and doxxing); *Thune*, No. 04-CV-4177, Dkt. No. 6, at 1-2 (aggressive poll watching); *United States ex rel. Katzenbach v. Original Knights of the KKK*, 250 F. Supp. 330, 342, 345-49 (E.D. La. 1965) (economic coercion and character assassination).

intimidation. In *United States v. Leflore County*, 371 F.2d 368 (5th Cir. 1967), this Court considered whether the "arrest and conviction" of forty-five civil rights marchers constituted unlawful voter intimidation under Section 131(b), and found it did not. It explained that "the state and its subdivisions may reasonably enforce their criminal laws," even where "such valid enforcement may incidentally have an inhibiting or intimidating effect upon the exercise of a protected right." *Id.* at 371. But then in *McLeod*, this Court explained that it would be wrong to overread *Leflore*: "This broad language [in *Leflore*] could be taken to mean that no arrest of a guilty person could violate" Section 131(b), but *Leflore* "does not stand for that proposition." *McLeod*, 385 F.2d at 744. Rather, the question under Section 131(b) is whether the law enforcement action was done *for the purpose of* interfering with the right to vote, and the answer to that inquiry "depends on all of the surrounding facts." *Id.* (And lest defendants argue that *Leflore* immunizes their conduct on the grounds that plaintiffs cannot show the requisite intent: *Leflore* specifically reserved the question of whether it would come out differently had the claim been brought under Section 11(b). *See Leflore*, 371 F.2d at 371 n.4.)

More broadly, even from the earliest days of the Klan Act, courts recognized that a law enforcement official's actions to enforce criminal laws does not override the prohibition against voter intimidation under federal law. So, for example, in a case analyzing what the then-in-force criminal-law equivalent of what is now Section

1985(3) clause 3,[14] the Court explained that "[e]veryone is justified in doing what is necessary for the faithful discharge of the duties annexed to his office, although he is doubly culpable if he wantonly commits an illegal act under the color or pretext of the law." *United States v. Butler*, 25 F. Cas. 213, 225 (Waite, Circuit Justice, C.C.D.S.C. 1877). Over a hundred years later, courts continue to repeatedly emphasize that the authority to enforce criminal laws does not absolve a state official of the obligation to follow federal law. *See Smith v. Meese*, 821 F.2d 1484, 1491-92 (11th Cir. 1987) ("The defendants cannot cloak constitutional violations under the guise of prosecutorial discretion and expect the federal courts simply to look the other way."). That's because Congress's authority under the Elections Clause to "provide a complete code for congressional elections," *Smiley v. Holm*, 285 U.S. 355, 366 (1932), as well as its power to protect federal elections against corrupt influences, *see Ex parte Yarbrough*, 110 U.S. at 666-67, ultimately allows it to constrain the Texas Attorney General's ability to enforce Texas law. *See* U.S. CONST. art. VI., para. 2 (Supremacy Clause); *see also* H.R. Rep No. 89-439, 1965 U.S.C.C.A.N. 2437, 2462 (1965) (noting Section 11(b)'s basis in the Elections Clause and the Necessary and Proper Clause).

Thus, the dicta in the motions panel's stay order that an injunction against Attorney General Paxton would limit "freedom of speech [and] rule of law," *Texas Democratic Party*, 961 F.3d at 410, should be understood in the correct context: more

[14] At the time, Rev. Stat. § 5520. *See supra* n.4.

than a century of jurisprudence from this Court and other courts holding that law enforcement is not exempt from its obligations to follow federal law, even when enforcing state laws. In other words, if Attorney General Paxton's statements constituted threats that are unlawful voter intimidation—whether under Section 1985(3) clause 3, Section 131(b), or Section 11(b)—an injunction so finding would not pose any First Amendment or rule-of-law concerns. It would merely be enforcing the supremacy of federal law over state law.

* * *

It appears from this less-than-clear record that plaintiffs have asserted a claim under Section 1985(3) clauses 1 and/or 2, and not clause 3; nor Section 11(b); nor Section 131(b). Certainly, both the district court's opinion and the motions' panel order should be understood to interpret only clauses 1 and 2 of Section 1985(3), because neither court considered any other provision. But given the fundamental confusion about which voter intimidation claim is properly before this Court, if this Court does not affirm the preliminary injunction on Twenty-Sixth Amendment grounds, it should instead vacate the preliminary injunction and remand for further proceedings (per plaintiffs' request), and in doing so, instruct the district court to apply the proper legal standard to the voter intimidation claim.

CONCLUSION

For the foregoing reasons, if this Court does not affirm the preliminary injunction on Twenty-Sixth Amendment grounds, it should remand the voter intimidation claim to the district court for further proceedings as requested by plaintiffs so that (1) plaintiffs can amend their complaint to clarify their voter intimidation claim and (2) the district court can issue a decision applying the correct legal standard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 6,132 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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