UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

JANET JENKINS, et al.,

Plaintiffs,

v.

KENNETH L. MILLER, et al.,

Defendants.

No. 2:12-cv-184-WKS

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS PHILIP ZODHIATES, VICTORIA HYDEN, AND RESPONSE UNLIMITED, INC.'S, LIBERTY UNIVERSITY'S, LIBERTY COUNSEL, MATHEW D. STAVER, AND RENA M. LINDEVALDSEN'S AND LINDA M. WALL'S MOTIONS TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER

I. Introduction

One thing is clear. Many Defendants in this case do not want their conduct, or their communications about their conduct, to see the light of day. In upwards of 200 pages of collective briefing, Defendants have raised nearly every conceivable argument as to why, nearly eight years after the 2009 abduction of her child, Janet Jenkins still should be blocked in her effort to collect the evidence she needs in order to present her case to a jury and to hold the members of the conspiracy accountable for the harm they have caused.

Much of Defendants' briefing simply rehashes arguments already made and ruled upon, including arguments about personal jurisdiction, venue, and whether Plaintiffs have stated a cause of action for kidnapping under Vermont law. Much of it constitutes a collateral attack on this Court's prior rulings, such as the rash of additional arguments as to why this Court's 2013 ruling declaring what it takes to state a valid conspiracy claim under Section 1985(3) is somehow wrong or incomplete. Much of it is just silly; some Defendants argue, for example, that Plaintiffs' conspiracy claims violate the First Amendment because they purportedly are premised on the allegation that Lisa Miller converted to fundamental Christianity (they are not). And much of Defendants' briefing and argument, unfortunately, is based on plainly inaccurate readings of authorities, and even the inclusion of lengthy string cites listing cases that have literally nothing to do with the stated proposition of law.

This opposition brief therefore is lengthy by necessity.[1] There is no need to lengthen it further by summarizing here every single argument developed below. What is important is this: Janet Jenkins has not seen her daughter since well prior to the 2009 abduction. About that fact

[1] So too is Plaintiffs' Opposition to certain Defendants' anti-SLAPP motions. *See* Pls.' Opp'n to Defs. Liberty Counsel, Mathew D. Staver, & Rena M. Lindevaldsen's & Linda M. Wall's Special Mots. to Strike, ECF No. 260 (filed August 7, 2017).

there is no dispute. Nor is there any dispute about whether Isabella was kidnapped, or whether at least some Defendants played a role in the kidnapping, or whether Isabella remains abroad. It is a near certainty that at least some if not all Defendants should be held civilly liable based on these admitted facts. And yet each day that passes the evidence becomes more stale and possibly more difficult to collect. Enough is enough. The motions to dismiss should be promptly denied in their entireties, and the Court should permit the immediate commencement of discovery.

II. Statement of the Case

Isabella Miller-Jenkins is the daughter of Lisa Miller and Janet Jenkins. Revised Second Am. Compl. & Demand for Trial by Jury ("RSAC"), ECF No. 223, ¶ 18. She was born in 2002, while the two mothers were united in a Vermont civil union. *Id.* In 2004, Lisa Miller moved with her to Virginia and petitioned the Vermont Family Court to dissolve the civil union. *Id.*

At or about the time that she petitioned to dissolve the civil union, Lisa Miller converted to fundamentalist Christianity and began asserting beliefs that homosexuality is sinful and that Isabella should not be exposed to it. *Id.* ¶ 19. The state courts in both Vermont and Virginia have since ruled that Vermont has continuing and exclusive jurisdiction over custody determinations regarding Isabella, that she has a right to a relationship with both of her parents, and that it is in her best interests to have contact with both of her parents. *Id.* ¶ 18.

Despite these rulings, from 2004 until 2009, Miller repeatedly denied Isabella and Jenkins their court-ordered parent–child contact. *Id.* ¶ 20. During this period, Miller developed connections with a number of organizations that promote anti-homosexual agendas, including the Thomas Road Baptist Church ("TRBC"), and Liberty University and its related law firm, Liberty Counsel, LLC, which serves as the "laboratory school" for the Liberty University School of Law ("the Law School"). *Id.* ¶ 21; Pls.' Mot. to Lift the Stay & Join Additional Defs., ECF No. 204,

¶ 1. Various individuals affiliated with these organizations assisted Lisa Miller in her efforts to prevent Isabella from having a relationship with Jenkins. *See generally* RSAC, ECF No. 223.

In or around 2004, Linda Wall, a Virginia anti-gay activist and member of TRBC, befriended Lisa Miller and assisted in screening her for legal representation by Rena Lindevaldsen and Mathew Staver. *Id.* ¶ 21. Staver and Lindevaldsen became Lisa Miller's lead attorneys and, at various times during the representation, worked as attorneys for Liberty Counsel and as faculty members at the Law School. *Id.* During the course of the representation, Staver became dean of the Law School. *Id.*

In 2008, Lisa Miller and Wall began discussing a plan for what to do if the legal battle to prevent Isabella from having a relationship with Jenkins failed. *Id.* ¶ 25. They agreed and decided that, if they did not prevail in the courts, Lisa Miller should flee with Isabella. *Id.*

Lisa Miller, Wall, and other TRBC members organized the Protect Isabella Coalition ("PIC") in spring of 2008. *Id.* ¶ 26. The group's purpose was to prevent contact between Isabella and Jenkins. *Id.* Lisa Miller's attorneys assisted with social media efforts to promote and solicit donations for the PIC. *Id.*

In 2008, Response Unlimited, Inc. ("RUL"), a Christian direct mail marketing company, also became involved in the effort to raise funds for and promote Lisa Miller's efforts to terminate Isabella's contact with Jenkins. *Id.* ¶¶ 28, 29. RUL's president, Philip Zodhiates, worked closely with Lisa Miller's team at Liberty Counsel and Liberty University on these efforts. *Id.*

On May 27, 2009, Jenkins filed a Motion to Modify Parental Rights and Responsibilities in the Vermont Family Court. *Id.* ¶ 28. The motion requested a transfer of custody to Jenkins due to Lisa Miller's repeated refusal to comply with court-ordered visitation. *Id.*

Around this time, Zodhiates proposed to Liberty Counsel a "personal option" for Lisa Miller in the event that her legal fight failed. *Id.* ¶ 29.

On August 25, 2009, the Virginia court granted Jenkins's request to hold Lisa Miller in contempt for violating Vermont court orders. *Id.* ¶ 31. On September 4, 2009, the Vermont court issued an interim order to take effect while it considered Jenkins's motion to transfer custody. *Id.* ¶ 32. Under the interim order, Jenkins was to have contact with Isabella from September 25, 2009, until September 27, 2009. *Id.* Lisa Miller acknowledged the order in an interview with an online publication and expressed her belief that she would lose custody if she did not follow it. *Id.* ¶¶ 32–33.

By late summer of 2009, Lisa Miller and her co-conspirators had devised a plan to kidnap Isabella and avoid detection by infiltrating the Beachy Amish-Mennonite Christian Brotherhood ("the Brotherhood") in Nicaragua. *Id.* ¶ 34. Lisa Miller would later tell Andrew Yoder, who worked for a Mennonite Charity called Christian Aid Ministries, that Liberty Counsel had told her it would be in her best interests to disappear. *Id.* ¶ 41.

On September 21, 2009, just days before the court-ordered visitation with Jenkins was to begin, Zodhiates and at least one other RUL employee transported Lisa Miller and Isabella, who were disguised as Amish-Mennonites, to the Canadian border. *Id.* ¶ 36. After crossing the border in a taxi, Lisa Miller and Isabella flew from Canada to Nicaragua using tickets that Zodhiates and Kenneth Miller, a member of the Brotherhood, had arranged to purchase with help from another member of the Brotherhood, Timothy Miller.[2] *Id.* ¶¶ 36, 38. Hours after Lisa Miller and Isabella crossed the border, Zodhiates placed phone calls to Liberty University and Liberty Counsel phone numbers used by Staver. *Id.* ¶ 60.

[2] Despite their shared surnames, Lisa Miller has no relation to Kenneth Miller or Timothy Miller.

Employees of Liberty University and Liberty Counsel provided assistance to Lisa Miller in her efforts to disappear with Isabella in September 2009. For example, Victoria Hyden, a student worker at Liberty University, used her administrative role to facilitate correspondence between Zodhiates, who is her father, and Lindevaldsen at the Law School. *Id.* ¶ 44. This correspondence facilitated Lisa Miller and Isabella's disappearance by requesting supplies and coordinating the removal of items from Lisa Miller's apartment to be sent to Nicaragua. *Id.* On the day before Isabella's disappearance, Hyden and Zodhiates both communicated with Lisa Miller's father, Terry Miller, to coordinate her transportation from Virginia to the Canadian border. *Id.* After Lisa Miller and Isabella left the country, Lindevaldsen and Wall visited her Virginia apartment and packed her personal belongings. *Id.* ¶ 45. Zodhiates then retrieved these belongings, and other supplies, and arranged to have them transported to Nicaragua. *Id*. Once Lisa Miller and Isabella were in Nicaragua, Hyden continued to use her employment at Liberty University to facilitate communication between Lisa Miller and Lindevaldsen. *Id.* ¶ 46.

In fall of 2009, Lisa Miller and Isabella went into hiding in Nicaragua and began living under assumed names. *Id.* ¶ 40. Jenkins, unaware of their whereabouts, continued her court battle to enforce her right to contact with Isabella by pursuing enforcement and contempt proceedings. *Id.* ¶¶ 40, 43, 46. Liberty Counsel attorneys thwarted these efforts to locate Isabella by intentionally making misrepresentations regarding their knowledge of her whereabouts to the courts. *Id.* ¶¶ 46, 49–50, 57. They continued to make these misrepresentations to the family courts well into 2010. *Id.* at 57; *see also* Tr. of Mots. Hr'g, ECF No. 216-6, at 11:15–12:1, 21:5–16.

On November 20, 2009, after making numerous contempt findings against Lisa Miller, the Vermont Family Court ordered that legal and physical parental rights and responsibilities for

Isabella be transferred to Jenkins. RSAC, ECF No. 223, ¶ 47. Although she was made aware of the ruling, Lisa Miller has continued to live in hiding with Isabella outside of the United States. *Id.* ¶ 53. Since January 2010, Isabella has been listed as missing by the National Center for Missing and Exploited Children—the victim of a family abduction. *Id.* ¶ 20.

In January 2010, Wall appeared on television with several members of the PIC to endorse the kidnapping. *Id.* ¶ 54. In discussing her role, Wall compared herself to Harriet Tubman and suggested she would take similar actions with regard to other children whose parents were of the same sex. *Id.* Wall contacted law enforcement to ask them not to look for Isabella and advised anyone else with knowledge of Isabella's whereabouts not to tell anyone. *Id.* ¶ 55.

In spring of 2010, Zodhiates arranged to have money sent to Nicaragua to support Lisa Miller and Isabella, using Yoder and Timothy Miller as conduits. *Id.* ¶ 56.

Timothy Miller, Kenneth Miller, and Zodhiates were all indicted and convicted for offenses related to their roles in Isabella's kidnapping. *See* Judgment, *United States v. Kenneth Miller*, No. 2:11-cr-161 (D. Vt. Mar. 6, 2013), ECF No. 110; Amended Judgment, *United States v. Zodhiates*, No. 1:14-cr-175 (W.D.N.Y. Apr. 3, 2017), ECF No. 196; Judgment, *United States v. Timothy Miller*, No. 1:14-cr-175 (W.D.N.Y. Mar. 28, 2017), ECF No. 191.

The Miller–Jenkins case has been an important part of the Law School's curriculum, and students have been asked in an exam question to put themselves in Staver and Lindevaldsen's position in advising Lisa Miller on whether to follow court orders. *See* Op. & Order, ECF No. 220, at 46. In 2011, Lindevaldsen published *Only One Mommy: A Woman's Battle for Her Life, Her Daughter, and Her Freedom: The Lisa Miller Story*. RSAC, ECF No. 223, ¶ 62. The book, which is based in part on personal diaries that Lisa Miller entrusted to Lindevaldsen, is required reading for incoming students at the Law School. *Id.*

Jenkins, for herself and as next friend of Isabella, filed the instant lawsuit on August 14, 2012. *See* Compl. & Demand for Trial by Jury, ECF No. 1. In her initial complaint, Jenkins named Lisa Miller, Kenneth Miller, Timothy Miller, Andrew Yoder, Christian Aid Ministries, Response Unlimited, Inc., Philip Zodhiates, Victoria Hyden, Liberty University School of Law, Thomas Road Baptist Church, Douglas Wright, and Linda Wall as defendants. *Id.* Plaintiffs made claims for the intentional tort of kidnapping, violations of the Racketeer Influence and Corrupt Organizations ("RICO") Act, 18 U.S.C. § 1962(c)–(d), and conspiracy to violate civil rights in violation of 42 U.S.C. § 1985(3) and 42 U.S.C. § 1986. *Id.*

On October 24, 2013, the Court granted in part and denied in part motions to dismiss filed by Defendants. *See* Op. & Order, ECF No. 115. The Court dismissed the RICO claims for failure to state a claim upon which relief can be granted; dismissed the claims against Yoder, Christian Aid Ministries, Liberty University, TRBC, and Douglas Wright for lack of personal jurisdiction; ordered jurisdictional discovery with respect to RUL; and dismissed the claim brought under 42 U.S.C. § 1985(3). *Id.* The Court granted Plaintiffs leave to amend the Section 1985(3) claim to allege that Defendants acted with discriminatory animus based upon sexual orientation rather than on the basis of gender. *Id.* The Court denied Defendants' motions to dismiss for improper venue and their motions for a change of venue. *Id.*

On April 6, 2015, the Court granted a motion to stay the case during the pendency of the criminal case against Zodhiates. *See* Mem. & Order Re: Mot. to Stay, ECF No. 192.

On March 20, 2017, the Court granted Plaintiffs' motion to lift the stay, to amend the complaint to join as additional defendants Lindevaldsen, Staver, Liberty Counsel, and Liberty University, and for a ruling that it has jurisdiction over RUL. *See* Op. & Order, ECF No. 220. The Court ruled that it has personal jurisdiction over all of these defendants. *Id.* It noted that,

although it had previously dismissed Liberty University from the case for lack of personal jurisdiction, additional allegations based upon evidence adduced at Zodhiates' trial and during jurisdictional discovery created a basis for personal jurisdiction. *See id.* at 4.

Plaintiffs filed a Revised Second Amended Complaint on May 4, 2017. *See* RSAC, ECF No. 223. Defendants Zodhiates, Hyden, and RUL filed a motion to dismiss on May 16, 2017. *See* ECF No. 228. Defendant Liberty University and Defendants Liberty Counsel, Staver, and Lindevaldsen filed motions to dismiss on June 5, 2017. *See* ECF Nos. 237–238. Defendant Linda Wall filed a motion to dismiss on June 8, 2017. *See* ECF No. 242.

III. Argument

A. Liberty University May Be Held Vicariously Liable for the Tortious Conduct of Its Employees

1. Defendants Lindevaldsen, Staver, and Hyden Committed Tortious Acts During or Incidental to the Scope of Their Employment with Liberty University

Plaintiffs have a stated a claim for vicarious liability against Liberty University because Lindevaldsen, Staver, and Hyden all committed tortious acts during or incidental to the scope of their employment with Liberty University. An employer may be held vicariously liable for the tortious acts of its employees where those acts are "committed during, or incidental to, the scope of employment." *Brueckner v. Norwich Univ.*, 730 A.2d 1086, 1090 (Vt. 1999) (citing *Anderson v. Toombs*, 117 A.2d 250, 253 (Vt. 1955); *Poplaski v. Lamphere*, 565 A.2d 1326, 1330 (Vt. 1989)) (describing "settled doctrine" of *respondeat superior*). Conduct falls within the scope of employment where: "(a) it is of the kind the [employee] is employed to perform; (b) it occurs substantially within the authorized time and space limits; [and] (c) it is actuated, at least in part, by a purpose to serve the [employer]." *Id* at 1091 (quoting Restatement (Second) of Agency § 228(1) (1958)). Whether a given act is committed during or incidental to the scope of

employment is a question of fact. *Id.* In assessing whether Plaintiffs have sufficiently pled a vicarious liability claim at the motion to dismiss phase, the Court must "construe the complaint liberally, accept[] all factual allegations in the complaint as true, and draw[] all reasonable inferences in the plaintiffs' favor." *Heller v. Consol. Rail Corp.*, 331 F. App'x 766, 767 (2d Cir. 2009).

With regard to Lindevaldsen and Staver, this Court has already found, as part of its jurisdictional analysis, that Plaintiffs have pleaded facts from which it may conclude that "Liberty Counsel and Liberty University operated as a unified entity with respect to Lindevaldsen and Staver's representation of Miller." Op. & Order, ECF No. 220, at 46. In making this finding, the Court relied upon Plaintiffs' prima facie showing that, as a general matter, Liberty Counsel and Liberty University are closely affiliated. *Id.* at 45. They share common leadership, employees, physical space, and institutional values, and Liberty Counsel acts a "laboratory school" to train Liberty University law students. *Id.* More importantly, the Court found that, regarding the Jenkins–Miller matter in particular, Lindevaldsen and Staver's legal representation of Lisa Miller as attorneys for Liberty Counsel "was critical to carrying out their roles as professors at Liberty University." *Id.* at 45–46. For example, Lindevaldsen wrote a book regarding her work on the case that became required reading for students and, in an exam question, had students place themselves in her and Staver's shoes in advising Lisa Miller on whether to follow court orders. *Id.* at 46. She also used her Liberty University email address and telephone for litigation-related correspondence in the Jenkins–Miller matter. *Id.* Staver's conduct also shows that his work in the Jenkins–Miller case was inextricably intertwined with his role as dean of Liberty University School of Law. For example, during a meeting with Philip Zodhiates regarding fundraising efforts being undertaken to support Lisa Miller's legal battle, Staver gave

him a tour of the law school. *Id.* Furthermore, after dropping Lisa Miller off at the Canadian border, Zodhiates placed a phone call to a Liberty University phone number used by Staver. *Id.* at 31.

In short, given that Lindevaldsen and Staver's legal representation of Lisa Miller was "critical" to their work on behalf of Liberty University, *id.* at 45, was performed using Liberty University resources (including physical space and technology), and furthered the shared mission of Liberty University and Liberty Counsel, Plaintiffs have made a prima facie showing that their case-related work was "committed during, or incidental to, the scope of [their] employment." *Brueckner*, 730 A.2d at 1090. Furthermore, Plaintiffs have alleged that Lindevaldsen and Staver each committed tortious acts within the scope of their work as Lisa Miller's attorneys. In particular, they advised Lisa Miller that disappearing would be in her best interests and then made factual misrepresentations to the Vermont and Virginia courts in order to thwart Jenkins's attempts to use court proceedings to locate Isabella. RSAC, ECF No. 223 ¶¶ 41, 50, 61. Because Lindevaldsen and Staver committed tortious acts while engaging in legal representation that was within or, at the very least, incidental to their work for Liberty University, the University may be held vicariously liable for those tortious acts.

Liberty University is also vicariously liable for the tortious conduct of Hyden. Plaintiffs allege that Hyden used her employment as a student worker performing administrative work at Liberty University to facilitate communications, both before and after Lisa Miller fled the country with Isabella, that were integral to the kidnapping. *Id.* ¶¶ 44, 46. In particular, she helped arrange for Lisa Miller and Isabella's transportation to the Canadian border. *Id.* ¶ 44. She also delivered emails from Zodhiates to Lindevaldsen requesting donations to support Lisa Miller in Nicaragua and coordinating the removal of items from Miller's apartment. *Id.* Finally, after Lisa

Miller had fled, Hyden facilitated Lisa Miller's continued contact with Lindevaldsen, who in turn made misrepresentations about these communications to the courts in order to frustrate Jenkins's attempts to locate Isabella. *Id.* ¶ 46. Hyden's tortious acts, which included delivering communications to Lindevaldsen's desk at Liberty University, meet all of the requirements for vicarious liability set forth in the Restatement: they were acts "of the kind" she was employed to perform as an administrative worker; they occurred substantially within the "time and space" she was working; and they served the purpose of Liberty University, insofar as it was acting, together with Liberty Counsel, to further Lisa Miller's quest to prevent Jenkins from exercising her parental rights. Restatement (Second) of Agency § 228(1).

To be clear, Plaintiffs do not argue that Liberty University should be held liable for the "torts of unaffiliated third parties," as Liberty University suggests. Mot. To Dismiss, ECF No. 237, at 13–14. Rather, they seek to hold the University liable for the tortious actions of its own employees, committed during, or incidental to, the scope of their employment. These actions include advising Lisa Miller to flee with Isabella, effectuating her flight by arranging her transportation and the transportation of her belongings and supplies to Nicaragua, and making knowing misrepresentations to courts in two states in order to thwart efforts to locate Isabella.

2. Liberty University Is Liable Under Section 1985(3)

Citing non-binding precedent, Liberty University argues that this Court should import into 42 U.S.C. § 1985(3) principles developed in the context of litigation against municipalities under 42 U.S.C. § 1983. *See* Def. Liberty University's Mot. To Dismiss, ECF No. 237, at 15–16. In particular, Liberty University argues that, contrary to the basic principles of *respondeat superior*, employers should not be held liable under Section 1985(3) unless the torts of their employees are the result of a policy or custom of the employer. *Id.*

As an initial matter, neither this Court nor the Second Circuit has adopted such a rule. The Ninth Circuit, which has considered the issue, expressed reluctance regarding the notion that the "policy or practice" requirement articulated in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), for cases against municipalities under Section 1983 should be "graft[ed] . . . onto § 1985(3)." *Scott v. Ross*, 140 F.3d 1275, 1284 (9th Cir. 1998). The Ninth Circuit reasoned that the policy rationale for limiting the liability of government entities under Section 1983 does not apply in the context of Section 1985(3) because that provision "was intended to reach 'private conspiracies aimed at interfering with rights constitutionally protected against private, as well as official, encroachment.'" *Id.* (quoting *United Bhd. of Carpenters v. Scott*, 463 U.S. 825, 833 (1983)).

Even if this Court were to import the principles of *Monell* into Section 1985(3), Liberty University's argument would fail because it may be held liable for the tortious acts of Staver, as dean of the Law School. Under *Monell*, "where the action of the employee in question is taken by, or is attributable to, one of the entity's authorized policy makers, the action will be considered the act of the entity itself." *Bowen v. Rubin*, 385 F. Supp. 2d 168, 177 (E.D.N.Y. 2005) (citing *Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 126 (2d Cir. 2004)). "[E]ven a single action by a decisionmaker who 'possesses final authority to establish . . . policy with respect to the action ordered is sufficient to implicate the [entity] in the constitutional deprivation . . . .'" *Amnesty Am.*, 361 F.3d at 126 (quoting *Pembauer v. City of Cincinnati*, 475 U.S. 469, 481–82 (1986)) (internal citation omitted). Here, Plaintiffs allege that at least some of the tortious acts for which it seeks to hold Liberty University responsible were committed by Staver while he was dean of the Law School. RSAC, ECF No. 223 ¶ 21. Moreover, under the motion to dismiss standard, Plaintiffs are entitled to the reasonable inference that as dean of the Law

School, Staver had policy-making authority with respect to litigation that was "critical to carrying out" the educational work of that institution. Op. & Order, ECF No. 220, at 34, 45.

B. Plaintiffs' Claims Are Not Time-Barred

The Liberty Defendants assert that Plaintiffs' action is time-barred for several reasons. Although Defendants note that the statute of limitations for Isabella is tolled because she is a minor child (who is being held outside the United States), they argue that the case is still time barred because Isabella fails to state a claim on which relief can be granted. Plaintiffs address this argument in sections 0 and 0, *infra*. Defendants also ignore the fact that the claims relate back to the allegations of the initial complaint, and gloss over the continuing nature of the tort of custodial interference. Liberty University also argues that the suit is untimely because following the October 24, 2013 dismissal, Jenkins should have simply refiled in another jurisdiction. *See* ECF No. 237, at 19. The Court should reject all of these arguments for the reasons stated below.

1. Facts Relevant to the Statute of Limitations

In December 2009, Janet Jenkins became aware that her daughter had been kidnapped by Lisa Miller. RSAC, ECF No. 223 ¶ 49. Over the next several months, Jenkins received tips from concerned citizens in Virginia concerning the involvement of Wall and the involvement of Hyden and Hyden's father, Zodhiates. Jenkins gained limited information about Zodhiates following the arrest and indictment of Timothy Miller in 2011. Timothy Miller in turn provided information that led to Jenkins's discovery of Kenneth Miller's involvement. During the August 2012 criminal trial of Kenneth Miller, the evidence presented by the government provided a sufficient factual basis for Plaintiffs to state claims for intentional torts and conspiracy against Lisa Miller, Timothy Miller, Kenneth Miller, Zodhiates, and Hyden. As all of this unfolded in the nearly three years between December 2009 and August 2012, the kidnapping of Isabella

continued, and continues to this day. Isabella is a minor child and is being held outside of the United States.

At the time that the original complaint was filed in August 2012, it was clear that several co-defendants had ties to, or were employed by, Lisa Miller's lawyers at the Law School and its "laboratory school" Liberty Counsel. *See, e.g.*, Compl. & Demand for Trial by Jury, ECF No. 1, ¶ 22. The Liberty attorneys and Hyden submitted falsely sworn affidavits to the court denying any knowledge or involvement in the conspiracy. Without evidence of direct involvement, Jenkins previously asserted that Liberty University and its related ministries were vicariously liable for the intentional torts of its agents and employees. *Id*. at 49. This Court rejected that allegation, stating:

> there is no factual support for the assertion that the attorneys committed a tortious act—or conspired to commit a tortious act—that caused injury to Janet Jenkins. There is no suggestion that the attorneys committed a tort by representing their client or publicly voicing their opinions concerning the issues.

Op. & Order, ECF No. 115, at 30.

Although this ruling was in the context of a decision on personal jurisdiction, it is clear that this Court found no factual support for the assertion that the attorneys committed tortious acts that caused harm to Jenkins. However, during the criminal trial of Zodhiates, and as a result of jurisdictional discovery in this case, information came to light showing that the Liberty attorneys were directly involved in the kidnapping conspiracy. *See generally* Pls.' Mot. to Lift Stay & Join Additional Defs., ECF No. 204. The new evidence showed that Liberty Counsel was in communication with RUL about the kidnapping as early as January 2009. *Id.* ¶¶ 4–8. The information also showed that Rena Lindevaldsen was directly involved in the removal of items from Lisa Miller's apartment after her disappearance, *id*. ¶ 13, and that the Liberty attorneys made misrepresentations to the courts in Virginia and Vermont in order to thwart Jenkins's

attempts to locate her daughter, *id.* ¶¶ 21–23. In light of the new facts, the Court joined the previously dismissed defendant Liberty University, and allowed amendment to name the Liberty lawyers and their related law firm Liberty Counsel.

2. Rule 15(c)(1)(C) Allows Relation Back Under the Facts of this Case

The U.S. Supreme Court has held that relation back focuses on the defendant's knowledge to determine whether they should expect to be haled into court. *See Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538, 549 (2010). The Court in *Krupski* explained that its rationale for allowing relation back was based on the relative knowledge that the parties possessed at the time of the original complaint. *Id.*. Related business entities and their employees possess much more information about their own relationship to each other and their individual involvement in a tort claim than a plaintiff can access without discovery. *Id.* When a party evades liability by exploiting this fact, allowing relation back best assures that justice will be done. *Id.* at 550 ("[R]epose would be a windfall for a prospective defendant who understood, or who should have understood, that he escaped suit during the limitations period only because the plaintiff misunderstood a crucial fact . . . ."). In this case, the source of the mistake was, in fact, Liberty University's and Liberty Counsel's own malfeasance by its agents and co-defendants Lindevaldsen and Staver. All four Defendants knew or should have known that they were proper defendants at the time of initial filing. At the time that the initial complaint was filed, Jenkins knew the identities of only some of the co-conspirators, and named Liberty University as one of those co-conspirators. As limited discovery proceeded, facts came to light showing the role of even more conspirators who were involved in the occurrence that was set out in the original pleading. Moreover, the new evidence revealed more information about the business relationship between the co-conspirators at RUL, Liberty University, and Liberty Counsel.

Also, because the University was named in the original complaint, the University has not been unexpectedly haled in to court, and is not unfairly prejudiced by the Court's decision to allow the amended complaints to proceed. Federal Rule of Civil Procedure 15(c)(1)(C)(i) establishes that relation back should be allowed, if the Rule criteria are met, so long as the defendant "received such notice of the action that it will not be prejudiced in defending on the merits." Here, Liberty University was represented by Attorney Richard Berger in defense of the initial complaint. Berger never withdrew from representation of Liberty University, only of Victoria Hyden, *see* ECF No. 126, and continued to appear on PACER notifications at all times. Moreover, he continued to file pleadings in this matter well after his client was dismissed from the case. *See* ECF No. 129 (filed December 19, 2013). Moreover, Berger's firm compiled and submitted affidavits by Staver and Lindevaldsen in support of a motion to dismiss the initial complaint before the lawyers were joined individually. ECF Nos. 54-4 (Staver), 54-5 (Lindevaldsen). Staver was certainly aware of the complaint, as he stated in his own sworn statement. ECF No. 54-4, at 4. The Liberty Defendants are thus not prejudiced by being joined in this action. These Defendants had notice not only from the time of the initial filing of this civil action, as well as before then, when the collateral criminal proceedings were initiated. The fact that these Defendants intentionally concealed and misrepresented their role in this kidnapping conspiracy should not insulate them from liability.

3. The Kidnapping of Isabella Is a Continuing Tort

Although the Liberty Defendants are properly joined in this suit for all of the reasons stated above, Plaintiffs have a continuing cause of action against all Defendants because their actions jointly and severally contribute to the ongoing tort from which Plaintiffs suffer daily injury: their forced separation due to Lisa Miller's kidnapping of Isabella. Although there is no

precedent on such a claim in Vermont for the intentional tort of kidnapping, the Indiana Supreme Court has held in a kidnapping case where a father first kept the daughter from the mother's custody in 1912, and kept them apart through "various schemes" for the following nine years that:

> [T]he accrual of a cause of action . . . depends upon the uniting of at least two elements—injury and damages. In the instant case we have referred, in a general way, to the wrongful acts continuing over a period of nine years. Whether or not these acts formed an unbroken chain from the time they began . . . and were of such continuity as to constitute one wrong which was the proximate cause of the alleged personal injuries and damages suffered . . . were facts for the jury . . . . The two-year statute of limitations will not begin to run as a shield against the consequences of wrongful acts until the wrongdoer thereby accomplishes an injury to the person of another . . . .
>
> [W]here, as here, the action is for damages resulting from the various consequences of one continuous wrong, the statute of limitations will not begin to run until there is a cessation of the overt acts constituting the wrong.

Montgomery v. Crum, 161 N.E. 251, 258–59 (Ind. 1928) (internal quotation marks and citation omitted). The Indiana Court of Appeals reaffirmed this opinion in 1999 when it held that, "[i]f a continuous course of conduct is the cause of the injury, the statute does not begin to run until the injury has been produced." *C & E Corp. v. Ramco Indus., Inc.*, 717 N.E.2d 642, 644 (Ind. Ct. App. 1999).

The doctrine of continuing torts applies to the kidnapping of Isabella by Lisa Miller because each day Jenkins and Isabella are unable to have a parent–child relationship, they each suffer a new and ongoing injury. In other words:

> [W]hile a limitations period generally begins to run when facts exist that authorize one party to maintain an action against another, where a tort involves a continuing or repeated injury, the limitations period is tolled and does not begin to run until the date of the last injury or the date the tortious acts cease

54 C.J.S. Limitations of Actions § 223. Therefore, until Isabella is returned to the United States and allowed to resume normal contact under the authority of the Rutland Family Court, both Plaintiffs maintain their cause of action against all Defendants.

Courts have generally held that that custodial interference is a continuing tort. "Generally, tort actions accrue when the wrongs alleged were committed and the resulting damages incurred. The tort of interfering with the parental relationship, however, is a continuing tort because it encompasses the withholding of a child from his or her parent's custody." *Risk v. Kingdom of Norway*, 707 F. Supp. 1159, 1169 (N.D. Cal. 1989). In *Tinker v. Abrams*, 640 F. Supp. 229 (S.D.N.Y. 1986), the court found that the statute of limitations had expired, but only because of the parent's inaction after learning the whereabouts of the children. The court in *Tinker* distinguished the facts from *Montgomery* because the parent in *Montgomery* continued to move and hide the children. 640 F. Supp. at 233. Here, Plaintiffs allege that Lisa Miller continues to move Isabella to unknown locations, and remains in hiding with the Beachy Amish Mennonite Brotherhood. RSAC, ECF No. 223, ¶ 63. The RSAC alleges that, following Timothy Miller's arrest, Lisa Miller fled to a different location. *Id.* The kidnapping is therefore a continuing tort under Vermont law.

4. Plaintiffs' Claims Are Not Time-barred for Failing To File a Claim in Virginia in 2013

If Plaintiffs had refiled their initial complaint in another jurisdiction without the benefit of the newly discovered information, Liberty University would have moved to dismiss that case for the exact reasons stated in this Court's October 24, 2013 decision. At that time, Plaintiffs had little evidence that the lawyers themselves, or anyone in a leadership or supervisory role at the University had committed an intentional tort. Indeed, Defendants did everything possible (going

so far as to submit false affidavits to this Court) to ensure that Plaintiffs did not have the information necessary to state such a claim.

In light of the Court's October 24, 2013 decision, it would have been impossible for Jenkins to state a claim against these attorneys and their employers in any jurisdiction without additional information. Nevertheless, Staver, Lindevaldsen, and Liberty Counsel argue that the claims against them are time-barred as well, asserting that the statute began to run as soon as a plaintiff knew or should have known that a defendant *might* have breached their duty. Mem. in Supp. of Mot. To Dismiss, ECF No. 240, at 32.[3] Absent the newly discovered evidence of intentional wrongdoing by the attorneys who led the Law School and its laboratory school Liberty Counsel, Jenkins could not necessarily have maintained a suit in Virginia or any jurisdiction. The Court should reject the argument that Plaintiffs' failure to file an unsustainable claim elsewhere is a bar to recovery in Vermont.

C. Defendants' Motions To Dismiss for Lack of Personal Jurisdiction Must Be Denied

1. The Court Should Deny Defendants' Repetitious Challenges to Its Rulings on Personal Jurisdiction Under the Law of the Case Doctrine

Defendants Lindevaldsen, Staver, Liberty Counsel, Liberty University, and Wall have moved to dismiss for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2). In granting Plaintiffs' motion to amend the complaint so as to join Lindevaldsen, Staver, Liberty Counsel, and Liberty University as Defendants, this Court, after engaging in extensive analysis, already ruled that amendment would not be futile because the Court may exercise personal jurisdiction over each of these Defendants. Op. & Order, ECF No. 220, at 17–60. In doing so, this Court explicitly stated that it was "apply[ing] the evidentiary standards that

[3] Page numbers in citations to Defendants Liberty Counsel, Staver, and Lindevaldsen's Memorandum in Support of their Motion to Dismiss, ECF No. 240, refer to the PACER page numbers and not those in the footer of the brief.

it would be required to apply at the motion to dismiss stage." *Id.* at 25. In denying Wall's 2013 motion to dismiss the Court also ruled that it may exercise personal jurisdiction over Wall. *Id.* at 23–26, 36–38. Having failed in their prior attempts to argue that the Court lacks personal jurisdiction, Defendants now seek to relitigate this very same issue. They should be prohibited from doing so under the law of the case doctrine.

"The law of the case doctrine commands that 'when a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case' unless 'cogent and compelling reasons militate otherwise.'" *Johnson v. Holder*, 564 F.3d 95, 99 (2d Cir. 2009) (quoting *United States v. Quintieri*, 306 F.3d 1217, 1225 (2d Cir. 2002)). Cogent and compelling reasons include "an intervening change in law, availability of new evidence or the need to correct a clear error or prevent manifest injustice." *Id.* at 99–100 (internal quotation marks omitted).

Here, Defendants point to no intervening change in law that mandates reconsideration of the Court's ruling on personal jurisdiction. Furthermore, they identify no clear error in the Court's thorough and thoughtful analysis of the jurisdictional issues, discussed *infra*. Finally, because Plaintiffs need only make a prima facie showing that personal jurisdiction exists in order to survive a motion to dismiss, and because, in evaluating whether such a showing has been made, the Court must "construe the pleadings and any supporting materials in the light most favorable to the plaintiffs," *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161, 167 (2d Cir. 2013), Defendants' attempts to inject factual disputes into their analysis by attaching self-serving affidavits to their pleadings do not create grounds for a departure from the law of the case. Rather, at this stage, "all factual disputes are resolved in the plaintiff's favor, and the plaintiff's *prima facie* showing [of personal jurisdiction] is sufficient notwithstanding the

contrary presentation by the moving party." *Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala*, 989 F.2d 572, 580 (2d Cir. 1993).

Recognizing that the Court already rejected Defendants' argument that amendment would be futile and that the Court's finding of personal jurisdiction over the additional Defendants is now the law of the case, Liberty University asks the Court to consider its motion to dismiss as a "request to reconsider its March 20, 2017 Order." ECF No. 237, at 25. But Defendants fare no better under the standard governing motions for reconsideration, which is "strict." *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995). It is well-settled that a motion for reconsideration is "not a vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a 'second bite at the apple.'" *Analytical Surveys, Inc. v. Tonga Partners, L.P.*, 684 F.3d 36, 52 (2d Cir. 2012) (quoting *Sequa Corp. v. GBJ Corp.*, 156 F.3d 136, 144 (2d Cir. 1998)). Accordingly, "[t]he major grounds justifying reconsideration are 'an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.'" *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992) (quoting 18 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 4478, at 790). Defendants present no such grounds.

"[W]here litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again." *Zdanok v. Glidden Co.*, 327 F.2d 944, 953 (2d Cir. 1964) (Friendly, J.). Here, Defendants present no good reason why they should be permitted to skirt the law of the case doctrine and relitigate the Court's well-reasoned ruling that it may exercise personal jurisdiction over them.

2. The Court Correctly Concluded That It May Exercise Personal Jurisdiction over Each Defendant

Due process requires that, in order to establish specific personal jurisdiction over a defendant, a plaintiff must allege that the defendant has "certain minimum contacts" with the relevant forum and that exercise of jurisdiction is reasonable under the circumstances. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). "Specific jurisdiction exists when a [forum] exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with forum . . . ." *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 567–68 (2d Cir. 1996) (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984)). Under the "effects test" established by the Supreme Court, "specific personal jurisdiction exists even where a defendant engaged in activities entirely outside of the state if the defendant took 'intentional, and allegedly tortious, actions . . . expressly aimed' at the forum and 'the brunt of the harm' was suffered in the forum." Op. & Order, ECF No. 220, at 27 (quoting *Calder v. Jones*, 465 U.S. 783, 788–89 (1984)). The Supreme Court has clarified that "[t]he crux of *Calder* was that the . . . 'effects' of the alleged [tort] connected the defendants to [the forum], not just to the plaintiff." *Id.* at 27–28 (quoting *Walden v. Fiore*, 134 S. Ct. 1115, 1123–24 (2014)) (alterations in original). Applying this standard, this Court correctly concluded that it has personal jurisdiction over Lindevaldsen, Staver, Liberty Counsel, Liberty University, and Wall because each Defendant had sufficient minimum contacts with Vermont, by virtue of their own actions or actions that may be attributed to them. *See id.* at 31 (Lindevaldsen); *id.* at 39–40 (Staver); *id.* at 40 (Liberty Counsel); *id.* at 43 (Liberty University); Op. & Order, ECF No. 115, at 25–26 (Wall). The Court further found that its exercise of personal jurisdiction over all Defendants would be reasonable because it would comport with "traditional notions of fair play and substantial justice." Op. & Order, ECF No. 220, at 57–60 (quoting *Metro. Life Ins.*, 84 F.3d at 568); Op. & Order, ECF No. 115, at 37).

a. Rena Lindevaldsen and Mathew Staver

The Court properly found that Plaintiffs have made a prima facie showing that Lindevaldsen and Staver had sufficient minimal contacts with Vermont to justify the Court's exercise of personal jurisdiction because they engaged in tortious conduct directed not only at Jenkins but also at the forum itself. ECF No. 220, at 28–32 (Lindevaldsen); *id.* at 34–40 (Staver). In particular, their tortious conduct was deliberately aimed at preventing Jenkins, a Vermont resident, from exercising the parental rights awarded to her by the Vermont courts, which had jurisdiction over the custody proceedings regarding Isabella. *See id.* at 31.

Plaintiffs allege that Lindevaldsen and Staver, while working for Liberty Counsel and Liberty University, served as Lisa Miller's lead attorneys in family court litigation in Vermont and Virginia. *See* RSAC, ECF No. 223, ¶ 21. During the course of that representation, they learned of a "personal option" proposed by Zodhiates, in the event that her legal fight failed. *Id.* ¶ 29. On August 25, 2009, a Virginia Court held a contempt hearing to address Lisa Miller's repeated flouting of Vermont Family Court orders. *Id.* ¶ 31. Lindevaldsen, Staver, and Lisa Miller held a press conference to garner support for her ongoing contemptuous conduct. *Id.* After Lisa Miller fled with Isabella to Nicaragua in fall of 2009, she told Andrew Yoder that Liberty Counsel had advised her that it would be in her best interests to disappear. *Id.* ¶ 41. Other evidence shows that the Liberty Counsel team not only advised Lisa Miller to disappear, but provided active assistance to her in her efforts to flee the country. Hyden delivered emails from Zodhiates to Lindevaldsen that requested donations for supplies to be sent to Lisa Miller and sought to coordinate the removal of items from Lisa Miller's apartment. *Id.* ¶ 44. Lindevaldsen personally packed up Lisa Miller's belongings and facilitated their transfer to Zodhiates, who in turn arranged to have the bags sent to Nicaragua. *Id.* ¶ 45. Moreover, phone records introduced at the criminal trial of Kenneth Miller revealed that Zodhiates, in the hours after he transported Lisa

Miller and Isabella to the Canadian border, called Liberty University and Liberty Counsel phone numbers used by Staver. *Id.* ¶ 60. Even though Hyden facilitated communications between Lisa Miller and Lindevaldsen at this time, Lindevaldsen falsely told the Vermont Family Court that she was unable to communicate with Lisa Miller in an attempt to stifle contempt and enforcement proceedings filed by Jenkins to help locate Isabella. *Id.* ¶¶ 46, 49–50. Staver also made misrepresentations regarding Lisa Miller's communications with his law firm and her whereabouts, and thwarted Jenkins's attempts to find Isabella in court proceedings in Virginia. Aff. of Mathew D. Staver in Support of Defs.' Mot. To Dismiss, ECF No. 204-18, at 6–13. Staver also falsely claimed to the press and to others that he had never discussed Lisa Miller's case with Zodhiates, when the evidence now shows that Staver and Zodhiates had been working closely on fundraising for Lisa Miller's case. *See* Erik Eckholm, *Sect Pastor Is Convicted of Assisting in Abduction*, ECF No. 204-19, at 4.

The Court had no difficulty concluding that based upon this string of "tortious conduct to counsel Miller to leave the country, coordinate and conspire with Zodhiates and Hyden to assist her in doing so, and prevent the authorities from learning of Miller's whereabouts," it can properly exercise personal jurisdiction over Lindevaldsen. Op. & Order, ECF No. 220, at 30. This is because the "'brunt of the harm' [has been] felt by Jenkins in Vermont, where she resides and would have lawfully brought Miller-Jenkins to reside." *Id.* 30–31 (quoting *Calder*, 465 U.S. at 789). Furthermore, such exercise of jurisdiction is consistent with *Walden* because "the actions taken by all defendants in furtherance of this conspiracy and kidnapping were directed not only at Jenkins, a forum resident, but also at the forum itself." *Id.* at 31. "Since the Vermont state courts awarded Jenkins [parental] rights" (ultimately, sole legal and physical custody), "which she would have exercised in Vermont but for Defendants' allegedly tortious conduct, the

Defendants' allegedly wrongful acts connected them 'to the forum in a meaningful way.'" *Id.* (quoting *Walden*, 134 S. Ct. at 1125). In other words, Defendants' tortious acts not only did harm to Jenkins in Vermont, but also prevented the rulings of the Vermont courts from being given their proper effect, thus doing damage to the integrity of Vermont's legal system.

The Court also correctly concluded that it may exercise jurisdiction over Staver, who served as co-counsel in the custody litigation and also as Lindevaldsen's boss and supervisor, both in his capacity as dean of the Law School and general counsel of Liberty Counsel. *Id.* at 34–40. From the evidence available thus far, which must be viewed in the light most favorable to Plaintiffs, it is apparent that Staver took an active role in the Jenkins–Miller matter. In addition to appearing for court proceedings in Virginia and obtaining *pro hac vice* admission in Vermont so that he could participate in the custody litigation taking place here, the jurisdictional discovery reveals that he was responsible for personally approving the work that RUL did to fundraise for the case. *See* Pls.' Mot. to Lift Stay & Join Additional Defs., ECF No. 204, ¶¶ 2–3. Indeed, he personally met with Zodhiates and gave him a tour of the Law School and Liberty Counsel offices. *See* Op. & Order, ECF No. 220, at 46. Moreover, in addition to placing phone calls to several phone numbers used by Staver shortly after depositing Lisa Miller and Isabella at the Canadian border, RSAC, ECF No. 223, ¶ 60, Zodhiates revealed in an email that he had been in touch with the Liberty University "lawyers" (that is, both Lindevaldsen and Staver) at the time Lisa Miller fled the country, *id.* ¶ 37.

Based upon Staver's status as Lindevaldsen's co-counsel, boss, and supervisor and the evidence that he took a particularly active role in this matter, the Court concluded that it may exercise jurisdiction over Staver under at least two different theories. Op. & Order, ECF No. 220, at 36–40. First, the doctrine of *respondeat superior* provides that "an employer or master is held

vicariously liable for the tortious acts of an employee or servant committed during, or incidental to, the scope of employment." *Brueckner*, 730 A.2d at 1090. Here, several of Lindevaldsen's tortious acts "were clearly committed within the scope of her employment" at both Liberty Counsel and Liberty University, where Staver was her supervisor. Op. & Order, ECF No. 220, at 36. For example, during appearances in court proceedings, she misrepresented her knowledge regarding Lisa Miller's whereabouts, thereby thwarting Jenkins's attempts to enforce her parental rights. *Id.* Because such misstatements were part of the legal representation that Staver supervised, "[u]nder this theory alone, Lindevaldsen's tortious act could be attributable to Staver for jurisdictional purposes." *Id.*; *see also Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, 290 F.3d 42, 55–60 (1st Cir. 2002) (applying common law principles of liability to impute contacts for jurisdictional purposes).

Next, the Court found that Staver's role as Lindevaldsen's supervisor and boss created an agency relationship between them. Op. & Order, ECF No. 220, 36–40. A court may find an agency relationship where the facts alleged establish three elements: "(1) the manifestation by the principal that the agent shall act for him; (2) the agent's acceptance of the undertaking; *and* (3) the understanding of the parties that the principal is to be in control of the undertaking." *Allen v. Dairy Farmers of Am., Inc.*, 748 F. Supp. 2d 323, 342 (D. Vt. 2010) (quoting *Cleveland v. Caplaw Enters.*, 448 F.3d 518, 522 (2d Cir. 2006)). Here, the Court found that each of these elements could be "inferred from the respective roles of the two lawyers in [the] organizational settings" at both Liberty Counsel, the law firm responsible for representing Lisa Miller, and Liberty University, where Lindevaldsen "used her position at Liberty University to generate broader awareness of the case and to physically conduct some of her work." Op. & Order, ECF No. 220, at 37. The Court's finding that Staver exercised direction and control over

Lindevaldsen's work on the Miller–Jenkins case is supported not just by the titles of their positions, *see, e.g.*, *id.* at 34 (discussing Staver's leadership roles as "Dean" and "General Counsel"), but also by specific allegations regarding the active role Staver took in this particular matter, including his participation in court appearances, *see, e.g.*, *id.* at 35; RSAC, ECF No. 223, ¶ 31, his personal approval of work on the case, and his direct contact with Zodhiates, *see, e.g.*, Pls.' Mot. to Lift Stay & Join Additional Defs., ECF No. 204, ¶ 3; Op. & Order, ECF No. 220, at 46.

Because Lindevaldsen acted as Staver's agent with respect to her work on the Miller–Jenkins case, her tortious conduct, committed within the scope of that agency relationship, can be attributed to Staver for purposes of establishing personal jurisdiction. *See Grand Entm't Grp., Ltd. v. Star Media Sales, Inc.*, 988 F.2d 476, 483 (3d Cir. 1993) ("Activities of a party's agent may count toward the minimum contacts necessary to support jurisdiction."). For example, Lindevaldsen's misrepresentations to the Vermont courts regarding Isabella's whereabouts are attributable to Staver. *See* Op. & Order, ECF No. 220, at 39. Furthermore, because, "[a]s a general rule, the knowledge of an agent acting within the scope of his or her authority is chargeable to the principal," *Estate of Sawyer v. Cromwell*, 559 A.2d 687, 690 (Vt. 1989), Lindevaldsen's knowledge that Lisa Miller had fled the country with Isabella is attributable to Staver.[4] Indeed, given his likely contact with Zodhiates in the hours and days after Lisa Miller and Isabella crossed the border, *see* RSAC, ECF No. 223, ¶ 60, it is probable that he had actual

[4] Lindevaldsen's knowledge of Isabella's kidnapping is chargeable to Staver not just because of her role as his agent, but also because they were co-counsel and members of the same firm. "As a general matter, knowledge by one attorney in the firm is imputed to the other attorneys in the firm." *Phillips v. Generations Family Health Ctr.*, No. 3:11-CV-1752-VLB, 2015 WL 4527008, at *5 (D. Conn. July 27, 2015) (citing *Hempstead Video, Inc. v. Inc. Vill. of Valley Stream*, 409 F.3d 127, 133 (2d Cir. 2005) (observing that "[a]n attorney's conflicts are ordinarily imputed to his firm based on the presumption that 'associated' attorneys share client confidences")).

knowledge of their flight. Staver's false statements to the press and others about never having discussed Lisa Miller's case with Zodhiates also strongly support this inference. *See* Eckholm, *Sect Pastor*, *supra*, ECF No. 204-19. Additionally, when Staver opposed Jenkins's attempts to locate Isabella and gain information about the kidnapping in the Virginia courts, he himself committed tortious acts that subject him to jurisdiction in Vermont. *See* Op. & Order, ECF No. 220, at 38–40.

Although Defendants argue that Lindevaldsen's tortious acts may only be attributed to the organizations for which she worked and not to Staver himself, this is incorrect. "Vermont has recognized that a corporate officer may be held liable for a tort in which the officer personally participated even though the corporation may also be held liable." *Sec'y Agency of Nat. Res. v. Upper Valley Reg'l Landfill Corp.*, 705 A.2d 1001, 1010 (Vt. 1997). In particular, the Vermont Supreme Court has recognized "the general rule that if an officer or agent of a corporation directs or participates actively in the commission of a tortious act or an act from which a tort necessarily follows or may reasonably be expected to follow, he is personally liable to a third person for injuries proximately resulting therefrom." *Prive v. Vt. Asbestos Grp.*, 992 A.2d 1035, 1041 (Vt. 2010) (quoting *Lobato v. Pay Less Drug Stores, Inc.*, 261 F.2d 406, 408–09 (10th Cir. 1958)). Here, Staver is subject to personal jurisdiction in Vermont because of his "active participation or cooperation in" Lindevaldsen's tortious acts, which were directed at the forum. *See* Op. & Order, ECF No. 220, at 36–40. In particular, his active role as co-counsel and supervisor on the legal team that advised Lisa Miller it was in her best interests to disappear, RSAC, ECF No. 223, ¶ 41, that assisted with her flight, *id.* ¶¶ 44–45, and that made misrepresentations to the courts in an effort to prevent Jenkins from finding her daughter and exercising her parental rights in Vermont, *id.* ¶¶ 46, 49–50, 61, subjects Staver to personal jurisdiction here.

b. Liberty Counsel

This Court correctly found that it has personal jurisdiction over Liberty Counsel because, under straightforward principles of agency law, Lindevaldsen and Staver's tortious acts, committed within the scope of their role as attorneys, may be attributed to the firm for which they were working. Op. & Order, ECF No. 220, at 40–42. "Since the corporate personality is a fiction . . . it is clear that unlike an individual its 'presence' [for jurisdictional purposes] can be manifested only by activities carried on in its behalf by those who are authorized to act for it." *Int'l Shoe Co.*, 326 U.S. at 316. "Activities of a party's agent may count toward the minimum contacts necessary to support jurisdiction." *Grand Entm't Grp., Ltd.*, 988 F.2d at 483. In particular, where an attorney engages in sufficient minimum contacts with the forum state while performing work on behalf of a law firm, the law firm too will be subject to personal jurisdiction. *See, e.g.*, *Gracious Living Corp. v. Colucci & Gallaher, PC*, 216 F. Supp. 3d 662, 669–70 (D.S.C. 2016) (holding, in a malpractice action, that attorney's unauthorized practice of law in South Carolina gave rise to personal jurisdiction over New York law firm by which he was employed).

Lindevaldsen and Staver worked for both Liberty Counsel and Liberty University during the course of their representation of Lisa Miller. RSAC, ECF No. 223, ¶¶ 14–15, 21. This Court has already found that Lindevaldsen and Staver are subject to jurisdiction here, based upon their alleged tortious conduct, which was aimed at Vermont. *See* Op. & Order, ECF No. 220. At least some of these tortious acts were committed in their capacity as Liberty Counsel attorneys—for example when they advised Lisa Miller that it would be in her best interests to disappear, *id.* ¶ 41, and when they made misrepresentations to the Vermont and Virginia courts in order to stifle Jenkins's efforts to locate Isabella, *id.* ¶¶ 46, 49–50, 61. Because at least some of the acts that create jurisdiction over Lindevaldsen and Staver were committed within the scope of their

agency relationship with Liberty Counsel, this Court may exercise jurisdiction over Liberty Counsel.

c. Liberty University

Having concluded that it may exercise personal jurisdiction over Liberty Counsel, this Court also found that it may exercise jurisdiction over Liberty University because those two organizations were "operating as one unified entity in supporting Lindevaldsen and Staver's representation of Miller." Op. & Order, ECF No. 220, at 43. Where two entities have led the public, including the plaintiff, "to believe they were joint venturers," the minimum contacts of one of those entities to the forum state may be attributed to the other for purposes of establishing personal jurisdiction. *Id.* (quoting *Daynard*, 290 F.3d at 57). Relatedly, "two companies' contacts can be attributed to one another for purposes of personal jurisdiction if they are 'two arms of the same business group, operate in concert with each other, and enter into agreements with each other that are nearer than arm's length.'" *Id.* at 44. (quoting *Mansfield Heliflight, Inc. v. Heli-One Canada, Inc.*, No. 2:12-CV-46, 2012 WL 4479851, at *7 (D. Vt. Sept. 28, 2012)). In evaluating whether two entities are sufficiently related for purposes of attributing jurisdictional contacts, the Court may look to several factors, including the entities' "public representations," "commonality of officers between the two companies," and the conduct of the entities in matters related to the litigation. *Mansfield Heliflight, Inc.*, 2012 WL 4479851, at *7–8.

Taking the pleadings in the light most favorable to the Plaintiffs, as it must do at this stage, the Court correctly concluded that Plaintiffs have made out a prima facie case that Liberty Counsel and Liberty University have a sufficiently close relationship for their jurisdictional contacts to be attributed to one another. *See* Op. & Order, ECF No. 220, at 45. Liberty Counsel and Liberty University share common leadership and employees, occupy the same building, and

have largely overlapping missions. *Id.* Liberty Counsel serves as a "laboratory school" for Liberty University law students. *Id.* Moreover, the two entities shared an especially close relationship in involvement in the Jenkins–Miller matter. Indeed, the Jenkins–Miller case was an integral part of the Law School curriculum. Lindevaldsen's book, *Only One Mommy: The Lisa Miller Story*, was required reading for all law students, *id.* at 46, and in an exam question, students were asked to place themselves in the shoes of Lindevaldsen and Staver in advising Lisa Miller on whether to follow court orders. Moreover, the two entities held themselves out to the public, and to the parties involved in this case, as being closely related. *Id.* For example, when Zodhiates visited Liberty Counsel to discuss fund-raising efforts it was undertaking on behalf of Lisa Miller, Staver gave him a tour of the Law School. *Id.* Furthermore, Lindevaldsen took advantage of Liberty University resources to further Liberty Counsel's representation of Lisa Miller, using a university phone line and email address for case-related correspondence with the courts and opposing counsel. *Id.*

Taken together, these facts establish a prima facie case that "Liberty Counsel and Liberty University operated as a unified entity with respect to Lindevaldsen and Staver's representation of Miller." *Id.* "Since Lindevaldsen and Staver's contacts with Vermont must be imputed to Liberty Counsel, they must be imputed to Liberty University as well," thereby conferring the Court with jurisdiction over Liberty University. *Id.* at 46–47.[5]

d. Linda Wall

[5] There are also alternative grounds for finding that this Court has jurisdiction over Liberty University. Because Lindevaldsen held herself out as acting on behalf of Liberty University during her representation of Miller—for example, by using a University email address for case-related correspondence—the Court may find that she acted with apparent authority from the University. Based upon the fact that Lindevaldsen acted with the apparent authority of Liberty University within the scope of her representation of Miller, Lindevaldsen's tortious acts may be attributed to the University by virtue of this agency relationship.

In 2013, this Court ruled that it may exercise personal jurisdiction over Wall. Op. & Order, ECF No. 115, at 23–26, 36–38. In her recent motion to dismiss, Wall asks the Court to revisit and reverse that decision.

As alleged in the RSAC, Wall played an integral role in Isabella's kidnapping. As early as June 2008, Wall and Lisa Miller decided and agreed that Lisa Miller should flee with Isabella in order to escape the Vermont and Virginia court rulings that permitted Jenkins to have contact with Isabella. RSAC, ECF No. 223 ¶ 25. In furtherance of this agreement, Wall and others launched the Protect Isabella Coalition, a group whose purpose was to prevent the court-ordered contact between Jenkins and Isabella and raise funds to support that effort. *Id.* ¶ 26. When Lisa Miller finally fled with Isabella in 2009, Wall played an active role, joining Lindevaldsen in packing up Lisa Miller's belongings and arranging to have them transported to Nicaragua. *Id.* ¶ 45. After the kidnapping was discovered, Wall compared herself to Harriet Tubman and suggested that she would take similar actions with regard to other children from same-sex families. *Id.* ¶ 54. She also urged anyone with knowledge of Lisa Miller and Isabella's whereabouts to conceal that information and contacted law enforcement officers to urge them not to look for Isabella. *Id.* ¶ 55.

Wall argues that because none of her tortious acts took place in Vermont, she is not subject to jurisdiction here. Under the standard set forth in *Calder* and *Walden*, she is wrong. The Court's finding that the other Defendants' actions were directed not only at Jenkins, but at the forum itself, apply with equal force to Wall, who played a particularly active role in depriving Jenkins of the parental rights awarded to her by the Vermont courts.

e. Reasonableness

This Court has twice analyzed the question of whether exercising personal jurisdiction over the various Defendants in this case would "offend traditional notions of fair play and substantial justice." Op. & Order, ECF No. 115, at 17; Op. & Order, ECF No. 220, at 57 (both quoting *Int'l Shoe Co.*, 326 U.S. at 316 (internal quotation marks omitted)). In doing so, it carefully weighed the five required factors: "(1) the burden that the exercise of jurisdiction will impose on the defendant; (2) the interests of the forum state in adjudicating the case; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of the controversy; and (5) the shared interest of the states in furthering substantive social policies." *Metro. Life Ins. Co.*, 84 F.3d at 568.

In 2013, the Court found that Defendants Kenneth Miller, Zodhiates, Hyden, and Wall failed to show that subjecting them to personal jurisdiction in Vermont would be unreasonable. Op. & Order, ECF No. 115, at 36–38. With respect to the second and third factors, the Court found that Vermont "has a strong interest in adjudicating claims involving repeated and flagrant violations of Vermont court orders and seeking redress for injuries sustained by a Vermont resident" and that "Plaintiffs' interest in obtaining convenient and effective relief will be served by maintaining this suit in their chosen forum and home state." *Id.* at 37. The Court found that the fourth and fifth factors favored neither forum, and that only the first factor favored the out-of-state defendants. *Id.* at 37–38.

More recently, in granting Plaintiffs' motion to amend their complaint by joining additional defendants, the Court concluded that the addition of Lindevaldsen, Staver, Liberty University, and Liberty Counsel to the case did not change its finding of reasonableness. Op. & Order, ECF No. 220, at 57–60. The Court noted that these particular Defendants' arguments under the first factor of the analysis were not as compelling as they might otherwise be because

Lindevaldsen and Staver have previously chosen to represent a client in this state and since Liberty University and Liberty Counsel "have previously permitted their agents and employees to act on their behalf in this state." *Id.* at 59. Furthermore, the U.S. Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), has strengthened the rationale for exercising jurisdiction in Vermont, the state that issued the orders recognizing Jenkins's parental rights. Op. & Order, ECF No. 220, at 59–60. Exercising jurisdiction here would advance the "states' shared interest in furthering the substantive social policy of protecting the rights of parents in same-sex relationships." *Id.* at 60.

"[W]here the requirement of minimum contacts has been met, 'only the unusual case' will not satisfy the reasonableness inquiry." *Mansfield Heliflight Inc.*, 2012 WL 4479851, at *9 (quoting *Am. Greetings Corp. v. Cohn*, 839 F.2d 1164, 1170 (6th Cir. 1988)). In light of Vermont's compelling interest in having this litigation proceed here and the fact that several of the defendants have chosen to engage in litigation here already, this is certainly not the unusual case where defendants can make a showing of unreasonableness.

D. Defendants' Motions To Dismiss for Improper Venue Must Be Denied

Defendants Lindevaldsen, Staver, Liberty Counsel, Liberty University, and Wall have moved to dismiss for improper venue under Federal Rule of Civil Procedure 12(b)(3). This Court has already ruled that venue is proper in Vermont. Op. & Order, ECF No. 115, at 70–73. As with their motions to dismiss for lack of personal jurisdiction, Defendants fail to present any "cogent and compelling reasons" why the Court should deviate from its prior ruling on venue, which is law of the case. *Johnson*, 564 F.3d at 99 (quoting *Quintieri*, 306 F.3d at 1225). They identify no "intervening change in law, . . . new evidence, or . . . clear error" in the Court's prior analysis. *Id.*

(internal quotation marks omitted). Accordingly, their venue challenge should be rejected under the law of the case doctrine.

Venue is proper in any "judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." 28 U.S.C. § 1391(b)(2). In deciding a motion to dismiss for improper venue, the Court takes the facts alleged in the complaint as true and views them in the light most favorable to the Plaintiffs. Op. & Order, ECF No. 115, at 70–71 (citing *Gulf Ins. Co. v. Glasbrenner*, 417 F.3d 353, 355 (2d Cir. 2005)).

Although the fact that a plaintiff has experienced an injury in a venue is "not necessarily a determinative factor," the locus of the injury is relevant to the analysis. *Id.* at 72 (citing *Bates v. C & S Adjusters, Inc.*, 980 F.2d 865, 868 (2d Cir. 1992)). Here, the Court found that venue is proper in Vermont because, although many of the Defendants' tortious actions took place outside of the state, these acts "were deliberately intended to have a tortious effect within the district . . . [by] obstruct[ing] Plaintiff Jenkins' exercise of parental rights in Vermont." *Id.* These tortious acts not only damaged Jenkins; they also compromised the integrity of the Vermont judicial system because "[t]he rulings of its courts have been deliberately and repeatedly flouted." *Id.* Accordingly, the Court correctly concluded that a substantial part of the events or omissions giving rise to the claim occurred in Vermont. *Id.* at 72–73. Defendants' motion to dismiss for improper venue should be denied.

Defendant Liberty University asks that, in the alternative to dismissal, the Court transfer the case to the Western District of Virginia, but presents no analysis of the factors relevant to a motion to transfer venue. *See* Def. Liberty University's Mot. To Dismiss, ECF No. 237. Defendants Lindevaldsen, Staver, and Liberty Counsel maintain that dismissal of the action, and not change of venue, is the only appropriate action the Court may take, but they incorporate

several of the factors relevant to change of venue into their analysis. *See* Mem. in Supp. of Mot. To Dismiss, ECF No. 240. To the extent that Defendants have moved for a change of venue, the Court should deny that motion as well.

In deciding a motion to transfer venue, the Court must weigh the following factors: "(1) the plaintiff's choice of forum, (2) the convenience of witnesses, (3) the location of relevant documents and relative ease of access to sources of proof, (4) the convenience of parties, (5) the locus of operative facts, (6) the availability of process to compel attendance of unwilling witnesses, [and] (7) the relative means of the parties." *D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 106–07 (2d Cir. 2006) (quoting *Albert Fadem Trust v. Duke Energy Corp.*, 214 F. Supp. 2d 341, 343 (S.D.N.Y. 2002)) (alteration in original). This Court has already recognized that "the plaintiffs' choice of forum is given great weight, and defendants must make 'a strong case for transfer.'" Op. & Order, ECF No. 115, at 74 (quoting *N.Y. Marine & Gen. Ins. Co. v. Lafarge N. Am., Inc.*, 599 F.3d 102, 114 (2d Cir. 2010)) (internal citation omitted) (internal quotation marks omitted).

Although Liberty University argues that the convenience of the witnesses weighs in favor of transferring venue, Def. Liberty University's Mot. To Dismiss, ECF No. 237, at 42, it fails to identify the specific venue it would prefer or any non-party witnesses who would find the unnamed venue more convenient. Similarly, Defendants Liberty Counsel, Staver, and Lindevaldsen's argument regarding the locus of operative facts falls flat because it fails to identify where that locus actually is and instead vaguely alludes to events "outside of Vermont." Mem. in Supp. of Defs. Liberty Counsel, Mathew Staver, and Rena Lindevaldsen's Mot. To Dismiss, ECF No. 240, at 77–78. This argument also ignores the Court's finding that this factor is "at least neutral" because of "the facts that set the stage for Lisa Miller's disappearance: the

civil union in Vermont, the adjudication of the dissolution of the civil union in Vermont, and the determination of parental rights and responsibilities in Vermont." Op. & Order, ECF No. 115, at 75. Finally, Defendants Liberty Counsel, Staver, and Lindevaldsen's argument that the relative means of the parties do not favor Vermont, Mem. in Supp. of Defs. Liberty Counsel, Mathew Staver, and Rena Lindevaldsen's Mot. To Dismiss, ECF No. 240, at 78–79, fails to address the fact that Lindevaldsen and Staver have previously chosen to represent a client in this state, and that Liberty University and Liberty Counsel "have previously permitted their agents and employees to act on their behalf in this state." Op. & Order, ECF No. 220, at 59. Having identified no preferable venue, Liberty University makes no arguments regarding the third and sixth factors. In sum, Defendants have failed to present any compelling reason to upset this Court's prior ruling that "the weight of the factors does not point decisively to changing venue." Op. & Order, ECF No. 115, at 76.

E. Plaintiffs' Complaint States a Claim for Kidnapping

Liberty Counsel, Lindevaldsen, and Staver raise arguments pertaining the validity of a custodial interference claim, and the timing of the kidnapping in relation to issuance of various family court orders. Mem. in Supp. of Defs. Liberty Counsel, Mathew Staver, and Rena Lindevaldsen's Mot. To Dismiss, ECF No. 240, at 79–118. They argue that the timing of those orders insulate them from liability because they (falsely allege) their client Lisa Miller had sole legal custody of Isabella before January 1, 2010. *Id*. at 85–94. Liberty University and Wall join these arguments and incorporate them by reference without application to the specific factual allegations against them, but all these co-conspirators (collectively "The Liberty Defendants and Wall") are addressed in this section. *See* ECF No. 237, at 17; ECF No. 242, at 3–5.

Additionally, the Liberty Defendants, Wall, and the RUL defendants challenge the validity of the conspiracy claim under Vermont law, falsely suggesting that no unlawful acts were carried out in furtherance of their unlawful scheme. In addition to the fact that Defendants' motions attempt to re-litigate settled issues and to delay the progress of this case, they also fail on substance for the reasons set forth below.

Under Rule 12(b)(6), the Court must accept as true all factual allegations in a complaint, drawing all reasonable inferences in Plaintiff's favor. *See Atterbury v. U.S. Marshals Serv.*, 805 F.3d 398, 402 (2d Cir. 2015). Ultimately, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Determining whether a complaint states a plausible claim for relief [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679.

1. Plaintiffs' Kidnapping Claim States a Cause of Action

In its Order dated October 24, 2013, this Court denied Defendants' motions to dismiss Count I, the claim for intentional kidnapping, also characterized as intentional interference with custodial rights. *See* Op. & Order, ECF No. 115, at 41–42 ("Defendants' motions to dismiss Count One for failure to state a claim are therefore denied. Count One may proceed as a claim of intentional interference with the custody of a minor child."). Although Defendants may disagree with this Court's ruling, attempts to re-litigate this issue should be denied.

The law of the case doctrine forecloses Defendants' arguments at this stage of the proceedings. *See Zdanok*, 327 F.2d at 953 ("[W]here litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it

again."). The major grounds justifying reconsideration are "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Virgin Atl. Airways*, 956 F. 2d at 1255 (citing 18 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 4478, at 790). None of these grounds have been asserted by the Defendants in this case—and none of these grounds exist—so the motions should be denied in their entirety as to Count I.

2. The Court Correctly in Ruling that the Vermont Supreme Court Would Recognize a Common Law Tort for Isabella's Kidnapping

Defendants Liberty Counsel, Staver, and Lindevaldsen, joined by Wall and Liberty University, now ask the Court to reconsider its prediction that the Vermont Supreme Court would recognize a tort of intentional kidnapping. *See* Mem. in Supp. of Defs. Liberty Counsel, Mathew Staver, and Rena Lindevaldsen's Mot. To Dismiss, ECF No. 240, at 39 n.2 ("This Court's prediction . . . was then, and certainly is now, in error."). The Liberty Defendants and Wall point to four decisions from courts in Oklahoma, Minnesota, Illinois, and Delaware that they claim support their argument. First, all of the decisions cited by the Liberty Defendants and Wall predate this Court's October 24, 2013 order, and therefore do not constitute an intervening change in the law. *See id.* at 81 (cases decided in 1992, 1990, 1986, and 2003, respectively). Moreover, two state supreme court rulings that Defendants cite held that other state laws provided causes of action for harms suffered. In the Minnesota case, the court noted that "Minnesota already recognizes the action for lost services of the child." *Larson v. Dunn*, 460 N.W.2d 39, 46 (Minn. 1990). The Oklahoma Court noted that "Oklahoma already recognizes a cause of action in the parent or legal guardian of a child for the abduction or enticement of that child." *Zaharias v. Gammill*, 844 P.2d 137 (Okla. 1992). Here, Defendants claim that Jenkins

and Isabella have no recourse, and that they should have no recourse against Defendants in Vermont.

Of course, many states do recognize the tort, including Virginia, Defendants' home state, the Supreme Court of which has observed that "[t]he overwhelming majority of the high courts of our sister states that have considered the issue have also recognized such a tort, many of them tracing its evolution in the common law." *Wyatt v. McDermott*, 725 S.E.2d 555, 560 (Va. 2012). The *Wyatt* court recognized that the common law right of a parent to establish and maintain a relationship with a child "necessarily implies a cause of action for interference with that right. To hold otherwise in this case would be to recognize 'a right without a remedy—a thing unknown to the law." *Id.* at 693.

The Liberty Defendants and Wall seem to suggest Vermont provides an adequate remedy for Jenkins in contempt proceedings. Mem. in Supp. of Defs. Liberty Counsel, Mathew Staver, and Rena Lindevaldsen's Mot. To Dismiss, ECF No. 240, at 84. Indeed, Jenkins attempted to secure Isabella's return through filing of contempt and enforcement motions in winter of 2009 and spring of 2010. *See, e.g.*, RSAC, ECF No. 223, ¶ 31. As Plaintiffs allege in this lawsuit, the Liberty Defendants hindered those proceedings by assisting in the kidnapping, then making false and misleading statements to counsel and to the family court aimed at helping Lisa Miller avoid service and to remain in hiding. *Id.* ¶¶ 46, 49–50, 57. Defendants were able to delay and interfere with Jenkins's attempts to obtain proper relief. *Id.* To now assert that Plaintiffs' claims against these Defendants should be barred because she had other available remedies that Defendants themselves successfully obstructed is circular and nonsensical. Unlike the states whose supreme court decisions Defendants cite, Vermont does not have alternative statutory causes of action for kidnapping, and Defendants' tortious conduct hindered the family court proceedings. The Court

therefore correctly concluded that Vermont would recognize a common law cause of action for Jenkins and Isabella.

3. Plaintiffs State a Claim for Kidnapping both Before and After January 1, 2010

As this Court and the Vermont Family Court have both ruled, Lisa Miller's custodial rights were not exclusive, and were subject to the rights held by Jenkins. *Id.* ¶¶ 20, 22, 27, 64. Plaintiffs have clearly alleged that Jenkins was entitled to lawful custody of Isabella both before and after January 1, 2010. *Id.* Certainly, Lisa Miller and the Liberty Defendants have a long history of contesting whether Jenkins had custodial, or indeed any, parental rights, and Plaintiffs fully expect Defendants to continue to raise arguments aimed at diminishing Jenkins's legal status as a parent throughout this case. Plaintiffs allege, and the family court ruled, however, that Jenkins was entitled to parenting time in September 2009 and during holidays and vacations. *Id.* ¶¶ 22, 64. The family court also granted legal and physical rights and responsibilities to Jenkins in November 2009—the very time that Plaintiffs allege that Hyden, Zodhiates, Wall, and Lindevaldsen were obtaining items from Lisa Miller's apartment. *Id.* ¶¶ 45, 47. The physical transfer of Isabella from Lisa Miller to Jenkins was to take effect on January 1, 2010, to give the parties and the *guardian ad litem* time to assist in an orderly transition. Findings of Fact, Conclusions of Law, and Order, *Miller-Jenkins v. Miller-Jenkins*, No. 454-11-03 (Vt. Super. Ct. Nov. 20, 2009), Ex. A. It is thus beyond dispute, and the RSAC clearly alleges, that Jenkins had parental and custodial rights prior to January 1, 2010. Defendants' argument to the contrary is nonsensical. If Jenkins had no protected rights, it is difficult to understand the years of custody litigation spanning two states between 2004 and 2010.

4. Outdated Concepts of Superior, Inferior, or Joint Parental Rights Do Not Guide Whether a Tort Has Been Committed Under Vermont Law

The Defendants rely on decisions from several states to support their argument that prior to January 1, 2010, Jenkins did not have the particular type of rights that would entitle her to relief in Vermont. The Court should reject this argument because Plaintiffs allege tortious acts by Defendants both before and after this proposed operative date. Moreover, the order transferring legal custody was plainly entered on November 20, 2009, not on January 1, 2010. *Id.* Assuming, for the sake of argument, that no tortious activity occurred after Jenkins gained what some states formerly considered "superior rights," Defendants' arguments would still fail under Vermont law.

Under this hypothetical, Defendants would ask this Court to ignore that the Vermont Supreme Court has adapted common law principles to meet changing times. The Vermont Supreme Court has "frequently met new and difficult problems head-on, using common law principles." *Hays v. Med. Ctr. Hospital of Vt.*, 496 A.2d 939, 945 (Vt. 1985). In *Hays*, the Vermont Supreme Court held that a parent had a common law claim for loss of consortium, and "rejected the notion that it should defer to the legislature when departing from common law," declaring that "[i]t is the responsibility of the courts to balance competing interests and to allocate losses arising out of human activities. One of the principal purposes of the law of torts is to compensate people for injuries they sustain as a result of the negligent conduct of others. The common law, which is judge-made and judge-applied, can and will be changed when changed conditions and circumstances establish that it is unjust or has become bad public policy." *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 379 F. Supp. 2d 348, 439 (S.D.N.Y. 2005) (quoting *Hays*, 496 A.2d at 945).

The Florida Supreme Court, like Vermont's, has declined to shirk its responsibility to allocate losses even when departing from common law in the context of custodial interference.

Indeed, Defendants' precise defense was rejected by the Florida Supreme Court following certification from the Eleventh Circuit in *Stone v. Wall*, 734 So. 2d 1038 (Fla. 1999). The Florida Supreme Court explained that "'[a]ll rules of the common law are designed for application to new conditions and circumstances,' and we 'exercise a "broad discretion" taking "into account the changes in our social and economic customs and present-day conceptions of right and justice."'" 734 So. 2d at 1043 (quoting *Hoffman v. Jones*, 280 So. 2d 431, 435–36 (Fla. 1973)). Applying common law rules to the tort of custodial interference, the *Stone* court ruled that:

> The tort has evolved significantly since 1600 so that in its contemporary version either custodial parent may recover, the child does not have to be the heir, and recovery is not predicated on loss of services but on the sanctity of the parent-child relationship.
>
> It would be violative of constitutional equal protection issues not to recognize the equal rights of both parents in allowing either a cause of action or an element of damages.

Id. at 1044.

The *Stone* court correctly reasoned that "the cause of action for interference with a custodial parent-child relationship is a natural progression of the common law with due regard for constitutional principles, changes in our social and economic customs, and 'present day conceptions of right and justice.'" *Id.* (quoting *Hoffman*, 280 So. 2d at 435). Moreover, the Florida court recognized that "that the parent-child relationship has fundamental constitutional significance" and that "[t]ort law has long protected 'relational' interests, such as those between family members, from interference." *Id.*

Vermont Supreme Court precedent, including *Hays*, 496 A.2d at 945 (Vermont Court has frequently modified common law rules to match changing times), suggests that it would adopt similar reasoning and allow a cause of action for damage to the parent–child relationship, regardless of "superior" or "inferior" custody rights. Plaintiffs clearly and repeatedly allege that

Jenkins was a "parent" to Isabella at all times relevant to this case. *See, e.g.*, RSAC, ECF No. 223, ¶ 18. Moreover, Plaintiffs clearly allege that Jenkins was responsible for the care, custody, or control of Isabella both before and after January 1, 2010. *Id.* ¶¶ 20, 22, 64. Where a protected right exists, such as the parental right to contact with a child, and a child's right to contact with a parent there must be a private action to protect that right, particularly where the right is supported by a court order.

Other states have not limited causes of action to those with a certain category of rights. The Supreme Court of West Virginia set forth the following elements for the offense, which were cited with approval in *Stone*:

> (1) the complaining parent has a right to establish or maintain a parental or custodial relationship with his/her minor child; (2) a party outside of the relationship between the complaining parent and his/her child intentionally interfered with the complaining parent's parental or custodial relationship with his/her child by removing or detaining the child from returning to the complaining parent, without that parent's consent, or by otherwise preventing the complaining parent from exercising his/her parental or custodial rights; (3) the outside party's intentional interference caused harm to the complaining parent's parental or custodial relationship with his/her child; and (4) damages resulted from such interference.

Kessel v. Leavitt, 511 S.E.2d 720, 765–66 (W. Va. 1998).

Given the fundamental right of a parent to be free from unreasonable interference with the parent–child relationship, the overwhelming majority of jurisdictions that have found such interference to be actionable, and the long-standing position stated in Section 700 of the Restatement (Second) of Torts that an abduction is a tort, there can be no doubt that Plaintiffs may pursue a tort claim of kidnapping against Defendants here.

5. Plaintiffs State Claims Against All the Defendants for Torts Committed Before and After January 1, 2010

Clinging to their flawed assertion that Jenkins's parental rights do not support a cause of action under common law prior to January 1, 2010, Defendants go on to argue that Liberty Counsel, Lindevaldsen, and Staver did not engage in tortious activity after that date, and are therefore immune from liability for their conduct under the authority of a 1993 Connecticut Supreme Court case—*Marshak v. Marshak*. 628 A.2d 964 (Conn. 1993). First, Defendants' assertion that no tortious conduct is alleged to have occurred after January 1, 2010, is incorrect. Lindevaldsen continued to make false and tortious representations to the family court in furtherance of the crime well into 2010. RSAC, ECF No. 223, ¶¶ 44–46. These false representations were to the family court, on the record and under oath, and also in writing in the form of a "partial" motion to withdraw from the contempt proceedings only, signed by Lindevaldsen and Staver, and other Liberty attorneys. *See* Op. & Order, ECF No. 220, at 39 (discussing Lindevaldsen and Staver's motion to withdraw); Mot. to Withdraw by Pl.'s Counsel, *Miller-Jenkins v. Miller-Jenkins*, No. 454-11-03 (Vt. Super. Ct. Jan. 20, 2010), Ex. B. Wall continued to solicit donations to support the kidnapping after January 1, 2010. RSAC, ECF No. 223, ¶ 57. The Liberty Defendants and Wall conspired and acted to obstruct the contempt proceedings aimed at locating and returning Isabella during 2010. *Id*. Jenkins asserts that the acts in furtherance of the conspiracy continued well into 2010 and continue to the present day. *Id.* ¶ 64; *see also* Section III-0-0, *supra* (discussing continuing nature of tort).

Defendants' reliance on the Connecticut Supreme Court's decision in *Marshak* is misplaced. In that case, the evidence at trial showed that some defendants' only conduct occurred prior to the issuance of any court order, and that their role in the kidnapping ended with that one involvement. *See* 628 A.2d at 657. Here, the Liberty Defendants and Wall are alleged to have engaged in tortious activity over an extended period of time while there were several different

and equally valid court orders in place. *See generally* RSAC, ECF No. 223. Notably, there was a flurry of activity by the co-conspirators in November 2009, around the same time that the family court granted Jenkins sole legal and physical custody of her daughter. *Id.* ¶¶ 45–46. Accordingly, the timing of Defendants' tortious acts does not bar recovery by Plaintiffs.

6. Plaintiff Isabella Miller-Jenkins Has a Claim for Custodial Interference

Defendants also claim that Isabella, a victim of international parental kidnapping and conspiracy to commit international parental kidnapping, does not have standing to sue for damages caused by Defendants' unlawful and tortious removal of her from her home country, and her forced separation from her lawful custodian, Jenkins. *See* Mem. in Supp. of Mot. To Dismiss, ECF No. 240, at 38–40, 94. For all of the reasons regarding why Jenkins is not barred from recovery by the language of Section 700 of the Restatement, this Court should also reject such a narrow view of the common law tort of custodial interference for Isabella.

The parent–child relationship has fundamental constitutional significance for both parents and children. *Bennett v. Town of Riverhead*, 940 F. Supp. 481, 488–89 (E.D.N.Y. 1996) ("It is clear that parents have a constitutionally protected liberty interest in the custody of their children that, in the absence of emergency, cannot be violated without due process. This interest is reciprocal in that it belongs to the children as much as it does to parents." (internal citation omitted)). Considering whether a child is a victim of custodial interference, the Vermont Supreme Court has ruled that:

> It is an unnecessarily narrow construction of the statute to view the crime of custodial interference as having only one victim. Parental abductions not only deprive the other parent of the child, but also deprive the child of contact with the other parent, and, in cases like this one, deprive the child of an ordinary childhood. Failing to recognize the harm done to children by these abductions is, in some way, to excuse the abducting parent.

State v. Wootten, 756 A.2d 1222, 1226 (Vt. 2000).

It would make little sense for this Court to predict the Vermont Supreme Court would treat children as victims of criminal custodial interference, but that it would bar their treatment as victims in the civil context. Such a holding for Isabella would create "a right without a remedy—a thing unknown to the law." *Wyatt*, 725 S.E.2d at 559. The Court should reject this argument that would diminish the rights of Vermont's children and excuse unlawful kidnapping by parents who feel unrestrained by the requirements of Vermont's family courts.

7. Plaintiffs State a Claim for Conspiracy Against All Defendants

The Liberty Defendants, Wall, Zodhiates, Hyden, and RUL all assert that Plaintiffs do not state a claim for civil conspiracy. *See, e.g.*, ECF No. 240, at 95 (Liberty Counsel, Staver, Lindevaldsen); ECF No. 227, at 10 (Zodhiates, Hyden, RUL). Under Vermont law, "[t]he crime of conspiracy consists in a combination of two or more persons to effect an illegal purpose, either by legal or illegal means, or to effect a legal purpose by illegal means." *Boutwell v. Marr*, 42 A. 607, 609 (Vt. 1899). For a civil action, the plaintiff must be damaged by something "done in furtherance of the agreement," and "the thing done [must] be something unlawful in itself. . . . [T]here can be no recovery unless illegal means were employed."" *Id.*

The RSAC clearly alleges that the object of the conspiracy was (and still is) to abduct Isabella and to prevent her from having contact with her mother, Jenkins, to violate Plaintiffs' civil rights, and to remove Isabella from the jurisdiction of the Vermont courts. RSAC, ECF No. 223, ¶ 67. The RSAC clearly alleges that at the time she was removed from the United States, Isabella was the subject of a custody order, and that Lisa Miller's parental rights were not exclusive. *Id.* ¶¶ 20, 53. Clearly, Plaintiffs have alleged that Defendants combined to effectuate the kidnapping, which was illegal and tortious under Vermont law.

This Court has also already ruled that the allegations of conspiracy, while vigorously denied by Defendants, are "far from vague, conclusory, or general." Op. & Order, ECF No. 115, at 55. If Defendants are suggesting that an explicit verbal or written agreement is required to make a prima facie showing of an agreement, they cite no support for this position. This Court already ruled that the complaint "adequately alleges that Defendants Lisa Miller, Timothy Miller, Kenneth Miller, Zodhiates, Hyden, and Wall agreed, tacitly or explicitly, to further" the illegal purpose of kidnapping Isabella. *Id.* During extremely limited jurisdictional discovery, and the criminal trial of Zodhiates, Plaintiffs were able to gather new information showing that Hyden was a link in the chain of the conspiracy between Zodhiates (who has been convicted of the crime of conspiracy to kidnap Isabella) and Lindevaldsen. RSAC, ECF No. 223, ¶¶ 44–46. The new evidence also shows that Lindevaldsen was a direct link in the chain of the conspiracy with Wall. *Id.* The RSAC alleges that these conspirators were working under dean of the Law School Staver and were acting as agents of their common employers at the Law School and Liberty Counsel. *Id.* ¶¶ 11, 14–15, 21. Based on the new information, this Court granted Plaintiffs' request to join new and previously dismissed Defendants. Op. & Order, ECF No. 220. Now, after no additional discovery has been conducted, Defendants ask this Court to conclude that Plaintiffs' failure to submit direct proof of an explicit criminal agreement between all co-conspirators "is evidence that she cannot do so." Mem. in Supp. of Defs. Liberty Counsel, Mathew Staver, and Rena Lindevaldsen's Mots. To Dismiss, ECF No. 240, at 78. The Court should reject this argument and allow the case to proceed to the general discovery phase.

Additionally, Defendants RUL, Zodhiates, and Hyden allege that no acts in furtherance of the conspiracy were unlawful, even if the object of the conspiracy was unlawful. Defs. Philip Zodhiates, Victoria Hyden, and Response Unlimited, Inc.'s Mem. in Supp. of Mot. To Dismiss

the Section 1985 & Civil Conspiracy Claims in the Revised Second Am. Compl., ECF No. 227, at 10 ("Even if there was an illegal purpose, there can be no cause of action if there are no illegal means."). Here, the conspiracy Plaintiffs have alleged in Count I is a conspiracy to commit custodial interference—a common law tort that is also crime under Vermont law. *See* Vt. Stat. Ann. tit. 13, § 2451. Plaintiffs clearly allege that Defendants carried out various unlawful acts in furtherance of the unlawful goal. Plaintiffs allege that, to ensure Isabella would be beyond the reach of the Vermont Courts and Jenkins, Defendants committed the federal felony of International Parental Kidnapping. *See id.* ¶¶ 64–65; *see also* 18 U.S.C. § 1204. This federal crime is distinct from the state law offense of custodial interference because it has the additional element of removing the child from the United States. *Id.* Kenneth Miller, Timothy Miller, and Zodhiates have all been convicted of this federal offense or conspiracy to commit this federal offense. *See* Judgment, *United States v. Kenneth Miller*, No. 2:11-cr-161 (D. Vt. Mar. 6, 2013), ECF No. 110; Amended Judgment, *United States v. Zodhiates*, No. 1:14-cr-175 (W.D.N.Y. Apr. 3, 2017), ECF No. 196; Judgment, *United States v. Timothy Miller*, No. 1:14-cr-175 (W.D.N.Y. Mar. 28, 2017), ECF No. 191. Plaintiffs allege that Zodhiates and Kenneth Miller laundered money through Kenneth Miller's family business to support Lisa Miller in Nicaragua. RSAC, ECF No. 223, ¶ 56. Money laundering is illegal. *See* 18 U.S.C. § 1956. Additionally, Plaintiffs allege instances of perjury in the family court litigation in violation of Vt. Stat. Ann. tit. 13, § 2904. Timothy Miller gave false testimony in connection with Kenneth Miller's federal criminal case, in violation of 18 U.S.C. § 1001. *Id.* ¶ 57. All of these acts are unlawful in themselves, and were done in furtherance of the unlawful kidnapping. Because the RSAC alleges both an unlawful goal and numerous unlawful acts committed by each Defendant, Plaintiffs clearly and amply state a claim for civil conspiracy under Vermont law.

8. As Alleged in the RSAC, Defendants Are Liable Under Both Conspiracy and Aiding and Abetting Theories

For the same reasons that Plaintiffs have adequately stated a claim for kidnapping and for conspiracy to commit kidnapping, Plaintiffs have also sufficiently alleged aiding and abetting liability. Under Vermont law, to establish liability as an aider or abettor, the plaintiff must show "(1) the existence of a primary violation; (2) knowledge of this violation on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in the achievement of the primary violation." *Montgomery v. Devoid*, 915 A.2d 270, 278 (Vt. 2006) (quoting *Calcutti v. SBU, Inc*., 273 F. Supp. 2d 488, 493 (S.D.N.Y. 2003)). The Court in *Montgomery* held that "closely intertwined with the concept of 'substantial assistance' is the principle of proximate cause. *Id*. (quoting *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 284 (2d Cir. 1992), *overruled on other grounds by Gerosa v. Savasta & Co*., 329 F.3d 317, 327 (2d Cir. 2003)).

Contrary to the Liberty Defendants and Wall's assertion, Plaintiffs have clearly alleged that all Defendants conspired with one another, in that they agreed to kidnap Isabella and keep her from the lawful custody of her mother, Jenkins. RSAC, ECF No. 223, ¶¶ 65, 67. Plaintiffs alleged that each Defendant committed tortious and criminal acts in furtherance of the unlawful agreement. *See, e.g.*, *id.* ¶ 20 (Miller); *id.* ¶¶ 36, 56 (Zodhiates); *id.* ¶¶ 44, 46 (Hyden); *id.* ¶¶ 49–50 (Lindevaldsen, Liberty Counsel, Staver, Liberty University); *id.* ¶ 55 (Wall); *id.* ¶ 57 (all Defendants). Clearly, it was and still is Defendants' common design to prevent contact between Jenkins and Isabella. The Liberty Defendants and Wall's claim that no tortious activity is alleged is both confusing and false. There is no defense to the unlawful kidnapping activities and perjury allegations simply because some of the facts outlined in the RSAC involve speech and legal advocacy. The evidence clearly shows that the RUL Defendants were in touch with Liberty

Counsel about the unlawful scheme as early as January 2009. *Id.* ¶¶ 29, 57. The emails show, and the RSAC alleges, that in the fall of 2009, Liberty attorney Lindevaldsen aided and abetted the kidnapping by coordinating the removal of items from Lisa Miller's apartment. *Id.* ¶ 45. The RSAC also alleges that she coordinated these efforts in conjunction with Hyden and Wall. *Id.* The RSAC also alleges that Lisa Miller spoke to Andrew Yoder in fall 2009, and told him that Liberty Counsel advised her it would be in her best interests to disappear. *Id.* ¶ 41. Contrary to Defendants' claims, statements of a party opponent and co-conspirator are not "unsupported hearsay" under the rules of evidence. Fed. R. Evid. 801(d)(2). Moreover, the RSAC alleges that, while Defendants were engaging in this unlawful activity, Lindevaldsen was making false and misleading statements to opposing counsel and to the family courts that were conducting hearings concerning Isabella's best interests and her whereabouts. RSAC ¶ 61. These false statements were made in the Rutland Family Court in December 2009, after the November 20 order transferring custody, and were reiterated under oath in January 2010. *Id.* ¶¶ 50, 57.

Defendants also allege that Plaintiffs failed to adequately plead that they had knowledge that the kidnapping activity was tortious. The RSAC alleges, and the evidence shows, that co-conspirators Zodhiates and Lindevaldsen were communicating secretively through a third party—Hyden. *Id.* ¶¶ 44, 46. The co-conspirators were referring to Lisa Miller and Isabella using the aliases "Sarah" and "Lydia." *Id.* ¶ 40. It is absurd to suggest that the licensed attorneys who represented a client in a protracted court battle, in two states, over several years, would claim ignorance of the law in secretly assisting their client's flight to another country with the child at the center of the custody dispute. It is also unbelievable to suggest that these licensed attorneys thought it was acceptable to make false statements to the family court and to opposing counsel.

Furthermore, the RSAC alleges that each member of the conspiracy provided substantial assistance and encouragement to Lisa Miller. The RSAC alleges that Defendant Wall solicited donations and assisted obtaining items to send to Nicaragua. *Id.* ¶ 57. The RSAC alleges that Lindevaldsen worked in conjunction with Wall and Hyden to obtain items to support Lisa Miller in Nicaragua, and also that she lied to the courts and opposing counsel to deflect efforts to locate Isabella. *Id.* ¶¶ 44–46, 57. The RSAC alleges that Zodhiates drove Lisa Miller to the Canadian border, and conspired with Kenneth Miller to arrange her travel and also participated in a scheme to launder money to send to Lisa Miller in Nicaragua. *Id.* ¶¶ 36, 56.

At this pre-discovery stage of the case, the extent of each participant's assistance is not yet known, but the RSAC amply alleges substantial assistance by all Defendants. While Defendants attempt to minimize the duration of their involvement, the RSAC clearly alleges that their involvement spanned from January 2009 and well into 2010. *See, e.g.*, *id.* ¶ 57.

The Liberty Defendants in particular attempt to distance themselves from Lisa Miller, saying that the relationship was that of legal counsel and nothing more. Mem. in Supp. of Mot. To Dismiss, ECF No. 240, at 93 ("Jenkins' allegation[s] . . . represent nothing more than the lawful representation of a client."). Although immaterial to the instant motion, this claim is also demonstrably false and shows the extent to which Defendants will bend the truth to avoid liability. In 2008, Lindevaldsen wrote an open letter in support of Lisa Miller that stated: "I'd like to tell you about Lisa Miller—my client, my friend, my sister in Christ, and mother of six-year old Isabella." Rena Lindevaldsen, *Virginia Christian Mom, Lisa Miller, Could Lose Custody of Daughter to Former Partner, Vermont Lesbian Activist*, Am. for Truth About Homosexuality (Sept. 22, 2008), http://americansfortruth.com/2008/10/08/virginia-christian-mom-lisa-miller-could-lose-custody-of-daughter-to-former-partner-vermont-lesbian-activist/. Lindevaldsen wrote

a book about Lisa Miller's life using Lisa's personal diaries, and taught about her friend and client at the law school. RSAC, ECF No. 223, ¶ 62. Testimony at the trial of Zodhiates by Janet Stasuli showed that Lisa Miller, Wall, and Lindevaldsen frequently sat together at Thomas Road Baptist Church and held prayer meetings with other members about Lisa's case. Tr. of Jury Trial Proceedings 507–08, *United States v. Zodhiates*, No. 1:14-cr-175 (W.D.N.Y. Sept. 23, 2016), Ex. C. Clearly, this relationship was much more than "legal counsel to alleged tortfeasor," as the Liberty Defendants maintain. *See* ECF No. 240, at 113. Defendants also claim that while their legal relationship with Lisa Miller ended in November 2010 when their appeals were exhausted, it would have ended earlier if they had been permitted to withdraw. *Id.* at 114. Defendants continue to attempt to mislead this Court because it is clear from the record that their request to withdraw was a partial request filed only in the Rutland family court, and drafted specifically with the intent of helping Lisa Miller duck service while continually pressing appeals based on "advance instructions" from Lisa. RSAC, ECF No. 223, ¶ 61.

Although the Liberty Defendants and Wall suggest that their conduct did not cause any injuries to Plaintiffs, the RSAC alleges that all Defendants conspired with each other to directly and intentionally cause harm and injury to Jenkins and Isabella. The harm did occur, and continues to this day as a direct and proximate result of this conspiracy and all of the acts committed in furtherance of the conspiracy. *Id.* ¶¶ 68–72. For all of the reasons stated above, the Court should hold Defendants accountable for their conduct that was tortious, substantial, and was undertaken with the direct purpose of obstructing the parent–child relationship and violating Plaintiffs' civil rights.

9. The Common Law Tort of Custodial Interference Does Not Violate the First Amendment

The RUL Defendants argue, in passing, that the tort of custodial interference violates the First Amendment to the U.S. Constitution. Mem. in Supp. of Mot. To Dismiss, ECF No. 227, at 11. In support of this argument, they argue that the use of the term "induce" is overly broad and can ensnare protected speech in the context of a parental kidnapping. *Id.* The Court should reject this undeveloped argument. Although the RSAC cites many comments made by Defendants in order to show the discriminatory animus with which they acted when carrying out the kidnapping, the kidnapping conduct forms the basis for Plaintiffs' claim, not Defendants' comments. The U.S. Supreme Court has held that "particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Here, Defendants have not made any showing that the common law tort of custodial interference is substantially overbroad. Defendants cite no law in support of their position, but suggest that mere use of the term "induce" renders the statute constitutionally infirm, without explaining why the overbreadth of the term outweighs consideration of the law's legitimate purpose of preventing parental kidnapping, and compensation victims of this criminal and tortious activity.

In addition to their failure to prove real and substantial overbreadth, the RUL Defendants ignore the fact that state laws are given greater leeway when seeking to protect the interests of children, as the custodial interference claim does here. A state's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982). "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens . . . ." *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944). Accordingly, the Supreme Court has "sustained

legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." *New York v. Ferber*, 458 U.S. 747, 757 (1982). Because the tort of parental kidnapping regulates kidnapping conduct and not speech, and its intent is to protect children from being unlawfully removed from their parents, the Court should reject the RUL defendants' unsupported argument.

F. Plaintiffs State a Claim Under Section 1985(3)

Count II alleges under 42 U.S.C. § 1985(3) that Defendants, acting with invidiously discriminatory animus toward gays and lesbians, including same-sex couples, successfully furthered a conspiracy to kidnap Isabella from the United States to hinder the ability of state authorities to secure the Fourteenth Amendment equal protection rights of those like Jenkins. Isabella and Jenkins remain separated to this day because of Defendants' extrajudicial efforts to separate a child from her mother simply because her mother is lesbian.

Section 1985 was originally enacted as Section 2 of the Civil Rights Act of 1871, which outlawed five broad classes of conspiratorial activity and provides a civil remedy for persons injured by those conspiracies. *Kush v. Rutledge*, 460 U.S. 719, 724 (1983). Section 1985(3) creates a cause of action for damages for plaintiffs injured in person or property by acts in furtherance of a conspiracy by two or more persons either to "depriv[e], 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" (the deprivation clause), or to "prevent[] or hinder[] 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" (the hindrance clause).[6]

[6] Section 1985(3) reads, in relevant part:

On its face, Section 1985(3) "fully encompass[es] the conduct of private persons." *Griffin v. Breckenridge*, 403 U.S. 88, 96 (1971). The statute applies to "two or more persons in any State" who "conspire or go in disguise on the highway or on the premises of another." *Id.* (quoting § 1985(3)). "[T]here is nothing inherent in the [deprivation clause] that requires the action working the deprivation to come from the State." *Id.* at 97. The hindrance clause, on the other hand, "deal[s] explicitly with" "interference with or influence upon state authorities"—a form of a state action limitation on Section 1985(3). *Id.* at 98–99 & n.7 (quoting the hindrance clause). That said, to avoid interpreting the deprivation clause as a general federal tort law, the U.S. Supreme Court interpreted it, first, to require class-based, invidiously discriminatory animus, and second, to require state involvement or an effect on the state if the right infringed protects solely against official conduct.

First, the Supreme Court gave full effect to Congress's purpose in enacting the statute by requiring "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Id.* at 102; *see also Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 269 (1993) (suggesting that the hindrance clause likewise requires class-based, invidiously discriminatory animus). The Supreme Court has not yet decided whether Section 1985(3) protects against more than racially motivated conspiracies, *see, e.g.*, *Bray*, 506

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws . . . 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.

U.S. at 269, but the Second Circuit decided that question in the affirmative, *see N.Y. State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1358–59 (2d Cir. 1989) (women); *Keating v. Carey*, 706 F.2d 377, 387–88 (2d Cir. 1983) (political affiliation). This Court did the same. Op. & Order, ECF No. 115, at 57–58 (collecting cases from lower courts deciding similarly). "A narrow interpretation of the statute as protecting only blacks and other analogously oppressed minorities is untenable in light of the history of" the statute. *Keating*, 706 F.2d at 387. "Distinctions based upon immutable characteristics . . . have long been considered invidiously discriminatory," *Terry*, 886 F.2d at 1358, and "[c]ases since *Griffin v. Breckenridge* have been generous in applying section 1985(3) to nonracial classifications, even though some of the classifications would not receive strict scrutiny under the equal protection clause," *People ex rel. Abrams v. 11 Cornwell Co.*, 695 F.2d 34, 42 (1982), *vacated on other grounds*, 718 F.2d 22 (2d Cir. 1983). "By its very language § 1985(3) is necessarily tied to evolving notions of equality and citizenship." *Terry*, 886 F.2d at 1358.

Although this Court held that Plaintiffs did not adequately allege a conspiracy motivated by animus toward women because "[a]ny invidiously discriminatory animus alleged in the Amended Complaint is not directed at women as a class," Op. & Order, ECF No. 115, at 60, it nonetheless held that "[t]he factual allegations of the Amended Complaint however can be read to suggest that the defendants harbored invidiously discriminatory animus against Jenkins because of her sexual orientation," *id.* at 61, and permitted Plaintiffs to move to amend to plead such a claim. Plaintiffs subsequently amended the complaint to allege that Defendants conspired to violate Plaintiffs' civil rights "based on discriminatory animus against same-sex couples and against Janet Jenkins due to sexual orientation." RSAC, ECF No. 13, ¶ 67.

Second, the deprivation clause "applies only to such conspiracies as are 'aimed at interfering with rights . . . protected against private, as well as official, encroachment," of which only two have been recognized—the Thirteenth Amendment rights to be free from involuntary servitude and to interstate travel. *Bray*, 506 U.S. at 278. This Court held that Plaintiffs failed to state a claim under the deprivation clause because they identified neither of these rights as being the object of Defendants' conspiracy. The Second Circuit has held that, unlike the deprivation clause, the hindrance clause does apply to private conspiracies aimed at constitutional rights that protect only against state action. *See Abrams*, 695 F.2d at 41–42. This Court acknowledged that decision, and a similar decision by the First Circuit, but nonetheless declined to decide the issue because "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" under the hindrance clause. Op. & Order, ECF No. 115, at 68–69. The Court permitted Plaintiffs to amend the complaint to allege a hindrance clause claim. *Id.* at 69–70. Plaintiffs amended their complaint to allege that Defendants conspired "to prevent the courts of Vermont and Virginia from securing to [Plaintiffs] equal protection of the law, and to prevent or hinder State authorities from securing equal protection of the law to same-sex couples." RSAC, ECF No. 223, ¶ 67.

Defendants seek the dismissal of Count II of the RSAC by arguing that Section 1985(3) is unconstitutional under the First Amendment (it is not), that Plaintiffs do not allege a conspiracy (they do), that Plaintiffs cannot allege animus (they can), and that Section 1985(3) requires "state action" and force (it does not). Plaintiffs' cause of action under Section 1985(3) withstands Defendants' motions to dismiss. The motions should be denied with respect to Count II.

1. The First Amendment Does Not Bar the Section 1985(3) Claim

Certain defendants argue that the Section 1985(3) claim must be dismissed because, "[a]s interpreted . . . Section 1985 suffers from a host of First Amendment infirmities." *See* ECF No. 227, at 3 (Zodhiates, Hyden, RUL); *see also* ECF No. 224-1, at 6 (Wall).[7] Specifically, Defendants argue that, "as interpreted," Section 1985(3) is both unconstitutionally overbroad and unconstitutionally vague. ECF No. 227, at 3. The argument is wrong on multiple levels, and the Court should reject it.[8]

a. Section 1985(3) Is Not Unconstitutionally Overbroad

Defendants direct their overbreadth arguments not at the text of Section 1985(3), but rather at this Court's interpretation of that statute as it applies to the facts of this case. In its 2013 Opinion and Order, ECF No. 115, this Court held:

> [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 laws states a valid cause of action.

ECF No. 115, at 69. This formulation, they assert, is overbroad in that "it punishes a substantial amount of First Amendment activity." ECF No. 227, at 3.

Defendants are correct that a party may challenge a *statute* as facially overbroad by demonstrating that, even assuming the possibility of some constitutional applications, including to the parties before the Court, there nonetheless are a "substantial number of instances in which a law cannot be applied constitutionally." *Id.* at 4 (quoting *Speet v. Schuette*, 726 F.3d 867, 873 (6th Cir. 2013)). Courts permit litigants facing penalties under such laws to seek facial

[7] Defendant Wall asserts that, "as interpreted and construed by this Court, § 1985(3) is unconstitutionally overbroad and vague," *see* ECF No. 224-1, at 6, and incorporates the First Amendment arguments made by the Zodhiates Defendants. She makes no additional arguments of her own.

[8] It bears note that Section 1985(3) is a part of the Civil Rights Act of 1871 and, to Plaintiffs' knowledge, has never been found to violate the First Amendment in the 146 years since its passage.

invalidation "not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick*, 413 U.S. at 612.

This Court's interpretation of Section 1985(3) poses no such dangers, however. In the first place, Defendants appear to be making a facial challenge to an interim legal ruling about the application of a statute to the facts of this case—not (as in most overbreadth cases) to the underlying statute itself. *Cf. id.* at 612–13 (listing categories of *statutes* subject to facial overbreadth challenges). Defendants cite no case entertaining a facial challenge to an interim legal ruling of this sort, and Plaintiffs' research has not revealed any. The formulation that Defendants attack as overbroad is simply the rule of decision that this Court will use in determining if these Plaintiffs have stated, and ultimately proved, a cause of action under Section 1985(3). Unlike a statute of general applicability, the formulation has no potential chilling effect beyond its effects on the litigants in this case, all of whose relevant conduct is long complete. For this reason alone, the Court should reject the "overbreadth" challenge.

Defendants attempt to identify potential nonlitigants whose constitutionally protected conduct could be chilled by this Court's formulation, but these attempts fall utterly short. They assert, for example, that "attorneys representing clients must be free from concerns as to whether their advocacy 'hinders' or 'prevents' the operation of the courts." ECF No. 227, at 6. It is hard to imagine, however, how a lawyer's zealous and ethical representation of a client in litigation could be chilled by a rule of law that pins liability on those who "conspire" against a "protected

class" "with invidiously discriminatory animus" in order to prevent a state from "securing equal protection of the law."[9]

These bogey-man arguments about the kind of conduct that might be chilled appear to be based on a complete, and possibly intentional, misapprehension of the predicate conduct that underlies Plaintiffs' Section 1985(3) claim. Defendants set forth a laundry list of conduct alleged in the RSAC they assert could be penalized or chilled based on the Court's formulation. They argue that "[t]o determine the breadth of Section 1985, the Court need only look at the actual allegations of the Complaint," observing that the RSAC alleges "a variety of activities protected by the First Amendment." *See* ECF No. 227, at 4. Examples provided include "Lisa Miller converting to 'fundamental Christianity,'" ECF No. 227, at 4 (citing RSAC, ECF 223, ¶ 19); "Deborah Thurman posting a notice on Facebook about a Court ruling," ECF No. 227, at 5 (citing RSAC, ECF No. 223, ¶ 47); and "Several individuals urging civil disobedience to rulings felt to be unjust," ECF No. 227, at 5 (citing RSAC, ECF No. 223, ¶¶ 51, 54).

But as Plaintiffs have explained elsewhere in this brief and in their opposition to the anti-SLAPP motions, the mere inclusion in a complaint of factual allegations relating to conduct that might enjoy constitutional protection does not render a cause of action *that is not predicated on that conduct* improper.

An analogy is in order. Imagine the following: a political candidate gives a campaign speech. When she steps down from the dais, she punches a bystander for no reason. The bystander files a lawsuit alleging these facts and asserts a cause of action for assault. The assault claim is not improper, or subject to a First Amendment overbreadth claim, just because the

[9] Nor it is apparent that "those who fund a wide variety of public policy litigation," *see* ECF No. 227, at 6, will be dissuaded from donating to their favored causes by this Court's ruling that a person can be liable if she conspires with invidiously discriminatory intent to prevent the state from securing equal protection of laws.

complaint also alleges conduct—the giving of the campaign speech—that is protected but that does not serve as the predicate for the assault claim.

Indeed, it is just silly for Defendants to argue that Plaintiffs' Section 1985(3) claim is predicated on, for example, the fact that Lisa Miller converted to fundamentalist Christianity or any of the other instances of protected conduct alleged in the RSAC. Plaintiffs' premise this claim on each individual Defendant's tortious *conduct* in assisting in the kidnapping of Isabella.

With respect to Defendants who make this First Amendment overbreadth argument, for example, this Court already has in its 2013 Opinion and Order set forth some of the conduct that serves as the predicate for the Section 1985(3) conspiracy claim:

- Zodhiates and another RUL employee assisted Lisa Miller and Isabella to travel disguised as Amish Mennonites from Virginia to the New York–Canada border. ECF No. 115, at 55.
- Defendants Zodhiates and Hyden arranged for Lisa Miller and Isabella to travel from Lynchburg to Waynesboro, Virginia, in order to embark on their journey to Canada and on to Nicaragua. *Id*.
- Wall agreed that Lisa Miller should flee with Isabella to escape the Vermont and Virginia court rulings that permitted Jenkins to see Isabella and, having formed the agreement, launched the Protect Isabella Coalition, whose purpose was to prevent the court-ordered contact, and to obtain donations to further that work. *Id*. at 25–26.

None of this predicate conduct is itself protected, of course, and Defendants make no effort to argue that it is. Rather, their overbreadth argument is based as it must be on the potential chilling effect of this Court's formulation on others not before the Court. But even if Defendants

had hypothesized a realistic possible chilling effect on others resulting from this Court's formulation of Section 1985(3) (and they have not), wholesale rejection of the formulation still would not be automatic.

> Application of the overbreadth doctrine . . . is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort. Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute.

Broadrick, 413 U.S. at 613.

Cantwell v. Connecticut, 310 U.S. 296 (1940), illustrates the principle. *Cantwell* addressed a prosecution for the common law crime of inciting a breach of peace. 310 U.S. at 300. The Court observed that conviction under the common law count was "analogous to a conviction under a statute sweeping in a great variety of conduct under a general and indefinite characterization"—that is, an overbroad statute. *Id*. at 308. The Court concluded that the specific conduct supporting the conviction in that case could not be constitutionally penalized, *see id*. at 310, and reversed the conviction, *see id*. at 311. Importantly, the Court did not abrogate the common law crime or declare it unconstitutionally overbroad.

> The Court did not hold that the offense 'known as breach of the peace' must fall in toto because it was capable of some unconstitutional applications, and, in fact, the Court seemingly envisioned its continued use against 'a great variety of conduct destroying or menacing public order and tranquility.'

Broadrick, 413 U.S. at 614 (quoting *Cantwell*, 310 U.S. at 308).

This Court should apply the same principle here. Even if Defendants could hypothesize some manner in which this Court's formulation of Section 1985(3) could be applied in an unconstitutional manner or chill protected conduct (and they have not), the proper "remedy" would be to insure that, in this case, liability is not predicated on any such conduct.

There is no basis for facial invalidation of this Court's formulation, and no basis to dismiss the Section 1985(3) claim that reflects it. Defendants' arguments regarding overbreadth should be rejected.

b. Section 1985(3) Is Not Unconstitutionally Vague

These same Defendants additionally argue that Section 1985(3) is unconstitutionally vague. *See* ECF No. 227, at 6–7. But this argument too is wrong.[10]

It is not clear whether Defendants direct their vagueness argument at the language of the statute itself or to this Court's formulation in its 2013 Opinion and Order. Regardless, however, they hang their argument almost entirely on the supposed fact that "[t]he United States Supreme Court has already twice determined the term 'hinder' is impermissibly vague in the First Amendment context." *See* ECF No. 227, at 7. ("Hinder" appears in the statutory text, but not this Court's 2013 formulation.)

But there is no talismanic significance to the word "hinder" in First Amendment vagueness doctrine, and the two cases Defendants' cite do not support Defendants' blunt proposition. Defendants cite *Thornhill v. Alabama*, 310 U.S. 88 (1940), which addressed a law barring picketing. It is true that the statute at issue included the word "hindering" in its definition of the proscribed conduct. *See* 310 U.S. at 91. It is also true that the Court observed that there were elements of the statute that were vague. *See id.* at 101 ("The vague contours of the term

[10] Defendants again buttress their argument with hyperbolic predictions of the purportedly far-reaching chilling consequences of Section 1985(3). Defendants hypothesize in their vagueness argument, for example, that "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." *See* ECF No. 227, at 8. In truth, no attorney need so worry, unless she also is considering falsely denying to the court any knowledge of her client's whereabouts despite knowing that the client kidnapped her child and fled to Nicaragua, RSAC, ECF No. 223, ¶ 61, or facilitating the gathering of items from her client's apartment for shipment to Nicaragua to ease the client's troubles as she hid out in Nicaragua to avoid compliance with a lawful court order, *id.* ¶ 44.

'picket' are nowhere delineated."). But the *Thornhill* Court did not invalidate the picketing statute because it was vague; it did so because it was facially overbroad. *See id*. at 105–06. *Thornhill* therefore provides no support for the facile proposition that including the word "hinder" in a statutory proscription necessarily renders that statute unconstitutionally vague under the First Amendment. So too with *Cox v. Louisiana*, 379 U.S. 536 (1964), a case addressing a statute that proscribed congregating with the intent to breach the peace. The Court held the subject statute unconstitutional because it was overbroad, not because it was vague. *See* 379 U.S. at 552 ("Therefore . . . the conviction under this statute must be reversed as the statute is unconstitutional in that it sweeps within its broad scope activities that are constitutionally protected free speech and assembly.").

In any event, if there is a concern that Section 1985(3) might be unconstitutionally vague, that concern is fully met by the fact that, as interpreted by this Court, it imposes a strict specific intent requirement: a defendant can be liable only if she acted "with invidiously discriminatory animus." *See* Op. & Order, ECF No. 115, at 69. Specific intent requirements greatly narrow the circumstances in which statutory proscriptions might apply, and therefore can save otherwise vague statutes. *Haagensen v. Pennsylvania State Police*, 490 F. App'x 447 (3d Cir. 2012), illustrates the point. *Haagensen* was a Section 1983 case following a prosecution under Pennsylvania's "Hunter Harassment Statute," which generally prohibited interfering with the rights of hunters. *See* 490 F. App'x at 448. Through her Section 1983 claim, the *Haagensen* plaintiff challenged the constitutionality of the Hunter Harassment Statute as a violation of the First Amendment, and specifically argued that it was void for vagueness because it failed to define the word "harassment." *See id*. at 452. The court of appeals rejected the argument, in part because "harassment" had been interpreted to incorporate the specific intent requirement from

the criminal definition of harassment, which meant that there could be no liability unless the "person's actions consist solely of 'non-legitimate nature-conduct which is not constitutionally protected.'" *Id.* As limited by this specific intent requirement, the court of appeals reasoned, the term "harassment" was not unconstitutionally vague. *See id*. (quoting *Commonwealth v. Miller*, 689 A.2d 238, 242 (Pa. Super. Ct. 1997)).

The same holds true here. No one need fear liability under Section 1985(3) unless she conspires against a protected class for the purpose of preventing state authorities from securing equal protection of the laws *with invidiously discriminatory animus*—a purpose that seems unlikely to creep unnoticed into the mind of anyone who is legitimately engaged in constitutionally protected conduct. The vagueness challenge is without merit, and should be rejected.

c. Section 1985(3) Does Not Impermissibly Bar Advocacy of Civil Disobedience

Finally, Defendants argue that the statute violates the First Amendment's protection of advocacy of illegality. *See* ECF No. 227, at 9. Defendants cite a number of cases that stand for the proposition that the First Amendment protects advocacy even of illegality and civil disobedience. *See id*. (citing, for example, *Brandenburg v. Ohio*, 395 U.S. 444 (1967)). Yes, it does. But Defendants make absolutely no effort to demonstrate any way in which Section 1985(3) violates this principle, and none is apparent. In any event, Plaintiffs have no intent to attempt to pin liability on anyone for advocating civil disobedience.[11]

[11] Of course, that does not mean that any such evidence will be irrelevant. For example, the jury should know that Defendant Lindevaldsen advocated for civil disobedience generally and in connection with this case in particular, *see, e.g.*, RSAC, ECF No. 223, ¶¶ 54–55, so that they may properly evaluate the credibility of any denial she offers regarding her involvement in the conspiracy. Her strong advocacy is relevant because it makes it more likely that she would act in accordance with her advocacy, and demonstrates a motive to conspire.

Defendants argue that Defendant Hyden in particular should be dismissed because she engaged in "fundraising and advocacy of civil disobedience." *See* ECF No. 227, at 9–10. But she did more than that. As this Court has observed, Hyden "arranged for Lisa Miller and Isabella to travel from Lynchburg to Waynesboro, Virginia, in order to embark on their journey to Canada on Nicaragua." *See* Op. & Order, ECF No. 115, at 55. This conduct is a far cry from that at issue in *Brandenburg* and its progeny, and of course enjoys no First Amendment protection. This argument should be rejected as well.

2. Plaintiffs Adequately Allege a Conspiracy by Defendants

Plaintiffs state a cause of action under Section 1985(3)'s hindrance clause by alleging that Defendants conspired "to violate their civil rights based on discriminatory animus against same-sex couples, and to prevent the courts of Vermont and Virginia from securing to them the equal protection of the law," Op. & Order, ECF No. 115, at 4, by assisting "Lisa Miller in removing Isabella from the jurisdiction of state and federal courts, and to prevent Janet Jenkins from exercising lawful parental rights," *id.* at 55. *See also* RSAC, ECF No. 223, ¶¶ 64–65, 67. Plaintiffs allege particular overt acts engaged in by Defendants that were reasonably related to the promotion of that conspiracy. *See Powell v. Workmen's Comp. Bd.*, 327 F.2d 131, 137 (2d Cir. 1964); *accord Thomas v. Roach*, 165 F.3d 137, 147 (2d Cir. 1999). Their allegations are not conclusory, vague, or general. *See Sommer v. Dixon*, 709 F.2d 173, 175 (2d Cir. 1983); *see also* Op. & Order, ECF No. 115, at 55 ("Although Defendants vigorously dispute the facts alleged . . . [the] allegations of conspiracy are far from vague, conclusory or general."). Plaintiffs' allegations provide a factual basis supporting an agreement, express or tacit, between Defendants to achieve that unlawful end. *See Webb v. Goord*, 340 F.3d 105, 110 (2d Cir. 2003); *see also LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 427 (2d Cir. 1995) ("A conspiracy . . . need not be

shown by proof of an explicit agreement but can be established by showing that the 'parties have a tacit understanding to carry out the prohibited conduct.'" (quoting *United States v. Rubin*, 844 F.2d 979, 984 (2d Cir. 1988)).

In *Powell*, for example, an employee alleged that his employer and the worker's compensation board conspired to deprive him of the equal protection of the laws by hindering the processing of his claim for worker's compensation. 327 F.2d at 133. Specifically, the employee alleged that the board limited the scope of hearings to issues other than his disability and earning capacity and his employer delayed final adjudication by appealing decisions by the referee for the compensation board. *Id.* at 134. The Second Circuit held that the employee did not allege with particularity any overt acts by defendants to further the claimed conspiracy of hampering plaintiff's efforts to secure a just measure of workmen's compensation because the allegations indicated no more than the actions of interested parties who sought vigorously to protect their interests through "the normal administrative processes of adjudication and appeal." *Id.* at 137. Unlike the employer and compensation board in *Powell*, Defendants here conspired to circumvent the normal judicial process adjudicating the dispute between Lisa Miller and Jenkins over Isabella's custody, simply because the courts dared recognize a lesbian's legal right to custody of a child.

Plaintiffs allege specific acts by which Defendants furthered that conspiracy to ensure that no court or state authority could enforce Jenkins and Isabella's parent–child relationship. This Court already held that Plaintiffs "adequately allege[] that Defendants Lisa Miller, Timothy Miller, Kenneth Miller, Philip Zodhiates, Victoria Hyden and Linda Wall agreed, tacitly or explicitly, to further this purpose." Op. & Order, ECF No. 115, at 55. Plaintiffs' allegations against those Defendants were "far from vague, conclusory or general." *Id.* Defendants, Plaintiffs

allege, helped Lisa Miller leave the United States "in order to continue to obstruct any parent–child relationship between Janet Jenkins and Isabella and to remain outside the jurisdiction of state and federal courts." *Id.* Specifically, "Zodhiates and another RUL employee assisted Lisa Miller and Isabella to travel disguised as Amish Mennonites from Virginia to the New York–Canada border," "Zodhiates and Hyden arranged for Lisa Miller and Isabella to travel from Lynchburg to Waynesboro, Virginia, in order to embark on their journey to Canada and on to Nicaragua," and "Timothy Miller, Kenneth Miller and Zodhiates arranged for the purchase of plane tickets, and Kenneth Miller arranged to have Lisa Miller and Isabella picked up on the Canadian side of the border." *Id.*

Likewise, Plaintiffs adequately allege that Defendants Liberty University, Liberty Counsel, Staver, and Lindevaldsen also helped Lisa Miller leave the United States "in order to continue to obstruct any parent–child relationship between Janet Jenkins and Isabella and to remain outside the jurisdiction of state and federal courts." *Id.* Specifically, Plaintiffs allege the following: Lisa Miller, whom Liberty Counsel attorneys Staver and Lindevaldsen represented, told Andrew Yoder that Liberty Counsel had advised her that it would be in her best interests to disappear. RSAC, ECF No. 223, ¶ 41; *see also* Op. & Order, ECF No. 220, at 29. Lindevaldsen and Staver made representations to RUL employees regarding when they expected the Vermont court would award full custody to Jenkins. Op. & Order, ECF No. 220, at 29. After Lisa Miller fled the country, Lindevaldsen, who was an employee of Liberty University and Liberty Counsel supervised by Staver, continued to communicate with Lisa through Zodhiates, whose company, RUL, contracted with Liberty Counsel, and through Hyden, who was an employee of Liberty University. RSAC, ECF No. 223, ¶¶ 44, 46; *see also* Op. & Order, ECF No. 220, at 6, 29. Lindevaldsen and Wall packed up Lisa Miller's personal belongings, which Zodhiates picked up

and delivered to Lisa in Nicaragua through Timothy Miller. RSAC, ECF No. 223, ¶ 45; *see also* Op. & Order, ECF No. 220, at 29. Despite her continued communications with Lisa Miller, Lindevaldsen told the Rutland Family Court that she had no reason to believe that Lisa had fled. RSAC, ECF No. 223, ¶¶ 50, 61; *see also* Op. & Order, ECF No. 220, at 6, 30. While returning from the Canadian border after dropping off Lisa Miller and Isabella, Zodhiates called a cell phone number and a landline phone number registered to Liberty Counsel, and a landline phone number registered to Liberty University. RSAC, ECF No. 223, ¶ 60; *see also* Op. & Order, ECF No. 220, at 6. These allegations too are "far from vague, conclusory or general." Op. & Order, ECF No. 115, at 55; *cf.* Op. & Order, ECF No. 220, at 30 (holding that, with respect to personal jurisdiction over Lindevaldsen, "Plaintiffs plead *specific* facts that Lindevaldsen in particular engaged in tortious conduct" (emphasis added)).

Defendants' conspiracy can be inferred when viewed in context. In *Zhang v. Chinese Anti-Cult World All. (CACWA)*, No. 15 CV 1046, 2016 WL 1128401, at *6 (E.D.N.Y. Jan. 28, 2016), for example, practitioners of the religion Falun Gong alleged that members of the anti-Falun Gong nonprofit organization CACWA conspired to deprive them of their right to intrastate travel through violence. The court inferred the existence of that conspiracy by viewing the defendants' violent acts "against the backdrop of CACWA's incorporation and mission statement, [a defendant's] affiliation with several Party-backed groups intent on suppressing the practice of Falun Gong in the United States, and the publications and materials routinely created and distributed by CACWA's members (including the individual Defendants) threatening the 'eradication' and 'violent suppression' of Falun Gong." 2016 WL 1128401, at *6.

Here, Defendants' conspiracy can be inferred from the facts alleged.[12] Plaintiffs allege, for example, that Lisa Miller and Wall formed the Protect Isabella Coalition, the purpose of which was to prevent court-ordered contact between Jenkins and Isabella. RSAC, ECF No. 223, ¶ 26. "Lisa Miller appeared on a radio program called 'Janet Parshall's America' and threatened that she would not comply with a court's order to transfer legal and physical rights and responsibilities to Janet Jenkins." *Id.* ¶ 27. "Philip Zodhiates offered Liberty Counsel a 'personal option' for Lisa Miller in the event that her legal fight failed." *Id.* ¶ 29. Lisa Miller told the online publication Lifesitenews.com that she thought she would lose custody of Isabella if she did not comply with the Virginia court's September 4, 2009 order to allow contact between Jenkins and Isabella. *Id.* ¶ 33. Wall appeared on television with other members of the Protect Isabella Coalition and compared herself with Harriet Tubman, a woman who escaped slavery who secretly helped rescue dozens of other slaves, and suggested she would take similar actions with regard to other children with same-sex parents. *Id.* ¶ 54. Wall also wrote on Facebook that anyone with information about Lisa Miller and Isabella's whereabouts should not tell anyone. *Id.*

Liberty Counsel published a book by Lindevaldsen entitled *Only One Mommy: A Woman's Battle for Her Life, Her Daughter, and Her Freedom*,[13] which she and Staver promoted on radio and television programs, including Liberty Counsel's YouTube channel. *Id.* ¶ 62; *see also* Liberty Counsel, *How Lisa Miller Became Intrigued & Fascinated with a Lesbian Lifestyle!*, YouTube (Nov. 16, 2011), https://www.youtube.com/watch?v=ME0kVBS882U.

[12] That Defendants' conspiracy can be inferred from activities arguably protected by the First Amendment does not mean that Plaintiffs' claims against them arise from those activities for purposes of Vermont's anti-SLAPP statute. *See generally* Pls.' Mem. in Opp'n to Defs. Liberty Counsel, Mathew D. Staver, & Rena M. Lindevaldsen's & Linda M. Wall's Special Mots. to Strike, ECF No. 260 (filed August 7, 2017).

[13] The book was published by New Revolution Publishers (Plaintiffs mistakenly alleged the publisher to be "New Revolution *Press*" in their RSAC, ECF No. 223 ¶ 62), which shares a mailing address with Liberty Counsel and features Liberty Counsel's name next to their publishing trademark.

Throughout the book, Lindevaldsen describes the fight over same-sex marriage as a war: "As people concerned about preserving our freedoms, we [Christians] need to realize . . . there is a real battle taking place to silence any who disagree with the homosexual agenda." Rena M. Lindevaldsen, *Only One Mommy* 120 (2011). "We need to realize that the battle lines have been drawn; we are at war." *Id.* at 122. According to Lindevaldsen, "[t]he most important first step is to get off the sidelines and into the battle before we [Christians] are silenced." *Id.* She concludes her book with a warning to Christians: "If we do nothing, and lose this war, we will be silenced." *Id.* at 125.

Plaintiffs also allege that Staver and Lindevaldsen required students at Liberty University School of Law to read *Only One Mommy*. RSAC, ECF No. 223, ¶ 62. In 2015, Lindevaldsen gave a videotaped lecture to students, posted to Liberty University's YouTube channel, in which she endorsed civil disobedience, saying, "It is the right thing to do to engage in civil disobedience to a law that was unjust and contrary to Scripture," and, "Civil government doesn't have the rightful authority from God to order you to do things that are contrary to Scripture." Liberty University, *Do Government Officials Have Authority to Impose Their Morals on Others? Rena M. Lindevaldsen*, YouTube (Aug. 19, 2015), https://youtu.be/V_0xeqh0gwQ.

These facts support an inference that Defendants conspired to prevent any contact between Jenkins and Isabella when their attempts to prevent such contact through the legal system failed time and again. Plaintiffs therefore adequately allege a conspiracy by Defendants.

3. Plaintiffs Adequately Allege Class-Based, Invidiously Discriminatory Animus by Defendants

a. Plaintiffs Allege that Defendants Acted with Animus Toward Gays and Lesbians, Including Same-Sex Couples

Plaintiffs adequately allege that Defendants acted with invidiously discriminatory animus toward the class of gays and lesbians, including those in same-sex relationships. To avoid interpreting Section 1985(3) as a "general federal tort law," the U.S. Supreme Court gave "full effect to the congressional purpose" by requiring some "class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin*, 403 U.S. at 102; *accord Dolan v. Connolly*, 794 F.3d 290, 296 (2d Cir. 2015). "By its very language § 1985(3) is necessarily tied to evolving notions of equality and citizenship." *Terry*, 886 F.2d at 1359. Gays and lesbians, including those in same-sex relationships, possess "sufficient" "inherited or immutable characteristics." *Dolan*, 794 F.3d at 296 (outlining characteristics of satisfactory versus non-satisfactory classes). Plaintiffs allege facts plausibly suggesting animus. *See Collins v. W. Hartford Police Dep't*, 324 F. App'x 137, 139 (2d Cir. 2009) (holding that plaintiff must "make any plausible allegation that there was 'some racial, or perhaps otherwise class-based, invidiously discriminatory animus' behind the conspirators' action"); *McCain v. United States*, No. No. 2:14-cv-92, 2015 WL 1221257, at *8 (D. Vt. Mar. 17, 2015) (holding that plaintiff failed to allege facts that "suggest" class-based animus).

This Court held that "at a minimum the Supreme Court acknowledged" in *Windsor v. United States*, 133 S. Ct. 2675 (2013), "that same-sex couples constitute a class for purposes of an equal protection analysis." Op. & Order, ECF No. 115, at 63 (citing *Romer v. Evans*, 517 U.S. 620 (1996)). Since this Court's decision, the U.S. Supreme Court also decided *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), which held that the Equal Protection Clause of the Fourteenth Amendment prohibits states from denying gays and lesbians the right to marry. This Court's decision was correct before—and certainly is correct after—*Obergefell*.

Defendants read *Windsor* and *Obergefell* so narrowly as to entirely write out gays and lesbians from the cases. *See* Mem. in Supp. of Mot. To Dismiss, ECF No. 240, at 125–26. The same-sex couples before the Court comprised gay and lesbian individuals, each of whom possessed a right to equal protection of the laws. In *Windsor*, the Court held the Defense of Marriage Act (DOMA) "unconstitutional as a deprivation of the liberty of the *person* protected by the Fifth Amendment of the Constitution." 133 S. Ct. at 2695. DOMA's "principal purpose" and "necessary effect" were "to demean those *persons* who are in a lawful same-sex marriage," but "[t]he liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any *person* the equal protection of the laws." *Id.* (emphasis added)). DOMA was invalid "for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in *personhood* and dignity." *Id.* at 2696.

Two years later, in *Obergefell*, the Court discussed the experience of gays and lesbians in the United States, 135 S. Ct. at 2596, and noted that "[m]ost States have allowed gays and lesbians to adopt, either as individuals or as couples," *id.* at 2600. It held that excluding gays and lesbians from marriage "has the effect of teaching that gays and lesbians are unequal in important respects" and "demeans gays and lesbians." *Id.* at 2601–02. "The imposition of this disability on gays and lesbians serves to disrespect and subordinate them." *Id.* at 2604. Same-sex couples could not be deprived of the right and liberty to marry because "the right to marry is a fundamental right inherent in the liberty of the *person*." *Id.* (emphasis added). The Court refused "to stay its hand to allow slower, case-by-case determination of the required availability of specific public benefits to same-sex couples" because doing so "would deny gays and lesbians many rights and responsibilities intertwined with marriage." *Id.* at 2606. And just this Term, the

Court summarily refused to chip away at *Obergefell* through narrow reading. *See Pavan v. Smith*, 137 S. Ct. 2075 (2017) (holding that *Obergefell* guarantees gays and lesbians all the benefits states have linked to marriage, thus rejecting the dissent's narrow reading of *Obergefell* to address only whether a state must recognize same-sex marriages). Defendants cannot hack at *Obergefell*'s reach, or *Windsor*'s, with linguistic trickery.

Defendants' conspiracy was motivated by animus toward gays and lesbians, including same-sex couples. Defendants would not have participated in the Jenkins–Miller matter or the unlawful conspiracy to kidnap Isabella had Jenkins been a straight man. Their animus toward gays and lesbians, including those in same-sex relationships, can be inferred from the facts alleged. Wall's animus was explicit; she appeared on television to endorse Isabella's kidnapping and suggested she would do the same for other children in homes with same-sex parents. RSAC, ECF No. 223, ¶ 54. Lindevaldsen's book *Only One Mommy* makes clear her belief that she has been fighting a war against "the homosexual agenda." Lindevaldsen, *Only One Mommy*, *supra*, at 120. She and Staver assigned that book to students at Liberty University, RSAC, ECF No. 223, ¶ 62, and it is reasonable to infer the thoughts expressed in the book influenced her decision to reach out to Wall in an attempt to meet with and retain for representation Lisa Miller, *id.* ¶ 21. The RUL Defendants' animus is clear from their central role in the conspiracy to kidnap Isabella and keep her out of the United States by transporting Isabella out of the United States, RSAC ¶¶ 36, 38, arranging for transportation of Lisa Miller's belongings to Nicaragua, *id.* ¶¶ 44–45, and facilitating continuing communication between Lisa Miller in Nicaragua and Lindevaldsen, *id.* ¶ 46.

Every case in Defendants' two-page string cite of cases in which "[n]umerous courts . . . refused to recognize homosexuals as a protected class for purposes of Section 1985" predates

Windsor and *Obergefell*. *See* ECF No. 240, at 122–23. Those decisions cannot and do not survive *Windsor* and *Obergefell*. *Cf. Weslowski v. Zugibe*, 14 F. Supp. 3d 295, 318 n.7 (S.D.N.Y. 2014) (noting, in the Equal Protection Clause context, "that the Second Circuit has held that 'homosexuals compose a class that is . . . quasi-suspect,' and that allegations of discrimination involving this class are 'subject to heightened scrutiny'" (quoting *Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012)).

Defendants primarily rely on *DeSantis v. Pacific Telephone & Telegraph Co.*, 608 F.2d 327, 333 (9th Cir. 1979), which held "that homosexuals are not a 'class' within the meaning of s 1985(3)." *DeSantis* reached that conclusion, in 1979, solely because "it cannot be said that homosexuals have been afforded special federal assistance in protecting their civil rights. The courts have not designated homosexuals a 'suspect' or 'quasi-suspect' classification so as to require more exacting scrutiny of classifications involving homosexuals. . . . And . . . Congress did not and has consistently refused to include homosexuals as a group within the special protection of Title VII." 608 F.2d at 333. The court cited, as an example, *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199, 1202 (E.D. Va. 1975), which upheld Virginia's sodomy law. But *DeSantis*'s reasoning does not survive *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding unconstitutional a Texas statute criminalizing same-sex intimate sexual conduct), *Windsor*, or *Obergefell*. And indeed, in *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864, 875 (9th Cir. 2001), the Ninth Circuit explicitly stated that "*DeSantis* is no longer good law," recognizing it was abrogated by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *Accord Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017) (en banc) (holding that Title VII's prohibition of sex discrimination prohibits discrimination on the basis of sexual orientation). The Second Circuit is poised to reconsider the same issue en banc in September. *See*

Zarda v. Altitude Express, No. 15-3775 (2d Cir. May 25, 2017), ECF No. 271 (ordering rehearing en banc).

Defendants' other citations rely on, and therefore die with, *DeSantis*. They cite, for example, *Gay Veterans Ass'n, Inc. v. Am. Legion-N.Y. Cty. Org.*, 621 F. Supp. 1510, 1515–16 (S.D.N.Y. 1985), *Yost v. Bd. of Regents*, No. HAR 93-471, 1993 WL 524757, at *4 (D. Md. Nov. 19, 1993), *Monitor v. City of Chicago*, 653 F. Supp. 1294, 1300 (N.D. Ill. Jan. 27, 1987), and *David v. Local 801, Danbury Fire Fighters Ass'n*, 899 F. Supp. 78, 80 (D. Conn. 1995)—all of which relied on *DeSantis* explicitly. *Dix v. City of New York*, No. 01 CIV. 6186, 2002 WL 31175251, at *10 (S.D.N.Y. Sept. 30, 2002), relied on a number of other cases that themselves relied on *DeSantis*. *See Segreto v. Kirschner*, 977 F. Supp. 553, 565 (D. Conn. 1997) (relying on *DeSantis*); *see also Martin v. N.Y. State Dep't of Corr. Servs.*, 115 F. Supp. 2d 307, 316 (N.D.N.Y. 2000) (relying on *Segreto*); *Trigg v. N.Y.C. Transit Auth.*, No. 99-CV-4730, 2001 WL 868336, at *12 (E.D.N.Y. July 26, 2001) (same). Similar to *DeSantis*, *Vega v. Artus*, held, in 2009, that a Section 1985(3) claim could not be based on animus toward "homosexuals" because "[*u*]*nder current law* . . . homosexuality has only been afforded rational basis review, and it has not been given special protection by Congress." 610 F. Supp. 2d 185, 204–05 (N.D.N.Y. 2009) (emphasis added); *see also David*, 899 F. Supp. at 80. That "current law" has since changed.

At least two of Defendants' citations in the lengthy string cite are misleading. First, Defendants cite *Preston v. Hughes*, 178 F.3d 1295 (6th Cir. 1999), because, they assert, the court "h[eld] that homosexuality is not a protected class under 1985(3)." Mem. in Supp. of Mot. To Dismiss, ECF No. 240, at 122. *Preston* did no such thing. Preston, a prisoner, brought a claim under 42 U.S.C. § 1983, not Section 1985(3), asserting a violation of his equal protection rights. The Sixth Circuit held, in 1999, that, "[f]or equal protection purposes" "Preston is not a member

of a protected class . . . as a homosexual." 178 F.3d at *1. Granted, the court relied on *DeSantis*, 608 F.2d at 333, for that conclusion, but that by no means confirms Defendants' assertion that *Preston* "h[eld] that homosexuality is not a protected class under 1985(3)."

Second, Defendants also cite *Harrison v. KVAT Food Mgmt., Inc.*, 766 F.2d 155, 159 (4th Cir. 1985), because, they assert, the court "recognize[ed] numerous courts' refusal to recognize 1985(3) claims by purported class of homosexuals." Mem. in Supp. of Mot. To Dismiss, ECF No. 240, at 122. Not so. Harrison, a grocery store manager, brought a claim under Section 1985(3), claiming that his employer conspired on the basis of his Republican political affiliation. 766 F.2d at 155. In its discussion of "whether non-racially motivated discrimination was actionable under § 1985(3)," the Fourth Circuit cited numerous cases in which courts of appeal "found non-racial classes deserving of § 1985(3) protection" and other cases in which "courts have not extended the protection of § 1985(3)." *Id.* at 159. Only one of the numerous cases cited by the Fourth Circuit dealt with "homosexuals"—*DeSantis*.

b. Plaintiff Isabella Miller-Jenkins Adequately Alleges Class-Based, Invidiously Discriminatory Animus

Plaintiffs need only allege that Defendants acted with class-based, invidiously discriminatory animus to survive Defendants' motions to dismiss. As explained, Plaintiffs meet that burden. Isabella need not allege, as Defendants suggest, that she was the target of Defendants' conspiracy because of her membership in a protected class of persons. *Cf. Chapman v. Barcus*, No. 08-CV-0497, 2009 WL 57092, at *6 (N.D. Okla. Jan. 7, 2009) ("[E]ven if plaintiff were a member of some protected class, his claim under § 1985 would still fail because he offers no facts to indicate that the conspiracy had a discriminatory purpose."); *id.* (noting that "[t]he mere assertion of a discriminatory motivation . . . is not sufficient to state a conspiracy claim" because the discriminatory purpose alleged must be based on a protected class). This is

consistent with the plain language of Section 1985(3), which provides that "another . . . injured in his person or property" by "any act in furtherance of the object of such conspiracy" "may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators."

For example, in *Arias v. U.S. Immigration & Customs Enforcement*, No. No. 07-1959, 2008 WL 1827604, at *15 (D. Minn. Apr. 23, 2008), a number of individuals, almost all of whom were Latino but some of whom were not, brought a claim under Section 1985(3) against immigration officials and police officers, alleging a conspiracy to deprive them of their constitutional rights to be free from unreasonable searches and seizures because almost all of them were Latino. Immigration officials, they alleged, planned and executed a civil immigration enforcement operation in which they forcibly entered the plaintiffs' homes and conducted warrantless, non-consensual searches. 2008 WL 1827604, at *3. They detained the Latino plaintiffs, but did not request identification from nor challenge the presence of the Caucasian plaintiffs. *Id.* The court held that the plaintiffs adequately alleged class-based, invidiously discriminatory animus by alleging "that the conspirators were motivated by the fact that almost all Plaintiffs are Latinos." *Id.* at *15. In other words, even the Caucasian plaintiffs' Section 1985(3) claim survived because they alleged anti-Latino animus.[14]

The cases Defendants cite are consistent with this principle; they merely prove that some class-based, invidiously discriminatory animus must be alleged. They do not prove, as Defendants suggest, that Isabella must allege membership in a protected class. First, the plaintiffs

[14] For similar reasons, whether Janet Jenkins belongs to the class of same-sex couples is immaterial. *See* ECF No. 240, at 107 (arguing that *Windsor* and *Obergefell* are inapposite because "Plaintiff indisputably does not belong in that class"). It is enough that Plaintiffs allege that Defendants' conspiracy to separate Jenkins from Isabella was motivated by invidiously discriminatory animus toward same-sex couples. To hold otherwise would, for example, foreclose Section 1985(3) claims by those injured by conspiracies motivated by animus toward a protected class simply because the conspirators mistook the plaintiff for a member of that class.

in *Magnum v. Archdiocese of Philadelphia*, 253 F. App'x 224, 230 (3d Cir. 2007), were individuals who alleged that they were sexually abused as children by Catholic priests. They brought a Section 1985(3) claim against the archdiocese and certain officials, alleging a conspiracy to conceal the child abuse. 253 F. App'x at 225. The court held that minor children were not a class for purposes of Section 1985(3). *Id.* at 230. Because no class-based animus was alleged, the claim failed. That these plaintiffs' claims were based on acts committed while they were minors has no bearing on Isabella's claim simply because she too is a minor.

Similarly, the Section 1985(3) claims in *Nieves-Ramos v. Gonzalez-De-Rodriguez*, 737 F. Supp 727, 729 (D.P.R. 1990), *Koenig v. Snead*, 757 F. Supp. 41, 44 (D. Or. 1991), and *L.Q.A. ex rel. Arrington v. Eberhart*, 920 F. Supp. 1208, 1229 (M.D. Ala. 1996), failed in part because not one plaintiff even alleged that defendants acted with animus. The claim in *Allison v. Shabazz*, No. C 14-04813, 2016 WL 2957121, at *7 (N.D. Cal. May 23, 2016), failed because the plaintiffs "made no allegations suggesting that any conspiracy, assuming one existed, was motivated by animus against female protective parents or victims of domestic violence," and "fail[ed] to allege that victims of domestic violence constitute a protected class." Again, that a plaintiff in those cases was a minor does not prove Defendants' point.

This case is also distinguishable from *Hardmon v. Lehigh County*, 613 F. Supp. 649, 653 (E.D. Pa. 1985). The plaintiff in that case was a mother who brought claims solely on behalf of her daughter, who suffered trauma after a prison inmate attempted to kill her. 613 F. Supp at 651. The mother alleged under Section 1985(3) that the defendants conspired to deprive her daughter of her right to bodily security by releasing a prison inmate on a forty-eight hour furlough even though the mother had previously informed the prison that the inmate had harassed her (the mother) while he was on work release. *Id.* at 651, 653. She alleged that the prison officials

ignored her complaint about the inmate at least in part because she (the mother) is black. *Id.* at 654. The court held that the mother failed to allege a Section 1985(3) conspiracy on her daughter's behalf because the alleged race-based conspiracy was directed at the mother rather than the daughter, on whose sole behalf the claim was made. *Id.* at 653. The defendants did not even know the daughter existed, much less her race. *Id.* In other words, the mother's allegation of a race-based conspiracy could not suffice for the daughter's claim because that conspiracy did not and could not have involved the daughter. Here, however, the alleged conspiracy was directed at both Jenkins and her daughter Isabella. Isabella's whereabouts were the crux of the conspiracy. Defendants did not merely know of Isabella's existence; they conspired to, and did, kidnap her to a foreign country. Therefore, Jenkins's allegation that Defendants' conspiracy was motivated by invidiously discriminatory animus toward gays and lesbians, including same-sex couples, suffices for Isabella's own claim under Section 1985(3) because that conspiracy was directed at Isabella as much as, or more than, it was directed at her mother, Jenkins.

Isabella's Section 1985(3) claim survives even if she too must allege membership in a protected class. *Windsor* and *Obergefell* upheld the rights of those in same-sex relationships in part because of the effect on children of same-sex couples. One reason "for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education." *Obergefell*, 135 S. Ct. at 2600. "By giving recognition and legal structure to their parents' relationship, marriage allows children 'to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.' Marriage also affords the permanency and stability important to children's best interests." *Id.* (quoting *Windsor*, 133 S. Ct. at 2694–95). "Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of

knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life." *Id.* (citing *Windsor*, 133 S. Ct. at 2694–95). Marriage laws that exclude same-sex couples "thus harm and humiliate the children of same-sex couples." *Id.* at 2601 (citing *Windsor*, 133 S. Ct. at 2694–95). Invidiously discriminatory animus toward same-sex couples, then, includes invidiously discriminatory animus toward their families. Insofar as conspiracies motivated by invidiously discriminatory animus toward same-sex couples are actionable under Section 1985(3), Isabella can state a claim under that theory.

c. Application of *Windsor* and *Obergefell* in this Case Is Permissible

The principle underlying *Windsor* and *Obergefell*—that gays and lesbians, including same-sex couples, are a class for purposes of the Equal Protection Clause—fairly applies to Defendants' prior conduct. "When [the Supreme Court] applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [the] announcement of the rule." *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993). "In both civil and criminal cases, [courts] can scarcely permit 'the substantive law [to] shift and spring' according to 'the particular equities of [individual parties'] claims' of actual reliance on an old rule and of harm from a retroactive application of the new rule." *Id.* (quoting *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 543 (1991) (Souter, J.)) (second and third alterations in original).

"'[B]oth the common law and [Supreme Court] decisions' have 'recognized a general rule of retrospective effect for the constitutional decisions of'" the Supreme Court. *Id.* at 94

(quoting *Robinson v. Neil*, 409 U.S. 505, 507 (1973)) (first alteration in original).[15] "Nothing in the Constitution alters the fundamental rule of 'retrospective operation' that has governed '[j]udicial decisions . . . for near a thousand years.'" *Id.* (quoting *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting)) (alterations in original). "[T]wo 'basic norms of constitutional adjudication'" justify such a rule. *Id.* at 95. First, "'the nature of judicial review' strips [courts] of the quintessentially 'legislat[ive]' prerogative to make rules of law retroactive or prospective as [they] see fit." *Id.* (quoting *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987)) (first and third alterations in original). Second, "selective application of new rules violates the principle of treating similarly situated [parties] the same." *Id.* (quoting *Griffith*, 479 U.S. at 322) (alteration in original).

Despite Defendants' lesson that *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995), provides "the correct retroactivity rule," Reply Mem. in Supp. of Mot. To Dismiss, ECF No. 179, at 8, *Reynoldsville* does nothing to support Defendants' position. In *Reynoldsville*, Hyde, the driver of a car, sued the driver of a truck and its owner more than three years after the two vehicles collided in an accident in Ohio. 514 U.S. at 751. Although Ohio law normally would have given Hyde only two years to bring her lawsuit, she was given unlimited time in this case because of an Ohio tolling statute that applied in cases involving out-of-state defendants, and the defendants were from Pennsylvania. *Id.* Ten months after Hyde filed her suit, the U.S. Supreme Court, in another case, held that tolling provision unconstitutional. *Id.* (citing *Bendix Autolite*

[15] In Defendants' first attempt at making this argument, they criticized Plaintiffs' citation to *Robinson* for failing to accurately quote the opinion. *See* Reply Mem. in Supp. of Mot. To Dismiss, ECF No. 179, at 8. Specifically, Plaintiffs supposedly neglected to include the first part of the quotation, which made clear that the general rule of retrospective effect for constitutional decisions of the Supreme Court existed until the Court's decision in *Linkletter v. Walker*, 381 U.S. 618 (1965). *See id. Linkletter* developed a doctrine under which retroactive effect could be denied to a newly announced rule of criminal law. *Harper*, 509 U.S. at 94. But as *Harper* makes clear, the Court "subsequently overruled *Linkletter* in *Griffith v. Kentucky*, 479 U.S. 314 (1987)). *Id.* at 95.

Corp. v. Midwesco Enters., Inc., 486 U.S. 888 (1988)). Nevertheless, the Ohio Supreme Court held that *Bendix* could not apply retroactively to Hyde's case or to any other claim that accrued prior to the announcement of the decision in *Bendix*. 514 U.S. at 751. The U.S. Supreme Court reversed. As Hyde conceded, *Harper* unquestionably controlled, thereby making *Bendix* retroactively applicable. *Id.* at 752.

Despite her concession, Hyde argued that *Bendix* should not retroactively apply to her particular case because she had reasonably relied on the tolling statute. *Id.* Here, Defendants similarly argue that *Windsor* and *Obergefell* should not apply retroactively to them because they apparently relied on DOMA, which defined "marriage" for purposes of congressional legislation and administrative acts, and which *Windsor* held unconstitutional, to justify kidnapping a child to a foreign country in contempt of court orders to keep her away from her mother simply because her mother is lesbian. *See* Mem. in Supp. of Mot. To Dismiss, ECF No. 227, at 17–20; ECF No. 179, at 7–8. "But, this type of justification—often present when prior law is overruled—is the very sort that [the U.S. Supreme Court], in *Harper*, found insufficient to deny retroactive application of a new legal rule (that had been applied in the case that first announced it)." *Reynoldsville*, 514 U.S. at 753–54.

Hyde also argued that the Ohio Supreme Court permissibly refused to retroactively apply *Bendix* because, as with qualified immunity, *Bendix*'s holding was not clearly established at the time Hyde contemplated filing suit. *Id.* at 757. Defendants argue that qualified immunity should apply to them too because DOMA's unconstitutionality was not clearly established when they kidnapped Isabella to Nicaragua to separate her from her lesbian mother. *See* Mem. in Supp. of Mot. To Dismiss, ECF No. 227, at 19. The Supreme Court rejected this argument. Qualified immunity is "a well-established, independent rule of law" created from "a set of special federal

policy considerations" "reflect[ing] the concern that 'society as a whole,' without that immunity, would have to bear 'the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office.'" *Reynoldsville*, 514 U.S. at 758 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)). Defendants in this case are private individuals, not public officials. They are alleged to have conspired to evade state authorities in kidnapping Isabella outside of the country to keep her away from her lesbian mother. Retroactive application of *Windsor* and *Obergefell* to this case would not raise any concerns warranting immunity. Defendants, like Hyde, "offer[] no more than simple reliance . . . as a basis for creating an exception to *Harper*'s rule of retroactivity." *Id.* at 759.

4. Defendants' Conspiracy Overpowered State Authorities for Purposes of Section 1985(3)

Under Section 1985(3)'s plain language, a mere two persons could be held liable for conspiring to prevent or hinder state authorities from giving or securing to all persons within the state the equal protection of the laws. Even if some undefined level of force were required, as Defendants suggest, their assertion that such a level of force is absent from Plaintiffs' allegations is belied by the most obvious of facts that, to this day, Lisa Miller remains at large with Isabella in her captivity despite numerous contempt findings against Lisa Miller, *see* RSAC, ECF No. 223, ¶ 47, a court order giving Jenkins legal and physical parental rights and responsibilities for Isabella, *see id.*, an FBI investigation, *see, e.g.*, Press Release, Federal Bureau of Investigation, Kenneth L. Miller Arrested for Aiding International Parental Kidnapping (Dec. 6, 2011), https://archives.fbi.gov/archives/albany/press-releases/2011/kenneth-l.-miller-arrested-for-aiding-international-parental-kidnapping, federal criminal charges against Lisa Miller, *see United States v. Lisa Miller*, No. 1:14-cr-175 (W.D.N.Y. filed Sept. 19, 2014), and three federal criminal

convictions against Defendants Kenneth Miller, *see* Judgment, *United States v. Kenneth Miller*, No. 2:11-cr-161 (D. Vt. Mar. 6, 2013), ECF No. 110, Zodhiates, *see* Amended Judgment, *United States v. Zodhiates*, No. 1:14-cr-175 (W.D.N.Y. Apr. 3, 2017), ECF No. 196,[16] and Timothy Miller, *see* Judgment, *United States v. Timothy Miller*, No. 1:14-cr-175 (W.D.N.Y. Mar. 28, 2017), ECF No. 191. A conspiracy, furthered by at least eight individuals and three entities, that continues to withstand the force of United States law enforcement surely has overpowered state authorities for purposes of Section 1985(3).

5. Defendants Hindered State Authorities

The hindrance clause does not require "state action," but even if it did, Plaintiffs adequately allege "state action" because they allege that Defendants hindered Vermont and Virginia authorities from giving or securing the equal protection of the laws. Specifically, by helping Lisa Miller take Isabella beyond the reach of the Virginia and Vermont courts, Defendants have hindered the ability of state authorities to enforce Jenkins's and Isabella's equal protection rights. *See* RSAC, ECF No. 223, ¶ 67.

The Second Circuit has held that the hindrance clause applies to private conspiracies aimed at constitutional rights that protect only against state action—specifically, the Fourteenth Amendment. In *Abrams*, the court held that "mentally retarded" citizens could allege under that clause a conspiracy by residents of Rockville Centre, New York, to hinder the state's ability to enforce their Fourteenth Amendment right to release from institutional confinement by the state's chosen method of establishing halfway houses. 695 F.2d at 41–42; *accord Friends of Falun Gong v. Pac. Cultural Enter., Inc.*, 288 F. Supp. 2d 273, 281 (E.D.N.Y. 2003)

[16] In fact, the court in Zodhiates's criminal case ordered *sua sponte* that Zodhiates's case be severed from Lisa Miller's criminal case "[g]iven the possibility that Defendant Lisa Miller is a fugitive who might never be arrested and extradited." Text Order, *United States v. Lisa Miller*, No. 1:14-cr-175 (W.D.N.Y. Sept. 15, 2016), ECF No. 103.

(recognizing the pre-*Bray* holding in *Abrams*); Op. & Order, ECF No. 115, at 68 (same). The Supreme Court, however, has yet to decide whether the hindrance clause applies "to a private conspiracy aimed at rights that are constitutionally protected only against official (as opposed to private) encroachment." *Bray*, 506 U.S. at 282–83.[17] In an opinion by Justice Scalia, the Supreme Court in no uncertain terms refused to address the issue in *Bray* and heavily criticized the dissenting Justices' "zeal to reach the question." *Id.* at 279. This Court declined to answer whether the hindrance clause is limited to rights protected only against official encroachment and whether interfering with state officials necessarily implicates state action because, regardless of the answers, "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." Op. & Order, ECF No. 115, at 69. That conclusion remains correct.

Even if the Court were to now decide to answer those questions, there are compelling reasons for not simply translating the deprivation clause rule over to the hindrance clause. First, whereas the deprivation clause's plain language makes no mention of the state, the hindrance clause explicitly applies and is limited to conspiracies to affect state action. A hindrance clause conspiracy, unlike one under the deprivation clause, "implicates the *ability* of the State to ensure and safeguard rights protected against any infringement." *Libertad v. Welch*, 53 F.3d 428, 450

[17] Plaintiffs were pleasantly surprised to read that Defendants Liberty Counsel, Staver, and Lindevaldsen conceded, unprompted, that "the proper view of Supreme Court precedent is that claims under" the hindrance clause "*require* that a private conspiracy be aimed at rights that are 'constitutionally protected against official (*as opposed to* private) encroachment.'" ECF No. 240, at 109–10 (emphasis added) (quoting *Bray*, 506 U.S. at 282–33). Given, however, what the Supreme Court actually stated in *Bray*, perhaps Defendants intended to state that, like the deprivation clause, the hindrance clause "does *not* cover private conspiracies aimed at rights protected only against state encroachment." *Bray*, 506 U.S. at 283. Even without the benefit of Defendants' concession, however, Defendants' argument, which willfully sidesteps their conspiracy's actual hindrance of state action, fails to support dismissal of Count II.

(1st Cir. 1995). "[T]hose conspirators are supplanting the State's conduct with their own," and "[w]hen the State's conduct is thus arrogated, state action is clearly implicated, and rights protected only against official infringement are likewise implicated." *Id.* Second, the hindrance clause's application only to conspiracies to hinder state officials is "considerably narrower by its own terms than the deprivation clause," so "it does not raise the same 'specter of federalizing general tort laws'" that so concerned the Supreme Court in *Griffin* and *Carpenters*. *Id.* (quoting *Nat'l Abortions Fed'n v. Operation Rescue*, 8 F.3d 680, 685 (9th Cir. 1993) (holding that the hindrance clause does apply to rights protected only against official infringement)). The hindrance clause "could not be used to vindicate ordinary trespasses or torts in federal court." *Id.*

Third, to require state participation in the conspiracy, as Defendants' insistence on "state action" seems to suggest, would transform the hindrance clause into a toothless provision that applies perhaps only in the wildest hypothetical. Under Defendants' theory, the hindrance clause would prohibit conspiracies involving participation by the state to hinder the state's own ability to give and secure those rights that protect only against state encroachment. Yet "there would almost never be a situation in which the State would be involved in hindering its own efforts to secure equal protection to its citizens." *Abrams*, 695 F.2d at 43. Section 1985(3) conspiracies involve activities "so little associated with official action and so commonly connected with private marauders that [Section 1985(3)] could almost never be applicable under the artificially restrictive construction of *Collins*," which required action under color of state law. *Griffin*, 403 U.S. at 96.

It is unclear why Defendants both cite and describe *Tilton* as "particularly instructive," *see* Mem. in Supp. of Mot. To Dismiss, ECF No. 240, at 128, for the proposition that "the Hindrance Clause requires state action for rights whose infringement is protected only against

official encroachment." *Tilton* in no way involved the hindrance clause. *See, e.g.*, *Tilton*, 6 F.3d at 684;[18] *id.* at 685–86;[19] *id.* at 686.[20] Equally unclear is why Defendants cite *Ramirez v. City of Wichita*, 78 F.3d 597 (10th Cir. 1996), or *Sanders v. Prentice-Hall Corp.*, 178 F.3d 1296 (6th Cir. 1999), or *Brown v. Philip Morris Inc.*, 250 F.3d 789 (3d Cir. 2001), or *Stevens v. Tillman*, 855 F.2d 394 (7th Cir. 1988), or *Hoffman v. Halden*, 268 F.2d 280 (9th Cir. 1959)—not one of which dealt with the hindrance clause. Some of those opinions even altered quotations of Section 1985(3) to omit the hindrance clause altogether. *See Tilton*, 6 F.3d at 685–86; *Sanders*, 178 F.3d at *2; *Brown*, 250 F.3d at 805. Nor can Plaintiffs understand Defendants' citation of *Hoffman*, given that the 1959 opinion applied the rule of *Collins v. Hardyman*, 341 U.S. 651 (1951), which required a conspiracy under color of state law and which the Supreme Court overruled in *Griffin* in 1971.

Magnum, 253 F. App'x 224, is the only court of appeals decision actually addressing the hindrance clause that Defendants cite. But the Third Circuit in *Magnum* applied *Bray*'s deprivation clause doctrine to the hindrance clause, *see Magnum*, 253 F. App'x at 231, apparently without recognizing that the *Bray* Court explicitly decided not to decide whether the hindrance clause protects rights subject to official as opposed to private encroachment, and without wrestling with this crucial issue in any way. Notably, in this regard, *Magnum* cited

[18] "Tilton claims Appellees' actions have *deprived* him of 'his right to freedom of religion as guaranteed by the First Amendment, [and] his right to pursue his chosen profession as guaranteed by the Fifth and Fourteenth Amendments.' He further alleges the unfavorable publicity *deprived* him of his right to trial by a fair and impartial jury." (emphasis added).

[19] "The pertinent provision of § 1985(3) provides: If two or more persons . . . conspire . . . for the purpose of depriving . . . any person . . . of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . [or] cause to be done, any act in furtherance of the object of such conspiracy . . . the party so injured or deprived may have an action for the recovery of damages . . . ." (alterations in original).

[20] "The essential elements of a § 1985(3) claim are: (1) a conspiracy; (2) *to deprive plaintiff of equal protection or equal privileges and immunities*; (3) an act in furtherance of the conspiracy; and (4) an injury or deprivation resulting therefrom." (emphasis added).

Brown, 250 F.3d 789, for this same proposition (that Section 1985(3) protects only rights subject to private as well as official encroachment), but *Brown* did not address the hindrance clause either.

Defendants rely on *Zhang*, 2016 WL 1128401, for too much. They claim that the court in *Zhang* held the hindrance clause to require state action when the right a plaintiff seeks to enforce requires state interference, but that issue was entirely beside the point for the *Zhang* court. Because the plaintiffs' Section 1985(3) claims in that case, brought under both the deprivation and hindrance clauses, were based on the right to intrastate travel, which is susceptible to private encroachment, the court held that the violation of that right could be asserted against private defendants, and that state action was unnecessary. 2016 WL 1128401, at *9. The court could not determine to which clause the defendants' state action defense applied, and merely restated the holding of *Carpenters*, which addressed only the deprivation clause. It is the deprivation clause that requires that "state involvement must be demonstrated" when a Section 1985(3) claim seeks to enforce a right that requires state interference. *Zhang*, 2016 WL 1128401, at *9. Thus, *Zhang* does not hold what Defendants wish it held.

So too do Defendants rely on *Friends of Falun Gong*, 288 F. Supp. 2d 273, and *Comtel Technologies, Inc. v. Paul H. Schwendener, Inc.*, No. 04 C 3879, 2005 WL 433327 (N.D. Ill. Feb. 22, 2005), for more than the cases can bear. In *Friends of Falun Gong*, the court declined to resolve whether the hindrance clause can be applied to wholly private conspiracies aimed at rights protected only against official encroachment because the facts alleged would fail to make out such a claim anyway. 288 F. Supp. 2d at 281 ("In any event, the Court need not resolve [the requirements for a hindrance clause claim] here."). In its own dictum, the court noted that the Supreme Court in *Bray* "left that question open, but suggested in dictum that a state action

requirement would apply to the hindrance clause as well." *Id.* at 280. Defendants conveniently leave out the court's recognition of a circuit split on the issue, as well as of a pre-*Bray* decision of the Second Circuit (*Abrams*, 695 F.2d 34) that state action is not required to state a colorable claim under the hindrance clause. *See id.* at 281. As already discussed, both Defendants and *Friends of Falun Gong* make too much of *Bray*'s "suggestion" that the hindrance clause requires state action, given the majority's clear and adamant refusal to reach the issue. Meanwhile, the plaintiffs in *Comtel Technologies, Inc.* did not allege a hindrance clause conspiracy. 2005 WL 433327, at *8 ("In their complaint, plaintiffs clearly state that defendants' conspiracy was intended to deprive them of their rights."). The court relied on *Tillman*, a deprivation clause case, for the proposition that all Section 1985(3) claims require "injury at the state's hands." *Id.*

In sum, the hindrance clause does not present the same concerns presented by the deprivation clause, which would caution against application to conspiracies to hinder a state's ability to enforce rights protected only against official encroachment. Even if it did, Defendants clearly have hindered the ability of Vermont and Virginia to do just that, and Plaintiffs therefore state a claim.

IV. Conclusion

For the foregoing reasons, Defendants' motions to dismiss, ECF Nos. 228, 237, 238, 242, should be denied.

DATED this August 7, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this date the foregoing document was filed through the Court's CM/ECF filing system, and by virtue of this filing notice will be sent electronically to all counsel of record, including the following:

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