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' REPLY MEMORANDUM IN FURTHER 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 reply memorandum in further support of their motion for certification for interlocutory appeal of this Court's March 31, 2024 Order, ECF No. 128, which incorporated this Court's memorandum opinion, ECF 127.

Response to Plaintiffs' Preliminary Statement. Defendants object, as before, to Plaintiffs' use of inflammatory labels such as "white supremacist" as though they were objective factual statements. These characterizations are inconsistent with *Twombly's* admonition to avoid labels and with First Amendment principles protecting fair treatment to unpopular ideologies. They are particularly inappropriate here because intent is a key issue in this case and the labels incorporate evil intent.

Response to Plaintiff's Legal Standard. Defendants of course acknowledge the court's discretion with respect to certification under § 1292(b). But of equal importance, Defendants submit, is respect for the essential role § 1292(b) plays "to inject an element of flexibility into the technical rules of appellate jurisdiction," 16 Charles Alan Wright et al., *Federal Practice and Procedure* (3d ed. 2008), where, as here, the statutory requirements for certification have been satisfied.

ARGUMENT

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

Plaintiffs do not challenge that the *Countryman Question* meets the Controlling Question of Law criterion for certification. They do assert, however, that Defendants have not satisfied the Substantial Ground for Difference of Opinion element. This contention is untenable.

Plaintiffs first take issue with Defendants' assertion that the *Counterman* case applies in civil actions. In this regard, they depreciate the statements of Justice Sotomayor (author of the concurring opinion in *Counterman*) in *McKesson v. Doe*, 144 S.Ct 913, 914 (2024) as "non-precedential." It is, however, at the least odd to disregard the statements of a Supreme Court Justice with respect to interpreting a case in which she wrote a lengthy concurring opinion. Justice Sotomayor's statements in *McKesson* cannot reasonably be construed otherwise than that she was instructing that *Counterman* be applied to a civil case.

Plaintiffs further contend that even assuming *Counterman* applies to civil cases, this Court's application of *Counterman*'s recklessness standard has fully addressed and resolved any relevant issues. The Court's discussion of *Counterman*'s recklessness standard, however, was brief

and minimal.[1] The *Counterman* decision can fairly be characterized as articulating an "Actus Reus Plus More" standard for pleading and proof in cases involving the First Amendment's "true threat" exception – in other words, a standard under which it is not enough merely to plead and prove the defendant's wrongful act (actus reus) as evidence of his or her intent (mens rea), but additional factual evidence or allegations of intent are required.[2] This Court's discussion and application of the *Counterman* recklessness standard, however, infers intent based entirely on the actus reus – the vandalizing of the Arthur Ashe mural – without additional evidence of subjective intent. This is particularly problematic as to the brief and conclusory conspiracy allegations.

Defendants believe this interpretation of the *Counterman* recklessness standard was erroneous. For present purposes, however, the important point is that this interpretive task is novel and difficult, and, accordingly, presents a paradigmatic pattern for satisfying the Substantial Grounds for Disagreement criterion. *See, e.g., United States er rel. Al Procurement, LLC. v. Thermcor, Inc.,* 173 F. Supp. 3d 320, 323 (E.D. Va. 2016) (holding that a substantial ground for

[1] Plaintiffs in their opposition memorandum make the surprising statement that "Defendants do not contest the accuracy of any of the factual allegations, or whether the Court correctly found that those allegations met the recklessness standard." Opp. Memo. at 7. Defendants in fact stated explicitly that "Defendants, of course, contend that [the Court's] interpretation of the recklessness standard was erroneous." Defendants' Opening Memorandum at 7.

[2] The *Counterman* decision in this regard is consistent with the Supreme Court's earlier decision in *Virginia v. Black*, 538 U.S. 343 (2003), a case Justice Sotomayor discusses at length in her concurrence. In *Virginia v . Black,* the Supreme Court struck down as unconstitutional the prima facie evidence section of Virginia's cross burning statute, which the Virginia Supreme Court had interpreted such that "the burning of a cross, by itself, is sufficient evidence from which you may infer the required intent." The United States Supreme Court in *Virginia v. Black* held that the prima facie provision as thus interpreted was unconstitutional as it "strips away the very reason why a State may ban cross burning with the intent to intimidate. . . . The provision permits the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself." *Id.* at 364.

disagreement may arise if there is a novel and difficult issue of first impression); *Locke v. North Carolina State University*, No. 5:22-cv-344, 2024 WL 1588577 (E.D. N.C. Mar. 25, 2024) (granting certification where a question arising under Title IX was one of first impression in the Fourth Circuit).

Defendants would add that the *Counterman* decision operates analogously to a privilege or immunity -- i.e., it has been created to spare defendants from the travail and expense of litigation. Justice Kagan's emphasis on the chilling effects of the true threat exception without a subjective intent component solidifies this analogy. *See Counterman*, 600 U.S at 78 ("The speaker's fear of mistaking whether a statement is a threat; his fear of the legal system getting that judgment wrong; his fear, in any event, of incurring legal costs—all those may lead him to swallow words that are in fact not true threats . . . An objective standard, turning only on how reasonable observers would construe a statement in context, would make people give threats 'a wide berth' . . . And so use of that standard would discourage the 'uninhibited, robust, and wide-open debate that the First Amendment is intended to protect.") (Internal citations omitted). As the Supreme Court stated in *Mohawk Industries v. Carpenter*, 558 U.S. 100, 108 (2009), "[t]he preconditions for § 1292(b) review . . . are most likely to be satisfied when a privilege ruling involves a new legal question or is of special consequence, and district courts should not hesitate to certify an interlocutory appeal in such cases."

Finally, with regard to the material advancement element, it bears emphasis that the *Counterman* case, assuming it applies to civil actions, would apply to Plaintiffs' claim under the Virginia statute as well as their § 1985(3) and § 1986 claims, as the Virginia statute claim also asserts that Defendants' actions constituted true threats. Further as to the material advancement element, Plaintiffs' contention that Defendants' arguments based on *Counterman* would lead only to an amended complaint loses sight of the reality that any such amended complaint would also

lack the necessary guidance from the Fourth Circuit as to the complex interplay between the *Twombly* pleading standard, the impact of the *Counterman* holding, and pre-existing pleading standards applicable to civil rights conspiracy claims.

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

As with the *Counterman* Question, Plaintiffs do not challenge that the *Standing Question* meets the Controlling Question of Law criterion for certification. They also do not challenge the Material Advancement criterion; they could hardly do so, for, as explained in Defendants' opening memorandum, standing issues are jurisdictional in nature. Here again, however, Plaintiffs incorrectly assert that the Substantial Ground for Difference of Opinion element has not been satisfied.

In response, plaintiffs condescendingly characterize the defendants' arguments as "recycling their same arguments." *See* Memorandum in Opposition at p. 8. But of course, all appeals must, of necessity, rely on the same arguments made previously, since the right of appeal is deemed waived if the argument was not presented in the trial court. And of course, all appeals result from adverse rulings in the trial court. Defendants ask this Court not to be swayed by the mere use of denigrating language in what is, in reality, a situation common to any case involving any appeal, interlocutory or otherwise.

The only other point made by the plaintiffs in their opposition to the standing argument is to again rely on cases that did discuss claims of emotional harm – but in none of those cases was emotional harm claimed by itself, without any attendant confrontation or targeting.

For example, *Sines v. Kessler*, 324 F.Supp. 3d 765 (W.D. Va. 2018) involved claims arising out of the infamous "Unite the Right" riot in Charlottesville, and was brought by plaintiffs who

were struck by a car, pepper sprayed, or at minimum, subjected to in-person threats and confrontations. All of the plaintiffs there were present during the riot, and had direct interaction with the defendants. Standing was not even contested in *Sines*, much less ruled upon by the court there.

The other cases relied upon by the plaintiffs are not much more helpful to their position. *See Johnson v. Hugo's Skateway*, 974 F.2d 1408 (4th Cir. 1992)(plaintiff detained by defendant for what plaintiff contended were racial motivations); *National Coalition on Black Civic Participation v. Wohl*, 512 F. Supp. 3d 500 (S.D.N.Y. 2021)(plaintiffs were the specific recipients/targets of robotic telephone calls subjecting them to intimidation and threats); and *Thompson v. Trump*, 590 F. Supp. 3d 46 (D.D.C. 2022)(addressing the standing question for plaintiff congressmen who were present at the U.S. capitol during the riot of January 6, 2021 and who claimed that they were therefore proximately subjected to fear and emotional harm).

The lowest bar supported by any of these cases is emotional distress allegedly resulting from a confrontation that was either suffered in person, or specifically directed to the plaintiff by telephonic (i.e. oral) communication. Our plaintiffs do not allege even this much. No case has been found under which injuries so unsubstantiated and so attenuated have been found sufficient.

This Court has nonetheless held that our plaintiffs have satisfied the constitutional standing requirement. But defendants hope that this Court will at least acknowledge that the Court of Appeals may well draw the dividing line somewhere between the minimums found in the case precedents relied upon, and the circumstances of our plaintiffs here. And if the Court of Appeals ultimately proves so inclined, everyone involved will have been better served by learning that now, instead of postponing resolution of this issue until after a full trial has taken place.

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

As to the *Scope of § 1985(3) Question*, Plaintiffs assert that "Defendants point to no case supporting their interpretation [of] Section 1985(3)." Opp. Memo. at 10. This is inaccurate. Defendants in fact cited and discussed *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 and addressed how Defendants' argument rested logically on basic principles articulated in those cases.

Plaintiffs further deprecated Defendants' hypothetical as a "straw-man." They did not, however, respond directly to the hypothetical, which, Defendants submit, exposes the faulty foundations for Plaintiffs' attempt to expand the scope of § 1985(3) far beyond what any prior case has done. Plaintiffs in reality seek to create a new substantive cause of action that is an amalgamation of § 1985(3)'s civil action preponderance of the evidence standard and claims under criminal statutes that require a more stringent beyond reasonable doubt standard, in contravention of the Supreme Court's repeated assertions that § 1985 must not be used to create a new substantive cause of action. *See, e.g., Great American Federal Savings & Loan Ass'n v. Novotny*, 442 U.S. 366, 376 (1979).

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 May 20, 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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