UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

SEALED PLAINTIFF 1	)	
	)	
and	)	
	)	
SEALED PLAINTIFF 2,	)	
	)	
Plaintiffs,	)	**Civil Action No. 3:22 cv 670-MHL**
	)	
v.	)	
	)	
PATRIOT FRONT, et al.	)	
	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR CERTIFICATION OF THIS COURT'S MARCH 31, 2024 ORDER PURSUANT TO 28 U.S.C. § 1292(B)

Defendants Nathan Noyce, Thomas Dail, Paul Gancarz, Daniel Turetchi, and Aedan Tredinnick, by counsel, submit this memorandum in support of their motion for certification of this Court's March 31, 2024 Order, ECF No. 128, which incorporated this Court's memorandum opinion, ECF 127, for interlocutory appeal. The Order involves "controlling question[s] of law as to which there is substantial ground for difference of opinion" and resolving them on immediate appeal "may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). As the Supreme Court has noted, a "district court[] should not hesitate to certify an interlocutory appeal" when its ruling "involves a new legal question or is of special consequence." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 110–11 (2009). In determining whether to grant § 1292(b)

certification, the court should weigh, among other things, "[t]he difficulty and general importance of the question presented" and "the significance of the gains from reversal." 16 Charles Alan Wright et al., Federal Practice and Procedure § 3931 (3d ed. 2008). Several questions addressed by the Court's March 31, 2024 Order meet these criteria.

More specifically, the March 31, 2024 Order addressed and determined at least three controlling questions of law satisfying the required elements:

1) Whether the Supreme Court's holdings in *Counterman v. Colorado* apply in civil actions and, if so, what effect they have on pleading requirements for § 1985 conspiracy claims that involve alleged true threats (the "*Counterman v. Colorado Question*").
2) Whether the Plaintiffs in their Amended Complaint properly alleged standing as to any of their claims against the Defendants (the *Standing Question*).
3) Whether the Court's March 31, 2024 Order contravened Fourth Circuit and Supreme Court precedents counselling a restrictive interpretation of the scope of a § 1985 claim (the "*Scope of § 1985(3) Question*").

ARGUMENT

I. THE *COUNTERMAN V. COLORADO QUESTION* SATISFIES ALL CRITERIA FOR A § 1292(B) INTERLOCUTORY APPEAL.

As this Court explained in *Gibbs v. Elevate Credit, Inc.*, No. 3:20 CV 632, 2021 WL 4851066 at *13 (E.D. Va. Oct. 17, 2021), 28 U.S.C. § 1292(b) authorizes a district court, in rendering an otherwise unappealable order in a civil action, to state in writing that: (1) "such order involves a controlling question of law"; (2) "as to which there is substantial ground for difference of opinion;" and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." A party seeking leave to file an interlocutory appeal must establish

all three elements to obtain the appeal. *Id.* For the reasons below, all three elements are present as to the *Counterman v. Colorado Question*.

Controlling Question of Law. This element has two subparts: (1) whether the issue is a "question of law" and (2) whether it is "controlling."

"Question of Law." In *United States ex rel. Michaels v. Agape Senior Cmty, Inc*., 848 F.3d 330 (4th Cir. 2017), the Fourth Circuit defined a controlling question of law as a "pure question of law," that is, "an abstract legal issue that the court of appeals can decide quickly and cleanly." *Id* at 340 (internal citations omitted). A pure question of law, the Court explained, does not require the appellate court "to delve beyond the surface of the record in order to determine the facts." *Id*. at 341 (internal citations omitted). By contrast, a question is not a controlling question of law where the appellate court is asked to consider "whether the district court properly applied settled law to the facts or evidence of a particular case." *Id*.

The *Counterman v. Colorado Question* satisfies these criteria. The application of *Counterman's* holding to the allegations in Plaintiffs' complaint is a pure question of law; it does not require the appellate court to delve into any factual determinations. The question is essentially what is the pleading standard that Plaintiffs must meet in this true threat conspiracy case in light of *Counterman*?

"Controlling." A question of law is "controlling" if it "control[s] many aspects of the proceedings in substantial respects, particularly the scope of the discovery," *In re Microsoft Corp. Antitrust Litig*., 274 F. Supp. 2d 741, 742 (D. Md. 2003); *see also Johnson v. Burken*, 930 F.2d 1202, 1206 (7th Cir. 1991) (observing that the standard for "controlling" questions "should be kept flexible" and acknowledging that "'controlling' means serious to the conduct of the litigation, either practically or legally'"); *Prince v. Johnson Health Tech Trading, Inc*., No. 5:22-cv-00035, 2023 WL 3190403 (W.D. Va. 2023) at *2 (holding an issue can be controlling if its resolution

would substantially shorten the litigation). The analysis is substantially similar to determining whether an order's immediate appeal may materially advance the ultimate termination of the litigation. The latter requirement is satisfied if the immediate appeal "could advance the litigation by ending it" or could "eliminate issues" for trial or "make discovery easier and less costly." *Lynn v. Monarch Recovery Mgmt, Inc.*, 953 F. Supp.2d 612, 626 (D. Md. 2013).

The requirements of this subpart are also satisfied here. If, as Defendants contend, *Counterman* applies in civil actions and its recklessness standard is substantially more stringent than the Court's interpretation in its March 31 Order, all three of Plaintiffs' claims in their Amended Complaint require dismissal as to all the Defendants.

Substantial Ground for Difference of Opinion. This element is met where reasonable jurists could disagree on an issue's resolution. *See Robert L. Dawson Farms, LLC. v. Meherrin Agriculture and Chemical Co.*, No. 4:20-CV-29, 2020 WL 1485673 (E.D. N.C. Mar. 23, 2020) at *3; *In re Trump*, 928 F.3d 360, 371 (4th Cir. 2019)[1]; *see also Ekstrom v. Congressional Bank*, No. ELH-20-1501, 2020 WL 119000 (D. Md. Jan. 13, 2021) at *3 (stating that this element is met "when there is genuine doubt or conflicting precedent as to the correct legal standard applied in the orders at issue"). The *Counterman v. Colorado Question*, indeed, exemplifies the "substantial ground for disagreement" element in accordance with these standards, for this Court acknowledges

[1] The subsequent history of *In re Trump* (928 F.3d 360) is complicated. That case involved the Fourth Circuit's issuance of a writ of mandamus to the District Court to overturn the District Court's declination to certify a question for appeal under § 1292(b). *In re Trump* (928 F.3d 360) was then vacated by the Fourth Circuit's *en banc* decision at 958 F.3d 274 (4th Cir. 2020) (en banc) on the ground that the initial Fourth Circuit (928 F.3d 360) decision improperly employed a writ of mandamus. The *en banc* decision was then vacated by the Supreme Court on grounds of mootness. *Trump v. District of Columbia*, 141 S.Ct 1262 (2021).

Despite this convoluted history, *In re Trump* (928 F.3d 360) has been cited by several courts for legal propositions that do not conflict with the e*n banc* reversal. *See, e.g., Prince v. Johnson Health Tech Trading, Inc.*, No. 5:22-cv-00035, 2023 WL 3190403 (W. D. Va. 2023) at *2.

in its March 31 Order that its position, that the *Counterman* holdings do not apply in civil matters, conflicts with views expressed by Justices Barrett and Thomas in their dissents in *Counterman*.

Moreover, quite recently Justice Sotomayor, who wrote the concurring opinion in *Counterman*, also indicated her view that *Counterman* applies in civil actions. *See Mckesson v. Doe*, 601 U.S. -- , 2024 WL 160734 (Apr. 15, 2024). In that document, Justice Sotomayor explained why she was voting to deny certiorari in the case of *Doe v. Mckesson*, 71 F.4th 278 (5th Cir. 2023), a case in which a police officer sued the organizer of a Black Lives Matter protest in a civil matter (for negligence) for injuries the officer suffered in the protest. In the course of her explanation, Justice Sotomayor advised the lower courts, which had rendered their decisions prior to *Counterman*, to "give full and fair consideration to arguments regarding *Counterman*'s impact in any future proceedings in this case." 2024 WL 160734 at *1. This admonition would have been nonsensical if Justice Sotomayor was of the view that *Counterman* did not apply in civil cases.

Defendants would add also that the Oregon Court of Appeals in *Cider Riot, LLC v. Patriot Prayer USA LLC*, 330 Or. App. 354 (2024) quite recently held that *Counterman* applies in civil actions, *id*. at 368-69, underscoring that there are substantial grounds for reasonable jurists to disagree on this question.

The Court's March 31, 2024 Order also set forth an alternative rationale for rejecting Defendants' arguments based on *Counterman*, i.e., that, assuming *Counterman* applied, the allegations in Plaintiffs' Amended Complaint satisfied the recklessness *mens rea* standard that *Counterman* articulated. As to this alternative rationale, however, the § 1292(b) criterion of substantial ground for disagreement is also satisfied. As this Court noted in *Gibbs v. Elevate Credit, Inc.*, 2021 WL 4851066, a "substantial ground for disagreement" for purposes of § 1292(b) may arise if there is a novel and difficult issue of first impression. *Id.* at *13. Further, as noted previously, in determining whether to grant § 1292(b) certification a court should weigh, among

other things, the "general importance of the question presented." 16 Charles Alan Wright et al., Federal Practice and Procedure § 3931 (3d ed. 2008). All three criteria – novel, difficult, and important – are present here.

The novelty is self-evident. No prior case to Defendants' knowledge has addressed application of the *Counterman* recklessness standard in a civil action. The difficulty of the question is also demonstrable, given that it entails a complex interplay involving the *Twombly* plausibility standard, the *Counterman* decision, and the pre-existing stringent standards for pleading § 1985(3) conspiracies. The closest and only real parallel to this question is the *New York Times v. Sullivan*, 374 U.S. 254 (1964) constitutional malice (also known as "actual malice") standard, which itself involves many complexities.

A focus on the profound changes to pleading standards wrought by the *Sullivan* decision, an era-changing decision that all the *Counterman* opinions – majority, concurrence, and two dissents -- considered of central relevance, also underscores the special importance of the issues that arise regarding the proper application of the *Counterman* recklessness standard. By any reckoning, the *Sullivan* constitutional malice standard has dramatically impacted pleading and proof in defamation claims. *See, e.g.*, John Bruce Lewis and Bruce L. Ottley, *New York Times v. Sullivan at 50: Despite Criticism, the Actual Malice Standard Still Provides "Breathing Space" for Communications in the Public Interest*, 64 DePaul L. Rev. 1, 1 (Fall 2014) (*Sullivan* opinion has "profoundly impacted defamation law and First Amendment rights"). More specifically, *Sullivan*'s constitutional malice standard has had a profound impact in preventing defamation claims from proceeding beyond the motion to dismiss stage. *See, e.g.*, Judy M. Cornett, *Pleading Actual Malice in Defamation after Twiqbal: a Circuit Survey*, 17 Nev. L. J. 709, 716 (2017) (noting that as of 2017 "no libel complaint filed by a public figure that has reached a Circuit Court of Appeals has succeeded in plausibly alleging actual malice"). A representative sample of the

barriers erected by *Sullivan*'s constitutional malice standard can be found in cases from the Eastern District of Virginia. Just in the last few years, numerous cases from the Eastern District have dismissed defamation claims on the grounds of insufficient pleading of constitutional malice, *i.e.*, subjective intent. *See, e.g.*, *McCullough v. Gannett Co., Inc.*, No. 1:22-cv-1099, 2023 WL 3075940 (E.D. Va. Apr. 25, 2023) at *13-15; *Agyapong v. Loud Silence Media, LLC*, No. 1:21-cv-1205, 2022 WL 21877624 (E.D. Va. Mar. 21, 2022) at *2-3; *Fairfax v. CBS Broadcasting, Inc.*, 534 F.Supp.3d 581, 592, 594-98 (E.D. Va. 2020); in particular, *see id*. at 597 ("As a general proposition, actual malice cannot be inferred from having a political or ideological animus toward a plaintiff, standing alone").

It is a fair statement, Defendants submit, that the *Counterman r*ecklessness standard that the Court applied in its March 31 Order would prevent very few true threat cases from proceeding beyond the motion to dismiss stage. Defendants, of course, contend that this interpretation of the recklessness standard was erroneous. At a minimum, however, the Order's salient departure from the *Sullivan* constitutional malice paradigm underscores the substantial grounds for disagreement that exist on this question.

Material Advancement of Ultimate Termination of Litigation. As noted earlier**,** there is considerable overlap between the "controlling" subpart of the first element and the "material advancement" element. Consequently, Defendants' previous discussion of the "controlling" aspect also supports the "material advancement" element. In addition, however, as several cases have noted, the fact that Defendants' § 1292(b) motion is being presented at an early stage of this litigation supports this element. *See, e.g.*, *Ekstrom*, 2021 WL 119000 at *4 ("[B]because the case is still in an early phase of litigation and substantive discovery has not yet occurred, an immediate appeal would materially advance the termination of litigation"); *UnitedHealth Grp. Inc. v. MacElree Harvey, Ltd.*, No. 16-1026, 2016 WL 5239675, at *3 (E.D. Pa. Sept. 21, 2016) (holding

that immediate appeal would materially advance termination of the litigation because the case was "early in its life-cycle" and "[s]ubstantial discovery ha[d] not yet occurred"*); Katz v. Live Nation*, Inc., No. 09-3740, 2010 WL 3522792, at * 3 (D.N.J. Sept. 2, 2010) ("Certification is more likely to materially advance the litigation where the appeal occurs early in the litigation, before extensive discovery has taken place and a trial date has been set.").

II. DEFENDANTS' CHALLENGE TO PLAINTIFFS' STANDING ALSO SATISFIES ALL CRITERIA FOR INTERLOCUTORY APPEAL.

In its Memorandum Opinion of March 31, 2024, the Court essentially converted the portion of Defendants' Motion to Dismiss under Fed. R. Civ. Proc. 12(b)(6) into a jurisdictional motion under Rule 12(b)(1). See Memorandum Opinion, ECF 127 at p. 19, n. 7. While the facts alleged by the Plaintiffs of course bear on the Court's ultimate rejection of Defendants' arguments, the application of the precedential standards applicable to standing is undoubtedly a question of law. And if the Plaintiffs had been held to lack standing to bring their claims, the Court would have opined that it lacked jurisdiction to proceed any further in this case; thus, the question of law with respect to standing is undoubtedly a "controlling" one. *See, e.g.*, *Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302, 307 (4th Cir. 2007) (reviewing on § 1292 interlocutory appeal whether plaintiffs had antitrust standing); *Montesa v. Schwartz*, 836 F.3d 176, 194 (2d Cir. 2016) (reviewing on § 1292(b) interlocutory appeal whether plaintiffs had standing to bring Establishment Clause claim).

With all due respect to this Court, there are substantial grounds for difference of opinion between how this Court ultimately ruled on the standing question, and how the Court of Appeals might ultimately rule. As was noted in the Memorandum in Support of Defendants' Amended Motion to Dismiss, the Supreme Court has consistently held that a plaintiff raising only a generally available grievance—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him

than it does the public at large—does not state an Article III case or controversy. *Lujan v. Defenders of Wildlife*, 505 U.S. 555, 573-74 (1992). Plaintiffs must allege, among other elements, facts demonstrating that they have suffered a concrete and particularized injury-in-fact. *Spokeo v. Robins*, 578 U.S. 330, 338 (2016).

The Plaintiffs in our case allege that Defendants painted over a mural of African-American civil rights icon Arthur Ashe in a City of Richmond public park, and that Defendants also affixed stickers showing the insignia of the Patriot Front group on the walls where the mural had been. There is no claim that Defendants confronted Plaintiffs, much less threatened them. There is no claim of any violent act against the Plaintiffs, no claim that the Plaintiffs witnessed violence against others, and no claim that Defendants threatened violence against any persons – Plaintiffs or otherwise. To the contrary, Plaintiffs complain that Defendants committed the acts complained of under cover of night, with no other persons present. The parties, according to the Plaintiffs' allegations, were never in each other's presence.

In attempting to rebut the defense argument, Plaintiffs contended, and the Court agreed, that Plaintiffs had sufficiently pled standing based on their claiming to have felt fear, and based on the City of Richmond having decided to close off at least some of its park facilities for some time after the incident. But there is nothing "concrete and particularized" about these claimed injuries. Plaintiffs cannot claim to have suffered anything beyond what anyone might have suffered with respect to their subjective feelings of fear, the actions they took or refrained from taking due to those fears, or the curtailment by the city of the general public's ability to access the park for some unspecified period of time. By Plaintiffs' arguments, any persons within an indeterminate radius of the park could have filed suit against the Defendants. All they need do is claim to have felt fear, and allege that they either have used the park on occasion, or might consider doing so in the future.

The concern here is not merely the number of potential plaintiffs. If Defendants had actually confronted a large number of persons with violence, or threats of violence, then Defendants might rightly have to defend claims brought by each and every person they confronted. Here, though, there are no claims of economic impact, physical touching, damage to property owned by the Plaintiffs, nor even something as modest as verbal abuse. With all due respect to this Court, it is difficult to imagine the low bar set by the Memorandum Opinion being applied to a less inflammatory tort claim. To apply a more generous rule of standing in this case because Defendants' actions supported their political beliefs puts this Court in the position of having taken a side in a First Amendment debate. No matter how abhorrent the Court may find Defendants' beliefs, it simply cannot allow its feelings to allow this hard case to make bad law.

If the Court of Appeals ultimately were to agree with the defense position, it would of course result in the end of this litigation. Thus, the third criterion for an interlocutory appeal is also satisfied.

III. THE *SCOPE* OF § *1985(3) QUESTION* SATISFIES ALL CRITERIA FOR A § 1292(B) INTERLOCUTORY APPEAL.

Controlling Question of Law. For reasons similar to those for the *Counterman v. Colorado Question*, the *Scope of § 1985(3) Question* satisfies the Controlling Question of Law criterion. One difference is that the *Counterman* question involved all three of Plaintiffs' claims while the *Scope* question involves two, i.e., Plaintiffs' § 1985(3) and § 1986 claims. But eliminating two of the three claims will substantially shorten the litigation, and that should be sufficient. *See Prince v. Johnson Health Tech Trading, Inc.*, 2023 WL 3190403 (W.D. Va. 2023) at *2

Substantial Ground for Difference of Opinion. Defendants in their briefs in support of their motion to dismiss argued that recognizing Plaintiffs' claims under § 1985(3) on the facts

alleged in Plaintiffs' complaint will entail an unprecedented expansion of the scope of § 1985(3) inconsistent with the guardrails against such expansion set forth in *United Brotherhood of Carpenters v. Scott*, 463 U.S. 825 (1983), *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), *Harrison v. KVAT Food Management, Inc.*, 766 F.2d 155 (4th Cir. 1985), and other cases. On these grounds alone, the substantial grounds for disagreement element is satisfied.

There is also additional support for this element. A hypothetical may add clarity.

Assume, if the Court will, that under facts identical to those alleged in Plaintiffs' complaint one of the alleged bad actors was initially charged under a criminal statute, for example 18 U.S.C § 245, which was the criminal statute invoked in *U. S. v. Bledsoe*, 728 F.2d 1094 (8th Cir. 1984), a case on which the Plaintiffs and the March 31 Order rely. Assume further that this alleged bad actor is acquitted, either because the court holds as a matter of law that under the facts as alleged no crime was stated under the criminal statute, or because the court or jury determined that the prosecution had not met its burden of proving guilt beyond a reasonable doubt. On this hypothetical scenario, could a resident of the park successfully, following the acquittal, bring a § 1985(3) claim? The answer, Defendants submit, is no. A focus on the Fourth Circuit's *Harrison* v. KVAT opinion, together with *Twombly* plausibility pleading standards, supports this negative answer.

In *Harrison*, the Fourth Circuit, adopting the Fifth Circuit's *en banc* holding in *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977), held that § 1985(3) "certainly extends no further than to provide redress to those persons who are deprived by others of legal rights by 'independently unlawful conduct.'" 766 F.2d at 162. The reason a negative answer in the hypothetical seems clear-cut is that, in light of the acquittal, the park residents could not plausibly allege under *Twombly* an independently unlawful violation by the bad actor (as *Harrison* requires) of a statute enacted under the authority of the Thirteenth Amendment (as *Bray* requires).

This conclusion is salient from the hypothetical but applies as well to the Plaintiffs' allegations and § 1985(3) claims in this case. Plaintiffs here must plausibly allege in accordance with *Twombly* and *Harrison* that Defendants' alleged vandalism "deprived [them] of legal rights [protected by the Thirteenth Amendment] by independently unlawful conduct" – i.e., Plaintiffs must identify a criminal statute (or perhaps a civil cause of action) enacted or authorized under the the Thirteenth Amendment under which a legal action against the Defendants, based on the facts alleged in Plaintiffs' complaint, would plausibly succeed. Plaintiffs have not done so. As this Court has acknowledged, the cases on which Plaintiffs rely, involving as they do murders, beatings, and brandishing of firearms, differ dramatically from the facts alleged in this case, involving spray painting over a mural and posting an ideological sticker on it. The fact that criminal convictions were obtained in Plaintiffs' cases under 18 U.S.C §§ 241 and 245 and similar criminal statutes does not support a plausible inference that criminal convictions could be obtained in this case. But if Plaintiffs cannot plausibly identify criminal statutes under which Defendants here would be convicted, they have not satisfied the requirement in *Harrison* of alleging "independently unlawful conduct."

This conclusion is consistent with the cases on which the Plaintiffs and the March 31 Order rely. In *Fisher v. Shamburg*, 624 F.2d 156 (10th Cir. 1980), for example, the Tenth Circuit explicitly stated that "[u]nder the factual allegations of the present case, the defendants could be criminally liable under 18 U.S.C § 241, as interpreted by *Johnson.* We find no logical reason to distinguish between the criminal liability imposed by section 241 and the civil liability imposed by section 1985(3)." *Id.* at 162. In *Sines v. Kessler*, 324 F.3d 765 (W.D. Va. 2018), the court stated that "the alleged violence is greater than that alleged in *Griffin* [*v. Breckenridge*, 403 U.S. 88 (1971)]," *id.* at 798, thus implicitly recognizing that to state a claim under § 1985(3) there must

be allegations of violence comparable to that alleged in *Griffin*, a case that, unlike the facts alleged in this case, involved direct confrontations and physical assaults of African-Americans.

Defendants recognize that the foregoing interpretation of *Harrison* and § 1985(3) differs from that adopted by the Court in its March 31 Order. They submit, however, that their interpretation is a rational one and that the substantial grounds for disagreement requirement for a § 1292(b) interlocutory appeal is therefore satisfied.

Material Advancement of Ultimate Termination of Litigation. For reasons similar to those for the *Counterman v. Colorado Question*, the *Scope of § 1985(3) Question* satisfies the Material Advancement criterion.

CONCLUSION

For these reasons, Defendants request that the Court certify its March 31, 2024 Order for interlocutory appeal under 28 U.S.C. § 1292(b).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2024, true and accurate copies of the foregoing were served via ECF procedures of this Court to the following counsel of record:

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