Using 42 U.S.C. § 1985(2) to Challenge Dragnet Immigration Enforcement at State Courthouses

By Cameron Sheldon

Synopsis of Paper: Immigration enforcement at state courthouses threatens the rule of law because it penalizes many people for exercising, and thus chills them in the exercise of, their fundamental right of access to the courts. Accordingly, this Paper considers the viability of 42 U.S.C. § 1985, a Reconstruction Era statute, to challenge Immigration and Customs Enforcement's overinclusive dragnet enforcement at state courthouses.

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INTRODUCTION

Gardendale: "Ground Zero" for Immigration Enforcement in Alabama

In Gardendale, the municipal court hears cases involving minor offenses and city ordinance violations, such as traffic tickets, and handles thousands of cases per year—in 2016 alone, it handled over 3,454 filed cases.[1] Over the summer of 2017, the municipal court and its elected judge, Kenneth Gomany,[2] came under public scrutiny after police officers detained several Latinx

[1] ALA. ADMIN. OFFICE OF COURTS, FISCAL YEAR 2016 ANNUAL REPORT AND STATISTICS 163 (2016), http://www.alacourt.gov/Annual%20Reports/2016AOCAnnualReport.pdf.

[2] In October of 2017, Southern Poverty Law Center (SPLC) sued Judge Gomany, the City of Gardendale, and Private Probation Services, alleging that the defendants collectively exploited low-income defendants. The lawsuit resulted in a settlement between the parties, prohibiting the municipality and the court from "entering into a new agreement for the provision of probation-related or money-collection-related services to the court, where individuals are charged fees for those services." *See* SOUTHERN POVERTY LAW CENTER, *SPLC Settles Federal Lawsuit Over Illegal Private Probation Scheme in Gardendale, Alabama* (Mar. 7, 2018), https://www.splcenter.org/news/2018/03/07/splc-settles-federal-lawsuit-over-

community members at the court and turned them over to the United States Immigration and Customs Enforcement (ICE)[3]—the federal law enforcement agency responsible for apprehending and removing persons present in violation of immigration law. In September of 2017, Adelante filed an official request under Alabama's state open records law "seek[ing] documentation and 'information about the nature of Gardendale's collusion with ICE.'"[4]

Adelante has reason to believe that ICE has access to the court's docket ahead of time, since some of the documents released after a Freedom of Information Act (FOIA) request show that ICE plans to apprehend specific people who have court on a given day.[5] Furthermore, Adelante members observed that court personnel—including Judge Gomany and the courtroom interpreter—identify individuals on the docket as potential targets for removal by proxy of racial markers or their national origin. Once identified by the court, ICE agents have approached the individuals upon exiting the courtroom for questioning, sometimes holding them in custody inside the court building. In this way, a referral-like practice has emerged where Gardendale court personnel tell ICE where to cast its net and detain the identified individuals.

For example, in May of 2017, MC,[6] a Latinx resident of Gardendale, went to the municipal court to pay a ticket for driving without a license. At her hearing, MC was among the first people to be called before Judge Gomany, after a court interpreter identified individuals with Latinx last names who required Spanish interpretation on the docket. When a police officer escorted MC out of the courtroom to pay her fine to the cashier, she was approached by plainclothes ICE agents who asked for her identification without identifying themselves to her. After MC produced a Mexican passport, the agents questioned her about her immigration status and scanned her fingerprint on a mobile device. Gardendale police proceeded to detain MC in the municipal jail attached to the courthouse and placed an "immigration hold" on MC, requesting the jail transfer her to federal custody at the end of her term.

MC's arrest is not an isolated incident in Gardendale, which has "swiftly emerged as ground zero for aggressive immigrant enforcement in Alabama."[7] In June of 2017, ICE detained JX, another undocumented Latinx Gardendale resident, who came to the municipal court to resolve a traffic violation.[8] When JX accompanied his attorney to get court documents from the clerk, ICE agents closed in and took him to a separate room for questioning.[9]

ICE's enforcement is notably imprecise, pulling in citizens as well as noncitizens. At or around the same time as MC's run-in with ICE, ICE interrogated and detained CV, a Latinx Gardendale resident and United States citizen. Federal agents targeted CV as a removable noncitizen

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illegal-private-probation-scheme-gardendale-alabama. At the same time, SPLC filed a separate judicial ethics complaint with the Judicial Inquiry Commission of Alabama against Judge Gomany for his role in the scheme, delegating judicial functions to the private probation company, failing to provide counsel to those who could not afford it, and failing to provide interpreters to those who did not speak English. *See* S. POVERTY LAW CTR., *SPLC Sues Private Company, City of Gardendale, Ala. And Judge Over Illegal Probation Scheme* (Oct. 24, 2017), https://www.splcenter.org/news/2017/10/24/splc-sues-private-company-city-gardendale-ala-and-judge-over-illegal-probation-scheme.

[3] *See* Connor Sheets, *'We feel attacked': Protesters decry immigration enforcement tactics at Gardendale court*, AL.COM (Sept. 15, 2017), https://www.al.com/news/index.ssf/2017/09/we_feel_attacked_protesters_de.html.

[4] *Id.*

[5] *See* E-mail to ICE Fugitive Operations Program (Jun. 2, 2017, 1:56 p.m.) (on file with author); U.S. IMMIGRATION & CUSTOMS ENF'T, ERO NEW ORLEANS -ENFORCEMENT ACTION AT COURTHOUSE (2017) (on file with the author).

[6] This Paper uses initials to refer to affected individuals to preserve their anonymity.

[7] Sheets, *supra* note 3.

[8] *See* Stephon Dingle, *Undocumented immigrant goes to court for traffic violation, gets detained by ICE agents*, CBS 42 (Jun. 5, 2017), http://www.cbs42.com/news/undocumented-immigrant-goes-to-court-for-traffic-violation-gets-detained-by-ice-agents/868054099.

[9] *See id.*

at his court appearance for driving under the influence, a misdemeanor offense. When CV pled guilty to the charge, he was sentenced to probation and instructed to meet with the private probation company located inside the court. Upon exiting the courtroom, three plainclothes ICE agents led CV to a room, interrogated him about his status, his family, and his country of origin, and threatened to detain him.

CV is not the only United States citizen to be apprehended by ICE. A 2016 study by National Public Radio revealed that 818 citizens were held in ICE detention between 2007 and 2015, and an additional 693 were held in local jails on federal detainers.[10] Furthermore, a 2011 UC Berkeley study found that approximately 3,600 United States citizens were arrested by ICE between 2009 and 2011 as part of the Secure Communities partnership between ICE and local law enforcement.[11]

ICE Courthouse Arrests in the National Enforcement Landscape

Courthouse arrests are not the invention of the Trump administration,[12] but they are on the rise.[13] Although the courts stand at the center of our system of justice, courthouses are not included on ICE's list of "sensitive locations," and thus remain vulnerable to ICE enforcement tactics. In January of 2018, ICE issued a policy directive explicitly endorsing the practice of making courthouse arrests.[14] Under that policy, ICE officers may arrest suspected immigration violators at federal, state, and local courthouses where probable cause exists to believe that such noncitizens are removable from the United States.[15] In justifying the policy, the memorandum scapegoats "jurisdictions [unwilling] to cooperate with ICE in the transfer of custody of aliens from their prisons and jails."[16]

Blaming escalating enforcement tactics on local noncooperation with federal immigration enforcement is a familiar narrative that the Department of Homeland Security has used in the "decades-long struggle … [with] states and localities over the[ir] proper role … in immigration enforcement."[17] However, Gardendale does not fit within this narrative where court personnel actively worked to facilitate ICE's enforcement actions in the courthouse.

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[10] Eyder Peralta, *You Say You're An American, But What If You Had To Prove It Or Be Deported?*, NAT'L PUB. RADIO (Dec. 22, 2016), https://www.npr.org/sections/thetwo-way/2016/12/22/504031635/you-say-you-re-an-american-but-what-if-you-had-to-prove-it-or-be-deported.

[11] AARTI KOHLI ET. AL., THE CHIEF JUSTICE EARL WARREN INST. ON LAW & SOC. POLICY, SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS 4 (2011), https://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf.

[12] *See* U.S. DEP'T OF HOMELAND PROTECTION, SENSITIVE LOCATIONS FAQS (2016), https://www.cbp.gov/border-security/sensitive-locations-faqs (clarifying that courthouses "do not fall under ICE or CBP's policies concerning enforcement actions at or focused on sensitive locations . . . .").

[13] *See* Joanne Lin, *Immigration Arrests at State Courthouses Are on the Rise in 2017. Here's Why That's Dangerous—For All of Us*, ACLU BLOG: SPEAK FREELY (Apr. 6, 2017), https://www.aclu.org/blog/immigrants-rights/ice-and-border-patrol-abuses/immigration-arrests-state-courthouses-are-rise.

[14] *See* U.S. IMMIGRATION & CUSTOMS ENF'T, CIVIL IMMIGRATION ENFORCEMENT ACTIONS INSIDE COURTHOUSES (Jan. 10, 2018), https://www.ice.gov/sites/default/files/documents/Document/2018/ciEnforcementActionsCourthouses.pdf.

[15] *Id.*

[16] *Id.*

[17] Annie Lai & Christopher N. Lasch, *Crimmigration Resistance and the Case of Sanctuary City Defunding*, 57 SANTA CLARA L. REV. 539, 544 (2017).

The Question Presented

How can advocates prevent local and state courts from facilitating federal immigration enforcement? While other challenges may be availing,[18] this Paper urges advocates to seriously consider challenging courthouse immigration arrests under the state court prong of 42 U.S.C. § 1985(2).

Section 1985 is an old and underused Reconstruction Era statute that has confounded litigants and courts alike.[19] The statute was enacted in 1871 as part of the Ku Klux Klan Act, which sought to control Klan violence against blacks in the post-Civil War South, in addition to preserving orderly government and assuring the smooth functioning of the courts.[20] As an idea that was born in history, Section 1985 has important implications for persons of color and of other nationalities seeking to access the courts today.

I. THE STATE COURT PRONG OF THE CIVIL RIGHTS CONSPIRACY STATUTE

Section 1985(2) proscribes conspiracies to interfere with the administration of justice in federal[21] and state courts.[22] The second clause of Section 1985(2), specifically, creates a cause of action for the obstruction of justice in *state courts* when

> two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating . . . the due course of justice in any State or Territory with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing . . . the right of any person, or class of persons, to the equal protection of the laws[.][23]

Unlike the first clause of Section 1985(2), which concerns interference with *federal court* access,[24] the second clause contains "equal protection" language as an essential element.[25] Accordingly, persons

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[18] The First Amendment Petition Clause, the Article VI Privileges and Immunities Clause, the Due Process Clauses of the Fifth and Fourteenth amendments, and the Fourteenth Amendment Equal Protection Clause, for example.

[19] *See* Bundy v. United States, No. 2:17-cv-01127-JAD-GWF, 2017 U.S. Dist. LEXIS 186900, at *7 (D. Nev. Nov. 9, 2017) (plaintiff pleaded under wrong subsection of 42 U.S.C. § 1985); Coker v. Corizon Med. Servs., No. 5:12-cv-01028-SLB-TMP, 2013 U.S. Dist. LEXIS 177659, at *1 (N.D. Ala. Oct. 7, 2013) (reciting the wrong elements of 42 U.S.C. § 1985(2)).

[20] *See* Kimble v. D. J. McDuffy, Inc., 648 F.2d 340, 350 (5th Cir. 1981).

[21] *See* McAndrew v. Lockheed Martin Corp., 206 F.3d 1031, 1035 n.2 (11th Cir. 2000) (holding that "court of the United States in § 1985(2) refers only to Article III courts and certain federal courts created by act of Congress, but not to state courts") (citing Shaw v. Garrison, 391 F. Supp. 1353, 1370 (E.D. La. 1975)).

[22] *See* 42 U.S.C. § 1985 (2016).

[23] *Id.* (emphasis added).

[24] If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any *court of the United States* from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(2–3) (2016).

[25] *See* 42 U.S.C. § 1985(2) (2016).

seeking to prove violations of their civil rights under the state court prong must allege that the conspiracy was motivated by racial or class-based animus.[26]

A. The Requirement of a "Conspiracy" Between "Two or More Persons"

The first element of the state court prong of Section 1985(2) requires a "conspiracy" between "two or more persons."[27]

1. What Constitutes a Conspiracy Within the Meaning of Section 1985(2)?

The existence of a conspiracy is a factual question essential to a cause of action under any part of Section 1985.[28] An allegation that two or more defendants agreed to perform the proscribed act is generally sufficient.[29] To that end, plaintiff must present evidence that some overt act was done in furtherance of the conspiracy.[30]

At least one Eleventh Circuit district court has held that the overt act must actually result in plaintiff's deprivation of a constitutional right.[31] However, another district court has held that plaintiff need only "show overt acts related to the promotion of the conspiracy" to "violate plaintiff's federally guaranteed rights."[32] The distinction might not matter where the plaintiff's rights under the statute are violated anyway, but the plain language of Section 1985(2) does not seem to require an actual violation.

Although a plaintiff is not required to "produce *direct* evidence of a meeting of the minds, [she] must come forward with specific circumstantial evidence that each member of the alleged conspiracy shared the same conspiratorial objective . . . ."[33] The Eleventh Circuit applies a heightened pleading standard in conspiracy cases because "a defendant must be informed of the nature of the conspiracy which is alleged."[34] Conclusory allegations, without substantiating details, of a conspiracy do not adequately allege a conspiracy.[35] But circumstantial evidence, if sufficiently detailed, may give rise to the inference of a conspiracy.[36]

2. Who Is a "Person" Within the Meaning of Section 1985(2)?

Section 1985 does not define who or what entities count as "persons," but at least one Eleventh Circuit district court invokes persuasive precedent from the Seventh, D.C., Third, and Ninth Circuits in holding that the term "person" has the same meaning under Section 1985 as does "person" under Section 1983.[37] This interpretation is problematic for the purposes of challenging

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[26] *See* Kush v. Rutledge, 460 U.S. 719, 720 (1983).
[27] 42 U.S.C. § 1985(2) (2016).
[28] *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 176 (1970).
[29] *See* Puglise v. Cobb Cty., 4 F. Supp. 2d 1172, 1181 (N.D. Ga. 1998).
[30] *See* Kitchen v. Crawford, 326 F. Supp. 1255, 1262 (N.D. Ga. 1970).
[31] *See* Puglise, 4 F. Supp. 2d at 1181 (citing Hinkle v. City of Clarksburg, 81 F.3d 416, 421–23, n.4 (4th Cir. 1996)).
[32] Croy v. Skinner, 410 F. Supp. 117, 126 (N.D. Ga. 1976).
[33] Puglise, 4 F. Supp. 2d at 1181 (emphasis added).
[34] Fullman v. Graddick, 739 F.2d 553, 557 (11th Cir. 1984).
[35] *Id. at 1501 (quoting Bailey v. Board of County Comm'rs of Alachua County, 956 F.2d 1112, 1122 (11th Cir. 1992)).*
[36] *Id.*
[37] *See* Hayden v. Ala. Dep't of Pub. Safety, 506 F. Supp. 2d 944, 949 (M.D. Ala. 2007) (quoting Small v. Chao, 398 F.3d 894, 898 (7th Cir. 2005); Sturdza v. United Arab Emirates, 281 F.3d 1287, 1307 (D.C. Cir. 2002); Rode v. Dellarciprete, 617 F. Supp. 721, 723 n.2 (M.D. Pa. 1985); Coggins v. McQueen, 447 F. Supp. 960, 963–64 (E.D. Pa. 1978); DaVinci v. Missouri, No. 06-068-AS, 2007 U.S. Dist. LEXIS 57827, at *7 (D. Or. Jan. 26, 2007)).

the actions of ICE, a federal agency, because a "person" under Section 1983 is limited to state and local government actors.

More specifically, Section 1983 imposes liability against "[e]very person" who, acting under color of state law, violates another's federally protected right.[38] "Person" in this context has traditionally been interpreted to encompass state and municipal officials sued in their individual capacities,[39] private individuals and entities that acted under color of state law, [40] and municipal entities (and their officials sued in an official capacity).[41] Although the term does not include states or state agencies, it does include state officials sued for prospective relief.[42] Crucially, however, it does not include the United States or federal agencies.[43]

Although federal agencies may not be liable under Section 1985, some courts—including the District Court for the Northern District of Alabama, which sits in the Eleventh Circuit—have held that federal officers are still subject to suit.[44] Outside of the Eleventh Circuit, other courts have held that Section 1985 can be pleaded against federal officers.[45] The Tenth Circuit Court of Appeals, for example, has squarely held that federal officers can be sued in tandem with state officers for violations of Section 1985(2).[46]

B. The Requirement of a Purpose of Impeding, Hindering, Obstructing, or Defeating the Due Course of Justice

The second element of a claim under Section 1985(2) is that defendants conspired with one another for the *purpose* of "impeding, hindering, obstructing, or defeating" the "due course of justice" as demonstrated by some "overt act."[47] Neither the Supreme Court nor the Eleventh Circuit has spoken with clarity to this element. Thus, insights from other circuit courts are instructive.

Racialized threats aimed at dissuading a plaintiff from filing a complaint come within the "impeding" language of Section 1985.[48] In *Jones v. Tozzi*, a case from the Eastern District of

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[38] 42 U.S.C. § 1983 (2016).

[39] *See* Kentucky v. Graham, 473 U.S. 159, 166 (1985).

[40] *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 950 (1982) (holding that a "color of law" inquiry acknowledges that private individuals, engaged in unlawful joint behavior with state officials, may be personally responsible for wrongs that they cause to occur).

[41] *See* Monell v. Dep't of Soc. Servs. of City of N.Y., 436 U.S. 658, 661 (1978).

[42] *See* Hutto v. Finney, 437 U.S. 678, 690 (1978).

[43] Polsky v. United States, 844 F.3d 170, 173 (3d Cir. 2016) (neither United States nor federal agencies, such as the IRS, is a suable Section 1983 "person"); McCloskey v. Mueller, 446 F.3d 262, 271 (1st Cir. 2006) (claims generally cannot be brought against federal actors and, since complaint failed to allege any tortious activity under color of state law nor any extraordinary circumstances that might implicate the federal defendants in state action, district court properly dismissed compliant); Hindes v. FDIC, 137 F.3d 148, 159 (3d Cir. 1998) (federal agencies are not persons subject to Section 1983 liability).

[44] Note, however, that there is disagreement among the lower courts where other district courts have held that federal officers are not subject to suit under Section 1985. *See, e.g.,* Moore v. Schlesinger, 384 F. Supp. 163, 165 (D. Colo. 1974) (federal officers are immune to suit under Section 1985 when acting under color of federal law); *accord* Williams v. Halperin, 360 F. Supp. 554, 556 (S.D.N.Y. 1973); Bethea v. Reid, 445 F.2d 1163, 1164 (3d Cir. 1971).

[45] *See* Dry Creek Lodge, Inc. v. United States, 515 F.2d 926, 931 (10th Cir. 1975) (holding that claim against Secretary of the Interior, the area director of the Bureau of Indian Affairs, and other federal officers under Section 1985 states cause of action); Alvarez v. Wilson, 431 F. Supp. 136, 142 (N.D. Ill. 1977) (holding that federal officers may be sued under Sections 1985(1) and 1985(3) if the complaint alleges racial discrimination).

[46] *See* Anthony v. Baker, 767 F.2d 657, 660–62 (10th Cir. 1985).

[47] *See* Kitchen v. Crawford, 326 F. Supp. 1255, 1262 (N.D. Ga. 1970).

[48] *See* Jones v. Tozzi, No. 1:05-CV-0148 OWW DLB, 2006 U.S. Dist. LEXIS 63278, at *42 (E.D. Cal. Aug. 23, 2006) ("[V]iewing the complaint liberally as is required, . . . Plaintiff is attempting to describe pieces of a larger conspiracy to *impede* his access to state court, specifically to discourage him from pursuing contempt charges against Ms. Chhay.") (emphasis added).

California, a father in a child custody dispute sued two attorneys for making racially derogatory remarks to him as part of a conspiracy to "*impede* his access to state court," effectively discouraging him from pursuing contempt charges against the mother of his child, in contravention of Section 1985.[49]

Harassing a plaintiff also qualifies as attempting to impede[50] or obstruct[51] the due course of justice under Section 1985(2). In *Britt v. Suckle*, the plaintiff sustained injuries during his employment at a cast iron foundry and sought worker's compensation benefits.[52] To undermine his claim, plaintiff's employer allegedly told plaintiff's doctor that it would not pay for plaintiff's medical treatment; urged plaintiff's legal counsel to drop plaintiff's case; and persuaded plaintiff's other part-time employer to discharge plaintiff.[53] In denying the employer's motion to dismiss, the district court held that the foundry's alleged acts constituted a conspiracy, the purpose of which was to obstruct plaintiff's equal access to state court, in violation of Section 1985(2).[54]

Although the plaintiffs in *Jones* and *Britt* were *civil* litigants who were found to have been hindered in their efforts to file suit in state court, Section 1985(2) should similarly prohibit conspiracies against criminal defendants' access to state courts. Section 1985(2) purports to protect "any citizen," without reference to civil or criminal parties, witnesses, or otherwise.[55] Further, the Eleventh Circuit Court of Appeals has recognized that "race-based retaliatory efforts tied to criminal proceedings in the state courts *do* implicate the criminal defendant's . . . right to equal protection of the law" under Section 1985(2).[56] Finally, as the district court held in *Britt*, "[a]ccess to state courts becomes an issue only when there is already some underlying legal claim."[57] Criminal defendants, as much as civil plaintiffs, are entitled to state court access to mount defenses against criminal charges pending against them, consult with public defenders, who may have offices within the courthouse,[58] to mitigate any sentence they may face for those charges, and to obtain final resolution in their cases.

The government might try to rebut that ICE's purpose in executing courthouse arrests is not to defeat the due course of justice since the agency actually relies on people coming to court to apprehend them. However, the agency continues to use an overinclusive strategy with a known chilling effect. Thus, its conduct arguably rises to a level of deliberate indifference[59] or, perhaps,

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[49] *Id.* (emphasis added).

[50] Britt v. Suckle, 453 F. Supp. 987, 989 (E.D. Tex. 1978) ("Plaintiff relied particularly on that part of § 1985(2), following the penultimate semicolon, which deals with *impeding* the due course of justice in any State or Territory") (emphasis added).

[51] *Id.* at 997 ("[D]efendant's intent, as alleged by plaintiff Britt, is to *obstruct* the due course of justice, the hearing and vindication of state claims . . . .") (emphasis added).

[52] *Id.* at 990.

[53] *Id.*

[54] *See id.*

[55] 42 U.S.C. § 1985(2) (2016).

[56] Chavis v. Clayton Cty. Sch. Dist., 300 F.3d 1288, 1293–94 (11th Cir. 2002) (finding a violation of the state court prong of Section 1985(2) where defendant school district and district officials engaged in "race-based retaliatory conduct aimed at a person who testified truthfully in criminal court in a way that was helpful to a person of a particular race--the 'wrong race in Defendants' eyes'") (citing Powers v. Ohio, 499 U.S. 400, 415 (1991)).

[57] Britt v. Suckle, 453 F. Supp. 987, 992 n.8 (E.D. Tex. 1978).

[58] In the case of Gardendale, the court appoints private attorneys to serve as public counsel. When defendants meet the usually scheduled attorney, the courtroom serves as the attorney's office. By targeting the courthouse, ICE's aggressive enforcement actions directly implicate the right to meaningful consultation with criminal defense counsel.

[59] Deliberate indifference is the general standard of 42 U.S.C. § 1983 liability. Section 1983 provides a civil remedy for persons to sue state actors who, acting under the color of law, violate federally protected rights. Section 1983 defendants act with deliberate indifference when they disregard a known, "substantial risk of serious harm" by "failing to take reasonable measures to abate it." Farmer v. Brennan, 511 U.S. 825, 847 (1994). Deliberate indifference is also the standard for compensatory damages under Section 504 of the Rehabilitation Act, which proscribes discrimination on the basis of disability in programs conduct by federal agencies, in programs receiving federal financial assistance, in federal

reckless indifference[60] to the federally protected rights of community members called to court. Both deliberate and reckless indifference have been construed as theories of intentional liability in other civil rights actions.[61] By challenging ICE's collusion under either theory, there is a convincing argument to be made that the chilling effect of ICE's dragnet enforcement is just as intentional as any act of physical obstruction or restraint.[62]

C. The Requirement of an Intent to Deny Any Citizen the Equal Protection of the Laws

1. Can Noncitizens Sue Under Section 1985(2)?

Noncitizen plaintiffs cannot sue under Section 1985(2) under the plain language of the statute. The deliberate use of "citizen" under Section 1985(2), where Congress identified "any person" under all three subsections or "any officer" under Section 1985(1), indicates that Congress did not intend for noncitizen plaintiffs to file suit thereunder. Nevertheless, this language does not foreclose a citizen plaintiff, like CV, or an organizational plaintiff, like Adelante, from bringing suit.

There is very little authority on organizational or representative standing under Section 1985. In a case from the District Court for the Western District of Louisiana, a corporate plaintiff had *organizational* standing under the state court prong of Section 1985(2) because it was a "person" within the meaning of the Equal Protection Clause and Due Process Clauses.[63] Accordingly, the corporation could assert a claim for damages under in Section 1985(3), but it did not expound upon the requirements for standing.[64] In another case from the Middle District of Tennessee, a nonprofit

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employment, and in the employment practices of federal contractors. Section 504 defendants act with deliberate indifference when they have knowledge "that harm to a federally protect right [i]s substantially likely and . . . fail[] to act on that likelihood." Liese v. Indian River Cty. Hosp. Dist., 701 F.3d 334, 344 (11th Cir. 2012) (quoting T.W. ex rel. Wilson v. Sch. Bd. of Seminole Cty., Fla., 610 F.3d 588, 604 (11th Cir. 2010)).

[60] "Reckless indifference" is the standard for punitive damages under 42 U.S.C. § 1981 liability. Section 1981 provides a civil remedy for race discrimination in employment, in both the public and private sectors, through its application to employment contracts. Section 1981 defendants act with "reckless indifference" when they "discriminate in the face of a perceived risk that [their] actions will violate federal law . . . ." Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 535–36 (1999). This standard requires a "'subjective consciousness' of a risk of injury or illegality." *Id.* (quoting Smith v. Wade, 461 U.S. 30, 38 n.6 (1983)).

[61] Liese, 701 F.3d at 345 (finding that deliberate indifference is the appropriate standard for showing "intentional discrimination" under Section 504 of the Rehabilitation Act); Archie v. City of Racine, 847 F.2d 1211, 1219 (7th Cir. 1988) (holding reckless infliction of injury constitutes intentional infliction in an action under 42 U.S.C. § 1983); Fagan v. City of Vineland, 22 F.3d 1296, 1324 (3d Cir. 1994) (Cowen, R., dissenting) (reckless indifference qualifies as intentional conduct "[e]ven under the most restrictive test for a § 1983 action").

[62] Intent matters where Section 1985(2) requires an intentional theory of liability. 42 U.S.C. § 1985(2) (2016) (defendant must have conspired with "*intent* to deny to any citizen the equal protection of the laws" to be liable). To support this argument, Adelante might cite to the widely publicized 2016 NPR and 2011 Berkeley studies and other publications highlighting ICE's mistakes, responsive ICE memoranda, and the agency's continued implementation of dragnet enforcement at the Municipal Court. This kind of evidence might demonstrate ICE's awareness of the problem of overinclusive enforcement and risk of dragging in the wrong kind of person *every time* by acting on less cause than they should have.

[63] "[A]lthough the plaintiff in this case, a corporation, cannot maintain a suit for damages under the first sentence of Sec. 1 of the 14th Amendment and Section 43 of Title 8 U.S.C.A., it does have a standing to assert a claim under … the last clause of subsection (2) of Sec. 47 of Title 8 U.S.C.A. providing 'or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws.'" Llano Del Rio Co. of Nev. v. Anderson-Post Hardwood Lumber Co., 79 F. Supp. 382, 392 (W.D. La. 1948).

[64] Llano Del Rio Co. of Nev., 79 F. Supp. at 392–93.

corporate plaintiff had *representational* standing to seek declaratory and injunctive relief under Section 1985, but not damages, inasmuch as the suit was brought in the corporation's representative capacity and was based on injury to others.[65]

Notwithstanding this gap in the case law, the legislative history of the Ku Klux Klan Act of 1871 suggests that both organizational and representational standing should be available. As the Eleventh Circuit Court of Appeals has recognized, "[a] principal concern of the 42nd Congress," which enacted Section 1985 of the Act, "was to protect newly-emancipated blacks, and *those who championed them*, against conspiracy to violate their civil rights."[66] Accordingly, it is conceivable that an organization like Adelante, fighting to secure the rights of Latinxs, would have standing for declaratory and injunctive relief under Section 1985(2).

2. What Types of Classifications are Protected by Section 1985(2)?

A Section 1985(2) plaintiff must demonstrate a relationship with a protected class[67] and show that defendants conspired to deprive her of equal protection by virtue of their class-based or invidiously discriminatory animus.[68] The case law interpreting Section 1985(3) is illuminating because of the parallel history and scope of Sections 1985(2) and (3).[69]

3. Alleging an Intentional Theory of Discrimination

Section 1985(2) likely requires that the alleged conspirators have discriminatory intent in depriving any citizen the equal protection of the laws.

The Supreme Court has rejected a disparate impact theory of invidiously discriminatory animus under Section 1985(3).[70] For example, in *Bray v. Alexandria Women's Health Clinic*, the Court held that it would "not suffice for application of § 1985(3) that a protected right be incidentally affected."[71]Although there is no case law under Section 1985(2) expressly rejecting a disparate impact theory, federal courts are likely to subscribe to *Bray* where Section 1985(2) and (3) are "both … aimed at prohibiting state level conspiracies that deny equal protection of the law; … and consequently, require proof of … specific discriminatory animus," which *Bray* later interpreted to require intentional discrimination.[72]

Although a disparate impact theory of liability is unlikely to suffice for purposes of Section 1985(2), evidence of the defendants' awareness of the disparate impact of their actions, depriving plaintiffs of equal protection under the law, and continued engagement in those actions

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[65] *See* Minority Emps. of Tenn. Dep't of Emp't Secur., Inc., v. Tenn., Dep't of Emp't Sec., 573 F. Supp. 1346, 1349 (M.D. Tenn. 1983) (citing Warth v. Seldin, 422 U.S. 490, 511 (1975) ("It is well established that an association may have standing to represent its members even in the absence of injury to itself.").

[66] Chavis, 300 F.3d at 1292 (emphasis added).

[67] *See* Smith v. Chief, No. 1:08-CV-1835-CAP-WEJ, 2009 U.S. Dist. LEXIS 137972, at *14 (N.D. Ga. Oct. 13, 2009) (discussing cases that have rejected classes deserving of protection).

[68] *See* Griffin v. Breckenridge, 403 U.S. 88, 102 (1971) (holding that the "language requiring intent to deprive of equal protection, or equal privileges and immunities" under Section 1985(3) "means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action); *see also Lyon v. Ashurst*, No. 08-16778, 2009 U.S. App. LEXIS 24726, at *6 (11th Cir. Nov. 9, 2009) (to state a claim under 1985(2), plaintiff must plead a private conspiracy with a racial or otherwise class-based invidiously discriminatory motivation).

[69] *See* Shahawy v. Lee, No. 95-269-CIV-T-21-B, 1996 U.S. Dist. LEXIS 22854, at *75-76 (M.D. Fla. Dec. 13, 1996).

[70] *See* Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 270, 275-76 (1993).

[71] *Id.* at 275.

[72] *See* Shahawy, 1996 U.S. Dist. LEXIS 22854, at *65.

notwithstanding that awareness, might support a finding of intentional discrimination under a theory of deliberate or reckless indifference.[73]

II. BRINGING A SECTION 1985(2) CLAIM: A "DRAGNET" THEORY OF INTENTIONAL DISCRIMINATION

Part II of this Paper delineates how a citizen plaintiff, like CV, or organizational plaintiff, like Adelante, might frame a Section 1985(2) claim. Section A discusses how ICE and Gardendale qualify as "persons" with the requisite conspiratorial purpose. Section B considers how ICE and Gardendale have conspired with the intent to deny Latinxs of equal protection under the law under a race-based theory of intentional discrimination. Section C explains how Adelante would have representational or organizational standing. Finally, section D contemplates potential barriers to litigating a Section 1985(2) claim.

A. ICE and Gardendale Are "Persons" that Share the Requisite Conspiratorial Purpose of Physically Obstructing and Chilling Adelante's Latinx Membership from Attending the Municipal Court

Federal officers may be sued in tandem with state officers for having agreed to impede, hinder, obstruct, or defeat the course of justice under Section 1985(2).[74] Accordingly, a citizen plaintiff should first identify a "meeting of the minds" between at least one federal ICE agent and one Gardendale official to impede, hinder, obstruct, or defeat her access to the court.

With respect to ICE, the complaint might first point to the agency's January 10, 2018 memorandum, which articulates a clear policy of "enforcement actions inside courthouses."[75] The complaint could then demonstrate a shared conspiratorial objective between ICE and Gardendale court personnel by describing their referral-like practice to apprehend Latinx litigants. To avoid conclusory allegations, the complaint should describe how court personnel repeatedly identified criminal defendants of a certain race or national origin as a proxy for lack of United States citizenship. Here, it would be important to use MC's and CV's factual allegations to highlight the discriminatory animus at play when court personnel identify and isolate individuals on the basis of language proficiency or surname.

To bolster a claim of conspiracy between ICE and court personnel, the complaint should cite to email correspondence between ICE officials (or between ICE and court personnel) that link both entities to a common purpose. Adelante Alabama already has several emails of the sort that were released in response to a FOIA request. These factual allegations and emails are sufficient to allege, upon information and belief, a shared conspiratorial purpose between ICE and court personnel. If Adelante is able to overcome a motion to dismiss, then it can more forward to discovery, where it may uncover more hard evidence of a common conspiratorial purpose to prevent access to the municipal court.

Finally, the complaint must describe some overt act in furtherance of the alleged conspiratorial purpose (i.e., impeding, hindering, obstructing, or defeating). ICE and Gardendale's practice of dragnet enforcement—targeting individuals by court personnel, followed by questioning,

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[73] *Supra* note 62.

[74] *Supra* Part I.A (discussing the conspiracy requirement).

[75] U.S. CITIZENSHIP & IMMIGRATION SERVS., CIVIL IMMIGRATION ENFORCEMENT ACTIONS INSIDE COURTHOUSES, (2018).

physical restraint, and/or arrest by ICE—should suffice to satisfy this requirement where indirect harassment has sufficed elsewhere.[76]

B. ICE and Gardendale Officials Have Conspired with Intent to Deny Latinxs Equal Protection Under the Laws

Section 1985(2) requires an intent to deprive a "*citizen* of equal protection" under the law.[77] Thus, alienage cannot define the protected class because the statute expressly requires that the defendant conspirators believe or realize the substantial probability that the party they seek to deprive of court access is a *citizen*. However, the citizen plaintiff—apprehended by ICE in error—could advance a class-based theory rooted in race and national origin discrimination.

Under a theory of intentional discrimination, the citizen plaintiff would have to demonstrate his membership in a protected class—racial, national origin, or both—and allege that ICE agents, colluding with state officials, targeted persons for arrest at the courthouse based on racial markers (e.g., the color of their skin, their language,[78] and the sound of their last name[79]) or citizenship from a foreign country at the court as a proxy for their "removability" or "unlawful presence." Because these markers belong to citizens (i.e., dual citizens, in the case of a foreign passport) and noncitizens alike, an expressed desire to target individuals based on a combination of these markers would suffice to meet the animus requirement.[80]

If the court requires an additional showing of specific intent to deprive *citizens* of equal protection, the citizen plaintiff might advance the dragnet theory of liability, alleging that ICE agents, colluding with state officials, knew or had reason to believe that their enforcement strategy was not reasonably calculated to apprehend noncitizens only (i.e., that their strategy could and would likely "drag in" citizens as well as noncitizens). Aware of their overinclusive enforcement, defendant conspirators continued to enforce the policy anyway, relying on the same intentionally discriminatory process of identifying "noncitizens" by proxy of racial markers or national origin, and dragging them into ICE custody, to the same effect. Careful framing might characterize ICE's practice as the conscious disregard of a known and substantial risk of illegal detention to the extent the agency is aware of false positives, yet has failed to change its enforcement strategy to limit the effect of their blunderbuss methods.

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[76] *Supra* Part I.B (discussing *Britt*, a case involving several instances of indirect harassment).
[77] 42 U.S.C. § 1985(2) (2016) (emphasis added).
[78] Justice Kennedy, writing for the plurality in *Hernandez v. New York*, recognized that "[i]t may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis." 500 U.S. 352, 355 (1991).
[79] At least one district court has found that surnames, like skin color, may be a surrogate for race. *See, e.g.*, *Diaz v. Silver*, 978 F. Supp. 96, 103 (E.D.N.Y. 1997) (finding the redistricting of a congressional district unconstitutional because race—through the use of a race-sensitive computer program, voter registration lists, and surname dictionaries to identify Latino and Asian names—was the predominant factor in its creation and it failed to meet the strict scrutiny standard).
[80] One issue to flag in advancing this theory of intent is that race or ethnic appearance has emerged as a legal factor in a reasonable suspicion calculus. United States v. Brignoni-Ponce, 422 U.S. 873, 886-87 (1975). However, this case law has been rebuked in the Ninth Circuit where the Supreme Court "relied on heavily now-outdated demographic information" in its reasoning. United States v. Montero-Camargo, 208 F.3d 1122, 1130-31 (2000). Simply because the Supreme Court once recognized racial profiling is a permissible factor under the Fourth Amendment does not mean that it is permissible in the context of Section 1985.

C. Adelante Would Have Organizational and/or Representative Standing to Sue Under 1985(2)

Adelante is a nonprofit corporation that qualifies as a "person" within the meaning of the Equal Protection Clause. Accordingly, it may have *organizational* standing for damages under the state court prong of Section 1985(2) if it can demonstrate injury to itself. Adelante might be able to adduce this by showing that it will suffer diminished financial support or membership due to ICE's dragnet enforcement,[81] or that it has been hindered in its efforts to assist others to assert their constitutional or statutory rights, and it has had to devote significant resources to counteract the defendants' actions.[82] Here, Adelante could highlight the chilling effect the defendants' actions have had on its membership, thus diverting it from providing core services in order to accompany membership to court for matters most people would resolve on their own.[83]

Alternatively, if Adelante cannot demonstrate injury to itself, it would have *representative* standing to litigate its members' claims for equitable relief.[84] Generally, standing requires an injury to the plaintiff that is actual or imminent and concrete and particularized harm.[85] A prerequisite of representative standing is that the citizen members would have standing in their own right were they to bring suit themselves.[86]

To allege an injury that is sufficiently concrete, Adelante could argue that its membership has suffered a stigmatic injury by virtue of ICE collaboration with the municipality and enforcement at the courthouse (i.e., the stigma of "criminality" or "illegality" ascribed to Latinxs).[87] Adelante could also cite the deprivation of liberty or other harms associated with the denied exercise of other federally protected rights at the courthouse (e.g., CV's interrogation and arrest), coupled with attendant emotional and physical harms that members have suffered, as evidence of actual or "real world" harm.[88]

To demonstrate that the defendants caused such injury, or that the injury is fairly traceable to the defendants' allegedly unlawful conduct, Adelante must carefully detail the referral-like practice between ICE and the courthouse for apprehending targets by proxy of their racial markers or their national origin (e.g., when the only form of identification an individual can produce is a foreign passport) to avoid a "speculative chain of possibilities."[89] Adelante might also characterize the

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[81] *See* NAACP v. Alabama, 357 U.S. 449, 459-60 (1958).

[82] *See* Haven's Realty Corp. v. Coleman, 455 U.S. 353, 379 (1982).

[83] For example, accompanying an individual member to pay for a ticket—a matter most members would resolve on their own without legal counsel.

[84] *See* Minority Emps. of Tenn. Dep't of Emp't Secur., Inc., 573 F. Supp. at 1348 (citing Warth v. Seldin, 422 U.S. 490, 511 (1975) (""There is no question that an association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy. Moreover, in attempting to secure relief from injury to itself the association may assert the rights of its members, at least so long as the challenged infractions adversely affect its members' associational ties."").

[85] *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016) (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992)).

[86] *See* Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville, Fla., 896 F.2d 1283, 1287 (11th Cir. 1990) (Tjoflat, G. concurring).

[87] Heckler v. Mathews, 465 U.S. 728, 729 (1984) ("[D]iscrimination itself, by perpetuating "archaic and stereotypic notions" or by stigmatizing members of the disfavored group as "innately inferior" and therefore less worthy participants in the political community, can cause serious noneconomic injuries to those persons who are denied equal treatment solely because of their membership in a disfavored group."); Hassan v. City of N.Y., 804 F.3d 277, 289 (3d Cir. 2015) (citing *Heckler* approvingly and recognizing standing on the basis of stigmatic injury).

[88] Spokeo, 136 S. Ct. at 1549 (injury in fact is not automatically satisfied whenever a statute grants a statutory right and purports to authorize that person to sue to vindicate that right; there must be additional evidence of actual or "real world" harm).

[89] Clapper v. Amnesty Int'l USA, 568 U.S. 398, 414 (2013).

chilling effect of ICE's enforcement as the deprivation of its membership's opportunity to attend court.[90]

Finally, Adelante would have to demonstrate that its desired redress would be sufficient. For equitable relief, Adelante must show the likelihood of future harm or injury—the same type of harm alleged—to its membership.[91] If Adelante were to secure an injunction against the collaboration of ICE and Gardendale officials, as well as against ICE enforcement in and around the courthouse, this would prevent the future denial of its members' equal protection at the court and reduce the harm resulting from the stigmatic injury that might flow (i.e., fewer Latinx members would apprehended while trying to enforce the law or comply with the law at court, thus reducing the stigma of "illegality" or "criminality" perpetuated by ICE enforcement).

D. Potential Barriers: Statute of Limitations, Standing, and Scope of Relief

There are several potential barriers to Adelante's Section 1985(2) claim, including the statute of limitations, standing, and scope of relief.

First, Section 1985(2) claims are subject to the same limitations period as personal injury claims in the forum state. For the citizen plaintiff in Gardendale, the residual, two-year limitations period for personal injury claims set forth in the Code of Alabama applies.[92]

Second, with respect to relief, Section 1985 expressly provides for damages,[93] but injunctive relief is also available because federal courts have "broad powers … to fashion remedies under the Civil Rights Act."[94] However, the plaintiff would have to demonstrate the likelihood of future harm or injury to herself or others like her.[95] The citizen plaintiff would have better odds if an organization, like Adelante, with other similarly situated members, would advance a claim for relief.

Finally, a related concern is the scope of relief that a court would have authority to order. Injunctive relief against one federal agent in his official capacity (among other state court personnel) would be unsatisfactory because ICE regularly rotates agents from office to office and could ostensibly continue to conduct civil immigration arrests through different officers in the municipal court. But an organizational plaintiff like Adelante might be able to secure relief against an entire office, as in the case of *Puente Arizona v. Arpaio*.[96]

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[90] *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 303 (1978) (by characterizing an injury as the deprivation of an opportunity, the injury is not necessarily speculative and is capable of judicial redress).

[91] *See* Los Angeles v. Lyons, 461 U.S. 95, 111 (1983). For example, Adelante could collect declarations from Latinx membership expressing fear of attending future court dates and try to do so anonymously. Doe v. Frank, 951 F.2d 320, 323 (11th Cir. 1992) (citing Doe v. Stegall, 653 F.2d 180, 186 (5th Cir. 1981)) ("The ultimate test for permitting a party to proceed anonymously is whether … [he] has a substantial privacy right which outweighs the 'customary and constitutionally embedded presumption of openness in judicial proceedings.'"). Further, Adelante could collect data demonstrating a continued pattern ICE and Gardendale's referral-type practice and subsequent arrest of Latinx membership at the Gardendale Municipal Court.

[92] *See* Kennedy v. Warren Props., No. 17-00114-KD-N, 2017 U.S. Dist. LEXIS 197908, at *20 (S.D. Ala. Nov. 30, 2017)

[93] "[I]n any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the *recovery of damages* occasioned by such injury or deprivation, against any one or more of the conspirators." 42 U.S.C. § 1985(3) (emphasis added).

[94] Pennsylvania v. Int'l Union of Operating Eng'rs, 347 F. Supp. 268, 301 (E.D. Pa. 1972) (citing Action v. Gannon, 450 F.2d 1227, 1238 (8th Cir. 1971) (affirming the District Court's issuance of an injunction under 42 U.S.C. § 1985(3)).

[95] *See* Lyons, 461 U.S. at 111.

[96] *See* 76 F. Supp. 3d 833, 861 n. 10 (D. Ariz. 2015). The organizational plaintiff sought injunctive relief against an individual policymaker, resulting in an injunction against the policymaker's entire office, where it would not have been possible to protect each of the organization's members at risk of future harm without enjoining the whole office. The

CONCLUSION

ICE's aggressive nationwide policy of making arrests and detentions and initiating other immigration enforcement actions at state courthouses is highly problematic because it penalizes many people for exercising, and thus chills them in the exercise of, their fundamental right of access to the courts. Given the background of violence and direct intimidation prevalent at the time of its passage, Section 1985(2) carries important implications today for persons of color who seek to access the courts and are at risk of dragnet immigration enforcement. The difficulty of Section 1985(2) is that the only people who have standing to raise claims thereunder are *citizens*, who must allege and prove that the defendants conspired to deprive citizens of court access to establish liability.[97] However, organizations like Adelante—trying to help persons of particular racial, ethnic, or cultural backgrounds—might very well have standing to represent citizens under a Section 1985(2) claim if they can prove ICE's target selection protocol is so broad as to include citizens with those particular backgrounds.

District Court issued broad injunctive relief on the basis of Easyriders Freedom F.I.G.H.T. v. Hannigan, 92 F.3d 1486, 1501-02 (9th Cir. 1996), which "extends benefits to persons other than those before the Court 'if such breadth is necessary to give prevailing parties the relief to which they are entitled'").

[97] 42 U.S.C. § 1985(2) (2016).