23-7577

In the United States Court of Appeals for the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

v.

DOUGLAS MACKEY,

Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of New York
Case No. 21-cr-00080-AMD

AMICUS CURIAE BRIEF OF PROFESSOR RICHARD L. HASEN IN SUPPORT OF APPELLEE AND AFFIRMANCE

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INTEREST OF AMICUS[1]

Richard L. Hasen is Professor of Law and Political Science at UCLA School of Law, where he directs the Safeguarding Democracy Project that aims to preserve free and fair elections in the United States. Professor Hasen is an internationally recognized expert in election law, and author of many books on elections and election law including, most recently, *A Real Right to Vote* (Princeton University Press 2024).

From 2001-2010, he served as founding co-editor of the quarterly peer-reviewed publication, *Election Law Journal*. He is the author of over 100 articles on election law issues, published in numerous journals including the *Harvard Law Review*, *Stanford Law Review*, and *Supreme Court Review*. He was elected to The American Law Institute in 2009 and serves as Co-Reporter on the Institute's law reform project, Restatement (Third) of Torts: Remedies.

Professor Hasen submits this brief to explain that the protection of federal rights in 18 U.S.C. § 241 ("Section 241") does extend to

[1] No party or its counsel had any role in authoring this brief. No person or entity—other than *amicus curiae* and his counsel—contributed money that was intended to fund preparing or submitting this brief.

conspiracies to spread knowingly false information about when, where, or how people vote in a federal election to prevent people from voting as the Government contends.[2] Pursuant to Federal Rule of Appellate Procedure 29(a)(2), *amicus* has authority to file this brief because all parties have consented to the filing.

[2] *Amicus* speaks on his own behalf and the views expressed herein do not necessarily reflect the official views, if any, of *amicus*'s or his counsel's institutions.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns the criminal conviction of Douglas Mackey under 18 U.S.C. § 241 for conspiring "to use Twitter to trick American citizens into thinking they could vote by text and stay at home on Election Day—thereby suppressing and injuring those citizens' right to vote." Gov't Br. 2. All parties agree that the government "may prohibit messages intended to mislead voters about voting requirements and procedures" consistent with the First Amendment. *Minn. Voters All. v. Mansky,* 138 S. Ct. 1876, 1889 n.4 (2018). The primary legal questions before this Court are whether Section 241 prohibits such intentionally misleading statements and whether it does so without being substantially overbroad in violation of the Constitution.

Section 241 properly construed does punish purposeful lies about when, where, or how people vote and is not overbroad. It prohibits, among other things, conspiracies to "injure . . . any person . . . in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States." 18 U.S.C. § 241. Its prohibition on conspiracies to "injure" proscribes purposeful lies about the mechanics of voting in federal elections because that conduct inflicts

an "injury" redressable under tort law dating back over three hundred years. *See* Restatement (Second) of Torts § 865 (Am. L. Inst. 1979); Restatement (First) of Torts § 865 (Am. L. Inst. 1939). Construing conspiracies to "injure" to encompass conspiracies to engage in conduct recognized as tortious at common law preserves Section 241's important protection of the right to vote while avoiding the First Amendment overbreadth concerns that would arise from an open-ended reading of the statute to criminalize deceptive, but not tortious, political speech.

A unanimous Supreme Court in an opinion by Chief Justice Rehnquist took just this approach in construing the almost contemporaneously enacted Enforcement Act of 1871. *See Haddle v. Garrison*, 525 U.S. 121, 124 (1998). The *Haddle* Court concluded that a plaintiff is "injured" under Section 2 of the 1871 Act when the plaintiff suffers "a compensable injury under tort law." 525 U.S. at 126. In parallel fashion, Section 241's proscription of conspiracies "to injure" someone in their exercise of a federal right extends to conspiracies to infringe the right to vote through knowing lies about "voting requirements and procedures," *Mansky*, 138 S. Ct. at 1889 n.4, because

intentional interference with the right to vote is a compensable injury under tort law.

Haddle's conclusion that the injuries recognized by Section 2 of the Enforcement Act of 1871 are those cognizable under the common law of torts applies to Section 241, which derives in relevant part from Section 6 of the Enforcement Act of 1870. The same term used in two laws passed within a year of each other should be construed consistently, particularly where both laws addressed a common subject and sought a common objective—ending resistance to Reconstruction. Indeed, the Supreme Court recognizes the two statutes to be "close[] . . . analogue[s]." *Griffin v. Breckenridge*, 403 U.S. 88, 98 (1971).

Applying *Haddle*'s interpretation that a conspiracy to "injure" under Section 241 means a conspiracy to undertake conduct recognized as tortious at common law does *not* mean that every conspiracy to commit a tort violates Section 241. That would transgress the Supreme Court's instruction that Reconstruction laws should not be interpreted as "open-ended federal tort law applicable to *all* tortious, conspiratorial interferences with the rights of others." *Kush v. Rutledge*, 460 U.S. 719, 725-26 (1983) (emphasis added) (cleaned up). Instead, Section 241 more

narrowly prohibits conspiracies to commit a tort only when the tortious act is committed for the purpose of infringing a right protected by "the Constitution or laws of the United States." 18 U.S.C. § 241; *see United States v. Price*, 383 U.S. 787, 800-01, 806 (1966).

Private tortious conspiracies thus violate Section 241 only when they seek to (i) infringe a constitutional right secured against private actors, *see, e.g.*, *United States v. Kozminski*, 487 U.S. 931, 940 (1988) (Thirteenth Amendment); *United States v. Guest*, 383 U.S. 745, 757-60 (1966) (right to travel), or (ii) infringe a right created by a federal law enforceable against private parties, *Price*, 383 U.S. at 798. For example, while the common law imposes liability for burglaries and muggings, a conspiracy to commit these torts is not punishable under Section 241 unless the tortious conduct is undertaken for the purpose of interfering with a federally protected right. *See United States v. Cruikshank*, 92 U.S. 542, 549 (1875); *cf. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 278 (1993) ("A burglar does not violate the Fourth Amendment . . . nor does a mugger violate the Fourteenth.").

Applying the *Haddle* definition of "injure" to Section 241 has three implications relevant to this appeal:

First, a conspiracy to deny the right to vote by intentionally misleading voters about voting mechanisms and procedures in a federal election constitutes a conspiracy "to injure" because the common law of torts has long recognized liability for interference with the right to vote. One who undertakes a consciously wrongful act (including fraud) that (i) intentionally deprives another of the right to vote or (ii) seriously interferes with the right to vote inflicts a legally cognizable injury for which a remedy is available in tort. *See* Restatement (Second) of Torts § 865; Restatement (First) of Torts § 865.

Second, construing conspiracies "to injure" within Section 241 to encompass conspiracies to commit this tort avoids constitutional conflict with the First Amendment. There is no First Amendment right to spread knowingly false information about voting mechanisms and procedures in a federal election with the intent to disenfranchise voters. *See Mansky*, 138 S. Ct. at 1889 n.4. Applying the *Haddle* definition also avoids any "substantial" overbreadth in the scope of Section 241 relative to its "plainly legitimate applications" as would be necessary to justify facial invalidation. *Virginia v. Hicks*, 539 U.S. 113, 120 (2003). The supposed potential for an explosion of prosecutions for protected speech

that troubles Defendant Mackey and his *amici* is dispelled by the *Haddle* construction of "injure" because most of their proffered examples do not impose a harm cognizable under tort law and thus would not fall within the ambit of conspiracies to "injure" under Section 241.

Third, a conspiracy undertaken to deny the right to vote in a presidential election, as alleged here, violates Section 241 because the tortious conspiracy would infringe multiple federal rights secured against both private parties and state actors:

- It violates the Article I, Section 2 right to vote for members of Congress, *see Ex Parte Yarbrough*, 110 U.S. 651, 663-64 (1884), because disseminating lies about the mechanics of voting to disenfranchise voters in a presidential election necessarily disenfranchises voters in simultaneous congressional elections;
- It violates the "right[] and privilege[] . . . secured to citizens of the United States by the Constitution" for voters eligible under state law "to vote for presidential electors," *In re Quarles*, 158 U.S. 532, 535 (1895); and

- It violates the federal right to engage in support or advocacy for presidential candidates free from injury guaranteed by 42 U.S.C. § 1985(3).

The Government correctly contends that Section 241 prohibits conspiracies to disseminate knowingly false information about the time, place, and manner of a presidential election to mislead voters. Enforcement of this prohibition is particularly needed given the ease with which false information can be spread today by bad actors, and the growing loss of confidence in the integrity of our elections. *See generally* Nathaniel Persily & Charles Stewart III, *The Miracle and Tragedy of the 2020 U.S. Election*, 32 J. Democracy 159 (2021).

ARGUMENT

I. Section 241 Prohibits Conspiracies to Deny the Right to Vote in a Federal Election, Including Through False Statements Intended to Mislead Voters About the Mechanics of Voting

A. The term "injure" in Section 241 denotes the infliction of harms cognizable as tortious at common law.

Section 6 of the Enforcement Act of 1870 enacted the prohibition at issue here on conspiracies "to injure" any person in the free exercise

of federal rights.[3] It was the first of three laws passed in quick succession that sought to end resistance to Reconstruction and protect civil rights.[4] Other provisions of those acts prohibited conspiracies to "injure" a variety of specific federal rights. For example, Section 2 of the Enforcement Act of 1871 prohibited conspiracies to "*injure*" witnesses in federal court on account of their testimony and lawful voters on account of their "support or advocacy" for congressional or presidential candidates, among other things. 17 Stat. at 13 § 2. Section 2 also gave anyone "*injured* in his person or property" by such a conspiracy "an action for the recovery of damages occasioned by such *injury*." *Id.* (emphasis added).

These civil prohibitions survive to this day in 42 U.S.C. § 1985 ("Section 1985"), and there is a body of case law interpreting the terms "injure" and "injury" in Section 1985. Most relevant here is *Haddle v. Garrison*, which resolved a circuit split over the interpretation of the

[3] *See* Act of May 31, 1870, Ch. 113, 16 Stat. 140, 141 § 6.

[4] *See* Act of Feb. 27, 1871, Ch. 99, 16 Stat. 433; Act of April 20, 1871, Ch. 22, 17 Stat. 13.

phrase "injured in his property or person" in Section 1985(3).[5] 525 U.S. at 124. The unanimous *Haddle* Court concluded that plaintiffs are "injured" for the purposes of Section 1985 when they suffer "a compensable injury under tort law." *Id.* at 126.

Haddle looked to the Second Restatement of Torts to determine whether the plaintiff was injured under the Act. It concluded that an at-will employee who sued individuals for conspiring to have him fired for his participation in a federal criminal trial had suffered a compensable injury because the "kind of interference with at-will employment relations alleged here is merely a species of the traditional torts of intentional interference with contractual relations and intentional interference with prospective contractual relations." *Id.* at 126-27 (citing Restatement (Second) of Torts § 766 cmt. g (Am. L. Inst. 1979)).

Accepting *Haddle*'s conclusion that Congress meant that someone is "injured" when they suffer "a compensable injury under tort law," 525

[5] Section 1985(3) provides the cause of action for victims injured by any conspiracies prohibited by Section 1985. *See Kush*, 460 U.S. at 726 n.9.

U.S. at 126, requires the parallel conclusion that a conspiracy to commit a common law tort is a conspiracy "to injure" under 241.[6]

This approach should be followed for multiple reasons. The "similarity of language" between the two provisions, *Northcross v. Bd. of Ed. of Memphis City Schs.*, 412 U.S. 427, 428 (1973), and their "similar purposes," *Wasser v. N.Y. State Off. of Vocational & Educ. Servs.*, 602 F.3d 476, 479-80 (2d Cir. 2010), plainly counsel in favor of similar methods of interpretation, particularly given that the 1870 and 1871 Acts are "close[] . . . analogue[s]." *Griffin*, 403 U.S. at 98.

Moreover, it is a "settled principle of statutory construction that, absent contrary indications, Congress intends to adopt the common law definition of statutory terms." *United States v. Shabahi*, 513 U.S. 10, 13 (1994). Understanding a conspiracy to "injure" to mean a conspiracy to inflict a harm redressable at common law accords with the term's meaning at the time of enactment. *See, e.g.*, J. Bouvier, *A Law*

[6] The infinitive form "to injure" in Section 241 and Section 1985(2) has the same meaning as the past participle form "injured" in Section 1985(3). *Haddle* addresses both Sections 1985(2) and 1985(3) and does not distinguish between the verb forms. *See* 525 U.S. at 125 (examining "the language or purpose of" § 1985(2)" and "its attendant remedial provisions" in § 1985(3)).

Dictionary Adapted to the Constitution and Laws of the United States of America 636 (14th ed. 1871) (defining "injury" as "[a] wrong or tort"). At the very least, *Haddle* should set a *floor* on what constitutes a conspiracy to injure in Section 241, as the statutory language at issue here should not be accorded an understanding "narrower than the common law definition" of a relevant term. *United States v. Crochiere*, 129 F.3d 233, 239 (1st Cir. 1997).

Construing "injure" in Section 241 consistent with *Haddle* disallows the distinction Mackey attempts to draw between injuries and deception. Def. Br. 18-19.[7] Under the *Haddle* approach, a conspiracy to deceive is a conspiracy to injure within the meaning of Section 241 when the conspiracy to deceive would be redressable at common law and is undertaken to deny someone a federal right. *E.g.*, *Peonage Cases*, 123 F. 671, 682-83 (M.D. Ala. 1903) (finding Section 241 violated by a deception constituting an abuse of process—"falsely accus[ing] another

[7] Prior case law does not reflect this distinction. *See United States v. Stone*, 188 F. 836, 840 (D. Md. 1911) (refusing to limit "injure" in what is now Section 241 to "personal or bodily harm to a citizen or to do some act with intent to control or coerce his will" and rejecting motion to dismiss indictment for creating ballots intended to deceive illiterate voters).

of crime . . . in order that he may be convicted and put to hard labor"). Construing Section 241 in this manner treats deceptive speech that injures the same way that case law treats deceptive speech that intimidates (another word on Section 241's list of prohibitions), wherein false speech is not inherently proscribed but may be when it is intimidating.[8]

Using the *Haddle* approach to construe Section 241, the relevant question for this appeal becomes whether knowingly false speech intended to disenfranchise voters inflicts an injury compensable at common law.

B. A deprivation of the right to vote—including through fraud—inflicts a cognizable injury under the common law of torts.

Even before the Constitution, the right to vote was protected by tort law. Under English common law, an intentional denial of the right to vote imposed a legally cognizable injury. *See Ashby v. White* (1703) 92 Eng. Rep. 126 (KB).

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[8] *E.g.*, *Nat'l Coal. on Black Civic Participation v. Wohl*, 661 F. Supp. 3d 78, 113-17 (S.D.N.Y. 2023); *League of United Latin Am. Citizens Richmond Region Council 4614 v. Pub. Int. Legal Found. ("LULAC")*, No. 18-423, 2018 WL 3848404, at *4 (E.D. Va. 2018).

The seminal English case on this point arose from the actions of a local constable that prevented the plaintiff Ashby from voting in the parliamentary election of 1700. Ashby sued for the denial of his right to vote and obtained a jury verdict of 200 pounds. *Id.* at 128. An appellate court reversed because, among other things, Ashby failed to prove monetary damage, *id.* at 130, but a vigorous dissent by Chief Justice Holt ultimately carried the day when the House of Lords reinstated the trial court judgment. *Id.* at 138-39; *see Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 799 (2021) (noting that the House of Lords "validat[ed] Lord Holt's position").

Because "the right of voting . . . is a thing of the highest importance, and so great a privilege," Lord Holt reasoned, "it is a great *injury* to deprive the plaintiff of it." *Ashby*, 92 Eng. Rep. at 136 (emphasis added). The right to vote being "a right in the plaintiff by the common law," Ashby could maintain a tort action for its deprivation without a showing of pecuniary harm. *Id.* at 136-37.

American courts have adopted Lord Holt's position. Justice Story, riding circuit, described Lord Holt's reasoning "as to a violation of the right to vote" as "incontrovertibly established." *Webb v. Portland Mfg.*

Co., 29 F. Cas. 506, 508 (C.C.D. Me. 1838) (No. 17,322). Justice Holmes later underscored that the ability to recover for "private damage" caused by a denial of the right to vote "hardly has been doubted for over two hundred years, since *Ashby v. White*." *Nixon v. Herndon*, 273 U.S. 536, 540 (1927). This is not forgotten history. Just recently, the Supreme Court cited *Ashby* again for the principle that "denial of the right to vote" inflicts a "personal injury" such that "a plaintiff could always obtain damages" at the common law even if he "does not lose a penny by reason of the violation." *Uzuegbunam*, 141 S. Ct. at 799 (cleaned up).

Unsurprisingly, Section 865 of both the First and Second Restatements of Torts recognize that intentional interference with the right to vote constitutes a tort.[9] This tort requires: (1) a consciously wrongful act; (2) that the act is done with intent to deprive another of a right; and (3) a victim who possesses a right to vote. Restatement

[9] *See* Restatement (Second) of Torts § 865 ("One who by a consciously wrongful act intentionally deprives another of a right to vote in a public election . . . or seriously interferes . . . is subject to liability . . . ."); Restatement (First) of Torts § 865 ("A person who by a consciously wrongful act intentionally deprives another of a right to vote in a public election . . . is liable to the other in an action of tort.").

(Second) of Torts § 865 cmt. a. The Restatement recognizes as actionable such conduct as "the use of tortious force, fraud or duress against either the other or a third person, bribery of a third person or the use of an official position to prevent the exercise of the right." *Id.* Knowingly false or deceptive conduct has specifically been found actionable. *See, e.g.*, *State, to Use of Bradshaw v. Sherwood*, 42 Mo. 179, 183 (1868) (acknowledging common law remedy for "tortious fraudulent acts" of a county clerk who falsely certified winner of election). The tort permits recovery against both private parties and state actors. *See, e.g.*, *Morris v. Colo. Midland Ry. Co.*, 109 P. 430, 431-32 (Colo. 1910).

A tortfeasor acts with "intent" when the tortfeasor "desires to cause consequences of the act, or believes that the consequences are substantially certain to result from it." Restatement (Second) of Torts § 8A (Am. L. Inst. 1965) (cleaned up); *see also* Restatement (Third) of Torts: Phys. & Emot. Harm § 1 (Am. L. Inst. 2010) (providing similar definition of "intent"). When an actor acts with the intent to disenfranchise, that actor can be liable for both direct and indirect

interference with the right to vote.[10] Tort liability does not require success in disenfranchising anyone—a serious interference with the plaintiff's right to vote is enough to give rise to a common law claim for damages. *See* Restatement (Second) of Torts § 865 cmt. b.

Given this common law tort, the *Haddle* framework instructs that a conspiracy to engage in a consciously wrongful act with the intent to deny eligible voters the right to vote should be considered a conspiracy "to injure" under Section 241. Just as *Haddle* relied on the Second Restatement of Torts to conclude that the plaintiff was "injured" under the Enforcement Act of 1871 because the defendants had committed the "traditional torts" of intentional interference with existing and prospective contractual relations, 525 U.S. at 126-27, this Court should look to the Second Restatement of Torts and conclude that intentionally misleading voters about the time, place, and manner of a federal election constitutes a conspiracy "to injure" under the Enforcement Act

[10] *See Griffin v. Rising*, 52 Mass. 339, 342-43 (1846) (remanding to determine whether defendant tax assessor's failure to levy a poll tax on plaintiff, rendering him unable to vote, was done intentionally to deny plaintiff his right to vote); *Morris*, 109 P. at 432 (recognizing a potential claim *if* private railway company's failure to get voters to the polls was willful and malicious).

of 1870 because it constitutes the traditional tort of intentional interference with a right to vote.

Applying the *Haddle* construction to the Enforcement Acts avoids much of the parade of horribles proffered by Mackey and his supporting *amici* because many of their hypotheticals do not involve tortious conduct. For example, advocating and voting for laws creating "voter-identification requirements or limits on early voting," Def. Br. 23, are not tortious acts. Neither those who advocate for a policy that may make voting harder for some people, nor legislators voting for such a policy, would be using "tortious force, fraud or duress against either the other or a third person" or "bribery of a third person" under Section 865. Nor would legislators enacting strict voter ID laws or limiting early voting be using their "official position to *prevent* the exercise of the right," Restatement (Second) of Torts § 865 cmt. a (emphasis added), even if they intended to increase the marginal cost of voting (*i.e.*, the effort needed to vote).[11]

[11] In addition, the exercise of a legislative function is immune from tort liability. *See* Restatement (Second) of Torts § 895B(3)(a).

Tort liability could exist at common law only with proof of a specific intent to *disenfranchise eligible voters*. Adopting policies to stop ineligible persons from voting is not tortious,[12] and *amicus* has found no case imposing tort liability for legislative actions that increase the cost of voting for, but do not disenfranchise, eligible voters.[13] "[U]nless" a plaintiff can show a defendant acted with the "willful and malicious object" of denying the right to vote, "there is no cause of action." *Morris*, 109 P. at 432; *see also Weckerly v. Geyer*, 11 Serg. & Rawle 35, 39 (Pa. 1824) (finding that "malice is an ingredient, without which the action cannot be supported").[14]

Thus, under the *Haddle* approach, a state or local official could be liable under Section 241 if they intended to deny the vote to an eligible voter by enforcing a state law *prohibiting* voting (such as a grandfather

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[12] *See, e.g.*, *Curry v. Cabliss*, 37 Mo. 330, 336-37 (1866) (affirming dismissal of tort claim because plaintiff did not show he was a qualified voter under state law).

[13] *Cf. Capen v. Foster*, 29 Mass. 485, 494 (1832) (rejecting tort liability against officials enforcing a reasonable "additional qualification" to vote enacted as a valid exercise of legislative power).

[14] At common law, malice is defined as "[t]he intent, without justification or excuse, to commit a wrongful act." *Malice*, *Black's Law Dictionary* (7th ed. 1999).

clause that violates the Fifteenth Amendment) while *knowing* the state law to be unconstitutional. *But that is already the law*. *See Guinn v. United States*, 238 U.S. 347, 356, 367-68 (1915).

* * *

Simply put, only "wrong[s] which [are] willfully, fraudulently, or corruptly perpetrate[d]" could give rise to common law liability for interfering with the right to vote. *Friend v. Hammil*, 34 Md. 298, 304 (1871). History shows that these hurdles are not easily cleared. In fact, plaintiffs frequently failed to sustain common law claims for lack of proof of a consciously wrongful act or of an intent to deny their right to vote.[15] These same common law constraints derail the prospect of runaway liability under Section 241.

[15] *See, e.g.*, *Perry v. Reynolds*, 53 Conn. 527, 557 (1886) (dismissing case where "there is no allegation of wanton or malicious conduct"); *Carter v. Harrison*, 5 Blackf. 138, 138-39 (Ind. 1839) (approving jury instruction requiring proof that defendants acted to "wrongfully and maliciously deprive a man of his right to vote"); *Jenkins v. Waldron*, 11 Johns. 114, 120-21 (N.Y. Sup. Ct. 1814) (reversing award where no showing of defendants' "malice express or implied"); *Drewe v. Coulton* (1787), reported in note to *Harman v. Tappenden* (1801) 1 East 563-64 (KB) (rejecting claim where plaintiff could not show malice).

II. Section 241's Prohibition of Conspiracies to Deny the Right to Vote in a Federal Election Is Not Unconstitutionally Overbroad and Does Not Violate the First Amendment

Both Mackey and his *amici* contend that the Government's interpretation of Section 241 creates significant First Amendment problems. Whatever purchase those arguments might have on the Government's interpretation of the statute (a position on which *amicus* expresses no view), those attacks do not establish any constitutional problem when Section 241 is interpreted consistently with *Haddle*.

At the outset, it is important to note that facial and as-applied First Amendment challenges have different substantive elements. *See John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010). Mackey does not directly make an as-applied challenge to the application of Section 241 to a conspiracy to spread knowingly false speech about the time, place, and manner of a federal election to mislead voters. *See* Def. Br. 31. Nor could he, given the Supreme Court's acknowledgment in *Mansky* that a "State may prohibit messages intended to mislead voters about voting requirements and procedures." 138 S. Ct. at 1889 n.4; *see also* Richard L. Hasen, *Cheap Speech* 109-15 (2022) (explaining that a prohibition on empirically verifiable false statements about the mechanics of voting

made with actual malice is consistent with the First Amendment under Supreme Court precedents, including *Mansky* and *United States v. Alvarez*, 567 U.S. 709, 719 (2012)).

Instead, the First Amendment question raised by Mackey is whether Section 241 "punishes so much protected speech that it cannot be applied to *anyone*, including" him. *United States v. Hansen*, 599 U.S. 762, 769 (2023). To succeed in that overbreadth challenge, Mackey "must therefore satisfy" the Supreme Court's "standards for a facial challenge." *Reed*, 561 U.S. at 194.

Invalidation for overbreadth is "strong medicine that should be employed only as a last resort." *L.A. Police Dep't v. United Reporting Publ'g Corp.,* 528 U.S. 32, 39 (1999) (cleaned up). "The mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *United States v. Williams*, 553 U.S. 285, 303 (2008) (cleaned up). Rather, a statute is overbroad under the First Amendment only if it "punishes a substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep." *Hicks*, 539 U.S. at 118-19 (cleaned up). "In the absence of a lopsided ratio, courts must handle

unconstitutional applications as they usually do—case-by-case." *Hansen*, 599 U.S. at 770.

Section 241 prohibits a wide range of conduct undertaken to deny a federally protected right. The overbreadth question asks whether, construed consistently with *Haddle*, Section 241 punishes a substantial amount of protected speech in relation to the totality of tortious conduct and unprotected speech proscribed. The question is not whether a narrower statute targeting only specific speech is theoretically possible. As *Hicks* explains, "the overbreadth doctrine's concern with chilling protected speech attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from pure speech toward conduct," so "[r]arely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech." 539 U.S. at 124.[16]

[16] For example, statutes prohibiting voter intimidation can incidentally proscribe false statements about the mechanics of elections. *See supra* n.8. That does not make prohibitions on voter intimidation unconstitutionally overbroad, even though a law specifically targeting false statements about the mechanisms of voting would be theoretically possible. *Cf. R.A.V. v. St. Paul*, 505 U.S. 377, 389 (1992) (observing no constitutional problem with a "content-based subcategory of a proscribable class of speech" being "swept up incidentally within the reach of a statute directed at conduct rather than speech").

The *Haddle* construction of Section 241 has a broad "plainly legitimate scope." After all, there are many tortious actions to disenfranchise that do not implicate speech—battering or falsely imprisoning someone to prevent them from entering a polling place would be covered by Section 241, for example. Even when words are part of a tortious course of conduct—for example by assaulting the plaintiff by saying "if you enter the polling place, I will hit you" or defrauding the plaintiff by falsely stating "you may be arrested if you vote because it is illegal to vote unless you've paid the poll tax"—such applications of Section 241 pose no First Amendment problem. They either fit within a recognized categorical exception (such as fraud, true threats, or speech incidental to a course of proscribable tortious or criminal conduct) or survive constitutional scrutiny. *See Burson v. Freeman*, 504 U.S. 191, 199, 211 (1992) (plurality opinion) (upholding law under strict scrutiny analysis and explaining that preventing voter confusion is—on its own—a compelling state interest).

The underlying governmental interests protected by Section 241 are compelling. "The right to vote freely for the candidate of one's choice is of the essence of a democratic society," *Reynolds v. Sims*, 377 U.S.

533, 554 (1964), and the basis for the legitimate exercise of presidential power, *see Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2203 (2020). As a result, prohibitions against injuring eligible voters in federal elections like Section 241 are "essential to the successful working of this government." *Yarbrough*, 110 U.S. at 666.

Applying the *Haddle* interpretation preserves Section 241's protection of these interests while avoiding any overbreadth issue by removing protected First Amendment speech from the reach of Section 241. It eliminates the concerns raised in *Alvarez* about regulation of false speech about political campaigns and related matters because Section 241, so construed, only incidentally regulates false speech when it is part of a tortious course of conduct imposing "a legally cognizable harm." 567 U.S. at 719. Statements about when, where, or how people vote are empirically verifiable, and punishing deliberate lies about voting mechanics and procedures does not raise issues of discretion or interpretation: saying "Democrats vote on Tuesday and Republicans vote on Wednesday," for example, is easily proven false by reference to earlier-published election materials. It has nothing to do with the kind of contested lies warned of in *Alvarez*. It requires no judgment to

determine the truth of the statement about the mechanics of voting, compared to, say, an arguably false statement that the last election was "rigged."

Moreover, the requisite elements of the underlying torts that define the scope of Section 241 liability, along with recognized First Amendment limitations on those torts, furnish the "materiality, reliance, [and] injury element[s]" that Mackey demands. Def. Br. 29; *see also* Br. for Amicus Curiae Eugene Volokh at 21 (suggesting need for "showing of materiality or reliance").[17] Tort law affecting speech has been around since the dawn of the republic without being considered "the most pronounced overbreadth violation" in American law, Def. Br. 25, creating a "sprawling speech code," Def. Br. 13, or transforming the

[17] *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 579 (1996) ("[A]ctionable fraud requires a *material* misrepresentation or omission.") (citing Restatement (Second) of Torts § 538 (Am. L. Inst. 1977)); *Basic Inc. v. Levinson*, 485 U.S. 224, 238 (1988) ("[A] plaintiff must show that the statements were misleading as to a material fact."); *see also Universal Health Servs., Inc. v. United States*, 579 U.S. 176, 193 (2016) (explaining that facts are material when either (i) a reasonable listener "would attach importance" to the false information "in determining his choice of action" or (ii) "if the defendant knew or had reason to know that the recipient of the representation attaches importance to the specific matter in determining his choice of action, even though a reasonable person would not" (cleaned up)).

judiciary into the "Ministry of Truth," Def. Br. 28 (cleaned up). The specific standards in Section 865 of the Second Restatement provide just the kind of limitations that would stop a slide down Mackey's slippery slope.

Nor will the *Haddle* approach result in the runaway explosion of liability that Mackey and his supporting *amici* envision. *See supra*, Section I.B. Wearing a "Please ID Me" button is not a tort. Br. for Amicus Curiae Eugene Volokh at 19. Neither is "peaceful picketing outside a political party's headquarters." *Id.* at 18. Nor is "true speech, false speech deriding government policy, and false speech about history, social science, and the like." *Id.* at 15. None of these involves "the use of tortious force, fraud or duress against either the other or a third person, bribery of a third person or the use of an official position to prevent the exercise of the right" to vote. Restatement (Second) of Torts § 865 cmt. a.

In the end, consistently applying the *Haddle* interpretation of "injure" as used in the Enforcement Acts avoids any risk of a constitutional conflict. As in *Hansen*, the overbreadth challenge by Mackey and his *amici* asks this Court "to throw out too much of the

good based on a speculative shot at the bad." 599 U.S. at 784-85. And as in *Hansen*, "as-applied challenges can take it from here." *Id.* at 785.

III. Section 241 Prohibits Private Conspiracies to Deprive the Right to Vote in Both Congressional and Presidential Elections

Both Mackey and the Former Officials *amici* contend that Section 241 cannot apply to purely private conspiracies to interfere with the right to vote in presidential elections. Def. Br. 34; Br. for *Amici Curiae* Former Department of Justice Officials ("Former Officials Br.") at 2-17. If this Court reaches this question,[18] it should conclude that Section 241 does reach purely private conspiracies to disenfranchise eligible voters in presidential elections because doing so infringes a "right or privilege secured . . . by the Constitution or laws of the United States," 18 U.S.C. § 241, for at least three independent reasons.

First, as Mackey concedes, Def. Br. 34, the right to vote in congressional elections is secured against private interference. *See Yarbrough*, 110 U.S. at 663-64. Section 241 does not require that interference with a congressional election be the sole purpose of a

[18] *Amicus* expresses no view on whether this argument was preserved in district court.

conspiracy. "A single conspiracy may have several purposes, but if one of them—whether primary or secondary—be the violation of a federal law, the conspiracy is unlawful under federal law." *Anderson v. United States*, 417 U.S. 211, 226 (1974).

Mackey's attempt to distinguish between congressional and presidential elections, Def. Br. 34, is illogical in cases such as this involving the intentional dissemination of false information about the time, place, and manner of voting. Presidential and congressional elections are held at the same time, *see Foster v. Love*, 522 U.S. 67, 70 (1997), so a message telling voters in a presidential election that they can "Avoid the line" and "Vote from home," A371, necessarily interferes with (and appears calculated to interfere with) the constitutional right to participate in the simultaneous congressional election.

Second, Section 241 extends to unlawful conspiracies to infringe upon "certain rights" that "the Supreme Court has long made clear . . . are implicitly conferred by the Constitution's establishment of a national government intended to be 'paramount and supreme within its sphere of action.'" *United States v. Pacelli*, 491 F.2d 1108, 1113 (2d Cir. 1974) (quoting *Quarles*, 158 U.S. at 536). Among the rights

recognized "to be secured to citizens of the United States" is the right of all those eligible to vote under state law "to vote for presidential electors." *Quarles*, 158 U.S. at 535. Private interference with this implicit right of national citizenship independently violates Section 241.[19]

Finally, the protections of Section 241 also "embrace[]" the rights and privileges secured to citizens by "all of the laws of the United States." *Price*, 383 U.S. at 800. Federal law gives eligible voters the right to participate in presidential elections free from injury. Specifically, the support-or-advocacy clauses in Section 2 of the 1871 Enforcement Act make it unlawful to "conspire . . . to injure any citizen in person or property" on account of their giving "support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President." 17 Stat. at 13-14 (as codified at 42 U.S.C. § 1985(3)).

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[19] Section 241's protection of the implicit right to vote for presidential electors does not "create serious constitutional problems." Former Officials Br. 10. Congress's Article I powers allow it to protect *all* federal elections from public *and* private interference. *See, e.g.*, *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 187 (2003), *overruled on other grounds by Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *Burroughs v. United States*, 290 U.S. 534, 545-48 (1934).

Tacitly acknowledging that this provision negates their argument, the Former Officials *amici* assert that (1) Section 2 of the 1871 Enforcement Act was "invalidated" by *United States v. Harris*, 106 U.S. 629 (1883), Former Officials Br. 10, and (2) the Supreme Court concluded in *United Brotherhood of Carpenters & Joiners v. Scott*, 463 U.S. 825 (1983), that 42 U.S.C § 1985(3) creates no substantive rights, Former Officials Br. 5. Neither claim is correct.

Harris did not strike down the entirety of Section 2 of the 1871 Act; it struck down just one particular provision of Section 2. Specifically, it voided Section 5519 of the Revised Statutes, the criminal enforcement provision of the equal protection clauses of Section 1985(3). *Harris*, 106 U.S. at 644. Just one year later, the Supreme Court unanimously upheld the constitutionality of the criminal enforcement of Section 2's support-or-advocacy clause (Section 5520).[20] *See Yarbrough*, 110 U.S. at 658-62. That would not have been possible if *Harris* had facially invalidated all of Section 2.

[20] Congress repealed the criminal enforcement provision of the support-or-advocacy clauses in 1894. *See* Act of Feb. 8, 1894, ch. 25, § 1, 28 Stat. 36, 37.

Nor did *Carpenters v. Scott* hold that the support-or-advocacy clauses incorporate only "preexisting rights." Former Officials Br. 5. The *Carpenters* Court did not purport to interpret the support-or-advocacy clauses; *Carpenters* interprets a textually distinct provision in Section 1985(3) dealing with denials of equal protection of the law. 463 U.S. at 827; *id.* at 839 n.1 (Blackmun, J., dissenting) (observing that the "first clause" of "Section 1985(3)" was "at issue here," and not the support-or-advocacy clauses).[21]

The support-or-advocacy clauses are best understood to "give[] rise to an independent substantive right." *Nat'l Coal. on Black Civic*

[21] The Former Officials *amici* would also be incorrect to argue that the support-or-advocacy clauses and the equal protection clauses of Section 1985 *must* have the same interpretation despite their materially different texts because both are found in Section 1985(3). When the 1871 Act was passed, there was no codification process. Its later codification into the first *Revised Statutes* in 1874 was "not intended" to change the meaning of the original statutory provisions so codification location is not relevant to determining the "substantive meaning of the 1871 Act." *Kush*, 460 U.S. at 724 (setting interference with "private enjoyment of 'equal protection of the laws'" apart from "the right to support candidates in federal elections"); *cf. Finley v. United States*, 490 U.S. 545, 554 (1989) (rejecting any inference that in revising and consolidating the laws Congress intended to change their effect absent a clear expression of such an intent). Thus, the meaning of a particular provision in the 1871 Act must be derived from the provision's text—not its location in the U.S. Code.

Participation v. Wohl, 498 F. Supp. 3d 457, 486 n.30 (S.D.N.Y. 2020); *e.g. LULAC*, 2018 WL 3848404, at *6 (noting that the support and advocacy clause "does not require . . . violation of a separate substantive right"). That right creates "a free-standing federal statutory protection against conspiracies—whether private or governmental—aimed at retaliating against a person" for giving "support or advocacy in a legal manner in favor of the election of a federal candidate." Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 Tex. Rev. L. & Pol. 295, 324-25 (2012) (cleaned up).[22] Violations of that federally protected civil right are also criminal under Section 241. *See id.* at 322 & n.123 (noting that violation of Section 1985(3) also likely constitutes a violation of Section 241).

[22] Some courts have suggested that the support-or-advocacy clauses are merely remedial devices for remedying violations of "independent constitutional right[s]." *See Gill v. Farm Bureau Life Ins. Co. of Mo.*, 906 F.2d 1265, 1270 (8th Cir. 1990). That view is a "misreading" of the clauses that should not be followed. Volokh, *supra*, at 324.

CONCLUSION

This Court should hold that a conspiracy to make intentionally false statements about the mechanics or procedures of voting in a federal election for the purpose of interfering with the right to vote constitutes an unlawful conspiracy to injure under Section 241 consistent with the First Amendment.

Dated: February 12, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29 and 32, undersigned counsel certifies that the foregoing brief:

1. Complies with the type-volume limitation of Local Rules 29.1(c) and 32.1(a)(4)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 6,969 words.

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Dated: February 12, 2024

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