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	)	**ORAL ARGUMENT REQUESTED**

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

Preliminary Statement

Section 1985 is unconstitutionally overbroad and vague. Plaintiffs' response to the sweeping overbreadth and vagueness of Section 1985 is to argue that it is not vague or overbroad with respect to the facts of this case. Plaintiffs incorrectly state the law. Courts resolve First Amendment overbreadth and vagueness challenges by reviewing factual circumstances beyond the facts stated in the complaint. Plaintiffs also ignore the facts of their own complaint. Plaintiffs do not deny that their own conspiracy allegations create a real risk of liability and uncertainty for a multitude of individuals exercising their First Amendment rights. Whether evaluated under an applied or facial standard, Section 1985 is unconstitutional.

When Congress originally enacted Section 1985(3), it had serious concerns about its Constitutionality. The Supreme Court addressed some of these issues by requiring that the Plaintiff plead and prove that Defendants conspired to apply overwhelming force to the state

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legal system. This Court's interpretation of Section 1985 does not require this element to state a claim. The result is a federal common law tort that can be applied to a vast number of situations. The tort threatens people who work to bring about change in the system, whether conservative or liberal. Attorneys, activists, financiers of causes, and ordinary citizens face liability when they band together to achieve a political goal or defend a client accused of violating the Equal Protection Clause.

Discussion

I. AS INTERPRETED BY THE COURT, THE HINDRANCE CLAUSE OF SECTION 1985 VIOLATES THE UNITED STATES CONSTITUTION.

A. Section 1985 Is Overbroad.

Plaintiffs' sole argument against the overbreadth claim is that the alleged conduct goes beyond "mere fundraising in support of a general cause."[1] This is true and shows why this Court's interpretation of Section 1985 renders it unconstitutional. The test to determine whether a statute is unconstitutionally overbroad is whether "a substantial amount of protected speech is prohibited or chilled" by the statute. *Ashcroft v. The Free Speech Coalition, Inc.*, 535 U.S. 234, 255 (2002). Plaintiffs do not contest that several of the alleged acts in furtherance of the conspiracy involve First Amendment protected activity. (Memo. in Support of Mot. to Dismiss at 4-5). These allegations from the complaint are enough in themselves to show the requisite "substantial amount of protected speech" chilled by the Court's interpretation of the hindrance clause of 42 U.S.C. § 1985. The allegations highlight that lawyers representing clients accused of violations of the Equal Protection Clause could be held liable for conspiring to "hinder" the

[1] Although Plaintiffs claim "many threatening statements made by Defendants and others," they do not identify a single "threat" that was made by any of the Defendants, let alone one that would satisfy the requirements of *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

operation of the Court system by zealously representing their clients. Likewise, fundraisers for legal defense funds also face the threat of conspiracy liability. Even people protesting or commenting on controversial cases face liability.

The Court's interpretation of Section 1985 also implicates a wide range of conduct beyond the complaint. Protestors of the white police officers and the grand jury decisions in the police brutality cases in Ferguson, Missouri or New York, New York are subject to liability from this overly broad interpretation of Section 1985. Even Paul Clement faces unfair retroactive liability for his advocacy on behalf of the Respondents in *United States v. Windsor*, 133 S.Ct. 2675 (2013). Before the Court dismisses this as pure fantasy, Mr. Clement faced a very similar situation when he was forced to leave King & Spaulding for that very same representation. It is to his credit that he continued the representation, but lawyers should not, then or now, have to make that kind of choice. April 25, 2011 Ltr from Paul Clement to Robert D. Hays, attached as Exhibit 1. As formulated by the Court, a claim for a Section 1985 violation could easily be stated against protestors and attorneys. Even if ultimately proved to be meritless, facing a lawsuit, including the inevitable burdensome discovery that goes with it, will have a chilling effect on them.

Defendants also misunderstand the overbreadth argument. They state that "Section 1985 is not overbroad when applied to the facts of this case." "As the Supreme Court has explained, the point of an overbreadth challenge is that there is no reason to limit the challenges to case-by-case 'as applied' challenges when the statute on its face and therefore in all its applications falls short of constitutional demands." *Speet v. Schuette*, 726 F.3d 867 (6th Cir. 2013) *quoting Secretary of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 966 n.13. Thus, even if Plaintiffs could establish that Section 1985 is not "overbroad" as to the facts of this case, which they

cannot, that would not resolve the overbreadth challenge. Because it is undisputed that the Court's interpretation of Section 1985 reaches a broad swath of protected First Amendment conduct beyond the scope of this case, (Memo. in Support of Mot. to Dismiss at 6), it is unconstitutionally overbroad.

B. Section 1985 Is Vague.

Plaintiffs do not dispute that Section 1985 as interpreted by the Court leaves attorneys defending a client charged under Section 1985, its criminal analog, or with violating the Equal Protection Clause to wonder whether it applies to his or her conduct. (Memo. in Support of Mot. to Dismiss at 8.) Financial supporters of litigation must also ponder the same liability. *Id.* at 8. Finally, Plaintiffs do not dispute that those engaged in political speech must also fear the wraith of Section 1985. *Id.* at 7-8.

Instead, Plaintiffs again argue that Section 1985 is not vague "as applied" to the facts in this case. The test for determining whether a statute is vague considers circumstances beyond the facts alleged in the Complaint to determine whether it violates the First Amendment. *See, e.g., NAACP v. Button*, 371 U.S. 415 (1963) ("Furthermore, the instant decree may be invalid if it prohibits privileged exercises of First Amendment rights whether or not the record discloses that the petitioner has engaged in privileged conduct. For in appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts beside that at bar.")

Plaintiffs are also wrong in saying that the statute is vague as to the facts in this case. There is little doubt that Ms. Miller's attorneys were surprised to learn that their representation of Ms. Miller subjected them to liability for conspiracy under Section 1985. Jerry Falwell would also be surprised to learn that he faces liability for fundraising. Those criticizing the government's handling of this case also could not predict that Section 1985 would be used in this

way. Indeed, Plaintiffs seems to double down and argue that not only are these activities properly subject to Section 1985, but it is actually good that they are attacking the attorneys who represent Ms. Miller. The Supreme Court has a different view. *See Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1035 (1990). Because Section 1985 is vague as applied to this case and other situations, it violates the First Amendment.

C. The Complaint Allegations Lack Any Allegation of Violence.

Although Plaintiffs argue that *Brandenburg* is inapplicable because "this case does not seek to punish mere advocacy of illegality," Plaintiffs ignore a critical element of *Brandenburg* and its progeny. 395 U.S. 444 (1969). That critical element is violence. Plaintiffs' complaint fails to allege it. This omission is significant because in the context of a civil conspiracy, violence is an essential element when the activity on which Plaintiffs seek to hold Defendants liable involves speech. *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886 (1982).

NAACP divides conspirators into two classes: those who use violence and those who do not. In *NAACP*, a Mississippi trial court held liable 130 individuals for their involvement in a conspiracy to boycott white merchants. *Id.* at 890. The United States Supreme Court reversed the judgment. In doing so, the Court insulated non-violent conspirators from civil liability. *See, id.* at 914 ("We hold that the nonviolent elements of petitioners' activities are entitled to protection of the First Amendment."); and *id.* at 918 ("While the State may legitimately impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity."). As the Ninth Circuit observed, "'[i]mminet lawless action,' as used in *Bradenburg*, means violence or physical disorder in the nature of a riot. 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).

The absence of this important element is seen in Victoria Hyden's case. Plaintiffs point to paragraphs 31 and 36 to hold Ms. Hyden liable. Neither paragraph provides a basis for doing so. Paragraph 31 does not even reference Hyden. Paragraph 36 actually provides a basis for *dismissing* Defendants. Plaintiffs do not contest that the bulk of paragraph 36 involves First Amendment protected fundraising activity. The last sentence of paragraph 36, which provides the only possible basis for liability, alleges a single conversation between Zodhiates, Hyden, and Terry Miller.

As paragraphs 31 and 36 illustrate, speech is the only basis for imposing liability on Hyden. The allegations against Hyden lacks any indication that the speech incited violence or even advocated violence or unlawful acts as understood in *Brandenburg*. Moreover, there is no indication that the speech resulted in any violent or unlawful activity. As to the other Defendants, the activities cited by Plaintiffs in their opposition do not rise to the level necessary for liability under *Brandenburg*.

II. PLAINTIFFS FAIL TO ALLEGE A SECTION 1985 CLAIM.

A. Section 1985 Requires An Allegation Of Force To Interfere With State Officials.

To support its Section 1985 claim, Defendants briefly argue that kidnapping provides a force sufficient to satisfy the requirement of force in Section 1985. (Opp'n at 10) ("The law cannot require more force than the intentional kidnapping of a child.") Assuming for the sake of argument that the alleged kidnapping involved force, the principal problem with Plaintiffs' argument is that the alleged force is not directed ***at*** the "constituted authorities" as required by the text of Section 1985.[2] (*See* Memo. in Supp. of Mot. to Dismiss at 18). Plaintiffs simply do

[2] "If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another . . . or for the purpose of preventing or ***hindering the***

not and cannot allege that there was a confrontation with the "constituted authorities," let alone a violent one. The best that can be made of the allegations in the Revised Second Amended Complaint is that Defendants – and not all of them – evaded the "constituted authorities." As the majority and the dissent in *Bray* stated, that is not enough to make out a claim under Section 1985. *Compare Bray*, 506 U.S. at 286 *with id.* at 304 n. 10 (Souter, J., dissenting)

B. Plaintiffs Have Failed To Allege Discriminatory Animus.

Plaintiffs have failed to allege discriminatory animus. Plaintiffs point to two paragraphs of the complaint, paragraphs 24 and 60 to establish discriminatory animus. Paragraph 60 recites alleged injury to Isabella and says nothing about Defendants' intent. Paragraph 24 describes Ms. Miller contacting Philip Zodhiates, but also does nothing to describe Defendants' intent. While the Revised Second Amended Complaint describes some alleged overt acts, it does nothing to describe why those overt actions were taken. These alleged actions could have been taken to support one person, rather than to harm another. (*See* Memo. in Supp. of Mot. to Dismiss at 15) The Revised Second Amended Complaint fails to allege discriminatory animus.

C. Application of Section 1985 to this Case Would Violate Retroactivity Rules.

The Court should not apply retroactively the recent and still not complete changes to the law. Plaintiffs would like the Court to recognize that homosexuality and same sex couples were protected classes at the time of the events in this case took place even though the law in the Second Circuit was to the contrary. Moreover, the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, acted as a shield to immunity when it still existed. When the Supreme Court declared it unconstitutional, it effectively amended a statutory immunity section. Moreover,

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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 . . ."

liability under Section 1985 is tied to "laws of the United States." The "laws of the United States" are constantly changing. Thus, Section 1985 is effectively amended when there is a change in the "laws of the United States." Given that the basis for statutory liability is a constantly shifting landscape, the rules of legislative retroactivity should apply here.

Independently, the immunity aspect of DOMA created reliance interests. Those reliance interests fit within one of the exceptions to traditional judicial retroactivity. The reliance interest in these laws is similar to the reliance interests identified in *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1981). Those reliance interests were analyzed in *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995) when the Court discussed the appropriate retroactivity rules for civil remedial cases, which are a closer analog than Plaintiffs' retroactivity cases. Plaintiffs' cases do not provide the correct retroactivity rule. *Robinson v. Neal*, 409 U.S. 505, 507 (1973); *Griffin v. Kentucky*, 479 U.S. 314, 323 (1987). Both of those cases dealt with criminal procedure rules. Under the reasoning in *Reynoldsville*, the Court should not apply the changes to the law retroactively.

Plaintiffs' citation to *Robinson v. Neal* suffers from another problem. Plaintiffs state: "However, it is well established that the Supreme Court constitutional decisions have retroactive effect. '[B]oth the common law and our decisions' have 'recognized a general rule of retrospective effect for the constitutional decisions of this Court.'" A more accurate statement would be that it "*was*" well-established. *See id.* Plaintiffs neglect to include the first part of the quotation, which said "For, until that time, . . ." As the *Robinson* Court goes onto describe, the retroactivity rules have gotten much more complex, as evidenced by *Reynoldsville Casket Co.*

III. THE MOTION TO DISMISS IS NOT A MOTION TO RECONSIDER.

Defendants' Motion to Dismiss is not a motion to reconsider. The case law that Plaintiffs cite about motions to reconsider relies on the doctrine of the law of the case. That doctrine is inapplicable here. First, the Court *granted* the motion to dismiss Plaintiffs' Section 1985 civil rights conspiracy claim. If the law of the case were applied as Plaintiffs urge they could not state a claim under Section 1985. Second, the Court considered a different issue when it ruled on the motion to dismiss the civil conspiracy claim.

"A district court's pretrial decision does not establish the law of the case on issues that are not actually decided by the court." 18 Moore's Federal Practice 3d § 134.22[1][a]. "The law of the case doctrine 'has no application where the issue in question was not previously decided.'" *Fortis Corporate Ins., SA v. Viken Ship Mgmt. AS*, 597 F.3d 784, 792 (6th Cir. 2010) *quoting Niemi v. NHK Spring Co.*, 543 F.3d 294 (6th Cir. 2008). "Moreover, a decision that the original complaint was sufficient does not necessarily say anything about the sufficiency of the second amended complaint." *Murr Plumbing v. Scherer Bros. Fin. Servs. Co.*, 48 F.3d 1066, 1069 n. 7 (8th Cir. 1995).

The current motion to dismiss is not addressing the same issues as the earlier motion to dismiss. In its October 24, 2013 ruling on motion to dismiss (Doc. 115), the Court granted the motion to dismiss the deprivation Section 1985 claim. (Order at 4). The Court then gave Plaintiffs leave to amend to assert a hindrance Section 1985 claim. Plaintiff added new allegations to the Revised Second Amended Complaint ("RSAC"). (*See* RSAC ¶ 56.) Defendants have never had an opportunity to brief whether Plaintiffs have stated a claim under the hindrance clause of Section 1985. Accordingly, Plaintiffs cannot claim that law of the case applies or that Defendants' motion is a motion to reconsider. For the civil conspiracy claim, the

issue in this motion to dismiss is different from the issue in the Court's October 24, 2013 ruling. There, the Court found that the Plaintiffs had stated a claim of intentional kidnapping against Lisa Miller. There was no analysis of the civil conspiracy part of the international kidnapping claim. As Defendants noted in their motion to dismiss, they are taking aim at the conspiracy allegations that attempt to tie them to the intentional kidnapping claim. (*See* Memo. in Support of Mot. to Dismiss at 10.) As the motions raised different issues, the doctrine of law of the case does not apply and this motion is not a motion to reconsider.

Conclusion

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

Dated: Burlington, Vermont
December 29, 2014

/s/ Matthew B. Byrne

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Exhibit 1

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Paul D. Clement

April 25, 2011

Robert D. Hays
Chairman
King & Spalding LLP
1180 Peachtree Street, NE
Atlanta, GA 30309

Dear Robert:

Please accept my resignation from the firm effective immediately.

My resignation is, of course, prompted by the firm's decision to withdraw as counsel for the Bipartisan Legal Advisory Group of the United States House of Representatives in defense of Section III of the Defense of Marriage Act. To be clear, I take this step not because of strongly held views about this statute. My thoughts about the merits of DOMA are as irrelevant as my views about the dozens of federal statutes that I defended as Solicitor General.

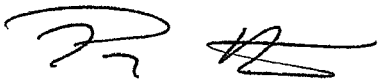
Instead, I resign out of the firmly-held belief that a representation should not be abandoned because the client's legal position is extremely unpopular in certain quarters. Defending unpopular positions is what lawyers do. The adversary system of justice depends on it, especially in cases where the passions run high. Efforts to delegitimize any representation for one side of a legal controversy are a profound threat to the rule of law. Much has been said about being on the wrong side of history. But being on the right or wrong side of history on the merits is a question for the clients. When it comes to the lawyers, the surest way to be on the wrong side of history is to abandon a client in the face of hostile criticism.

I would have never undertaken this matter unless I believed I had the full backing of the firm. I recognized from the outset that this statute implicates very sensitive issues that prompt strong views on both sides. But having undertaken the representation, I believe there is no honorable course for me but to complete it. If there were problems with the firm's vetting process, we should fix the vetting process, not drop the representation.

I reached this decision with great reluctance. I have immense fondness for my colleagues and the law firm. But in this instance, my loyalty to the client and respect for the profession must come first.

As I searched for professional guidance on how to proceed, I found wisdom in the place you and I both would have expected to find it: from our former partner, Judge Griffin Bell, in a 2002 commencement speech to his alma mater, Mercer Law School. "You are not required to take every matter that is presented to you, but having assumed a representation, it becomes your duty to finish the representation. Sometimes you will make a bad bargain, but as professionals, you are still obligated to carry out the representation." I have every good wish for the firm, but I intend to follow Judge Bell's guidance and see this representation through with my new colleagues at Bancroft PLLC.

Yours sincerely,



Paul D. Clement

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CERTIFICATE OF SERVICE

I, Matthew B. Byrne, Esq., attorney for Defendants Philip Zodhiates, Victoria Hyden and Response Unlimited, Inc., certify that, on December 29, 2014, I served Defendants Philip Zodhiates, Victoria Hyden and Response Unlimited, Inc.'s Reply Memorandum in Support of 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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