COMMENT

"WE FIGHT LIKE HELL": A FRAMEWORK FOR SAFEGUARDING POLITICAL INTIMIDATION STATUTES AGAINST FIRST AMENDMENT CHALLENGES

ANNA D. STILLMAN†

Much of former President Trump's legacy will be defined by his rhetoric regarding the validity of the 2020 election, culminating in a rally speech on January 6, 2021. The infamous attack on the Capitol followed, as did a flood of litigation. The legal challenges against President Trump present another legacy-making opportunity.

Former President Trump and rioters have defended their conduct by asserting the protections of the First Amendment. Many, including Trump, have simultaneously challenged the constitutionality of the statutes under which they have been indicted or sued. These statutes fall into the genre of "political intimidation statutes"—laws that prohibit interference with exercises of democracy, from constituents voting to officials carrying out their duties. Such statutes tend to proscribe some expressive conduct, making them ripe for First Amendment challenges.

Yet these political intimidation statutes are pivotal to a fair and functioning democracy, and safeguarding them is vital. This Comment argues that the slate of January 6 cases currently making their way through the courts provides a unique opportunity to lay down a comprehensive framework that solidifies the constitutional

† Comments Editor, Volume 171, *University of Pennsylvania Law Review*; J.D. Candidate, 2023, University of Pennsylvania Law School; M.S. Social Policy Candidate, 2023, University of Pennsylvania School of Social Policy and Practice; A.B., 2018, Princeton University. I am grateful to Professor Seth Kreimer for sharing his First Amendment expertise and providing helpful direction. Thank you to the editors of the *University of Pennsylvania Law Review*, especially Coco Xu and Jordan Cohen-Kaplan, for their tireless work and dedication to improving this piece. For inspiring me to tackle big things and big questions, thank you to my parents Mary and Tom Stillman, to John and Isabelle—the best writers I know—and to my dear grandparents Sally and Jack Danforth, who are the driving forces behind everything I do. Finally, thank you to Maggie Elias for your countless hours counseling me through every up and down of this process and for always answering my FaceTime calls.

ground on which political intimidation statutes rest, at a time when our democracy needs these statutes the most.

To do so, courts must grapple with the countervailing interest of preserving the free trade of ideas, a tenet of democratic government and key rationale behind the First Amendment. This Comment proposes a two-pronged approach that respects the importance of free and open dialogue while taking seriously the risks of political intimidation. It suggests that litigators should argue, and courts should acknowledge: (1) the unprotected nature of politically intimidating speech and (2) the government's compelling interest in proscribing such speech through statute. These justifications may stand on their own or operate in tandem to broadly affirm the constitutionality of political intimidation statutes insofar as they infringe on free speech.

INTRODUCTION

Denying former President Trump's motion to dismiss claims against him for his rally speech preceding the January 6, 2021 storming of the Capitol, the *Thompson v. Trump* court described the case as "one-of-a-kind."[1] But the First

1 Thompson v. Trump, 590 F. Supp. 3d 46, 108 (D.D.C. 2022).

Amendment issues raised in the litigation can hardly be cabined to the particular circumstances of that day. Rather, *Thompson* raises questions about the constitutionality of prohibitions on politically intimidating speech—questions that must be addressed to preserve the protections those prohibitions afford our democratic system. *Thompson* and other cases against January 6 rioters provide the opportunity for courts to create impactful precedent outlining the doctrines on which these statutes rest to affirm their constitutionality.

According to the *Thompson* opinion,[2] Trump claimed ahead of the 2020 presidential election in which he, the incumbent, ran against then-candidate Joe Biden, that the election would be "rigged" and fraught with "fraud."[3] On election night and in the days following, he launched accusations that "they are trying to STEAL the Election" and claimed that if only "legal votes" were counted, he had "easily w[o]n."[4] Protests to "stop the steal" emerged across the country, culminating in a rally in Washington, D.C. on January 6.[5] That date marked Congress's vote to certify the Electoral College votes and consequently the outcome of the election in Biden's favor.[6]

This Comment focuses on Trump's words during that rally (as they are the central focus of the allegations in *Thompson*), Trump's First Amendment defense, and the court's analysis. In front of a crowd of supporters, known to have been violent in the past, Trump continued his rhetoric that the election was "stolen" and "rigged" and urged the crowd to march to the Capitol building.[7] In his closing lines, he offered the oft quoted and debated statement: "And we fight. We fight like hell and if you don't fight like hell, you're not going to have a country anymore,"[8] followed by:

> [W]e're going to walk down Pennsylvania Avenue . . . we're going to the Capitol and we're going to try and give—the Democrats are hopeless. They're never voting for anything, not even one vote. But we're going to try to give

2 *Id.* at 64. Importantly, because the court ruled on a motion to dismiss, it assumed all facts alleged to be true and did not make factual findings. *Id.*

3 *Id.*

4 *Id.*

5 *Id.* at 65-66.

6 *Id.* at 61. For an argument that the certification process is unconstitutional, see J. Michael Luttig & David B. Rivkin Jr., *Congress Sowed the Seeds of Jan. 6 in 1887*, WALL ST. J. (Mar. 18, 2021, 12:59 PM), https://www.wsj.com/articles/congress-sowed-the-seeds-of-jan-6-in-1887-11616086776 [https://perma.cc/9F8W-68N2].

7 *Thompson*, 590 F. Supp. 3d at 65-66, 102, 113 ("The President was aware of [the prior 'stop the steal'] rallies . . . and he would have known about the violence that accompanied them.").

8 *Id.* at 114; *see also Trump's Full Speech at D.C. Rally on Jan. 6*, WALL ST. J. VIDEO, at 69:36 (Feb. 7, 2021, 2:00 PM), https://www.wsj.com/video/trump-full-speech-at-dc-rally-on-jan-6/E4E7BBBF-23B1-4401-ADCE-7D4432D07030.html [https://perma.cc/ZT8N-CBBJ] (displaying Trump's January 6 speech).

> our Republicans, the weak ones, because the strong ones don't need any of our help, we're going to try and give them the kind of pride and boldness that they need to take back our country.[9]

Following Trump's address, protesters arrived at the Capitol. While some remained peaceful, others entered the Capitol building where congresspeople were assembled for the Electoral College vote, overcoming police barriers and destroying property in efforts to stop the vote.[10] The Representatives took shelter, delaying the vote, while rioters injured police officers and others, some fatally.[11]

After experiencing the attack from the inside of the Capitol, eleven members of the House of Representatives sued President Trump, primarily alleging violation of 42 U.S.C. § 1985(1).[12] Section 1985(1) proscribes conspiracies that prevent federal officials from carrying out their duties by use of force, intimidation, or threat.[13] In broad strokes, Trump is said to have conspired with his allies to impede members of Congress from carrying out their statutorily-conferred duty of certifying the Electoral College votes by sowing doubt in the legitimacy of the election and urging violence in his rally speech.[14]

In his motion to dismiss *Thompson*, Trump raised a First Amendment defense against these allegations, arguing that his speech during the rally

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9 *Thompson*, 590 F. Supp. 3d at 114; *see also Trump's Full Speech*, *supra* note 8, at 70:09.

10 Kat Lonsdorf, Courtney Dorning, Amy Isackson, Mary Louise Kelly & Ailsa Chang, *A Timeline of How the Jan. 6 Attack Unfolded—Including Who Said What and When*, NAT'L PUB. RADIO (June 9 2022, 9:11 AM), https://www.npr.org/2022/01/05/1069977469/a-timeline-of-how-the-jan-6-attack-unfolded-including-who-said-what-and-when [https://perma.cc/5LD2-N55P].

11 *Id.*; *see also* Jack Healy, *These Are the 5 People Who Died in the Capitol Riot*, N.Y. TIMES (Oct. 13, 2022), https://www.nytimes.com/2021/01/11/us/who-died-in-capitol-building-attack.html [https://perma.cc/5R75-TPGZ] ("These five people[s'] . . . lives all ended last week as a mob incited by Mr. Trump stormed the Capitol.").

12 *Thompson*, 590 F. Supp. 3d at 62-63. *Thompson v. Trump* consolidates cases against Trump from a number of plaintiffs who assert similar claims. Plaintiff Swalwell's § 1985(1) claim is the focus of this Comment, though it closely resembles those of other plaintiffs. While the court's opinion concerns the consolidated case, Trump's motion to dismiss, the Plaintiff's opposition to the motion to dismiss, and the amicus brief discussed herein concern Swalwell's suit specifically.

13 As the statute states:

> If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties.

42 U.S.C. § 1985(1).

14 *Thompson*, 590 F. Supp. 3d at 63.

deserved First Amendment protection.[15] If the court were to find his speech outlawed by the statute, he argued, "then it would make these important statutes susceptible to facial challenges due to overbreadth and vagueness."[16] A reading of § 1985(1) inclusive of Trump's language, "would lead to a boundless statute essentially holding politicians vicariously liable for actions of their supporters, substantially chilling important political speech."[17]

An amicus brief filed by constitutional and First Amendment scholars Floyd Abrams, Erwin Chemerinsky, Martha Minow, and Laurence Tribe (the Amici) considers Trump's speech on January 6 as a prime example of what they term "political intimidation"—conduct that inhibits "federal officials, voters, and those who seek to support and advocate for candidates for federal office."[18] Section 1985(1) is a political intimidation statute, as are many voting rights laws like the Civil Rights Act of 1957 and the Voting Rights Act.[19] These "important" statutes face an uphill battle against the First Amendment, given that the conduct they proscribe and the language they use to prohibit that conduct often involve speech; "conspire," "intimidate," and "threaten" are at their core.[20]

Trump is correct that challenges to these "important" statutes pose certain dangers. But that observation does not necessitate his narrow interpretation of § 1985(1) or the invalidity of political intimidation statutes under the First Amendment. It does, however, implicate a debate at the heart of the First Amendment: how do we strike a balance between maintaining free political dialogue and protecting democracy?

This question is particularly vexing in the context of the challenges to the legitimacy of democratic elections. Democracy becomes pitted against itself. On the one hand, democratic values push in favor of Trump's ability to contribute freely to the marketplace of ideas.[21] As the *Thompson* opinion acknowledges, "[s]peech concerning public affairs is more than self-

15 Memorandum in Support of Donald J. Trump and Donald Trump Jr.'s Motion to Dismiss at 22, *Thompson*, 590 F. Supp. 3d 46 (D.D.C. 2022) (No. 21-cv-00586) [hereinafter Trump Motion to Dismiss].

16 *Id.* at 24.

17 *Id.* at 25.

18 Brief of Amici Curiae Floyd Abrams, Erwin Chemerinsky, Martha Minow, and Laurence H. Tribe in Support of the Plaintiffs at 1, *Thompson*, 590 F. Supp. 3d 46 (D.D.C. 2022) (No. 21-cv-00586) [hereinafter Amicus Brief].

19 *See id.* at 6 (listing three statutory provisions that create civil causes of action for voter intimidation).

20 *Id.* at 4, 10.

21 The marketplace of ideas justification for the First Amendment originates from Justice Holmes's dissent in *Abrams v. United States*. He wrote that the "theory of our Constitution" is the "free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out." 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

expression; it is the essence of self-government."[22] On the other hand, democratic values push against allowing expression that weakens the ability to peacefully transfer power in accordance with the wishes of the electorate, the bedrock of democracy. "The First Amendment serves the greater purpose of promoting a democratic government and serves the people's interest in having the information they need to enable self-government," and in the circumstances like the 2020 election, these dual purposes conflict.[23]

Given this context, *Thompson v. Trump* is anything but a "one-of-a-kind" case.[24] It holds the potential to shape the landscape of how courts evaluate the constitutionality of political intimidation statutes and provides the opportunity, as the Amici urge, to "preserve the effectiveness of political intimidation statutes generally."[25] This Comment proposes a uniform framework for litigators and courts to utilize to affirm the constitutionality of political intimidation statutes under the First Amendment. To place these vital protections on solid constitutional footing, courts adjudicating challenges to political intimidation statutes arising out of January 6 cases should ground their decisions in (1) the unprotected nature of intimidating speech and (2) the government's compelling interest in outlawing it.

This Comment explores both avenues in four parts. Part I describes the landscape of political intimidation today. Part II summarizes courts' handling of First Amendment January 6 cases to date. Part III explores the doctrinal categories of unprotected true threats and intimidating speech, then applies them to the political intimidation context. Finally, Part IV outlines the government's compelling interest in proscribing political intimidation, enabling such statutes to overcome heightened scrutiny.

I. CURRENT LANDSCAPE OF POLITICAL INTIMIDATION

A. *Defining Political Intimidation Statutes*

Political intimidation statutes prohibit interference with exercises of democracy, from constituents voting to officials carrying out their duties. The Amici define political intimidation statutes as those that, "[a]mong other things[,] . . . prohibit threatening federal officials to prevent them from carrying out their duties, threatening citizens to prevent them from voting freely, and threatening anyone for supporting or failing to support federal candidates."[26] This categorization includes civil and criminal voter

22 *Thompson*, 590 F. Supp. 3d at 108 (quoting Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964)).

23 *See* Gilda R. Daniels, *Voter Deception*, 43 IND. L. REV. 343, 373 (2010).

24 *Thompson*, 590 F. Supp. 3d at 108.

25 Amicus Brief, *supra* note 18, at 3.

26 *Id.*

intimidation laws, such as § 131(b) of the Civil Rights Act of 1957 and § 11(b) of the Voting Rights Act of 1965, and extends further to the impediment of other political activity, such as certifying the Electoral College vote.[27]

The political intimidation statute in question in *Thompson v. Trump*—42 U.S.C. § 1985(1)—originated in the Enforcement Act of 1871 (the KKK Act). Retaliating against the franchise of African Americans secured by the Fifteenth Amendment and the electoral success of Black candidates during Reconstruction, white Southerners engaged in voter intimidation in the form of terrorism and violence.[28] Though notorious primarily for its racial violence, the KKK's tactics extended to white political opponents as well.[29] Congress responded with the KKK Act, which contains important protections for political rights.[30] Section 1985(3)'s support-or-advocacy clauses account for most of the statute's voting-related protection and case law generated to that end, minimal as it is.[31] It creates a right of action for any party injured by a conspiracy to "to prevent by force, intimidation or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner."[32] Given this focus, § 1985(3) is commonly classified as a voter-intimidation statute.[33]

But the unique circumstances of January 6 make § 1985(1) more relevant. Rioters sought to interfere with Congress's ability to certify the vote, rather than constituents as they cast their ballots. Section 1985(1) extends to democratic pursuits beyond voting on election day, such as vote certification, by ensuring the ability of federal officials to "discharge[e] any duties."[34] Thus, it fits into the broader category of political intimidation statutes. Even less precedent explores § 1985(1)'s scope.

Two other statutes frequently used to prosecute January 6 rioters—18 U.S.C. §§ 1512(c)(2) and 231(a)(3)—also fit into the category of political intimidation statutes.[35] In brief, § 1512(c)(2) criminalizes obstructing official

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27 *See* Michael Weingartner, *Remedying Intimidating Voter Disinformation Through § 1985(3)'s Support-or-Advocacy Clauses*, 110 GEO. L.J. ONLINE 83, 88 (2021) (summarizing federal civil and criminal voting rights statutes).

28 *See* Ben Cady & Tom Glazer, *Voters Strike Back: Litigating Against Modern Voter Intimidation*, 39 N.Y.U. REV. L. & SOC. CHANGE 173, 184 (2015) (recounting the historical development of the KKK Act).

29 *Id.* at 185; Weingartner, *supra* note 27, at 96-97.

30 Cady & Glazer, *supra* note 28, at 185.

31 *See* Weingartner, *supra* note 27, at 102-03 (summarizing recent cases addressing the support-or-advocacy clause).

32 42 U.S.C. § 1985(3).

33 *See, e.g.*, Weingartner, *supra* note 27, at 88-89 (analyzing the KKK Act in a discussion of "federal voter-intimidation statutes").

34 42 U.S.C. § 1985(1).

35 United States v. Nordean, 579 F. Supp. 3d 28, 40 (D.D.C. 2021) (describing charges against defendants involved in the January 6 riots).

proceedings,[36] and § 231(a)(3) criminalizes obstructing officials carrying out their lawful duties.[37] Both statutes are characterizable as political intimidation statutes because they apply to situations involving interference with official democratic duties.

B. *Difficulties of Confronting Modern Political Intimidation*

The nature of political intimidation has shifted from the violence of the post-Reconstruction South to subtler forms. Though political violence was on display on January 6 and certainly persists today,[38] political intimidation more often takes the form of disinformation, anonymous threats, and challenges to voter eligibility disseminated via social media, phone calls, and aggressive poll-watching.[39] The Federal Prosecution of Election Offenses Manual describes intimidation as "amorphous and largely subjective in nature."[40]

Take, for example, the case of Jacob Wohl and Jack Burkman during the 2020 election.[41] The two orchestrated thousands of robocalls to voters, primarily in Black neighborhoods, warning that information from mail-in ballots, widely perceived to lean Democrat, would be used to identify outstanding arrest warrants, collect debts owed, and administer mandatory

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36 *See* 18 U.S.C. § 1512(c)(2) ("Whoever corruptly . . . obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.").

37 *See* 18 U.S.C. § 231(a)(3) ("Whoever commits or attempts to commit any act to obstruct, impede, or interfere with any fireman or law enforcement officer lawfully engaged in the lawful performance of his official duties incident to and during the commission of a civil disorder which in any way or degree obstructs, delays, or adversely affects commerce or the movement of any article or commodity in commerce or the conduct or performance of any federally protected function—[s]hall be fined under this title or imprisoned not more than five years, or both.").

38 *See* Brief of J. Michael Luttig, Peter Keisler, Carter Phillips & Stuart Gerson et al. as Amici Curiae in Support of Respondents at 23, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (No. 20-843) ("Although the January 6, 2021, attack on the Capitol itself was unprecedented, political violence in our streets unfortunately is not. Indeed, elected officials and others have continued to make statements long after January 6, 2021 that threaten more political violence.").

39 Weingartner, *supra* note 27, at 84-86; Cady & Glazer, *supra* note 28, at 178, 219; Daniels, *supra* note 23, at 348; *see also* Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, 135 HARV. L. REV. F. 265, 271 (2022) (describing the "death threats and intimidating messages" received by election officials in 2020). For a detailed summary of modern voter intimidation tactics, see Cady & Glazer, *supra* note 28, at 215-22. Furthermore, "it is no coincidence that the more recent bumper crop of voter intimidation . . . immediately followed record-breaking turnout by African American voters and the election (and re-election) of the nation's first African American President." Sean Younger, *Voter Intimidation in the Context of Existing Civil Rights Frameworks*, 40 HARBINGER 111, 112 (2015).

40 U.S. DEP'T OF JUST., FEDERAL PROSECUTION OF ELECTION OFFENSES 50 (Richard C. Pilger ed., 8th ed. 2017).

41 Nat'l Coal. on Black Civic Participation v. Wohl, 498 F. Supp. 3d 457 (S.D.N.Y. 2020).

vaccinations.[42] Granting relief for victims of the scheme, the court wrote that "[b]ecause of the vastly greater population they can reach instantly with false and dreadful information, contemporary means of voter intimidation may be more detrimental to free elections than the approaches taken for that purpose in past eras, and hence call for swift and effective judicial relief."[43] This subtler nature, combined with the ability to reach relatively large numbers of constituents easily, characterizes today's political intimidation.

But such judicial relief is not always available. The elusiveness of modern political intimidation makes prevention and redress more difficult. "[R]emarkably few" prosecutions of voter intimidation occur, and, when they do, they tend to be unsuccessful.[44] Many of the long-available federal political intimidation statutes lie "dormant," obscured by uncertainty over their scope and minimal appetite for enforcement.[45] The "amorphous" nature of modern intimidation makes witnesses, concrete evidence, and victim testimony hard to come by.[46] Anonymity frustrates efforts to identify suspects, and far-reaching tactics lead to dispersed victims.[47] Moreover, perpetrators often act under the guise of upholding the law, such as preventing voter fraud, sometimes making it difficult for victims to identify that they have been targeted.[48] This dearth of prosecution leaves intimidation under-deterred and lacking foundational precedent—concerns the slate of January 6 proceedings could ameliorate.

Notably, many of the newfound tactics that erect barriers to redress modern voter intimidation coincide with the gray area of the First Amendment. Intimidation today tends to blur the disputed line between speech and conduct.[49] Mass calls distributing misinformation, for example, could be viewed as false speech—communication *protected* by the First Amendment—or as threating, intimidating, or inciting conduct—*unprotected* behavior.[50] In combination with their use of terms like "intimidate,"

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42 *Id.* at 466, 483; *see* CHARLES STEWART III, MIT ELECTION DATA & SCI. LAB, HOW WE VOTED IN 2020: A FIRST LOOK AT THE SURVEY OF PERFORMANCE OF AMERICAN ELECTIONS 4-5 (Dec. 15, 2020), https://electionlab.mit.edu/sites/default/files/2020-12/How-we-voted-in-2020-v01.pdf [https://perma.cc/QR66-ES78] ("Democratic activists and voters were more likely [than Republicans] to embrace the opportunity to vote by mail.").

43 *Wohl*, 498 F. Supp 3d at 464.

44 James J. Woodruff II, *Where the Wild Things Are: The Polling Place, Voter Intimidation, and the First Amendment*, 50 U. LOUISVILLE L. REV. 253, 253 (2011).

45 Daniels, *supra* note 23, at 349, 361.

46 FEDERAL PROSECUTION OF ELECTION OFFENSES, *supra* note 40, at 50.

47 Daniels, *supra* note 23, at 349-50.

48 Cady & Glazer, *supra* note 28, at 209.

49 *Id.* at 11 ("[M]odern political intimidation often takes subtler forms . . . . [and] embraces a wider and ever-expanding range of coercive tactics . . . .").

50 *See* Weingartner, *supra* note 27, at 92 (noting the advantages to victims of viewing voter disinformation through a voter intimidation lens to establish its unprotected nature).

"threaten," and "conspire," political intimidation statutes are ripe for First Amendment challenges.[51]

Augmenting the difficulties facing these statutes, the Supreme Court has recently shown a willingness to question the constitutionally of century-old political intimidation laws. Its 2018 decision in *Minnesota Voters Alliance v. Mansky* struck down a Minnesota law prohibiting a political apparel ban at or near polling places.[52] That opinion also reversed the decision of the district court to dismiss the petitioners' First Amendment claims,[53] a situation that could be mirrored if Trump were to appeal *Thompson* on First Amendment grounds.

The lack of litigation regarding political intimidation, combined with the obstacles in its way, highlights the importance of getting it right when given the chance. The notoriety and number of cases arising out of January 6 present such a chance. The Amici describe *Thompson v. Trump* as a case that "could have repercussions for the entire suite of political-intimidation statutes."[54] Litigators and courts should seize the opportunity to clarify the constitutional framework underlying political intimidation statutes, shoring up their legitimacy under the First Amendment and resurrecting the defense mechanism such statutes originally sought to provide.

II. POLITICAL INTIMIDATION ON JANUARY 6

Before delving deeper into the best approach for achieving widespread statutory validation in the context of January 6 claims, this Part examines how courts have addressed defendants' First Amendment defenses thus far. First, it discusses the *Thompson* court's handling of Trump's assertions.[55] It then expands the discussion to criminal cases against January 6 rioters.

A. *Trump's First Amendment Defense*

Trump viewed his January 6 rally speech as protected to the highest degree as "speech on 'matters of public concern.'"[56] While acknowledging that the First Amendment leaves speech that communicates a "true threat" or

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51 Amicus Brief, *supra* note 18, at 4.

52 Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1892 (2018). For further discussion of the *Mansky* decision, see *infra* Section IV.A.

53 *See id.* at 1884 (noting the district court's decision).

54 Amicus Brief, *supra* note 18, at 10.

55 Since the district court's decision, Trump appealed, claiming absolute immunity from the suits' claims. Brief for Appellant Donald J. Trump at 6, Blassingame v. Trump, No. 22-5069 (D.C. Cir. July 27, 2022). The issues raised on appeal do not implicate the First Amendment arguments discussed herein, and as such, this Comment focuses only on the district court's analysis.

56 *Trump Motion to Dismiss*, *supra* note 15, at 22.

"incitement" of violence unprotected, Trump insisted his speech met neither standard.[57] Furthermore, his legal team introduced a facial challenge to § 1985(1), arguing that reading the statute as inclusive of Trump's speech on January 6 necessarily opens the statute to challenges of overbreadth and vagueness.[58]

In response, the plaintiffs not only rebutted the classification of Trump's speech as outside the bounds of the incitement exception but also added a "speech integral to criminal conduct" rationale for finding his speech unprotected.[59] Here, the plaintiffs argued that Trump's speech constituted an integral part of the accusation of conspiracy against him and thus warranted no First Amendment protection.[60]

The Amici piggyback on the argument that Trump's speech fits into the "speech integral to criminal conduct" carve-out.[61] Taking it a step further, they propose that rationale extend to the entire sphere of political intimidation statutes as a means to affirm their constitutionality.[62]

However, the district court found the "integral to criminal conduct" argument unsatisfactory. First, precedent evoking that principle typically involves criminal conspiracies, whereas the *Thompson* claims alleged a civil conspiracy.[63] "[I]t would be imprudent," Judge Mehta wrote, "for the court to assess whether factual allegations in a *civil* complaint make out *criminal* conduct."[64] Second, cases that have used this "integral to criminal conduct" rationale in civil litigation can be differentiated from *Thompson* because the speech at issue was not related to matters of public concern.[65] Furthermore, while the seminal case *NAACP v. Claiborne Hardware Co.* concerned a civil conspiracy involving matters of public concern, that Court evaluated the First

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57 *Id.* at 23.

58 *Id.* at 24-25.

59 Plaintiff's Combined Opposition to the Motions to Dismiss by Defendants Donald J. Trump, Donald J. Trump Jr., and Rudolph Giuliani at 18, Thompson v. Trump, 590 F. Supp. 3d 46 (D.D.C. 2022) (No. 21-cv-00586) [hereinafter Opposition to the Motion to Dismiss] (recognizing "speech integral to criminal conduct" as a category of content not protected by the First Amendment (citing United States v. Alvarez, 567 U.S. 709, 717 (2012))).

60 *Id.* at 18-22.

61 *See* Amicus Brief, *supra* note 18, at 4 ("[T]he Court should rely upon the long-recognized, categorical exception to First Amendment coverage for speech that is integral to the commission of a crime . . . .").

62 *See* Amicus Brief, *supra* note 18, at 15-16 ("Amici therefore urge the Court to hold that speech integral to the types of political intimidation barred by these statutes falls squarely within the historically unprotected category of speech integral to a crime or tort.").

63 *Thompson*, 590 F. Supp 3d at 109.

64 *Id.*

65 *See id.* (describing economic regulation cases in which speech "is naturally afforded less First Amendment protection").

Amendment concerns in accordance with an "incitement" standard rather than disposing of the issues on "integral to criminal conduct" grounds.[66]

The *Thompson* court heeded *Claiborne Hardware*'s example, focusing its evaluation of Trump's First Amendment defenses on incitement rather than "integral to criminal conduct" grounds.[67] Agreeing with Trump's characterization of speech on matters of public concern as due the utmost respect, the court acknowledged such freedom is not "unbounded."[68] Trump's speech, Judge Mehta pronounced, "will lose its First Amendment protection only if it meets the stringent *Brandenburg* 'incitement' standard."[69] The court recited the *Brandenburg* test as whether speech "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[70] Analyzing Trump's speech under this framework, the court found portions of his rally speech were "plausibly words of incitement" that "implicitly" encouraged "violence or lawless action" which, given his knowledge that spectators were "prone to violence," may be viewed as imminent.[71]

The *Thompson* court then declined to address Trump's facial challenge to § 1985(1) in depth. It relegated its response to a footnote in which it remarked "the President cannot seriously contend that § 1985(1) either sweeps in too much protected speech (an overbreadth challenge) or does not provide fair notice of what it prohibits (void for vagueness)."[72] While indicating support for § 1985(1)'s constitutionally, the court squandered the opportunity to establish a much-needed analytical framework supporting political intimidation statutes.

Though Trump's speech on January 6 may very well meet the *Brandenburg* incitement test, as the district court predicted, such a framework lacks the potential to protect political intimidation statutes broadly. Section III.C explores the inadequacies of a foundational incitement approach. Parts III and IV then go onto posit a more broadly useful two-pronged approach that relies on the true threat doctrine and identifies a compelling interest for regulating politically intimidating speech.

66 *See id.* at 109-10 (discussing NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982)).

67 *Id.* at 110.

68 *Id.* at 108.

69 *Id.* at 110.

70 *See id.* at 110-11 (quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)).

71 *Id.* at 115-17.

72 *Id.* at 117 n.33.

B. *First Amendment Defenses in January 6 Criminal Cases*

This Comment takes up the Amici's invitation to evaluate *Thompson v. Trump* in the context of challenges to political intimidation statutes more broadly by adding other January 6 cases to the dialogue. A year after the Capitol riot, the Department of Justice (DOJ) had arrested over 725 suspects present at the Capitol on January 6.[73] At least 275 individuals were charged with "corruptly obstructing, influencing, or impeding an official proceeding, or attempting to do so."[74] Approximately forty individuals were charged with "(a) conspiracy to obstruct a congressional proceeding, (b) conspiracy to obstruct law enforcement during a civil disorder, (c) conspiracy to injure an officer, or (d) some combination of the three."[75]

Like the civil case against Trump, the slew of cases filed by the DOJ involve alleged political intimidation through interference with certification of the Electoral College votes. And these cases similarly abound with First Amendment questions given the communicative nature of some of the charges' elements, such as "influencing" and "conspiracy."[76] Similar to Trump, many defendants have raised First Amendment defenses. They assert constitutional protection of their conduct while launching facial challenges to the political intimidation statutes under which they are charged.[77] Facial challenges have tended to focus on 18 U.S.C. §§ 1512(c)(2) and 231(a)(3).[78] For example, in *United States v. Nordean*, alleged leaders of white nationalist organization the Proud Boys objected to their indictments for interfering with officials and official proceedings under §§ 1512(c)(2) and 231(a)(3),

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73 *One Year Since the Jan. 6 Attack on the Capitol*, DEP'T OF JUST. (Dec. 30, 2021), https://www.justice.gov/usao-dc/one-year-jan-6-attack-capitol [https://perma.cc/D7FC-E5FP].

74 *Id.*

75 *Id.*

76 Of course, for those rioters who succumbed to violent tactics, freedom of speech concerns are not in the foreground.

77 *See, e.g.*, United States v. Caldwell, 581 F. Supp. 3d 1, 10 (D.D.C. 2021) (describing the grounds on which the defendants challenged their indictment); United States v. McHugh, 583 F. Supp. 3d 1, 11, 28 (D.D.C. 2022) (same); United States v. Bozell, No. 21-CR-216, 2022 WL 474144, at *2 (D.D.C. Feb. 16, 2022) (same); United States v. Fischer, No. 21-CR-00234, 2022 WL 782413, at *2 (D.D.C. Mar. 15, 2022) (same); United States v. Mostofsky, 579 F. Supp. 3d 9, 16 (D.D.C. 2021) (same).

78 *See* 18 U.S.C. § 1512(c)(2) ("Whoever corruptly . . . obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both."); 18 U.S.C. § 231(a)(3) ("Whoever commits or attempts to commit any act to obstruct, impede, or interfere with any fireman or law enforcement officer lawfully engaged in the lawful performance of his official duties incident to and during the commission of a civil disorder which in any way. or degree obstructs, delays, or adversely affects commerce or the movement of any article or commodity in commerce or the conduct or performance of any federally protected function—[s]hall be fined under this title or imprisoned not more than five years, or both.").

arguing that these statutes unconstitutionally infringed upon their right to free speech.[79]

The January 6 prosecutions present ample opportunity for courts to outline a definitive approach cementing the constitutionality of political intimidation statutes under the First Amendment, especially considering the dearth of political intimidation cases that had come before them in the last century. Yet, thus far, courts' responses to rioters' First Amendment defenses have been unsatisfactory for attaining that broader goal. While courts have rejected defendants' challenges to political intimidation statutes across the board,[80] their grounds for doing so have been less than instructive.

Most courts have disposed of the arguments on a speech/conduct distinction rationale, finding that §§ 1512(c)(2) and 231(a)(3) primarily proscribe a defendant's actions rather than speech, thus falling outside of the First Amendment's reach.[81] While such a rationale suffices for situations in which defendants "forcibly storm[ed] past exterior barricades, Capitol Police, and other law enforcement officers"[82] or "broke into the Senate Chamber,"[83] it fails to provide a foundation on which to assess trickier questions of political intimidation where speech is at the forefront, in the January 6 context and beyond. Furthermore, the speech/conduct rationale has a "speech integral to criminal conduct" flavor, which the *Thompson* court already disposed of as inapplicable to civil political intimidation statutes. Thus, extending the speech/conduct rationale would not offer a sufficient tool to hold perpetrators of subtler forms of political intimidation civilly liable.

In addition to the speech/conduct distinction, some of the DOJ cases bring in alternative doctrinal approaches. *United States v. Fischer* dabbled in a true threat rationale, stating that § 231(a)(2) "covers 'primarily, if not exclusively, conduct or unprotected speech, such as threats,'" without exploring the threat exception's applicability to acts of political intimidation further.[84] *Nordean* acknowledged the "weighty interest in protecting

79 United States v. Nordean, 579 F. Supp. 3d 28, 40-41, 54 (D.D.C. 2021).

80 *See, e.g.*, *Nordean*, 579 F. Supp. 3d at 52-54 (affirming the constitutionality of §§ 1512(c)(2) and 231(a)(3)).

81 *See, e.g.*, United States v. Caldwell, 581 F. Supp. 3d 1, 34 (D.D.C. 2021) (stating that § 1512(c)(2) does not proscribe speech); *Nordean*, 579 F. Supp. 3d at 53, 58 (stating that defendants were charged with conduct such as acts of trespass, not expressions of speech such as protests); *Bozell*, 2022 WL 474144, at *7 (stating the same); *Fischer*, 2022 WL 782413, at *4 (stating that § 231(a)(3) is directed towards conduct and not speech); *Mostofsky*, 579 F. Supp. 3d at 22, 27 (stating that both § 231(a)(3) and § 1512(c)(2) target conduct, not speech); *McHugh*, 583 F. Supp. 3d at 28 ("[T]he plain text of § 231(a)(3) demonstrates that 'the statute is directed towards conduct, not speech . . . .'" (quoting *Nordean*, 579 F. Supp. 3d at 58)).

82 *See Caldwell*, 581 F. Supp. 3d at 34 (describing the actions of alleged members of the Oath Keepers).

83 *Bozell*, 2022 WL 474144, at *7.

84 *Fischer*, 2022 WL 782413, at *4.

Congress's ability to function," particularly when exercising "one of its most solemn and important constitutional duties" of certifying the vote, hinting at a compelling interest rationale.[85] Parts III and IV explore these rationales more deeply in an effort to articulate principles to answer gray-area First Amendment questions in the realm of political intimidation when speech, rather than conduct, takes center stage.

III. UNPROTECTED TRUE THREATS AND INTIMIDATION

Evaluation of the constitutionality of restrictions on speech often proceeds in three steps. First, the court considers whether the First Amendment protects the regulated speech.[86] Second, the type of forum is determined, upon which the constitutional standard hinges.[87] Third, the court assesses whether the restriction meets that constitutional standard.[88] This Part engages with step one, exploring how intimidating speech is not protected by the First Amendment and thus can be regulated. It then argues that intimidating speech offers the most promising route to establishing the unprotected nature of politically intimidating speech. Part IV proceeds to tackle steps two and three.

A. *Doctrinal Background*

Pockets of unprotected speech are a foundational aspect of First Amendment jurisprudence. *Chaplinsky v. New Hampshire* articulated that "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[89] According to the *Chaplinsky* Court, the fact that some words "by their very utterance inflict injury" justifies certain exceptions to the First Amendment's protection of free speech.[90]

The Supreme Court first identified a "true threat" as one of these categories of unprotected speech in *Watts v. United States*.[91] Under a statute criminalizing threats to the President, the *Watts* Court conducted a context-dependent analysis of the petitioner's statement that he would kill the

85 *Nordean*, 579 F. Supp. 3d at 53.

86 Woodruff, *supra* note 44, at 273.

87 *Id.*

88 *Id.*

89 315 U.S. 568, 571-72 (1942); *see also* Paul T. Crane, *"True Threats" and the Issue of Intent*, 92 VA. L. REV 1225, 1230 (2006) (listing libel, obscenity, and fighting words as classes of speech that are unprotected).

90 *Chaplinsky*, 315 U.S. at 572.

91 394 U.S. 705, 708 (1969) (per curiam).

President if forced to join the military.[92] The statement did not rise to the level of a "true threat," failing the as-applied challenge.[93] The Court evaluated the circumstances "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open," taking a purposivist approach to First Amendment interpretation.[94] Given the petitioner's conditional phrasing and the crowd's reaction of laughter, the Court deemed the language "political hyperbole[,]" not fitting into the true threat exception and thus protected by the First Amendment.[95] Nevertheless, the Court validated the statute's ability to limit threatening speech, instructing that "[w]hat is a threat must be distinguished from what is constitutionally protected speech."[96]

Decades later, *Virginia v. Black* defined "true threats" as "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[97] It deemed "intimidation" a subspecies of "true threats," identifiable by "a speaker direct[ing] a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death."[98] Justification for this category's exception from First Amendment protection rested on three bases: protection from (1) "fear of violence," (2) "the disruption that fear engenders," and (3) "the possibility that the threatened violence will occur."[99] The case called into question a Virginia statute banning cross burning with the intent to intimidate after the defendant burned a cross at a KKK rally.[100] The Court determined that although cross burning for communicative purposes warranted First Amendment protection, cross burning for intimidation purposes lacked First Amendment protection under the aforementioned definition and justifications.[101]

The so-called *Nuremburg Files Case* illustrates another instance of a court's willingness to withhold First Amendment protection from implied threats and intimidation.[102] That case involved the circulation of "WANTED"

92 Christopher Conrad, Note, *The Pernicious Problem of Platform-Enabled Voter Intimidation*, 4 GEO. L. TECH. REV. 463, 486 (2020).

93 *Watts*, 394 U.S. at 708.

94 *Id.* (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

95 *Id.*

96 *See id.* at 707 (stating that the challenged statute is constitutional on its face).

97 538 U.S. 343, 359 (2003).

98 *Id.* at 359-60 (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992)).

99 *Id.* at 360 (citing *R.A.V.*, 505 U.S. at 388).

100 *Id.* at 348-49.

101 *Id.* at 360-62.

102 *See* Planned Parenthood of the Columbia/Willamette, Inc. v Am. Coal. of Life Activists (Nuremburg Files Case), 290 F.3d 1058, 1077 (9th Cir. 2002) (holding that an implied threat constitutes a true threat when a reasonable person would view it as a true threat to inflict bodily harm).

posters by anti-abortion activists with names, addresses, and other personal information of doctors who provided abortions.[103] Murders of identified physicians followed, making other providers "truly frightened" for their lives.[104] Though the posters did not explicitly call for this violence, the Ninth Circuit declared them "a true threat because, like . . . burning crosses, they connote something they do not literally say, yet both the actor and the recipient get the message."[105] Furthermore, the statute restricting these types of threats aligned with the category of true threats unprotected by the First Amendment, allowing the law to endure.[106]

B. *Overview of Overbreadth*

Applying the true threats doctrine to the political intimidation statutes at issue in the January 6 cases requires a bit of background on the overbreadth doctrine. Overbreadth refers to the mechanism through which facial challenges often operate in the First Amendment space. The court will invalidate a statute as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep."[107]

Trump deployed an overbreadth argument when challenging the constitutionality of § 1985(1). He asserted that to read § 1985(1) as inclusive of his rally speech would render the statute overbroad, as it would sweep up too much protected speech.[108] If the statute were broad enough to proscribe his speech on January 6, which he claimed did not rise to the level of true threat or intimidation earning it protection under the First Amendment, the statute would proscribe enough legitimate speech to make it unconstitutional.[109]

C. *Political Intimidation Statutes under the True Threat Doctrine*

Watts, Black, and the *Nuremburg Files Case* can all be viewed as political intimidation cases: *Watts* involved protection of a federal official, *Black* concerned a message to Black voters from the KKK, and central to the

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103 *Id.* at 1062-63.

104 *Id.* at 1066.

105 *Id.* at 1085.

106 *See id.* at 1077 ("[A] threatening statement that violates [the statute] is unprotected under the First Amendment.").

107 United States v. Miselis, 972 F.3d 518, 530 (4th Cir. 2020).

108 Trump Motion to Dismiss, *supra* note 15, at 24.

109 *Id.*

Nuremburg Files Case was the political controversy over abortion.[110] Thus, they affirm the government's ability to proscribe threatening or intimidating political speech, which is the core of modern political intimidation.

Like the implicit threats in *Black* and the *Nuremburg Files Case*, much of modern political intimidation takes the form of subtler, implicit tactics such as aggressive poll watching and robocalling. Based on courts' rulings in these past cases, modern tactics communicate an unmistakably intimidating message that fits into the unprotected true threat category.

Furthermore, *Watts*'s purposivist approach to analyzing context bolsters the grounds for courts to view politically intimidating speech as a true threat. The *Watts* Court's view of the facts in light of a "profound national commitment" to public debate conjures the First Amendment's marketplace of ideas rationale and increases the Court's willingness to view speech as permissible.[111] But an even deeper underlying rationale drives the First Amendment's protection of a marketplace of ideas: the need to protect the "foundations of democracy itself," including voting and participation in other democratic activities.[112] When courts must evaluate the context of speech to determine whether it communicates a threat, the First Amendment's goal of protecting democracy supports an increased willingness to view threatening speech that interferes with the exercise of core political activity, like voting, as unprotected.

Recent January 6 case law confirms the effectiveness of the true threat approach in safeguarding political intimidation statutes. In *Fischer*, as in other cases brought by the DOJ, the district court denied the defendants' overbreadth contention, reasoning that most, if not all, of the challenged statute's applications proscribe threats and thus the constitution allows for their regulation.[113] On the other hand, the *Thompson* court disregarded arguments advancing the true threat exception and instead focused on incitement.[114] The next section describes why an incitement approach is broadly less effective in solidifying the constitutionality of political intimidation statutes and a *Fischer*-esque approach would be more useful.

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110 Watts v. United States, 394 U.S. 705, 708 (1969); Virginia v. Black, 538 U.S. 365, 352 (2003); *Nuremburg Files Case*, 290 F.3d at 1063-64.

111 *Watts*, 394 U.S. at 708 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

112 G. Michael Parsons, *Fighting for Attention: Democracy, Free Speech, and the Marketplace of Ideas*, 104 MINN. L. REV. 2157, 2158-59 (2020).

113 United States v. Fischer, No. 21-CR-00234, 2022 WL 782413, at *4 (D.D.C. Mar. 15, 2022).

114 *See* discussion *supra* Section II.A (summarizing the *Thompson* court's analysis under an incitement framework).

D. *The Case for True Threat over Incitement*

Despite the *Thompson* court's reliance on incitement to reject Trump's First Amendment defense, a true threat framework would be more valuable to the broader goal of establishing a strong constitutional foundation for political intimidation statutes. In some circumstances, the *Brandenburg* incitement approach provides just as much First Amendment protection for speech as would a true threat analysis.[115] But, in other instances, the two exceptions diverge. Scholar Marc Rohr provides such an example: a speaker who exclaims "Judge X deserves to die. Here are his home and office addresses."[116] Recall that *Brandenburg* leaves unprotected speech that "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[117] The statement about the judge lacks the imminence required by *Brandenburg*, making the incitement exception inapplicable.[118] However, the statement conveys an implied true threat like that in *Black*, pushing it outside the bounds of First Amendment protection.[119] To summarize, analyzed under an incitement lens, a statute *could not* prohibit the statement but under a true threat lens, it *could*.

To apply these doctrines to the political intimidation context, recall Trump's January 6 exhortation that "[W]e fight. We fight like hell and if you don't fight like hell, you're not going to have a country anymore," followed by an instruction to "walk down Pennsylvania Avenue."[120] In response to Trump's motion to dismiss, the *Thompson* court found these words "plausibly . . . 'directed to inciting or producing imminent lawless action . . . .'"[121] These words could also plausibly fit into *Black*'s definition of intimidation; Trump "direct[ed]" them toward representatives in the Capitol with the "intent of placing the victim[s] in fear of bodily harm or death."[122]

While either categorization could leave Trump's words unprotected, other political intimidation contexts mirror Rohr's example in which the doctrines diverge. Recall *Wohl*, in which the defendants orchestrated robocalls to voters,

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115 *See* Marc Rohr, *"Threatening" Speech: The Thin Line Between Implicit Threats, Solicitation, and Advocacy of Crime*, 13 RUTGERS J.L. & PUB. POL'Y 150, 151 (2015) (arguing that the *Brandenburg* test theoretically protects speech that, when viewed by a target, is equally threatening to a true threat).

116 *Id.* at 150. This example comes from United States v. Turner, 720 F.3d 411, 413-14 (2d Cir. 2013).

117 *See* Thompson v. Trump, 590 F. Supp. 3d 46, 111 (D.D.C. 2022) (quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)).

118 *See* Rohr, *supra* note 115, at 151 (explaining that the statement advocates a "non-imminent crime").

119 *See id.* ("[C]ourts *have* treated speech that takes the form of [the] statement . . . as an unprotected threat . . . .").

120 *Thompson*, 590 F. Supp. 3d at 114.

121 *Id.* at 115 (quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)).

122 Virginia v. Black, 538 U.S. 343, 360 (2003).

warning them of adverse consequences were they to vote via mail-in ballots.[123] Such communication lacks a feasible argument for imminence under *Brandenburg*. But the *Wohl* court could deny First Amendment protection on true threat grounds, describing the calls as intimidation that "place[s] the victim in fear" of harm.[124]

Another distinction between the true threat and incitement doctrines concerns the target of the speech each test requires. Incitement hinges on the involvement of third parties, applying in instances when the speaker encourages, urges, or directs *others* to engage in lawless action. But much political intimidation occurs directly—from perpetrator to victim—such as a phone call placed to a prospective voter. Unlike the incitement doctrine, the true threat doctrine covers this direct context, thus encompassing more typical instances of modern political intimidation.

These discrepancies matter beyond the doctrines' applicability to particular incidents; they affect the constitutionality of the underlying statutes. Consider § 1985(1) under which Representative Thompson sued Trump. Comparing the speech proscribed by § 1985(1) to the sweep of unprotected speech in accordance with the *Brandenburg* incitement approach unearths a vulnerability.[125] The statute's plain language neither has an imminence requirement nor requires the speech be directed to a third party. On the other hand, a threat/intimidation justification maps onto the statute's language much more closely, with those terms appearing in the statute and describing much of the activity it deems unlawful.[126] The congruence of § 1985(1) to the latter classification makes it more likely to withstand an overbreadth challenge that "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep."[127]

Similarly, §§ 1512(c)(2) and 231(a)(3) overlap more tightly with a true threat rationale than an imminence one. Like § 1985(1), neither reference "imminence" nor impose a strict time limit.[128] And both target scenarios in

123 *See* Nat'l Coal. on Black Civic Participation v. Wohl, 498 F. Supp. 3d 457, 483 (S.D.N.Y. 2020) (describing the threats of mandatory vaccination and tracking down old warrants made to voters).

124 *Id.* at 479 (quoting *Black*, 538 U.S. at 360).

125 *Compare* 42 U.S.C. § 1985(1) (criminalizing conduct that "prevent[s], by force, intimidation, or threat" federal officers from performing their duties), *with* Ohio v. Brandenburg, 395 U.S. 444, 447 (1969) (protecting speech advocating for illegal conduct except when such speech "is directed to inciting or producing imminent lawless action").

126 *See* § 1985(1) (requiring action by "force, intimidation, or threat" in order to violate the statute).

127 United States v. Miselis, 972 F.3d 518, 530 (4th Cir. 2020) (citing United States v. Stevens, 559 U.S. 460, 473 (2010) (quotations and alterations omitted)).

128 *See* 18 U.S.C. § 1512(c)(2); 18 U.S.C. § 231(a)(3).

which the perpetrator themself obstructs an official proceeding or a law enforcement officer, respectively, rather than through a third party.[129] Section 1512(c)(2) also covers acts of corruptly influencing official proceedings, leaving room for incitement-style third party involvement.[130] Still, the scope of § 1512(c)(2) encompasses a large swath of applications beyond those in which a perpetrator directs others to act lawlessly, overwhelming the narrow set of legitimate applications under an incitement framework. The closer fit between the language of these statutes and the true threat exception suggests that the true threat approach is more consistently reliable to comprehensively shore up the validity of political intimidation statutes.

E. *Hurdles for the True Threat Framework*

While applying the true threat doctrine to the January 6 cases holds the potential to broadly solidify the constitutionality of political intimidation statutes, key open questions persist. Before suggesting their rejected "speech integral to criminal conduct" approach, the Amici grapple with the applicability of the true threat doctrine. While they "harbor little doubt that § 1985(1), as applied to the facts of the January 6 insurrection, falls within the . . . true-threat exception[]," they identify two pitfalls of the approach's ability to broadly sustain political intimidation statutes.[131] First, they express hesitancy given uncertainty over the intent standard required for a true threat.[132] Next, they question the true threat doctrine's ability to curb the nonviolent threats that constitute most of today's political intimidation.[133] The following sections take up these concerns in turn.

1. Intent

Since *Black*, the outstanding major question of whether subjective or objective intent is required to establish a true threat has preoccupied judges and scholars alike. Most circuit courts have adopted an objective approach, inquiring "whether a reasonable observer would perceive the threat as real."[134] But the Ninth and Tenth Circuits have committed to a subjective approach that seeks "proof that the speaker subjectively intended the speech as a

129 *See* § 1512(c)(2); § 231(a)(3).

130 *See* § 1512(c)(2) ("Whoever corruptly . . . obstructs, influences, or impedes any official proceeding . . . shall be fined under this title or imprisoned not more than 20 years, or both.").

131 Amicus Brief, *supra* note 18, at 11.

132 *Id.* at 11-12.

133 *Id.* at 11.

134 Cady & Glazer, *supra* note 28, at 209 (quoting United States v. Jeffries, 692 F.3d 473, 479 (6th Cir. 2012)).

threat."[135] The subjective approach sets a high bar, but on the other hand, the objective approach may be overinclusive.[136]

The Supreme Court's much-anticipated *Elonis* decision failed to resolve the circuit split as some had hoped it would, leaving the question open to date.[137] In that case, Elonis argued that he lacked intent to threaten his wife when posting alarming comments on Facebook, and thus his posts deserved First Amendment protection, despite his wife's view of the content as threatening.[138] But rather than addressing his First Amendment defense, the Court determined the criminal statute under which he was prosecuted required subjective intent.[139] In taking this route, the Supreme Court neglected to clarify the true threat intent standard, predicating its conclusion instead on the criminal statute's mens rea requirement.

This area of uncertainty colors the application of the true threat framework to political intimidation statutes. The Amici worry that, "[i]f the [subjective] position were to prevail, the true-threat exception could work to undermine important statutory protections for our democratic system" because political intimidation statutes tend not to require intent.[140] Generally, political intimidation statutes only require a reasonable person to view the perpetrator's actions as intimidating.[141] Thus, they proscribe much more speech than a subjective approach would consider constitutionally permissible. Moreover, perpetrators frequently commit political intimidation under the guise of upholding the rule of law, just as Trump supposedly sought to uphold nonfraudulent elections, making subjective intent difficult to prove.[142]

However, there is reason to believe the objective standard will ultimately prevail. Though the plain language of *Black* seems to take the subjective

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135 *Id.* (quoting United States v. Cassel, 408 F.3d 622, 633 (9th Cir. 2005)).

136 *See* Crane, *supra* note 89, at 1271-72 (noting that the subjective test makes prosecution of true threats significantly more difficult, and the objective standard prohibits some speech that the First Amendment protects).

137 *See* Cady & Glazer, *supra* note 28, at 209-10 ("[T]he Court said essentially nothing about the broader First Amendment issues, leaving the doctrinal split among the lower courts in place.").

138 *See* Elonis v. United States, 575 U.S. 723, 746, 748 (2015) (Alito, J., concurring in part and dissenting in part) (describing Elonis's First Amendment claim).

139 *See id.* at 740 (majority opinion) (holding that the mens rea requirement in § 875(c) is satisfied by an intent to threaten or knowledge that the statements would be viewed as a threat and declining to consider any First Amendment issues).

140 Amicus Brief, *supra* note 18, at 12.

141 *See* Woodruff, *supra* note 44, at 254 ("None of the laws against voter intimidation actually require the intimidation of a voter. They only require that a reasonable person would view the actions of the actor as intimidating.").

142 *See* Cady & Glazer, *supra* note 28, at 209 (noting that the pretext that an aggressor is simply upholding voting laws is a common characteristic of voter intimidation); Thompson v. Trump, 590 F. Supp. 3d 46, 64 (D.D.C. 2022) (urging supporters to combat alleged fraud).

approach, its context—a criminal prosecution—is significant.[143] Constitutional requirements may differ for criminal and civil cases—the former requiring actual intent and the latter tolerative of objective intent.[144] *Elonis* highlights the criminal-civil distinction at play and provides evidence that this distinction may be the operative force behind *Black*'s language suggesting a subjective intent requirement, rather than the Supreme Court's understanding of what the First Amendment protection entails.[145] Given that some political intimidation statutes are criminal in nature, those statutes may require subjective intent under the *Elonis* framework. However, if that requirement arises from criminal law doctrine, rather than First Amendment jurisprudence, civil political intimidation statutes could adhere to the objective standard.

Furthermore, in the realm of political intimidation, pragmatic reasons support the use of an objective standard. First, an objective standard carries a lower prosecutorial burden.[146] In an area already plagued with barriers to prosecution, and thus obstacles to realizing statutes' deterrent effect,[147] the objective approach could aid successful prosecution. Still, given the significant current difficulties in holding perpetrators of political intimidation accountable, easing the burden to proving intent would be unlikely to swing the pendulum too far in the opposite direction. Second, critics cite the chilling effect of the objective standard to argue against its use.[148] However, the vitalness of voting and similar activities afflicted with political intimidation increases tolerance for chilling free speech, an idea explored further in Part IV. Thus, the chilling effect criticism need not be given as much weight in this context.

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143 *See* Daniel P. Tokaji, *True Threats: Voter Intimidation and the Constitution*, 40 HARBINGER 101, 108-07 (2015) (observing that *Black*'s language calls for intent); Virginia v. Black, 538 U.S. 343, 360 (2003) ("Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm of death.").

144 *See* Tokaji, *supra* note 143, at 108 ("An intent to intimidate might well be constitutionally required for criminal prosecutions, but not for civil actions.").

145 *Id.* at 109.

146 *See* Crane, *supra* note 89, at 1273 ("[O]bjective intent proponents . . . claim that that a subjective intent test will increase the prosecutor's burden.").

147 See discussion *infra* Section I.B (describing the difficulties of pursuing political intimidation prosecutions).

148 *See* Crane, *supra* note 89, at 1272-73 ("Because an objective test makes the intent of the speaker irrelevant, a speaker who does not intend for his communication to be threatening, but fears that some may interpret it as so, will not engage in such expression.").

2. Nonviolence

Whether the First Amendment affords nonviolent threats First Amendment protection also remains unsettled. Given the tendency towards nonviolent tactics in modern political intimidation, a definition of intimidation inclusive of nonviolent threats is pivotal to the true threat doctrine's success in protecting the efficacy of political intimidation statutes.

Though *Black* speaks only to threats of violence, it does not close the door to nonviolent threats that otherwise fit the exception.[149] Accordingly, numerous circuits have legitimized prohibitions of nonviolent intimidation in the voting context; courts have deemed threats of legal consequences, economic pressure, and distribution of voters' information constitutionally proscribable.[150] Relatively recently in *United States v. Turner*, the Second Circuit backed the idea that a true threat need only threaten "injury," not bodily injury.[151] And even more recently, phone calls threatening nonviolent consequences such as debt collection ahead of the 2020 election were viewed as unprotected true threats by the district court in *Wohl*.[152] Recognition of such activity as unprotected by the First Amendment bodes well for the constitutionality of political intimidation statutes pertaining to nonviolent threats.

Scholar Daniel Tokaji predicts the Supreme Court's determination of whether nonviolent threats cede First Amendment protection will turn on what the Justices view as the most important justification for the intimidation exception.[153] Recall the three reasons espoused for the exception in *Black*: protection from (1) fear, (2) disruption, and (3) the possibility that the violence will come to fruition.[154] The first two reasons apply to violent contexts equally as well as nonviolent contexts.[155] Furthermore, the disruption caused by political intimidation is "particularly noxious, given the

149 See Nat'l Coal. on Black Civic Participation v. Wohl, 498 F. Supp. 3d 457, 479 (S.D.N.Y. 2020) ("[T]he [*Black*] Court did not specify whether only threats of unlawful violence are true threats.").

150 *See id.* at 481 (listing examples of nonviolent threats recognized by different circuits); *see e.g.*, United States v. Beaty, 288 F.2d 653, 654-57 (6th Cir. 1961) (ruling that using economic pressure to intimidate voters constitutes a threat); United States v. Nguyen, 673 F.3d 1259, 1265 (9th Cir. 2012) (ruling that mailing letters warning immigrant voters that voting could cause their information to be leaked to anti-immigrant groups constitutes intimidation).

151 *See* United States v. Turner, 720 F.3d 411, 420 (2d Cir. 2013) (recognizing substantial emotional disturbance as a form of injury).

152 *See Wohl*, 498 F. Supp. 3d at 480 ("The Court accordingly does not interpret the First Amendment as prohibiting the government from restricting speech that communicates threats of nonviolent or nonbodily harm.").

153 Tokaji, *supra* note 143, at 107.

154 Virginia v. Black, 538 U.S. 343, 360 (2003).

155 *See* Tokaji, *supra* note 143, at 107 ("If the doctrine is primarily used to prevent fear and attendant disruption . . . threats of nonviolent harms may be just as bad as threats of violence.").

fundamental character of the right to vote."[156] But if a majority of the Court views the third justification as the paramount objective of First Amendment exceptions, restrictions on nonviolent intimidation would likely yield to the First Amendment, diminishing the exception's efficacy in the political intimidation context.[157]

While nonviolent threat categorizations and intent requirements have yet to be clarified, lower court decisions indicate a realistic path by which these open questions can be determined favorably for the protection of political intimidation statutes. Even if the Supreme Court concludes that constitutionally proscribable true threats must be made with subjective intent and/or involve violence, the avenue explored in the next Part provides a viable alternative route.

IV. COMPELLING INTERESTS WITHSTANDING HEIGHTENED SCRUTINY

In contrast to the true threat analysis which seeks to establish political intimidation speech as unprotected, the compelling interest approach justifies encroaching on protected free speech when the government's interest in doing so is important enough. This approach may be argued in the alternative or used as a backstop to the true threat line of analysis. This Part explores why heightened scrutiny tends to apply in political intimidation contexts and how statutes nonetheless can survive that standard.

A. *Doctrinal Background*

The First Amendment provides utmost protection for political speech.[158] However, in certain instances "the First Amendment gives way to other interests."[159] The election context is one of those instances in which protection can "yield . . . without danger."[160] As the following cases teach, strict—or some form of heightened—scrutiny tends to apply in political contexts, yet the Supreme Court readily acknowledges the compelling interests in regulating speech in these contexts, enabling statutes to overcome the tall order.

The leading case on the protection owed to political speech, *Burson v. Freeman*, addressed the restriction of expression during elections. At issue in

156 *Id.*

157 *See id.* ("If the doctrine is primarily aimed at preventing physical violence, then other kinds of threats will probably be deemed insufficient.").

158 *See* Daniels, *supra* note 23, at 373-374 ("The First Amendment protections are paramount on issues involving political debate.").

159 Virginia v. Black, 538 U.S. 343, 399 (2003) (Thomas, J., dissenting).

160 Burson v. Freeman, 504 U.S. 191, 213 (1992) (Kennedy, J., concurring).

the case was a Tennessee statute prohibiting campaigning within one hundred feet of a polling place's entrance.[161] The statute involved three central First Amendment concerns: (1) political speech, (2) in a public forum, that is (3) restricted based on its content.[162] By implicating these three concerns, the statute invited a strict scrutiny standard of analysis.[163]

Under strict scrutiny, the statute's survival hinged on whether the State could establish a compelling interest warranting the restriction.[164] The Court described the State's interest as "preventing voter intimidation[,] . . . election fraud[,]" "undue influence," and "preserving the integrity of its election process."[165] Describing just how compelling this interest was, the Court pronounced, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."[166] Given the State's compelling interest in protecting the "fundamental right" to vote, *Burson* was the "rare case" in which the Court upheld a statute subjected to strict scrutiny.[167]

Burson has since been interpreted as "expansive."[168] The recent *Minnesota Voters Alliance v. Mansky* decision construed *Burson* as tolerating restrictions on not just active persuasion at the polls, but also of any passive "display" of campaign messaging.[169] Drawing on *Burson*'s reasoning, the *Mansky* court viewed a political apparel ban inside polling places as an acceptable restriction on expression.[170] But unlike the public polling place entrance in *Burson*, the Court viewed the inside of the Minnesota polling place as a nonpublic forum.[171] Thus, a less stringent standard of scrutiny applied, requiring only that the restriction on expression be "reasonable in light of the purpose served by the forum."[172] Still, the forum's purpose of voting made it a "unique context."[173] In light of that purpose, clothing bans were reasonable given "the State's interest in maintaining a polling place free of distraction and

161 *Id.* at 193.

162 *Id.* at 196.

163 *Id.* at 198.

164 *Id.*

165 *Id.* at 199, 206.

166 *Id.* at 199 (quoting Wesberry v. Sanders, 376 U.S. 1, 17 (1964)).

167 *Id.* at 211.

168 *The Supreme Court, 2017 Term—Leading Cases*, 132 HARV. L. REV. 337, 339 (2018).

169 Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1888 (2018).

170 *Id.*

171 *See id.* at 1886 ("A polling place in Minnesota qualifies as a nonpublic forum. It is, at least on Election Day, government-controlled property set aside for the sole purpose of voting.").

172 *See id.* ("We therefore evaluate [the] First Amendment challenge under the nonpublic forum standard.").

173 *Id.* at 1887.

disruption," despite being unconstitutional in more "mundane" contexts.[174] While the Court ultimately struck down the statute in *Mansky*, it did so on vagueness grounds, thus preserving the ability of election-related restrictions to withstand scrutiny as per *Burson*.[175]

Crawford v. Marion County Election Board took an expansive view toward the kinds of compelling interests that could justify election-related restrictions.[176] Upholding an Indiana voter ID law, the Court affirmed that the State had a compelling interest in preserving public confidence in elections.[177] Preserving public confidence covers a broad swath of regulations, reaching not only instances in which wrongdoing actually occurs but also instances in which constituents perceive wrongdoing.[178]

The Supreme Court's acknowledgment of compelling interests in the election context lays the groundwork for finding a compelling interest able to withstand heightened scrutiny in the context of political intimidation statutes generally.

B. *Level of Scrutiny for Political Intimidation Statutes*

For the most part, the prior case law concern statutes restricting speech at or around polling places. While similar statutes certainly fall into the political intimidation genre, other political intimidation statutes reach beyond the polling place and even beyond voting. Still, most meet the factors outlined in *Burson* that give rise to strict scrutiny: regulation of (1) political speech, (2) in a public forum, that is (3) restricted based on content.[179]

First, and most obviously, political intimidation speech is, by definition, political. Trump rightfully stresses that his speech on January 6 dealt with matters of public concern, thus warranting protection on the "highest rung."[180] Such an observation does not immunize the speaker, but it does subject the speech to a stringent standard. Matters of public concern and political speech elevate a court's suspicion of a restriction.

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174 *Id.* at 1887-88, 1891; *see also* Bd. of Airport Comm'rs of L.A. v. Jews for Jesus, Inc., 482 U.S. 569, 576 (1987) ("[T]he wearing of a T-shirt or button [in an airport] that contains a political message . . . is still protected speech . . . ."); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969) (affirming students' ability to wear black armbands in protest of the Vietnam War as a "silent, passive expression of opinion" in a school setting).

175 *Leading Cases*, *supra* note 168, at 342 ("[The Court] ground[s] the case in the logic that the Court has used to uphold facial challenges on vagueness grounds in the past. However, it purposefully avoids saying that is what it is doing . . . .").

176 553 U.S. 181 (2008).

177 *Id.* at 197.

178 *Id.* ("[P]ublic confidence in the integrity of the electoral process has independent significance . . . .").

179 Burson v. Freeman, 504 U.S. 191, 196 (1992).

180 Trump Motion to Dismiss, *supra* note 15, at 26-27.

Second, the statute's applicability to a "public forum" in *Burson* weighed in favor of deploying strict scrutiny.[181] Likewise, many political intimidation statutes can apply to activity in public forums.[182] Section 1985(1) readily encompassed Trump's January 6 speech, which took place at the paradigmatic public forum—a public park—given its focus on public officers.[183] And §§ 1512(c)(2) and 231(a)(3) covered the rioters' behavior in that same public forum.[184]

However, subtler forms of political intimidation, such as those transmitted through cyberspace, tend to occur in a nonpublic forum.[185] Take, for example, the robocalls in *Wohl*. Section 11(b) of the Voting Rights Act, under which the defendants were liable, proscribes political intimidation without respect to the type of forum.[186] The private telephone lines used by the defendants certainly constituted a nonpublic forum.[187] But this different type of forum means a lower standard of scrutiny, like the one operationalized in *Mansky*, applies.[188] Thus, political intimidation statutes concerning nonpublic forums need to satisfy a lower hurdle than those concerning public forums.

Third, as for content, some political intimidation statutes are facially content-based, but others are content-neutral. The First Amendment disfavors content-based regulations.[189] Content-based regulations include those restricting expression of certain views as well as those that proscribe an entire area of discussion.[190] The campaigning restriction considered in *Burson*

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181 *See Burson*, 504 U.S. at 198 ("As a facially content-based restriction on political speech in a public forum, § 2–7–111(b) must be subjected to exacting scrutiny . . . .").

182 *See e.g.*, 42 U.S.C. § 1985(1) (forbidding preventing an officer from performing their duties); 18 U.S.C. § 1512(c)(2) (forbidding corrupt obstruction or interference in any official proceeding).

183 § 1985(1)

184 *See* § 1512(c)(2); 18 U.S.C. § 231(a)(3) (criminalizing obstruction or interference with any law enforcement officer's lawful duties).

185 *See generally* Dawn Carla Nunziato, *From Town Square to Twittersphere: The Public Forum Doctrine Goes Digital*, 25 B.U. J. SCI. & TECH. L. 1 (2019) (exploring the contours of the public forum category in the digital age).

186 52 U.S.C. § 10307(b) ("No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote . . . .").

187 Nat'l Coal. on Black Civic Participation v. Wohl, 498 F. Supp. 3d 457, 476 (S.D.N.Y. 2020).

188 *See* Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1880 (2018) (permitting limitations on speech in a nonpublic forum so long as they are "reasonable in light of the purpose served by the forum").

189 *See* Burson v. Freeman, 504 U.S. 191, 197 (1992) ("This Court has held that the First Amendment[] [is] hostil[e] to content-based regulation . . . .").

190 *See id.* ("[Such] hostility to content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition of public discussion of an entire topic.").

fits the latter description.[191] For content-based political intimidation statutes, strict scrutiny must apply.[192]

Other political intimidation statutes are content-neutral, aimed at certain conduct rather than its content, and thus touching on speech only incidentally.[193] Section 1985(1), for example, burdens certain *modes* of communication—"intimidation" and "threat[s]"—but not *what* is communicated.[194] Similarly, §§ 1512(c)(2) and 231(a)(3), the two most common statutes leveraged against January 6 rioters, disregard underlying views or ideas, similarly focusing on modes of communication such as "obstruct[ion]" and "imped[iment]."[195] As content-neutral restrictions, a lower standard of scrutiny may apply.

What combination of First Amendment concerns a political intimidation statute implicates varies statute-by-statute. Political speech, public forums, and/or content-based restrictions may raise the degree of scrutiny applied. Nevertheless, as explored in the next Section, a state's compelling interest in curbing political intimidation can protect political intimidation statutes from even the most rigorous scrutiny.

C. *Compelling Interest in Thwarting Political Intimidation*

Though a heightened scrutiny standard often foreshadows the demise of a statute, the successful compelling interest reasoning outlined in *Burson* maps onto political intimidation statutes broadly. The *Burson* Court's validation of the compelling interest in protecting rights fundamental to a functioning democracy readily translates to circumstances beyond the polling place on election day and to circumstances only adjacent to voting. Like the activity of voting is critical to democracy, so too is the ability of the government to carry out its critical functions, which political intimidation statutes, including § 1985(1), seek to protect. Statutes like § 1985(1) "advance[] the important federal interest in the effective operation of government."[196] Furthermore, ensuring federal officers can discharge their duties is "but a necessary incident of sovereignty . . . akin to the inherent

191 *See id.* at 217 ("Tennesse's statutory 'campaign-free zone' . . . . targets a specific subject matter . . . and thus regulates expression based on its content.").

192 *Mansky*, 138 S. Ct. at 1885.

193 *See, e.g.*, Weingartner, *supra* note 27, at 116-17 ("§ 1985(3) implicates the First Amendment to the extent that it can be violated by speech . . . . But although defendants may raise a First Amendment defense, support-or-advocacy claims will pass constitutional muster, . . . because they are content-neutral regulations of conduct rather than speech . . . .").

194 42 U.S.C. § 1985(1).

195 18 U.S.C. § 1512(c)(2); 18 U.S.C. § 231(a)(3).

196 Stern v. U.S. Gypsum, 547 F.2d 1329, 1338 (1977).

governmental 'power of self-protection . . . .'"[197] In rejecting the Proud Boys's motion to dismiss for their January 6 case, the *Nordean* court reaffirmed this compelling interest, stating that the government has a "weighty interest in protecting congress's ability to function . . . ."[198]

Crawford's recognition of preserving the public's confidence in elections as a compelling state interest further supports the constitutionality of political intimidation statutes generally. Political intimidation statutes seek to protect not only the public's confidence in elections, but also its confidence in the democratic system of government. Widespread rhetoric in the 2020 election regarding voter fraud by mail-in ballot exemplifies the undermining of public confidence.[199] And the events of January 6 highlight the dangerous consequences of eroded public confidence in the integrity of our elections, which the government certainly has an interest in guarding against. Therefore, political intimidation statutes should be evaluated with the compelling interests of preserving public confidence in mind.

These compelling interests in the "unique context" of elections can justify restrictions on speech that otherwise would not be tolerated.[200] Courts should broadly recognize a general compelling interest in regulating politically intimidating speech flowing from the compelling interests outlined in previous case law. Recognizing those compelling interests would extend the government's ability to proscribe speech that it could not proscribe in other contexts. That recognition would put political intimidation statutes on solid ground, while courts' continued inspection of a statute's narrow tailoring or substantial relation to its ends can appropriately cabin the government's reach.

CONCLUSION

The events of January 6 and the mainstreaming of false claims of voter fraud have put democracy itself on the ballot in recent elections.[201] Grounded

197 *Id.*

198 United States v. Nordean, 579 F. Supp. 3d 28, 53 (D.D.C. 2021).

199 *See Trust in America: Do Americans Trust Their Elections?*, PEW RSCH. CTR. (Jan. 5, 2022), https://www.pewresearch.org/2022/01/05/trust-in-america-do-americans-trust-their-elections [https://perma.cc/4VNA-RENU] (explaining how Trump's campaign rhetoric concerning mail-in ballots and the likelihood of fraud led his voters to have less confidence in the 2020 election results).

200 Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1887-88 (2018); *cf.* Bd. of Airport Comm'rs of L.A. v. Jews for Jesus, Inc., 482 U.S. 569, 576 (1987) (protecting the display of political messages in an airport); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969) (sanctioning students' wearing of black armbands to protest the Vietnam War as a "silent, passive expression of opinion").

201 *See Remarks by President Biden on Standing Up for Democracy*, WHITE HOUSE (Nov. 2, 2022), https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/11/03/remarks-by-president-

in skepticism of the system itself, this false narrative makes protection of the democratic system against political intimidation all the more important. Safeguarding political intimidation statutes in this fraught environment is pivotal to the continued functioning of a fair and representative democracy.

In conjunction, the dual approach outlined in this Comment creates a formidable barricade against challenges to the constitutionality of political intimidation statutes. Litigators should argue and courts should acknowledge the unprotected nature of politically intimidating speech and the government's compelling interest in proscribing such. Each analysis can stand on its own or work in tandem as a backstop for the other.

Challenges to political intimidation statutes raise questions about how to balance the preservation of the democratic free trade of ideas with the need to allow for uninhibited political participation in democracy, and what protection the First Amendment provides to each consideration. The January 6 cases, particularly *Thompson v. Trump*, present a rare opportunity to address these issues. Given the scarcity of precedent and these cases' notoriety, the January 6 cases hold the potential to be anything but "one-of-a-kind."

biden-on-standing-up-for-democracy [https://perma.cc/7B6D-L35S] (reflecting remarks by President Biden ahead of the 2022 midterm elections that "democracy itself" was "at stake").

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