

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

JANET JENKINS, *et al.*,
Plaintiffs

v.

KENNETH L. MILLER, *et al.*,
Defendants

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Docket No. 2:12-cv-184

DEFENDANTS PHILIP ZODHIATES, VICTORIA HYDEN, AND
RESPONSE UNLIMITED, INC.'S MOTION TO DISMISS THE SECTION 1985 AND
CIVIL CONSPIRACY CLAIMS IN THE REVISED SECOND AMENDED COMPLAINT

Defendants Philip Zodhiates, Victoria Hyden, and Response Unlimited, Inc., by their attorneys, Gravel & Shea PC, hereby move this Court to dismiss the Section 1985 and civil conspiracy claims in Plaintiffs' Revised Second Amended Complaint. A Memorandum of Law accompanies this motion and explains the basis for dismissal in more detail.

Dated: Burlington, Vermont
November 10, 2014

/s/ Matthew B. Byrne

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DEFENDANTS PHILIP ZODHIATES, VICTORIA HYDEN,
AND RESPONSE UNLIMITED, INC.'S MEMORANDUM IN
SUPPORT OF MOTION TO DISMISS THE SECTION 1985 AND CIVIL
CONSPIRACY CLAIMS IN THE REVISED SECOND AMENDED COMPLAINT

Preliminary Statement

This is an action started as an attempt to hold liable twelve defendants in a wide ranging conspiracy alleging both a scheme to deprive Janet Jenkins of her civil rights and to kidnap Isabella Miller-Jenkins. In its October 24, 2013 ruling on motions to dismiss (Doc. 115), the Court dismissed five defendants and certain claims, including a 42 U.S.C. § 1985 conspiracy claim. The Court granted Plaintiffs leave to amend. In their Revised Second Amended Complaint (“RSAC”), Plaintiffs restate the Section 1985 claims and a common law claim against Defendants Phillip Zodhiates, Victoria Hyden, and Response Unlimited, Inc. Defendants move to dismiss those claims.¹

¹ In addition to the grounds set forth in this Motion to Dismiss the Revised Second Amended Complaint, Defendants incorporate as if fully restated the arguments raised in support of their Motion to Dismiss the initial Complaint (Doc. 57) and Renewed Motion to Dismiss in light of *Walden* (Doc. 142).

As interpreted by this Court, the hindrance clause of Section 1985 violates the First Amendment. It is unconstitutionally overbroad and vague because it fails to provide fair notice of its scope and punishes legitimate First Amendment speech and activity. Section 1985 also punishes speech advocating civil disobedience and other passive resistance.

Plaintiffs' Section 1985 claim fails for four additional reasons. First, Plaintiffs fail to allege with specificity that Defendants conspired to violate any Constitutional right that is enforceable against individuals. Second, Plaintiffs have not alleged that Defendants acted with "animus" when they took their alleged actions. Third, Plaintiffs fail to allege that Defendants acted with sufficient force to "hinder" Vermont's law enforcement personnel's efforts to protect a right or privilege of a citizen of the United States. Adding a force element to a Section 1985 hindrance clause claim is necessary to avoid any Constitutional federalism issues associated with applying federal statutes to state law enforcement duties. Fourth, Plaintiffs' conspiracy claim improperly relies on a retroactive understanding of the law to actions that took place in the past. At the time that the alleged actions occurred, the Second Circuit had not recognized sexual orientation or same sex couples as protected classes. Moreover, the United States Congress had for more than a decade affirmatively declared that sexual orientation and same sex couples were not entitled to special treatment under federal law. For all these reasons, the Court should dismiss Plaintiffs' Section 1985 claim with prejudice.

Plaintiffs' claim that Defendants conspired to interfere with custodial rights fails as against Zodiates, Hyden, and RUL because Plaintiffs do not allege that they used any illegal means to further the conspiracy. Neither buying a plane ticket nor fundraising is illegal. If the facts alleged do state a claim, Vermont's application of its common law would violate the First Amendment for many of the same reasons that Section 1985 violates it.

Discussion

I. AS INTERPRETED BY THIS COURT, SECTION 1985 VIOLATES THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION.

The hindrance clause of Section 1985 violates the First Amendment of the United States Constitution. In its October 24, 2013 Opinion and Order, the Court interpreted Section 1985 based on *Libertad* and Justice Souter's dissenting opinion in *Bray. Jenkins v. Miller*, 2013 U.S. Dist. LEXIS 152846, *82 (D. Vt. October 24, 2013) citing *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 280-81 (1993) and *Libertad v. Welch*, 53 F.3d 428, 448-50 (1st Cir. 1995). In its conclusion about Section 1985, the Court held that: "Whether one concludes that a hindrance clause claim is not limited to rights protected only against official encroachment, or that interfering with state officials necessarily implicates state action, a claim that private citizens have conspired against a protected class with invidiously discriminatory animus for the purpose of preventing State authorities from securing equal protection of the law states a valid cause of action." *Id.* at *84-85. The Court required no allegation of force to hinder or prevent a state judicial system from operating.

As interpreted by this Court, Section 1985 suffers from a host of First Amendment infirmities. Section 1985 is overbroad in that it punishes a substantial amount of First Amendment activity. Section 1985 is also vague because the hindrance clause necessarily leaves people to wonder what activities might "hinder" or "prevent" state officials from providing equal protection of the laws. In addition, Section 1985 violates the First Amendment because it punishes speech without a demonstration of clear and present danger.

A. As Interpreted By This Court, Section 1985 Is Unconstitutionally Overbroad.

"It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly

drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.” *Broaderick v. Oklahoma*, 413 U.S. 601, 611-612 (1973). To make out a First Amendment facial challenge that a statute is impermissibly overbroad, the movant must “demonstrate that a substantial number of instances exist in which a law cannot be applied constitutionally.” *Speet v. Schuette*, 726 F.3d 867, 873 (6th Cir. 2013). “The overbreadth doctrine prohibits the government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.” *Ashcroft v. The Free Speech Coalition, Inc.*, 535 U.S. 234, 255 (2002).

To determine the potential breadth of Section 1985, the Court need only look at the actual allegations of the Revised Second Amended Complaint. The vague and undefined conspiracy imputes to all Defendants a variety of activities protected by the First Amendment:

- Lisa Miller converting to “fundamental Christianity,” *Compare RSAC ¶ 15 with Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940);
- Retaining attorneys to represent Lisa Miller in family court proceedings, *Compare RSAC 17 with NAACP v. Button*, 371 U.S. 415, 431-437 (1963) (holding NAACP litigation and support of it were protected by the First Amendment).
- Lisa Miller giving assemblies to students to discuss her legal case, *Compare RSAC 20 with Boy Scouts of America v. Dale*, 530 U.S. 640, 656 (2000) (holding that First Amendment freedom of association prohibits the government from interfering with a group’s teachings about the morality of homosexuality);
- Lisa Miller appearing on a radio program and threatening not to comply with Court orders, *Compare RSAC 23 with Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)(holding speech urging illegal actions protected by the First Amendment as long as they are not “imminent”);
- Victoria Hyden soliciting donations from Liberty Law School personnel to support Lisa Miller outside the country, *Compare RSAC 36 with Secretary of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 959 (1984) (“charitable solicitations are so intertwined with speech that they are entitled to the protections of the First Amendment”) *and NAACP*, 371 U.S. at 431-437;
- Deborah Thurman posting a notice on Facebook about a Court ruling, *Compare RSAC 38 with Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 122-24 (2d Cir. 2006) (First

Amendment right to access civil proceedings to allow criticism of Court ruling) *and Reno v. ACLU*, 521 U.S. 844, 869-870 (1997) (finding that internet was broad public forum, which bars restrictions similar to those found in various broadcast medium);

- Deborah Thurman making a statement on an internet blog on an issue of political speech, *Compare RSAC 40 with Reno v. ACLU*, 521 U.S. at 869-70;
- Several individuals urging civil disobedience to rulings felt to be unjust, *Compare RSAC 40 and 43 with Brandenburg*, 345 U.S. at 447;
- Linda Wall soliciting donations to assist Lisa Miller, *Compare RSAC 46 with Joseph H. Munson Co.*, 467 U.S. at 959 *and NAACP*, 371 U.S. at 431-437.²

² To the extent the allegations in the Revised Second Amended Complaint differ from the previous iteration, the Second Circuit has held that “[t]he amendment of a pleading does not make it any the less an admission of the party.” *Andrews v. Metro N.C.R. Co.*, 882 F.2d 705, 707 (2d Cir. 1989). District courts have divided regarding their treatment of such prior admissions in the context of a Rule 12 motion. *See, e.g., Singleton v. Lee*, 2012 U.S. Dist. LEXIS 154474, *6-7 (S.D.N.Y. Oct. 26, 2012) (concluding that “Admissions in earlier complaints remain binding when a plaintiff files subsequent pleadings” and considering allegations included in an original complaint, but omitted from a later complaint, when granting a motion to dismiss)(quoting *Sulton v. Wright*, 265 F. Supp. 2d 292, 295 (S.D.N.Y. 2003)); *but see In re PXRE Group, Ltd. Sec. Litig.*, 600 F. Supp. 2d 510, 525 (S.D.N.Y. 2009) (acknowledging that prior allegations would be admissible at trial, but declining to consider them at the motion to dismiss stage). In any event, the Court may certainly take judicial notice that Plaintiff made the allegations now omitted from the Revised Second Amended Complaint. The eliminated allegations from the Revised Second Amended Complaint include the following First Amendment activity:

- Jerry Falwell donating money to produce television and radio ads concerning topics of political and religious speech. *Compare AC 27 with Citizens United v. Federal Elec. Comm’n*, 558 U.S. 310, 360 (2009) (holding that independent expenditures unconnected to a particular candidate were protected political speech);
- Several individuals urging civil disobedience to rulings felt to be unjust, *Compare AC 45, 47, 48, 49, 51, 52 with Brandenburg*, 345 U.S. at 447;
- Rena Lindevaldsen writing a book criticizing law enforcement for their efforts to track down Lisa Miller, *Compare AC 60 with Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1035 (1991) (holding that criticism of law enforcement is at the core of First Amendment protection).
- Rena Lindevaldsen commenting that her religion did not permit same sex couples, *Compare AC 60 with Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

The Court must also consider the impact on non-present parties to determine whether Section 1985 is impermissibly overbroad. *NAACP*, 371 U.S. at 432. For example, attorneys representing clients must be free from concerns as to whether their advocacy “hinders” or “prevents” the operation of the courts. Such a result is not tolerable in a system that relies on attorneys to zealously represent the interests of their clients. Moreover, those that fund a wide variety of public policy litigation must also be free from concerns that their actions may be considered a conspiracy to hinder the operation of the state court system. The resulting chill on this advocacy is an unacceptable loss to the judicial system.

As interpreted by this Court, Section 1985 impermissibly chills a broad swath of protected speech. Accordingly, it must be struck down as inconsistent with the First Amendment.

B. The Statute is Impermissibly Vague.

A statute is unconstitutionally vague when it fails to provide fair notice as to whom it is directed. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1049 (1991). In addition, a statute can fail the vagueness standard in the First Amendment context when it creates a “danger of tolerating . . . the existence of a penal statute susceptible of sweeping and improper application.” *NAACP*, 371 U.S. at 433. In the context of the First Amendment, the standards for permissible statutory vagueness are strict. *Id.* at 432. Because First Amendment freedoms are delicate, vulnerable, and need breathing space to survive, the government may regulate in the area only with narrow specificity. *Id.* at 433.

The United States Supreme Court has already twice determined that the term “hinder” is impermissibly vague in the First Amendment context. *Cox v. Louisiana*, 379 U.S. 536, 551 (1964); *Thornhill v. Alabama*, 310 U.S. 88, 99-100 (1940). *Thornhill* involved a challenge to a loitering statute. *Id.* at 91. Part of the statute barred people from picketing with the purpose of

“hindering, delaying, or interfering with or injuring any lawful business or enterprise.” *Id.* at 98. The Court invalidated the vague statute, in part, because “an intention to hinder, delay, or interfere with a lawful business . . . can be proved by showing that others reacted in a way normally expectable of some upon learning the facts of the dispute.” *Id.* at 100. Picketers have First Amendment rights and the statute did nothing to distinguish between “hindrance” protected by the First Amendment and “hindrance” that was not. *Id.* *Cox* involved a civil rights protest of racial segregation. The Louisiana Supreme Court had interpreted “breach of peace” to mean “to agitate, to arouse from a state of repose, to molest, to interrupt, to disquiet.” *Cox*, 379 U.S. at 551. The U.S. Supreme Court invalidated the statute because, as interpreted, it would punish peaceful expressions of unpopular views. *Id.*

The concern about vagueness is even higher when it is the person’s role to “hinder” the operation of the system. In *Gentile*, the United States Supreme Court reviewed attorney ethical restrictions from using the press to advance a client’s case. The vagueness inquiry “is of particular relevance when one of the classes most affected by the regulation is the criminal defense bar, which has the professional mission to challenge actions of the State.” *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1051 (1991). A public defender had been prosecuted for giving a press conference where he discussed his client’s case. *Id.* at 1048. The careful review is required here as well because the hindrance under Section 1985 must be with the state “constituted authorities.” The statute necessarily implicates the rights of lawyers and others who have “a professional mission to challenge the actions of the State.” *Id.* at 1051.

The Court again need not wonder whether the vagueness inherent in Section 1985, as interpreted, will impact protected speech because plaintiffs have alleged that it does. For example, Plaintiffs have alleged that Rena Lindevaldsen has “publically criticized law

enforcement.” AC ¶ 60; *see also id.* AC ¶ 22 (Jerry Falwell), RSAC ¶ 38, 40 (Debroah Thurman), AC ¶ 47 (Matthew Staver and Rena Lindevalden), RSAC ¶ 43 (Linda Wall) and AC ¶ 48 (Jonathan Falwell). Nor need the Court wonder whether defendants speech has been chilled because Plaintiffs have alleged the speech was chilled when they alleged that the “threat [political speech] was removed from the internet.” RSAC ¶ 41.

In the context of a First Amendment vagueness challenge, the United States Supreme Court recognized the absolutely essential role that criticism of the government plays in our democracy. “There is no question that speech critical of the exercise of the State’s power lies at the very center of the *First Amendment*.” *Gentile*, 501 U.S. at 1034. “Public vigilance serves us well, for the knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power . . . Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small amount.” *Id.* at 1035.

The vagueness in Section 1985 threatens to chill speech with its uncertain application. Under this Court’s interpretation, an attorney defending a client charged under Section 1985 or its criminal analog must wonder whether his or her advocacy hinders or prevents the state court system from operating. Supporters of the defendant, financial or otherwise, must also wonder whether they will be hauled into court to defend a Section 1985 suit.

C. The Statute Violates The First Amendment’s Protection of Advocacy of Illegality.

Long ago, the nation decided that the best way to cure “incorrect,” “subversive,” or “dangerous” ideas was to subject them to examination and criticism in the marketplace of ideas. The nation rejected the idea that suppression of thought and speech promoted the general good:

The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the process of education and discussion is

essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgement of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting errors through the process of popular government.

Thornhill v. Alabama, 310 U.S. 88, 95 (1940).

The First Amendment protects even the advocacy of violent, illegal actions.

Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). *Brandenburg* involved the Ohio Criminal Syndicalism Act that punished “persons who ‘advocate or teach the duty, necessity, or propriety’ of violence ‘as a means of accomplishing industrial or political reform’ . . .” *Id.* The Court held that “the mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent actions and steeling it to such action.” *Id.* at 448 (internal quotations omitted). The advocacy alleged here merely urges passive resistance or civil disobedience. Given *Brandenburg*, it is no surprise that “peaceful speech, even speech that urges civil disobedience, is fully protected by the First Amendment.” *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000) *citing* *Brandenburg*, 395 U.S. at 347.

Finally, Victoria Hyden has been named as a defendant because Plaintiffs believe that she solicited funds that would be used to assist in civil disobedience. As applied to her, Section 1985 is unconstitutional because fundraising and advocacy of civil disobedience are both protected by the First Amendment. *Joseph H. Munson Co.*, 467 U.S. at 959; *NAACP*, 371 U.S. at 431-437; *Brandenburg*, 395 U.S. at 447. Because Section 1985 directly punishes her protected speech, she should be dismissed with prejudice.

II. PLAINTIFFS FAIL TO STATE A CLAIM FOR CONSPIRACY TO INTERFERE WITH CUSTODIAL RIGHTS.

A. Plaintiffs Fail To Allege Sufficient Facts To Establish A Conspiracy.

Plaintiffs fail to properly allege a claim for conspiracy to interfere with parental kidnapping. As against Zodhiates, Hyden, and RUL, Plaintiffs have alleged a conspiracy rather than a direct claim. In its October 24, 2013 Opinion and Order, this Court stated that Vermont recognized a claim for custodial interference when “a person who abducts or otherwise compels or induces a minor child to leave a parent who is legally entitled to her custody, with knowledge that the parent does not consent, is subject to liability to the parent.” *Jenkins v. Miller*, 2013 U.S. Dist. LEXIS 152846, **51 (D. Vt. October 24, 2013). The Court did not address the issue of whether it was possible to have a conspiracy to interfere with custodial rights. Under Vermont law, there is some uncertainty about whether a claim for civil conspiracy still exists. *Davis v. Vile*, No. 2002-465, 2003 WL 25746021, *3 (Vt. 2003), citing *Boutwell v. Marr*, 71 Vt. 1, 6-7, 42 A. 607, 609 (1899). If a claim still exists at all, it is clear that “a civil action cannot be sustained unless something causing damage to the plaintiff has been done in furtherance of the agreement and the thing done be something unlawful in itself.” *Id.* Even if there was an illegal purpose, there can be no cause of action if there are no illegal means. *Id.*

Plaintiffs’ civil conspiracy allegations are conclusory and barebones. Plaintiffs do not even allege what the object of the alleged conspiracy was. (RSAC ¶ 56). They should be dismissed for that reason alone. *See infra*, Section III. In addition, the conspiracies to buy a plane ticket or to fundraise are insufficient to make out a claim for interference with custodial rights because neither is an illegal act that is “unlawful in itself.” The claim also fails because Plaintiffs do not allege that Zodhiates, Hyden, or RUL knew that Ms. Jenkins did not consent.

Moreover, under the Restatement, “[w]hen the parents are by law jointly entitled to the custody and earnings of the child, no action can be brought against one of the parents who abducts or induces the child to leave the other.” Restatement (Second) of Torts § 700 cmt. c. The allegations of the Revised Second Amended Complaint make clear that Lisa Miller had custodial rights in September 2009. (RSAC ¶¶ 24, 27, 38.) Thus, no claim for interference with custodial rights could be maintained against Lisa Miller. As a result, no claim for conspiracy can be made out against Zodiates, Hyden, or RUL. *Davis v. Vile*, No. 2002-465, 2003 WL 25746021 (Vt. 2003), *citing Boutwell v. Marr*, 71 Vt. 1, 6-7, 42 A. 607, 609 (1899).

B. As Applied To This Case, Plaintiffs’ Alleged Conspiracy Claims Violate The First Amendment.

As stated by this Court, Vermont’s tort for custodial interference is unconstitutional under the First Amendment of the United States Constitution. The Court held that one who “induces” a child not to stay with one parent is liable for a tort. This requirement raises the same overbreadth, vagueness, and clear and present danger concerns discussed in Section II. These concerns are higher when one can be found liable for just entering a conspiracy to “induce” a child to remain with one parent.

III. PLAINTIFFS FAIL TO STATE A CLAIM UNDER 42 U.S.C. § 1985.

To state a claim under 42 U.S.C. § 1985, the plaintiffs must allege that the defendants did: (1) conspire or go in disguise on the highway or on the premises of another, (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws. Plaintiffs must also allege that one or more conspirators (3) did, or caused to be done any act in furtherance of the object of the conspiracy where another was (4a) injured in his person or property or (4b) deprived of having and exercising any right or privilege

of a citizen of the United States. *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971).³ These requirements apply both to the deprivation and hindrance clauses. To allege a conspiracy in violation of the first clause of Section 1985(3), a plaintiff must also show: (1) some racial or perhaps otherwise class-based invidiously discriminatory animus and (2) the conspiracy aimed at interfering with rights that are protected against private as well as official encroachment. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 267-268 (1991). This Court has previously ruled that Plaintiffs do not state a claim under the deprivation clause.

Although few other courts have addressed the claim, both the First Circuit and most members of the Supreme Court in *Bray* agreed that a “hindrance” claim requires allegations of a significant level of force that interferes with the capabilities of state law enforcement. Plaintiffs’ Second Amended Complaint fails to allege that Defendants used any level of force. The Court should dismiss the claim.

A. Plaintiffs Have Failed To Allege Facts That Show A Conspiracy Existed.

Plaintiffs’ conspiracy allegations are sparse. These allegations only state the legal conclusion that a conspiracy existed. To allege a claim under 42 U.S.C. § 1985, a plaintiff must provide some factual basis, express or tacit, supporting a meeting of the minds between the defendants to achieve an unlawful end. *Webb v. Goord*, 340 F.3d 105, 110 (2d Cir. 2003). Conclusory conspiracy allegations must be dismissed. *Id.*; *Gyadu v. Hartford Ins. Co.*, 197 F.3d 590, 591 (2d Cir. 1999). In addition, conspiracy allegations must meet the heightened Rule 8 pleading standards outlined in *Twombly* and *Iqbal*. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556-57 (2006) (“a conclusory allegation of agreement at some unidentified point does not

³ For the purposes of preserving issues for appeal, Defendants incorporate by reference the arguments made in their prior motions to dismiss as well as those made by other defendants.

supply facts adequate to show illegality”); *Ashcroft v. Iqbal*, 556 U.S. 662 (2008). *Twombly* has particular force because it involved conspiracy allegations. *Twombly*, 550 U.S. at 556-57. *Iqbal* confirmed that *Twombly* had an effect beyond the realm of anti-trust law. *Iqbal*, 556 U.S. at 684. “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678.

Here, Plaintiffs’ conspiracy allegations are no better than those in *Twombly*. With respect to Zodiates, Plaintiffs allege a conspiracy in three places. (RSAC ¶¶ 32, 54, 56). As to the conspiracy, Paragraph 32 says only that: “In the days prior to September 22, 2009, Lisa Miller and Philip Zodiates conspired with Kenneth Miller, a member of the Virginia Brotherhood with whom both Victoria and Philip Zodiates were acquainted, to arrange the purchase of plane tickets from Canada to Nicaragua for Lisa Miller and Isabella Miller-Jenkins.” *Id.* at ¶ 32. Hyden and RUL are only mentioned twice in any conspiracy allegation, and those paragraphs, paragraphs 54 and 56, contain only conclusory statements of law. As conclusory statement of laws, there is no presumption of truth for pleading purposes. *Iqbal*, 556 U.S. at 679 (noting that *Twombly* allegations of conspiracy were not entitled to presumption of truth).

The conspiracy allegations are simply insufficient. Beyond fundraising, there is no description of what Hyden and RUL agreed to actually do or how they were going to achieve the ends of their agreement. Nor is there any description of when or where the alleged conspiracy was formed. For Zodiates, the additional marginal detail is still insufficient. The only agreement that is alleged is a conspiracy to buy plane tickets. That alone is insufficient to establish a conspiracy to violate a person’s civil rights.

The conspiracy allegations also lack facts sufficient to show that the conspiracy was “for the purpose” of denying Plaintiffs’ civil rights. *Bray v. Alexandria Women’s Health Clinic*, 506

U.S. 263 (1991). The impairment of the right “must be a conscious objective of the enterprise.” *Id.*; see also *Libertad*, 53 F.3d at 450 (“The hindrance clause provides a cause of action only where the purposeful hindering of state officials was directed at denying or infringing on the rights of a group of citizens; it is, therefore, considerably narrower by its own terms than the deprivation clause. . .”).

Once the legal conclusions are stripped away from the Revised Second Amended Complaint, there are no allegations about the state of mind of Zodhiates, Hyden, or RUL, let alone that they had a purpose to deny Plaintiffs their civil rights. Moreover, the alleged actions taken in furtherance of the conspiracy suggest that violating Ms. Jenkins’s civil rights and hindering state officials were not the objectives of the conspiracy. Holding fundraising to meet a person’s basic needs suggests a goal of helping one individual rather than harming the other.

(RSAC ¶ 36.)

B. Plaintiffs Fail To Allege That Defendants Acted With Animus.

Plaintiffs fail to allege any animus toward same sex couples or those with different sexual orientation. The required state of mind for “invidiously discriminatory animus” is a high one. *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263 (1991). It involves actions that tend “to excite odium, ill will, or envy; likely to give offense; esp., unjustly and irritatingly discriminating.” *Id.* quoting Webster’s Second International Dictionary 1306 (1954). The requirement of discriminatory animus applies to claims under the hindrance clause of Section 1985(3). *Libertad*, 53 F.3d at 448.

In *Bray*, the Court held that protests against abortion did not satisfy the standard for invidious discrimination against women. Here, Plaintiffs have failed to allege any facts surrounding the state of mind of Zodhiates, Hyden, or RUL. The lack of facts makes it impossible to conclude that Defendants acted with odium, ill will, or envy. Moreover, the

alleged overt actions taken in support of the alleged conspiracy suggest support for one person rather than an intent to harm another. Without allegations of ill-will toward Jenkins, there is no claim for a civil rights violation.

C. Plaintiffs Fail To Allege That Defendants Acted With Sufficient Intensity To “Hinder” Vermont’s Exercise Of Its Power.

This Court should hold that pleading a Section 1985 hindrance claim requires allegations of force to “hinder” or “prevent.” There are good reasons to do so as discussed here and in Section II above. Plaintiffs do not allege that Zodiates, Hyden, or RUL used force to overwhelm the operation of the state judicial or law enforcement apparatus. As a result, the Court should dismiss the Section 1985 claim.

Without requiring allegations of sufficient force in the overt actions of the conspiracy, the application of Section 1985(3) to this case violates the Constitutional protection designed to protect States’ rights. The provision at issue was a part of the last reconstruction legislation passed after the end of the Civil War (“the Ku Klux Klan Act”). The 42nd Congress passed Section 1985(3) as a reaction to the violent suppression of rights by the Ku Klux Klan immediately after the Civil War. *United Bhd. of Carpenters & Joiners, Local 610 v. Scott*, 463 U.S. 825, 835-36 (1983); *see also id.* at 839 (Blackmun, J., dissenting) (“The Ku Klux Klan Act was the Reconstruction Congress’ response to politically motivated mob violence in the past between the South designed to intimidate persons in the exercise of their rights.”)

When the 42nd Congress enacted the Ku Klux Klan Act, it had significant concerns about the Constitutionality of the Act. *Bray*, 506 U.S. at 293-94 (Souter J., dissenting). Moderate Republicans proposed an amendment to the original act that limited the reach of the act. *Cong. Globe*, 42nd Cong., app. at 315, col. 2. The 42nd Congress felt that there had to be a high level of force involved prior to the invocation of federal power under the Ku Klux Klan Act. In

discussing the act, Representative Burchard from Illinois stated: “The conspiracies [the amendment to the bill] seeks to punish are those designed to prevent the equal and impartial administration of justice. These are essentially different from the combinations and conspiracies to resist the execution of ordinary process.” Cong. Globe, 42nd Cong. app. at 315, col. 2. Likewise, Representative Cook explained that an extraordinary level of force is required to come within the provisions of the act. “I know of no one who believe that Congress has any right to enforce the laws of a State except in the emergency contemplated in the Constitution, when the State may be unable to do so by any reason of lawless combinations *too strong* for the state authorities to suppress.” Cong. Globe, 42nd Cong. at 485, col. 2 (emphasis added). In the same discussion, Cook noted that under the Constitution, Congress could punish an ordinary assault and battery “only in the case, the emergency has arisen . . . if those one or two persons belong to a combination that is too strong for the State to suppress.” *Id.*, col. 3; *see also United Bhd. of Carpenters & Joiners, Local 610*, 463 U.S. at 843 (Blackmun, J., dissenting)(summary of Rep. Garfield’s comments that act punished those “who by violence, threats, or intimidation shall deprive any citizen of their fullest enjoyment.”); *see also id.* at 850 n. 15 & 851 n. 16 (discussing importance of “mob violence” to passage of the KKK Act.) Concerns about the Act’s Constitutionality were borne out shortly after its enactment, when the Supreme Court struck down related criminal provisions. *United States v. Harris*, 106 U.S. 629 (1883). After that time, the provision at issue here lay dormant. *See Collins v. Hardyman*, 341 U.S. 651, 656 (1951).

When the Act began to be used again, Constitutional questions reemerged. In *Bray*, federalism concerns drove the textual analysis. In his dissent, Justice Souter recognized that “hindrance” or “prevention” required a certain level of intensity to be actionable under 42 U.S.C.

§ 1985(3).⁴ Justice Souter noted that: “Private conspiracies to injure according to class or classification are not enough here; they must be conspiracies to act with enough force, of whatever sort, to overwhelm the capacity of legal authority to act evenhandedly in administering the law.” 506 U.S. 263, 300 (Souter, J., dissenting). Indeed, as the power of law enforcement has grown over time, the level of force required has likewise increased: “But a more ambitious conspiratorial object would be required under normal modern conditions, and in order to satisfy the requirement of affecting the law enforcement system sufficiently, such a conspiracy would need to envision action capable of countering numbers of officers or injuring in their respective capacity (as by disabling their communication system, for example).” *Id.*

The debate over the level of force required by Section 1985 led both the majority and Justice Souter to state that the hindrance clause of Section 1985(3) should not reach acts of civil disobedience. *Compare Bray*, 506 U.S. at 286 (“These offenses may be prosecuted criminally under state law, and may also be the basis for state civil damages. They do not, however, give rise to a federal cause of action simply because their objective is to prevent the performance of abortions, any more than they do so (as we have held) when their objective is to stifle free speech.”) *with id.* at 304 n. 10 (“As to the lunch counter sit-in protests of the early 1960’s, to which the Court refers, see *ante* at 282 n. 14, if the cases that made it to this Court are representative, these normally were not ‘mass demonstrations, but rather led to arrests of small groups of orderly students who refused to leave segregated establishments when requested to do

⁴ In its analysis of the hindrance clause, this Court reviewed the dissenting opinion of Judge Souter in *Bray*. *Jenkins v. Miller*, 2013 U.S. Dist. LEXIS 152846, **82 (D. Vt. October 24, 2013).

so.”) (Souter, J., dissenting) Plaintiffs allege that the actions taken were acts of civil disobedience. (RSAC ¶¶ 40, 43.)⁵

Plaintiffs’ allegations simply do not allege any use of force against the Vermont state court system or law enforcement. The allegations suggest, at best, that some of the Defendants sought to evade law enforcement. This type of alleged evasion is an occurrence that Vermont State Courts encounter routinely and for which Vermont has sufficient power to address. There is no suggestion in the Revised Second Amended Complaint that Defendants attempted to overwhelm the ability of state law enforcement officials or that Defendants were “too strong” for the State of Vermont.

In fact, the allegations of the Complaint establish the opposite. When faced with non-compliance of its orders, Vermont state courts were able to enter sanctions for non-compliance. (RSAC ¶¶ 14-15, 24-27, 38.) No use of force prevented the Court from entering sanctions. Recognizing a federal tort on these facts will turn routine non-compliance with state custody orders into federal cases. This is a result that the statute and its framers sought to avoid. *Griffin*, 403 U.S. at 101-102 (Section 1985 not intended to be general federal tort law); *see also Libertad*, 53 F.3d at 450 (hindrance clause “could not be used to vindicate ordinary trespass or torts in federal courts”).

⁵ The federalism concerns that the 42nd Congress had in enacting the Ku Klux Klan Act and the Supreme Court had in *Harris* undergird the decision in *Windsor*. The basis for the Court’s invalidation of DOMA was the history of the Federal Government deferring to the States on issues of domestic relations. “Consistent with this allocation of authority, the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations.” *United States v. Windsor*, 133 S.Ct. 2675, 2691 (2013). Federal courts avoid issues of marital status and custody because of the “virtually exclusive primacy . . . of the States in the regulation of domestic relations.” *Id. quoting Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992).

Plaintiffs have also failed to show a violation of a “right or privilege of a citizen of the United States.” The orders that Plaintiffs alleges in the Complaint are orders of Vermont state courts enforcing rights under Vermont state law. (RSAC ¶¶ 14-15, 24-27, 38.) Without asserting federal rights, Plaintiffs fail to state a claim under the hindrance clause. *Snowden v. Hughes*, 321 U.S. 1, 6-7 (1943) (“The protection extended to citizens of the United States by the privileges and immunities clause includes those rights and privileges which, under the laws and Constitution of the United States, are incidental to citizenship of the United States, but does not include rights pertaining to state citizenship and derived solely from the relationship of the citizen and his state established by state law.”); *see also McDonald v. City of Chicago*, 130 S. Ct. 3020, 3028-29 (2010) (declining invitation to overrule *Slaughterhouse* cases and offer new interpretation of “privileges and immunities of the citizens of the United States”); *Griffin*, 403 U.S. at 102 (setting forth the elements of a Section 1985 claim).

D. Plaintiffs’ Claim Relies On An Impermissible Retroactive Application Of The Law.

The recent advances in the law concerning sexual orientation and same sex couples make enforcing Section 1985 against Defendants unfair. There is no doubt that the legal protection of sexual orientation and same sex couples has changed significantly. Until recently, the United States Supreme Court held that laws that banned sodomy were Constitutional. *Compare Bowers v. Hardwick*, 478 U.S. 186 (1986) with *Lawrence v. Texas*, 539 U.S. 558 (2003). Even more recently, the law has begun to accept the premise that sexual orientation and same sex couples should be actively protected. In the recent past, courts in the Second Circuit repeatedly refused to recognize sexual orientation and same sex couples as protected classes. *See, e.g., Vega v. Artus*, 610 F. Supp. 2d 185, 204-05 (N.D.N.Y. 2009)(refusing to recognize homosexuality as a protected class); *Martin v. New York State Dep’t of Correctional Servs.*, 115 F. Supp. 2d 307,

316 (S.D.N.Y. 2000); *David v. Local 801, Danbury Fire Fighters Ass'n*, 899 F. Supp. 78, 80 (D. Conn. 1995) (“homosexuals have not been deemed a protected class under Section 1985(3)).

The Second Circuit did not declare sexual orientation or same sex couples as protected classes until 2012. *Windsor v. United States*, 699 F.3d 169, 183 (2d Cir. 2012). The First Circuit admits to continuing uncertainty on the status of same sex couples and sexual orientation. *See Massachusetts v. United States Dept. of Health and Human Servs.*, 682 F.3d 1, 9-10 (1st Cir. 2009). Although the Supreme Court invalidated DOMA, it did not issue a definitive ruling on the status of sexual orientation and same sex couples in its 2013 opinion. *United States v. Windsor*, 133 S.Ct. 2675, 2706 (2013) (Scalia, J. dissenting).⁶ Importantly, both the Second Circuit opinion and the Supreme Court opinion occurred after the events alleged in the Complaint.

In 1996, Congress still viewed sexual orientation and same sex couples as being unworthy of protection. In fact, it passed legislation to enshrine that view in law. The Defense Against Marriage Act (“DOMA”) amended the Dictionary Act adding a new section to the act: “In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.” 1 U.S.C. § 7. By its plain text, DOMA intended to impact the entire field of federal law.

The determination of whether a group is a protected class relies on both legislative and judicial action. The enactment of DOMA is relevant to Section 1985 because Congressional

⁶ *Romer v. Evans*, 517 U.S. 620 (1995) is not to the contrary. The *Romer* Court also avoided deciding whether homosexuality was a protected class. *See Massachusetts v. United States Dept. of Health and Human Servs.*, 682 F.3d 1, 9 (1st Cir. 2009).

action influences the determination of whether a particular group is treated as a protected class. *Trautz v. Weisman*, 819 F. Supp. 282 (S.D.N.Y. 1993); *see also Lake v. Arnold*, 112 F.3d 682, 688 n. 11 (3rd Cir. 1997).

Congress likewise tied interpretation of Section 1985 to the then existing federal law. The jurisdiction in civil matter and criminal matters conferred on district courts in connection with 42 U.S.C. § 1985 “shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect. . .” 42 U.S.C. § 1988(a).

The role that current legislation plays in determining whether a group of people are a protected class means that the rules for legislative retroactivity should govern this case. With Congress making such a definitive statement in passing DOMA, it is unfair to apply the law as it was understood in 2012 and 2013 to events occurring prior to that time. “[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.” *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). “Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.” *Id.*

For judicial retroactivity, the uncertain nature of the status of sexual orientation and same sex couples places this case in an exception to the normal retroactive application of judicial decisions. *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 757-58 (1995) (discussing the interaction of the doctrine of qualified immunity with judicial retroactivity doctrine). Under Section 1983, the Supreme Court has held that state actors, under the doctrine of qualified immunity, are not to be punished when the rights at issue are not clearly established. *See Harlow*

v. Fitzgerald, 457 U.S. 800, 818-819 (1981). The Court should recognize a similar type of protection from private conspiracy Section 1985 claims. This is particularly important because the Constitution protects the rights of private individuals to associate freely with whomever they choose. *Boy Scouts of America v. Dale*, 530 U.S. 640, 656 (2000). Unless the law of protected classes is clear, Section 1985 will chill the rights of people to associate freely.

Conclusion

Plaintiffs' Section 1985 and civil conspiracy claims fails to state a claim for relief. The Court should dismiss them with prejudice.

Dated: Burlington, Vermont
November 10, 2014

/s/ Matthew B. Byrne

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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

JANET JENKINS, *et al.*,)
Plaintiffs)
)
v.) Docket No. 2:12-cv-184
)
KENNETH L. MILLER, *et al.*,)
Defendants)

CERTIFICATE OF SERVICE

I, Matthew B. Byrne, Esq., attorney for Defendants, certify that, on November 10, 2014, I served Defendants Philip Zodhates, Victoria Hyden, and Response Unlimited, Inc.'s Motion to Dismiss the Section 1985 and Civil Conspiracy Claims in the Revised Second Amended Complaint through the CM/ECF system on the following individuals:

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