IN THE IOWA DISTRICT COURT FOR POLK COUNTY

PRESIDENT DONALD J. TRUMP, an individual, U.S. REPRESENTATIVE MARIANNETTE MILLER-MEEKS, an individual and FORMER STATE SENATOR BRADLEY ZAUN, an individual, Plaintiffs, v. J. ANN SELZER, SELZER & COMPANY, DES MOINES REGISTER AND TRIBUNE COMPANY, and GANNETT CO., INC., Defendants.	Case No. CVCV069420 **MOTION BY DEFENDANTS J. ANN SELZER AND SELZER & COMPANY TO STAY UNTIL: (1) RESOLUTION OF THE PENDING PARALLEL PROCEEDING; (2) PLAINTIFF DONALD J. TRUMP NO LONGER HOLDS THE OFFICE OF PRESIDENT OF THE UNITED STATES; AND (3) TRUMP FURNISHES AN UNDERTAKING UNDER IOWA CODE § 617.16**

Defendants J. Ann Selzer and Selzer & Company (collectively "Selzer" or the "Selzer Defendants"), by and through their counsel, respectfully move this Court under its inherent authority to manage its docket and under Iowa Code § 617.16 to stay this action in its entirety until the later of: (1) the final resolution of the earlier-filed, identical matter pending before the United States District Court for the Southern District of Iowa entitled *President Donald J. Trump, et al. v. Selzer, et al.*, No. 4:24-cv-449 (S.D. Iowa, removed Dec. 17, 2024); (2) President Trump no longer holds executive office of the United States; and (3) President Trump furnishes an undertaking to pay all costs resulting to the Selzer Defendants, including their reasonable attorney fees.

In support of their motion for a stay, the Selzer Defendants state:

1. A parallel action between Defendants and Plaintiff President Donald J. Trump was first filed in this Court (Ex. 1) and removed to the United States District Court for the Southern District of Iowa (Ex. 2), where it has been actively litigated since December 17, 2024. Notice of

Removal, *President Donald J. Trump v. J. Ann Selzer, et al.*, No. 4:24-cv-00449-RGE-WPK (S.D. Iowa Dec. 17, 2024) ("*Trump I*"), ECF No. 1. Plaintiff Trump added U.S. Rep. Mariannette Miller-Meeks and former state Sen. Brad Zaun as Plaintiffs to that action and moved to remand the case to this Court on the basis that their addition destroyed the federal court's diversity jurisdiction. The federal district court denied the remand motion, holding the "addition of Zaun and Miller-Meeks appears intended to defeat diversity jurisdiction" rather than to advance a legitimate litigation purpose.

2. After the federal court denied Plaintiffs' motion to remand *Trump I* to the Iowa District Court for Polk County, Plaintiffs initiated this action and unsuccessfully attempted to dismiss *Trump I*, which remains pending in the federal district court.

3. President Donald J. Trump's complaint in *Trump I* contains the same claims and seeks the same relief as the petition pleaded by Plaintiff Trump in this case.

4. The United States District Court for the Southern District of Iowa is now poised to decide Defendants' motions to dismiss in *Trump I*. That decision could dispose of *Trump I* entirely based on the First Amendment issues implicated by all claims. That decision will have preclusive effects on this state court case and will provide guidance to this Court as to the questions of federal law that predominate over the matter and as to the state law claims asserted by Plaintiff Trump.

5. This case should be stayed at least until the final resolution of the *Trump I* matter to avoid conflicting rulings, conserve scarce judicial resources, and avoid duplicative proceedings.

6. This case should also (or alternatively) be stayed until Plaintiff Trump no longer holds executive office of the United States. Because the Plaintiff is the President of the United States, this state court's orders will necessarily raise federalism, comity, and separation-of-powers concerns under the United States Constitution. *See, e.g.*, U.S. Const. art. VI, cl. 2 (Supremacy

Clause); U.S. Const. art. II, § 1 ("The executive Power shall be vested in a President"); *Clinton v. Jones*, 520 U.S. 681, 691 (1997).

7. This case should also (or alternatively) be stayed under Iowa Code Section 617.16 until President Trump furnishes an undertaking secured by cash or approved sureties to pay all costs resulting to opposing parties to the action, including a reasonable attorney fee. Iowa Code § 617.16.

8. Iowa Code Section 617.16 authorizes a stay until a plaintiff furnishes an undertaking where the plaintiff "has in the preceding five-year period unsuccessfully prosecuted three or more" frivolous actions.

9. In the five years before Plaintiff Donald J. Trump filed this action, Trump unsuccessfully prosecuted at least six frivolous actions, including:

a. *Trump v. Clinton*, No. 2:22-cv-14102 (S.D. Fla. filed Mar. 24, 2022) (*deemed frivolous*, *Trump v. Clinton*, 653 F.Supp.3d 1198 (S.D. Fla. 2023), *appeal docketed sub nom. Trump v. Clinton*, No. 23-10387 (11th Cir. Feb. 6, 2023));

b. *Trump v. Kemp*, No. 1:20-cv-5310 (N.D. Ga. filed Dec. 31, 2020) (*dismissed*, *Trump v. Kemp*, 511 F.Supp.3d 1325 (N.D. Ga. 2021)); *see In re Eastman*, No. SBC-23-O-30029 (State Bar Ct. of Cal., Rev. Div., June 13, 2025) (Ex. 16) at pp. 1, 17–20, 28–31 (affirming disbarment for filing frivolous case);

c. *Trump v. Raffensperger*, No. 2020CV343255 (Sup. Ct. of Fulton Cnty., Ga., dismissed Dec. 12, 2020);

d. *Trump v. James*, No. 1:21-cv-1352 (N.D.N.Y. filed Dec. 20, 2021) (*dismissed*, *Trump v. James*, No. 1:21-cv-1352, 2022 WL 1718951 (N.D.N.Y., May 27, 2022), ECF No. 36);

e. *Trump v. James*, No. 2022-CA-10792 (Cir. Ct. for 15th Judicial Cir. for Palm Beach Cnty. filed Nov. 2, 2022), *removed*, *Trump v. James*, No. 9:22-cv-81780 (S.D. Fla. 2022, removed Nov. 16, 2022), *Mot. for TRO denied*, *Trump v. James*, 647 F.Supp.3d 1292 (S.D. Fla. 2022) (rejecting "plainly frivolous" arguments and urging voluntary dismissal of "vexatious and frivolous" suit); and

f. *Trump v. Trump*, No. 453299/2021 (Sup. Ct. N.Y. Cnty. filed Sept. 21, 2021), *dismissed*, *Trump v. Trump*, 79 Misc. 3d 866 (N.Y. Sup. Ct. 2023) (Ex. 19) (awarding attorney fees under anti-SLAPP statute for frivolous suit).

10. This case should be stayed until each and all of these conditions are met:

a. Until a final judgment is entered in *Trump I*;

b. Until President Trump no longer holds executive office; and

c. Until President Trump furnishes an undertaking under Iowa Code § 617.16.

The Selzer Defendants refer to their accompanying memorandum in support and the exhibits submitted with this motion.

For ease of reference, the exhibits submitted with this motion are:

Filings in *Trump I*	
Ex. 1	Petition, *Trump v. Selzer*, No. CVCV068364 (Iowa Dist. Ct. for Polk Cnty., Dec. 16, 2024)
Ex. 2	Def. Gannett Co., Inc.'s Notice of Removal in *Trump v. Selzer*, No. 4:24-cv-449 (S.D. Iowa, Dec. 17, 2024), ECF No. 1
Ex. 3	Amended Compl. in *Trump v. Selzer*, No. 4:24-cv-449 (S.D. Iowa, Jan. 31, 2025), ECF No. 23
Ex. 4	Defs.' J. Ann Selzer and Selzer & Co.'s Br. in Supp. of Mot. to Dismiss in *Trump v. Selzer*, No. 4:24-cv-449 (S.D. Iowa, Feb. 24, 2025), ECF No. 33
Ex. 5	Pls.' Mem. of Law in Opp. to Defs.' J. Ann Selzer and Selzer & Co.'s Mot. to Dismiss in *Trump v. Selzer*, No. 4:24-cv-449 (S.D. Iowa, Apr. 3, 2025), ECF No. 52
Ex. 6	Defs. J. Ann Selzer and Selzer & Co.'s Reply Brief in Supp. of Mot. to Dismiss in *Trump v. Selzer*, No. 4:24-cv-449 (S.D. Iowa, Apr. 16, 2025), ECF No. 57
Ex. 7	Defs. Des Moines Register and Tribune Co. and Gannet Co., Inc.'s Reply Brief in Supp. of Mot. to Dismiss in *Trump v. Selzer*, No. 4:24-cv-449 (S.D. Iowa, Apr. 17, 2025), ECF No. 61
Ex. 8	Order re: Mots. to Remand and for Att'y's Fees in *Trump v. Selzer*, No. 4:24-cv-449 (S.D. Iowa, May 23, 2025), ECF No. 65

Ex. 9	Order Denying Mot. to Stay in *Trump v. Selzer*, No. 4:24-cv-449 (S.D. Iowa, June 6, 2025), ECF No. 70
Ex. 10	Order Re: Defs.' Mot. to Strike in *Trump v. Selzer*, No. 4:24-cv-449 (S.D. Iowa, July 2, 2025), ECF No. 78
Ex. 11	Order Denying Pl.'s Renewed Mot. to Stay in *Trump v. Selzer*, No. 4:24-cv-449 (S.D. Iowa, July 23, 2025), ECF No. 86
Ex. 12	Revised Amended Compl. in *Trump v. Selzer*, No. 4:24-cv-449 (S.D. Iowa, July 25, 2025), ECF No. 88-1
Ex. 13	Defs. J. Ann Selzer and Selzer & Co.'s Memo. in Supp. of Mot. to Dismiss Revised Amended Compl. in *Trump v. Selzer*, No. 4:24-cv-449 (S.D. Iowa, July 26, 2025), ECF No. 90-1
Filings and Orders in Other Matters	
Ex. 14	Order, *Bennett Mach. & Fabrication Inc. v. Deere & Co.*, No. LACV006963 (Iowa Dist. Ct. for Jones Cnty., June 26, 2022)
Ex. 15	Mot. to Dismiss or Stay on the Basis of Temporary Presidential Immunity, *United Atlantic Ventures, LLC v. TMTG Sub Inc.*, No. 2024-0184-MTZ (Chancery Ct. of Del., Jan. 24, 2025)
Ex. 16	*In re Eastman*, No. SBC-23-O-30029 (State Bar Ct. of Cal., Rev. Div., June 13, 2025)
Ex. 17	Resp. Erica Hamilton's Mot. for Att'ys' Fees, *Trump v. Raffensperger*, No. 2020CV343255 (Sup. Ct. Fulton Cnty., Feb. 22, 2021)
Ex. 18	Resp. Erica Hamilton's Notice of Withdrawal of Her Mot. for Att'y's Fees, *Trump v. Raffensperger*, No. 2020CV343255 (Sup. Ct. Fulton Cnty., June 21, 2021)
Ex. 19	*Trump v. Trump*, 189 N.Y.S.3d 430 (N.Y. Sup. Ct. 2023)
Ex. 20	*Trump v. Trump*, 2024 WL 133846, 81 Misc.3d 1228(A) (N.Y. Sup. Ct. 2024)

Dated: July 28, 2025

Respectfully Submitted,

/s/ *Robert Corn-Revere* .

Robert Corn-Revere*†
(DC Bar No. 375415)
Conor T. Fitzpatrick*
(Mich. Bar No. P78981)
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION (FIRE)

700 Pennsylvania Ave., SE; Suite 340
Washington, DC 20003
(215) 717-3473
bob.corn-revere@thefire.org
conor.fitzpatrick@thefire.org

Greg Greubel
(Iowa Bar No. AT0015474)
Adam Steinbaugh*
(Cal. Bar No. 304829)
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION (FIRE)
510 Walnut St., Suite 900
Philadelphia, PA 19106
(215) 717-3473
greg.greubel@thefire.org
adam@thefire.org

Matthew A. McGuire, AT0011932
NYEMASTER GOODE, P.C.
700 Walnut St., Suite 1300
Des Moines, IA 50309
(515) 283-8014
mmcguire@nyemaster.com

Attorneys for Defendants J. Ann Selzer and Selzer & Company

* *Admitted pro hac vice.*
† *Lead counsel*

CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2025, I electronically filed the foregoing document with the Clerk of Court by using the Iowa Judicial Branch electronic filing system which will send a notice of electronic filing to the following:

Edward Andrew Paltzik
TAYLOR DYKEMA PLLC
914 E. 25th Street
Houston, TX 77009
Email: edward@taylordykema.com

Alan R. Ostergren
ALAN R. OSTERGREN, PC
500 East Court Avenue, Suite 420
Des Moines, IA 50309
Email: alan.ostergren@ostergrenlaw.com

/s/ Matthew A. McGuire

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

PRESIDENT DONALD J. TRUMP, an individual, U.S. REPRESENTATIVE MARIANNETTE MILLER-MEEKS, an individual, and FORMER STATE SENATOR BRADLEY ZAUN, an individual, Plaintiffs, v. J. ANN SELZER, SELZER & COMPANY, DES MOINES REGISTER AND TRIBUNE COMPANY, and GANNETT CO., INC., Defendants.	Case No. CVCV069420 **MEMORANDUM IN SUPPORT OF DEFENDANTS J. ANN SELZER AND SELZER & COMPANY'S MOTION TO STAY UNTIL: (1) RESOLUTION OF THE PENDING PARALLEL PROCEEDING; (2) PLAINTIFF DONALD J. TRUMP NO LONGER HOLDS THE OFFICE OF PRESIDENT OF THE UNITED STATES; AND (3) TRUMP FURNISHES AN UNDERTAKING UNDER IOWA CODE § 617.16**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

INTRODUCTION

This action, a clone of a lawsuit that *began* in this Court and was removed to the federal court in Des Moines, baselessly alleges that reporting the findings of an outlier election poll can constitute fraud and actionable misrepresentation. The claims are unprecedented and patently frivolous, and the abusive litigation strategy on which they are based was long foreshadowed in public statements by the lead Plaintiff. Years before the November 2024 poll that spawned this lawsuit, then-candidate Donald J. Trump suggested the Iowa Poll discards pro-Trump results, adding "I only like polls that treat me well."[1] Likewise, his punitive approach to litigation was crystalized in his explanation of why he sued a reporter who questioned his net worth: "I spent a couple of bucks on legal fees, and they spent a whole lot more. I did it to make his life miserable, which I'm happy about."[2] These petty and vindictive tactics have now come together in this case, which Plaintiffs filed in this Court for a *second* time after a series of disappointing rulings in the duplicate federal action. *Trump v. Selzer*, No. 4:24-cv-449-RGE-WPK. It is a continuation of their unsuccessful effort to evade the federal court's jurisdiction, avoid its order denying remand to this Court, and to dodge Iowa's statute barring Strategic Lawsuits Against Public Participation (SLAPPs), which took effect mere hours after Plaintiffs filed this petition.

This Court should stay this duplicative action for three reasons:

First, the Court should stay this action until the federal district court resolves the first-filed action there, where motions to dismiss are on file. A stay will allow that court to decide the dispositive First Amendment questions that are identical to the issues in this case, while conserving

[1] Wash. Post, Trump holds rally in Iowa, YouTube (Dec. 11, 2015), https://youtube.com/live/OgZslQRCDk4?t=5897s (at about 1:38:15).

[2] Paul Farhi, *What really gets under Trump's skin? A reporter questioning his net worth*, Wash. Post (Mar. 8, 2016), https://wapo.st/3QibOx6 [https://perma.cc/AG6E-MZ6D].

this Court's and the litigants' resources, avoiding the potential for conflicting rulings, and preventing unnecessary duplication of effort.

Second, this Court should stay this action while its lead plaintiff, Donald J. Trump, is President of the United States. The President has argued in other cases that state court litigation, and any requirement to comply with state court orders, would interfere with his official duties. Proceeding with state court litigation, if this Court's ability to ensure compliance with its orders is in doubt, would inevitably inhibit the parties and this Court in effectively resolving this litigation. Granting a stay while he holds office would avoid having to resolve thorny federalism questions while the President attends to matters of national concern.

Third, this Court should stay this action under Iowa Code Section 617.16, given President Trump's history as a prodigious and vexatious litigant who misuses the legal system to target his perceived critics, until he furnishes an undertaking sufficient to cover Selzer's costs and attorney fees. Where, as here, a plaintiff frequently files frivolous lawsuits, Section 617.16 allows Iowa courts to stay an action until the plaintiff posts a bond to cover the defendants' potential costs and attorney fees. This Court should require as much from President Trump, a frequent litigant whose decades-long pattern of vexatious litigation across the country is on full display in this case.

FACTUAL AND PROCEDURAL BACKGROUND

This action seeks to penalize a newspaper and a prominent pollster for publishing an outlier poll projecting that candidate Kamala Harris had taken the lead in Iowa shortly before the 2024 election. President Trump, along with two Iowa politicians he later added in an unsuccessful bid to defeat federal jurisdiction, alleges J. Ann Selzer, a pollster famous for buck-the-trend polls that defied conventional wisdom, manipulated the results of her final 2024 Iowa poll to throw the election to the Democratic Party. *See, e.g.*, Pet. at ¶¶ 12, 14, 53–55, 71, 92. From this, Trump and

his ride-along plaintiffs allege they are consumers defrauded by reading a newspaper article about the poll. *Id.* at ¶¶ 105–107, 136.

A. Plaintiffs filed this case to evade an order denying remand.

President Trump filed his first petition concerning this dispute in the Iowa District Court for Polk County on December 16, 2024, raising one claim under the Iowa Consumer Fraud Act. ("*Trump I*").[3] Defendant Gannett promptly removed *Trump I* to the United States District Court for the Southern District of Iowa based on diversity jurisdiction.[4] Seeking to undermine that court's jurisdiction, Trump filed without leave of court an Amended Complaint adding two Iowa residents as plaintiffs—Rep. Mariannette Miller-Meeks and former state Sen. Brad Zaun—then moved to remand the action to Iowa state court.[5]

The United States District Court denied the remand motion and vacated the amended complaint as a nullity, holding the "addition of Zaun and Miller-Meeks appears intended to defeat diversity jurisdiction" rather than to advance a legitimate litigation purpose.[6] President Trump then sought permission to appeal that decision to the United States Court of Appeals for the Eighth Circuit.[7]

---

[3] Pl.'s Pet., *Trump v. Selzer*, No. 4:24-cv-449, Dkt. No. 1 1-1 (S.D. Iowa Dec. 17, 2024) (petition in *Trump v. Selzer*, removed from Iowa Dist. Ct. in and for Polk Cnty., Case No. CVCV068364) ("*Trump I*") (Ex. 1). The Selzer Defendants request this Court take judicial notice of its own files, those of the U.S. District Court for the Southern District of Iowa, and those of the U.S. Court of Appeals for the Eighth Circuit. *See* Iowa Rule 5.201(b)–(d) (requiring a court to take judicial notice of facts not subject to reasonable dispute that can be "accurately and readily determined from sources whose accuracy cannot reasonably be questioned" when a party requests judicial notice.)

[4] Notice of Removal in *Trump I*, Dkt. No. 1 (Ex. 2).

[5] Amend. Compl. & Mot. to Remand in *Trump I*, Dkt. Nos. 23 & 30–32.

[6] Order of May 23, 2025, in *Trump I*, Dkt. No. 65 (Ex. 8).

[7] Notice of Pet. for Permission to Appeal in *Trump I*, Dkt. No. 69.

Without awaiting any ruling from the Eighth Circuit, Plaintiffs unsuccessfully attempted to dismiss *Trump I* both in the District Court and the Court of Appeals.[8] The morning of June 30, 2025, and before attempting to dismiss their federal suit, Plaintiffs filed the instant action in this Court, seeking to avoid application of Iowa's Uniform Public Expression Protection Act (colloquially known as the "anti-SLAPP statute"), which took effect at midnight that night. *See* Iowa Code §§ 3.7 (providing that acts passed during a regular legislative session take effect on July 1); 652.1, *et seq.* (Iowa anti-SLAPP statute, allowing for early evaluation and dismissal of actions targeting protected expression, and providing automatic attorney fee awards to prevailing defendants).

Plaintiffs' attempt at a self-help remand to this Court—an end-run around the federal district court's denial of their remand motion—was not successful. The federal district court struck the Plaintiffs' notice of voluntary dismissal because they filed it while the Eighth Circuit had exclusive jurisdiction over the matter, and because Plaintiff-Appellants' attempt to dismiss that appeal did not comply with Federal Rule of Appellate Procedure 41. The Eighth Circuit then denied the Plaintiff-Appellants' request for permission to appeal and denied as moot their attempt to dismiss their appeal, returning jurisdiction to the district court.[9] The Eighth Circuit also denied Plaintiffs-Appellants' subsequent motion seeking to recall the mandate and modify the order.[10]

[8] Notice of Vol. Dismissal in *Trump I*, Dkt. No. 71 (stricken by Order of July 2, 2025, in *Trump I*, Dkt. No. 78 (Ex. 10)); "Stipulation for dismissal" in *Trump v. Selzer*, No. 25-8003 (8th Cir. June 30, 2025).

[9] Judgment & Mandate in *Trump v. Selzer*, No. 25-8003 (8th Cir. July 3, 2025).

[10] Order in *Trump v. Selzer*, No. 25-8003 (8th Cir. July 24, 2025).

B. Plaintiffs' complaint in federal court is ripe for dismissal based on the First Amendment.

The *Trump I* complaint remains pending before the federal district court. The Defendants' motions to dismiss *Trump I* were fully briefed on April 17, 2025.[11] Those motions broadly argue that Trump's consumer-fraud theories are barred by the First Amendment and, even if the Constitution were no barrier, the Plaintiffs still failed to plead the necessary elements of any claim.

In rejecting Trump's attempt to defeat the federal court's diversity jurisdiction, the federal court ordered Trump to refile the Amended Complaint without alterations, new allegations, or claims.[12] However, Trump failed to file the Amended Complaint on July 18 as ordered and instead moved (for a second time) to stay the action.[13] The federal court promptly denied his motion, again ordered him to refile his Amended Complaint, and warned that his continued defiance "may result in sanctions."[14] Trump filed his Revised Amended Complaint on July 25 and the Selzer Defendants again filed a motion to dismiss.[15] The federal court will be prepared to rule on the dispositive motions soon.

LEGAL STANDARD

This Court has the discretion, based on statutory and common law, to stay this action. Iowa courts recognize several "classes of stays," including those "granted pursuant to statute" and "those issued under a court's common law authority to control the disposition of causes on its docket."

---

[11] *See* Reply Brs. in Supp. of Mots. to Dismiss in *Trump I*, Dkt. Nos. 57 & 61 (Exs. 6 & 7).

[12] Order re: Mots. to Remand and for Att'y's Fees in *Trump I*, Dkt. No. 65 (Ex. 8) at p. 11).

[13] Renewed Mot. to Stay in *Trump I*, Dkt. No. 83; Order Denying Pl.'s Renewed Mot. to Stay in *Trump* I, Dkt. No. 86 (Ex. 11)).

[14] Order Denying Pl.'s Renewed Mot. to Stay in *Trump* I, Dkt. No. 86 (Ex. 11)).

[15] Revised Amend. Compl. in *Trump I*, Dkt. No. 88-1 (Ex. 12); Defs. J. Ann Selzer and Selzer & Co.'s Br. in Supp. of Mot. to Dismiss Revised Amend. Compl. in *Trump I*, Dkt. No. 90-1 (Ex. 13).

Chicoine v. Wellmark, Inc., 894 N.W.2d 454, 460 n.3 (Iowa 2017); *see also Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) (recognizing that "every court" has the "inherent" power to "control the disposition" of cases on its docket to accommodate the "economy of time and effort for itself, for counsel, and for litigants."). Both classes are relevant here. The Court's inherent power to manage its docket gives it the authority to stay this action while the first-filed *Trump I* action proceeds and until Plaintiff no longer holds office. And by statute, Iowa guards against frivolous lawsuits by authorizing courts to stay actions brought by frequent-filers and requiring an undertaking to secure the costs and attorney fees a defendant might reasonably incur. Iowa Code § 617.16.

ARGUMENT

I. This Court Should Stay This Action Until the Federal Court Resolves the Identical First-Filed Case to Avoid Conflicting Rulings and to Conserve Resources.

This Court should stay this action on principles of comity because any further litigation over this second, mirror-image action will waste judicial resources, risk conflicting rulings, and—as SLAPP lawsuits intend—strain Selzer's resources. A stay is appropriate when, as here, a pending case involves the same parties, causes of action, and issues, because it avoids duplicative litigation and promotes judicial efficiency. *First Midwest Corp. v. Corp. Fin. Associates*, 663 N.W.2d 888, 890 (Iowa 2003) (reversing the trial court's denial of a motion to stay pending trial of identical issues in a Nebraska court). Each of the considerations evaluated in determining whether to grant a stay pending disposition of another action—whether the action "involves the same parties and the same issues," whether the other litigation is "pending before a court capable of doing prompt and complete justice," the stage of the litigation, the "desirability of avoiding a multiplicity of forums," the likelihood of complete relief, and the potential for collateral estoppel or res judicata—supports a stay. *Id.* at 891 (citing 1 Am.Jur.2d *Actions* § 78, at 773 (1994)).

Beginning with the parties, the issues, and the federal court's ability to effectively resolve the issues, Plaintiff Donald J. Trump has an identical Complaint asserting identical claims against identical defendants originally filed in this Court and now pending in the Southern District of Iowa. That court can fully resolve all the First Amendment and legal questions raised by all the plaintiffs' claims. Allowing the federal court to analyze the predominant First Amendment questions and their application to the state law matters will provide useful and efficient guidance in the event this Court must later tackle the same questions.

The relative stages of the litigations—and the interest in preventing conflicting rulings (and forum shopping) by avoiding a multiplicity of forums—also favor granting a stay. For eight months, President Trump has vigorously prosecuted his first lawsuit in federal court, which has ruled on jurisdictional issues and is now poised to consider the parties' dispositive briefing. In the process, Plaintiffs filed a 31-page merits brief defending their claims in federal court.[16] However, after the federal court denied his remand motion, finding in the process that the two state plaintiffs had been added illegitimately to defeat federal jurisdiction, President Trump is trying to evade those rulings and return to state court by filing this petition. In contrast to *Trump I*, this action has not progressed at all. Allowing the first-filed action to proceed first will provide clarity and avoid the possibility of conflicting rulings on substantive or procedural matters that will arise if the two matters proceed simultaneously.

The Iowa Supreme Court has made clear trial courts should stay closely related actions when an already-pending case is more advanced. In *First Midwest Corporation*, the Court held a trial court abused its discretion by refusing to stay proceedings in light of a more advanced, closely related case in another court. 663 N.W.2d at 893. Similarly, a Florida court reversed a lower court's

[16] Mem. in Opp. to Selzer Defs.' Mot. to Dismiss in *Trump I*, Dkt. No. 52 (Ex. 5).

denial of a motion to stay because it was "well established that when a previously filed federal action is pending between the same parties or privies on the same issues, a subsequently filed state court action ordinarily should be stayed until the determination of the federal action." *City of Miami Beach v. Miami Beach Fraternal Ord. of Police*, 619 So.2d 447, 447 (Fla. Dist. Ct. App. 1993); *see also, e.g.*, Order, *Bennett Mach. & Fabrication Inc. v. Deere & Co.*, No. LACV006963 (Iowa Dist. Ct. for Jones Cnty., June 26, 2022) (staying state court action pending resolution of motion to dismiss in federal district court) (Ex. 14).

These principles of comity are compelling here, where the plaintiffs transparently seek to undermine and evade federal court jurisdiction and bypass the federal court's adverse remand rulings. Multiplying proceedings in this way is an abusive litigation practice that illustrates the overall purpose of a SLAPP: to leverage the costs of mounting a legal defense against disfavored speech. This Court should stay this action to avoid that purposeful waste.

II. Additionally (or Alternatively) This Court Should Stay This Action Until President Trump No Longer Holds Office to Avoid Thorny Separation-of-Powers Issues and Abusive Litigation Tactics.

This Court should stay the instant case, both to avoid the difficult constitutional questions that necessarily arise when the President is a private litigant, and as prophylactic protection against Trump's ability to game the process by using the presidency as an on-off switch over this Court's authority. While the lead Plaintiff occupies the highest office in the land, resolving this action inevitably will raise difficult questions of federalism, comity, and separation-of-powers attendant to the presidency. To avoid those conflicts, and to prevent their exploitation for strategic advantage, this Court should exercise its discretion to stay this action until after the current presidential term ends.

The Supreme Court has recognized the President "occupies a unique office with powers and responsibilities so vast and important that the public interest demands that he devote his

undivided time and attention to his public duties." *Clinton v. Jones*, 520 U.S. 681, 697 (1997). In light of the President's unique position, the *Jones* Court noted that civil litigation, whether through burdens of discovery or a court's attempts to enforce its orders on a recalcitrant party, "may impose an unacceptable burden on the President's time and energy, and thereby impair the effective performance of his office," violating separation-of-powers principles. *See id.* at 701–702.

While the Court in *Jones* declined to issue a bright-line "categorical" rule mandating a stay when the President in his personal capacity is party to a civil suit (given the rarity at that time of civil suits involving the President), it recognized the courts' discretion to impose stays when necessary. *Id* at 702, 706 (upholding "discretion to stay proceedings as an incident to its power to control its own docket").[17] It deferred to courts to determine whether (or when) to issue a stay in actions involving the President. *Id*. at 706–707.

If this matter is litigated while Plaintiff is in office, it will take this Court onto a collision course with the presidency. This action is not brought by Plaintiff's campaign or by any of his corporate entities, but by the President *personally*, alleging he was *personally* defrauded by a poll in a newspaper. This Plaintiff is no mere witness or even a defendant: he is a plaintiff whose participation will be indispensable if this case moves beyond the pleadings stage, and discovery will necessarily require his extensive, personal involvement. To meet his affirmative burden of proving his case, the Plaintiff necessarily will be involved in discovery, particularly because contested questions include whether Plaintiff *individually*—not his campaign or aides—relied on

[17] The *Jones* Court also left open the question, not presented by the federal case, of whether a *state* court could properly exercise jurisdiction over the president, recognizing that a state court's exercise of jurisdiction may present "federalism and comity concerns" in addition to the "separation-of-powers argument." *Jones*, 520 U.S. at 691 & n.13; *but see Zervos v. Trump*, 171 A.D.3d 110, 125–28 (N.Y. App. Div. 2019) (answering separation-of-powers question in the affirmative but not addressing the federalism or comity questions raised in *Clinton v. Jones*).

Selzer's poll and the existence or extent of Plaintiff's personal damages. That will entail written discovery concerning his personal state of mind and finances, as well as his deposition. In this regard, the *Jones* Court left open the question of whether a "court may compel the attendance of the President at any specific time or place." *Jones*, 520 U.S. at 691.

Those questions would arise with litigation brought by any President, but the oversight of state court civil litigation involving *this* Plaintiff during his term of office will likely create additional issues for this Court. As set forth below, this Plaintiff has a fraught relationship with the legal system and has been undeterred by monetary sanctions or orders by multiple courts holding him in contempt, raising the distinct possibility this Court will also face having to use its contempt power. *See, e.g., infra* § III(B)(1); *People v. Trump*, 209 N.Y.S.3d 921 (N.Y. Sup. Ct. 2024) ("because this is now the tenth time that this Court has found Defendant in criminal contempt … it is apparent that monetary fines have not, and will not, suffice to deter Defendant"); *People v. Trump*, 213 A.D.3d 503 (N.Y. App. Div. 2023) (affirming civil contempt).[18]

A stay would also deter Plaintiff from abusing this very tension (*i.e.*, whether principles of federalism, comity, and separation-of-powers require deference to a president embroiled in civil litigation) to thwart this Court's authority. In prior litigation Plaintiff has exploited this issue by using his unique position as both sword and shield, deploying inconsistent arguments to alternatively claim litigation *against* him is a distraction threatening our Nation, but that litigation he brings poses no substantial burden. In New York state court, for example, he sought a stay for

[18] Judge Engoron also sanctioned Trump's attorneys in that action for their "intentional and blatant disregard of controlling authority" and their "continued reliance on bogus arguments," observing that Trump and his attorneys were "no strangers to sanctions" and it was "not their first rodeo." Decision & Order, *People v. Trump*, No. 452564/2022, Doc. No. 1531 at *8–11 & n.6 (N.Y. Sup. Ct. Sept. 26, 2023), *available at* https://int.nyt.com/data/documenttools/trump-judges-ruling/ce6de7d636227e1b/full.pdf.

the duration of his presidency, arguing state courts cannot exercise jurisdiction over the President in his individual capacity. *Zervos*, 171 A.D.3d at 117. In January, he asked a Delaware court to stay a civil action "until the end of the President's term," citing a mounting "burden of litigation" imperiling his "unrelenting" duties, as *any* "[c]ivil litigation" involving the President "necessarily intrudes upon those unremitting responsibilities."[19] More recently, in Florida, he argued instead that a state court *can* adjudicate cases to which the President is a "willing participant"—in that case, a defamation suit Trump brought against the Pulitzer Prize committee for giving an award to journalists who had critically covered him. *Alexander v. Trump*, No. 4D2025-1019, 2025 WL 1509267, at *3–4 (Fla. Dist. Ct. App. May 28, 2025), *pet. for cert. pending*, No. SC2025-0922 (Fla. June 30, 2025). This Court should not permit the President to unilaterally dictate this Court's docket or the parties' time but rather should stay this action until Plaintiff no longer holds office.

III. This Court Should Stay This Action Until the Plaintiff Furnishes an Undertaking to Cover Defendants' Costs and Fees.

Even if this Court disagrees the grounds above warrant a stay in full, it should apply state law to impose the stay permitted by lead Plaintiff's status as a prolific litigant renowned for abusing the legal system to impose costs on his perceived critics. To deter meritless lawsuits and ensure that a defendant can recover costs and attorney fees incurred in defending against frequent litigants' abusive suits, Iowa provides by statute that its courts may stay an action until a serial plaintiff furnishes an undertaking to cover the defendants' anticipated costs and fees. Iowa Code § 617.16. This Court should thus stay this action until the lead Plaintiff—who has a long history

[19] Mot. to Dismiss or Stay on the Basis of Temporary Presidential Immunity, *United Atlantic Ventures, LLC v. TMTG Sub Inc.*, No. 2024-0184-MTZ at *3, 6, 23, 25 (Chancery Ct. of Del., Jan. 24, 2025) (Ex. 15).

of frivolous suits targeting his critics and seeking to subvert the democratic process—furnishes an undertaking sufficient to cover the Defendants' costs and attorney fees.

A. Iowa's undertaking statute guards against vexatious litigants who abuse the legal process through frivolous litigation.

Plaintiffs filed this duplicative action in this Court in an attempt to come in just under the wire to avoid Iowa's recently enacted anti-SLAPP statute. By adopting it, the Iowa Legislature recognized that litigants file meritless lawsuits to harass, intimidate, or silence their critics, abusing the legal system—and the costs that come with defending against any lawsuit—to impose a cost on criticism. *See* Iowa Code §§ 652.7, 652.11 (anti-SLAPP statute to be broadly construed to protect speech). But the anti-SLAPP law is not the only guard provided by Iowa law against this type of vexatious litigation—the state's preexisting undertaking statute serves similar ends by providing that:

> If a party commencing an action has in the preceding five-year period unsuccessfully prosecuted three or more actions, the court may, if it deems the actions to have been frivolous, stay the proceedings until that party furnishes an undertaking secured by cash or approved sureties to pay all costs resulting to opposing parties to the action including a reasonable attorney fee.

Iowa Code § 617.16; *accord:* Iowa R. Civ. P. 1.413(2).

The undertaking statute serves two principal public policy interests. First, it deters meritless litigation, which wastes scarce judicial resources and monopolizes adversaries' resources by burdening them with the costs of defending a lawsuit. Second, the undertaking statute ensures that a prevailing defendant can easily recoup her costs and fees without the additional burdens of locating and seizing assets from an evasive debtor—a heightened risk when the plaintiff is from out-of-state. *Compare* Iowa Code § 617.16 *with* Cal. Code Civ. P. § 1030(a) (requiring undertaking from out-of-state plaintiffs).

To apply the statute, the Court conducts an independent evaluation of the plaintiff's prior litigation history. It does not evaluate whether *this* petition has merit (although this one surely does not), but whether three (or more) past actions were frivolous. *See* Iowa Code § 617.16. The Court can consider any unsuccessful action pending in the five years before the plaintiffs filed this action. *See id.* (actions qualify for the undertaking statute if they were unsuccessful and "prosecuted" in the five years before plaintiff "commenc[ed]" the extant action).

An action is frivolous if it is not well-grounded in both fact and law, or if it was filed for an improper purpose. *See, e.g.*, Iowa R. of Civ. P. 1.413(1) (every motion, pleading, or other paper must be "well grounded in fact," "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law," and not filed "for any improper purpose, such as to harass" or cause a "needless increase in the cost of litigation."). Another court's determination that the action pending before it was frivolous is strong if not dispositive evidence that the action was frivolous. *See, e.g.*, *Stolz v. Bank of Am.*, 15 Cal.App.4th 217, 221–23 (1993) (vexatious litigant collaterally estopped from relitigating prior determinations his cases were frivolous). But the undertaking statute does not require a *prior* finding of frivolousness by another court. Instead, the statute directs *this* Court to make its own evaluation of past actions, providing that it can require an undertaking "if *it* deems the actions to have been frivolous." Iowa Code § 617.16 (emphasis added).

If three or more qualifying actions were frivolous, this Court may stay this action until the plaintiff furnishes an undertaking sufficient to satisfy an award of costs and attorney fees. *Id.* It should do so here, as well more than three of Trump's prior lawsuits were frivolous.

B. Plaintiff is a "prolific" litigant, having unsuccessfully pursued numerous frivolous actions in the last five years.

President Trump's long history of abuse of the legal system to target his critics is unrivaled. He has pursued significantly more than three frivolous actions in the last five years, easily clearing the threshold required by the undertaking statute. Iowa Code § 617.16 (movant is only required to identify three prior actions). This copycat lawsuit is but one star in the constellation of lawsuits and threats waged on court dockets and on social media, against so-called "fake news."

While the statute requires identifying three frivolous cases, this litigant provides a well-stocked smorgasbord from which to choose. The unsuccessful lawsuits described below are only *some* of Plaintiff's frivolous suits.[20] Any three would satisfy the statute, and four have been expressly ruled frivolous: a "racketeering" suit against Hillary Clinton (*Trump v. Clinton*), a suit seeking to overturn the 2020 election (*Trump v. Kemp*), a twice-filed suit against New York's

[20] The actions cited in support of this motion were all brought by Donald Trump in his personal capacity and do not include the many additional frivolous actions initiated through straw entities under his control, including SLAPP suits targeting critics or seeking to overturn the 2020 election. For example, Donald J. Trump for President, Inc. unsuccessfully sued the *New York Times*, *Washington Post*, and CNN for nonactionable opinion pieces. Decision & Order, *Donald J. Trump for Pres., Inc., v. New York Times Co.*, No. 152099/2020 (N.Y. Sup. Ct. Mar. 9, 2021), *available at* https://bit.ly/trumpvnyt; *Donald J. Trump for Pres., Inc. v. WP Co. LLC*, No. CV 20-626 (RC), 2023 WL 1765193, at *7 (D.D.C. Feb. 3, 2023); *Donald J. Trump for Pres., Inc. v. CNN Broad., Inc.*, 500 F.Supp.3d 1349, 1356–58 (N.D. Ga. 2020).

Many of the baseless lawsuits seeking to overturn the 2020 election were also filed under the auspices of his campaign. For example, the lawsuit seeking the "disenfranchisement" of Pennsylvania voters presented "strained legal arguments without merit and speculative accusations … unsupported by evidence." *Donald J. Trump for President, Inc. v. Boockvar*, 502 F.Supp.3d 899, 906 (M.D. Pa. 2020); *see also, Donald J. Trump for President, Inc. v. Sec. of Penn.*, 830 Fed.Appx. 377, 381 (3d Cir. 2020) (rejecting Trump's efforts to overturn the 2020 election, as "calling an election unfair does not make it so," as "[c]harges require specific allegations and then proof. We have neither here."). Trump's lawyer in that action, Rudy Giuliani, was disbarred because he facilitated Trump's frivolous litigation. *Matter of Giuliani*, 197 A.D.3d 1, 10–13 (2021); *Matter of Giuliani*, 230 A.D.3d 101, 107, 125 (2024).

attorney general (*Trump v. James II*), and a SLAPP suit targeting coverage by the *New York Times* (*Trump v. Trump*).

1. *Trump v. Clinton*: Federal court sanctions Plaintiff one million dollars for a "completely frivolous" suit, part of his "prolific" litigation campaigns against political adversaries.

In 2022, Plaintiff sued Hillary Clinton and thirty other defendants, alleging that publication of "false and injurious information" about him amounted to *racketeering*. *Trump v. Clinton*, 653 F.Supp.3d 1198, 1207–18 (S.D. Fla. 2023), *appeal docketed sub nom. Trump v. Clinton*, No. 23-10387 (11th Cir. Feb. 6, 2023). Trump's complaint consisted of, in the federal district court's words, a "hodgepodge of disconnected, often immaterial events, followed by an implausible conclusion," amounting to nothing more than a tactic designed "to harass; to tell a story without regard to facts." *Id.* at 1213. The court found Trump's complaint frivolous and imposed monetary sanctions against both the Plaintiff and his attorneys:

> Here, we are confronted with a lawsuit that should never have been filed, which was completely frivolous, both factually and legally, and which was brought in bad faith for an improper purpose. Mr. Trump is a prolific and sophisticated litigant who is repeatedly using the courts to seek revenge on political adversaries. He is the mastermind of strategic abuse of the judicial process, and he cannot be seen as a litigant blindly following the advice of a lawyer.

Id. at 1210.

The court reached that conclusion by noting the "abusive" tactics in the case and by surveying the litigant's track record, which revealed consistent abuse of the courts to punish critics. *Id.* at 1210, 1219–26. The *Clinton* RICO case, the court observed, was part of "Trump's pattern of misusing the courts to serve political purposes," and Plaintiff was a "repeat offender, undeterred by admonitions" whose "widespread and persistent conduct points to the need for deterrence" through sanctions. *Id.* at 1219, 1226. Given the abusive litigation history and the frivolous RICO

suit, the court imposed $937,989.39 in sanctions against Trump, his attorney, and her firm. *Id.* at 1233.[21]

The district court's determination that the *Clinton* action was frivolous is res judicata and Trump cannot relitigate that question in this Court. *Johnson v. Ward*, 265 N.W.2d 746, 749 (Iowa 1978) (a ruling in an "original case is res judicata of the issues there decided while that ruling is on appeal").

2. *Trump v. Kemp*: Plaintiff unsuccessfully sues Georgia's governor, falsely alleging the 2020 election was stolen. His attorney is disbarred as a result.

After losing the Georgia vote in the 2020 election, the Plaintiff filed a frivolous "verified" petition in a bid to overturn the results. *Trump v. Kemp*, 511 F.Supp.3d 1325, 1329 (N.D. Ga. 2021). The *Kemp* suit was one of more than sixty cases alleging electoral fraud that federal and state courts dismissed "due to lack of standing or lack of evidence," part of a litigation campaign that "Trump likely knew … was baseless" and "unlawful." *Eastman v. Thompson*, 594 F.Supp.3d 1156, 1190–92 (C.D. Cal. 2022) (collecting cases). In *Kemp*, Plaintiff urged the court to "take the unprecedented action of decertifying the result of the presidential election in Georgia and directing the Georgia General Assembly to appoint presidential electors." *Trump v. Kemp*, 511 F.Supp.3d at 1330.

The *Kemp* suit was frivolous—so much so that Plaintiff's counsel, John Eastman, was disbarred for filing it. *In re Eastman*, No. SBC-23-O-30029 (State Bar Ct. of Cal., Rev. Div., June

[21] This sum was in addition to the $66,274.23 in sanctions awarded to one of the thirty-one defendants. *Trump v. Clinton*, 640 F.Supp.3d 1321, 1332–35 (S.D. Fla. 2022) (imposing monetary sanctions under Fed. R. Civ. P. 11, citing a "frivolous … political grievances masquerading as legal claims" in a "deliberate use of the judicial system to pursue a political agenda."), *appeal docketed sub nom. Trump v. Clinton*, No. 23-10387 (11th Cir. Feb. 6, 2023).

13, 2025) at pp. 1, 17–20, 28–31 (affirming disbarment) (Ex. 16).[22] The district court had no trouble concluding there was "no authority to support a federal court hijacking" an election and that the suit was manufactured to "disenfranchise … millions of Georgia voters." *Trump v. Kemp*, 511 F.Supp.3d at 1334–35, 1339. The claim was also factually deficient—and knowingly so. In the wake of the *Kemp* suit in Georgia, a California court adjudicating ethics charges held, after a 36-day trial, that Plaintiff's lead attorney knew the complaint's fanciful allegations—that Georgia authorities were allowing "deceased voters" to cast ballots and were hiding "suitcases of ballots" and counting them outside of public view—were false and that Trump's counsel was, at the very least, "willfully blind" to their falsity. *In re Eastman*, *supra*, at pp. 28–30 (Ex. 16). Additionally, the California court held that the *Kemp* suit was frivolous because it was instituted for an improper purpose: to subvert the democratic process. *Id.* at p. 1.

3. *Trump v. Raffensperger*: Defendant's motion for attorneys' fees for a frivolous complaint is mooted when the full amount is paid.

The *Kemp* case was not Plaintiff's only attempt to subvert the 2020 Georgia vote through bogus litigation. In an earlier suit, Plaintiff unsuccessfully asserted the same frivolous claims against Georgia Secretary of State Brad Raffensperger. *Trump v. Kemp*, 511 F.Supp.3d at 1134–35 (describing the genesis of *Trump v. Raffensperger*); *see also In re Eastman*, *supra*, at pp. 17–20 (Ex. 16) (discussing the allegations of the *Raffensperger* action and known "inaccuracies" later incorporated into the *Kemp* suit).

After the case was dismissed, the respondent counties sought their attorneys' fees under a state statute concerning frivolous actions. Resp. Erica Hamilton's Mot. for Att'ys' Fees, *Trump v. Raffensperger*, No. 2020CV343255 (Sup. Ct. Fulton Cnty., Feb. 22, 2021) (Ex. 17); *see* O.C.G.A.

[22] The State Bar Court of California Review Department opinion affirming Eastman's disbarment is *available at* https://bit.ly/eastmandisbar and *attached as* Ex. 16.

§ 9-15-14 (frivolous actions statute). Plaintiff's attorneys mooted that motion when they "provided payment for the full amount of attorneys' fees requested" by the motion. Resp. Erica Hamilton's Notice of Withdrawal of Her Mot. for Att'y's Fees, *Trump v. Raffensperger*, No. 2020CV343255 (Sup. Ct. Fulton Cnty., June 21, 2021) (Ex. 18).[23] Preemptively paying the sanction for filing a frivolous action is strong evidence the action was frivolous.

4. *Trump v. James* and *Trump v. James II*: Plaintiff's multiple suits to block an investigation are "wholly unsupported" and "vexatious and frivolous."

Plaintiff sued to block an investigation by New York Attorney General Letitia James, calling her office's investigation a "baseless fishing expedition." *Trump v. James*, No. 1:21-cv-1352, 2022 WL 1718951, at *12, n.13 (N.D.N.Y. May 27, 2022). But the federal judge flatly rejected this effort, holding Plaintiff's allegations were "wholly unsupported." *Id.* Undeterred, Plaintiff sued New York's Attorney General in Florida—and obtained the same result there. *Trump v. James*, 647 F. Supp. 3d 1292, 1296 (S.D. Fla. 2022) (*Trump v. James II*). The court found the Florida complaint was a "plainly frivolous" attempt to replead the same allegations already rejected by the New York court. *Id.* at 1297–98. The Florida federal court also cautioned Plaintiff's lawyers that "[t]his litigation has all the telltale signs of being both vexatious and frivolous." *Id.* at 1298 n.6.

5. *Trump v. Trump*: Court orders Plaintiff to pay the *New York Times*'s attorney fees for an unsuccessful suit over ordinary news coverage.

In 2021, Plaintiff sued the *New York Times* for $100 million over a story about his tax returns. *Trump v. Trump*, 189 N.Y.S.3d 430, 434–36 (N.Y. Sup. Ct. 2023) (Ex. 19 at *2). The court

[23] Trump's counsel acknowledged to media that there was "no settlement" and asserted that an unidentified person other than Trump paid the fees. David Wickert, *Cobb, DeKalb recover legal costs in Trump election lawsuit*, Atlanta Journal-Constitution (June 22, 2021), https://www.ajc.com/politics/election/trump-pays-cobb-dekalb-legal-costs-in-georgia-election-lawsuit/WVONVSVHLVEHPAZRTVEPOJKRY4 [https://archive.is/LzCvT].

dismissed the action under New York's anti-SLAPP statute, as Plaintiff had sued over "ordinary newsgathering activities ... at the very core of protected First Amendment activity." *Id.* at 432–33, 436 (Ex. 19 at *2, *15–16). The court noted that Plaintiff's history of "abusive and frivolous" lawsuits targeting speech was so prolific that it motivated the state legislature to amend New York's anti-SLAPP statute to reinforce it against censorious litigants. *Id.* at 436 (Ex. 19 at *9).

The court granted the anti-SLAPP motion and awarded fees because the *Times* showed that the suit lacked "a substantial basis in law" or a "substantial argument for an extension, modification or reversal of existing law." *Id.* at 435–36, 443 (Ex. 19 at *7–8, *14, *20); *see also Trump v. Trump*, 2024 WL 133846, 81 Misc.3d 1228(A) at *1–2 (N.Y. Sup. Ct. 2024) (Ex. 20) (granting $392,638.69 in attorneys' fees because the suit was without a substantial basis in law and fact). Because the New York court necessarily found that Plaintiff's suit met the same standard Iowa applies in identifying frivolous actions,[24] the action qualifies for one of the cases justifying an undertaking.

C. An undertaking is justified given Plaintiff's abusive litigation tactics.

The Plaintiff's well-documented history of abusive litigation tactics in courts across the country—and in *this* action given his efforts to evade an unfavorable remand decision and dodge the anti-SLAPP law—demonstrates why this Court should require him to furnish an undertaking sufficient to accommodate an attorney fee award. That would satisfy both objectives of Iowa's

[24] Plaintiff is barred by res judicata from relitigating the question of whether the action is frivolous. New York's anti-SLAPP law mirrors Iowa's definition of frivolous actions. *Compare* N.Y. Civ. Rights Law § 70-a(1)(a) (action "was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law"), *with* Iowa R. Civ. P. 1.413(1) (a claim is frivolous if not "well grounded in fact" and "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law") & Iowa Code § 610A.2 (frivolous if it lacks "substantial justification" or an "arguable basis in law or fact").

undertaking statute: (1) ensuring a prevailing defendant can recover her costs and attorney fees and (2) deterring abusive litigation tactics.

First, an undertaking here satisfies Iowa's interest in ensuring its residents have a course of recovery against an out-of-state defendant with a track record of frivolous litigation—and this Plaintiff in particular has a history of dodging adverse attorney fee awards. For example, even after his unsuccessful RICO lawsuit in *Trump v. Clinton*, the Plaintiff *again* sued one of the defendants, this time in the United Kingdom. Yet when he lost *that* action, he refused to comply with a court order awarding attorneys' fees to the victorious defendants—claiming "sovereign immunity" as President of the United States.[25] An undertaking posted here will provide Selzer with a source to recover any costs or fees awarded to her without the additional burdens of domesticating an Iowa judgment against the President, a Florida resident. That burden would be onerous enough against any ordinary plaintiff. But the President of the United States is uniquely positioned to make that recovery even more difficult, if not impossible, by raising constitutional immunity arguments to dodge an award.

Second, to deter further abusive litigation conduct, that undertaking should account for the attorney fees Selzer may recover, as permitted by the undertaking statute. Iowa Code § 617.16. As one federal court already noted, "backward looking" sanctions for past conduct have proven "ineffective" at deterring this litigant. *Trump v. Clinton*, 653 F.Supp.3d at 1210. Moreover, the procedural machinations of this case alone bear the hallmarks of frivolous litigation, as it is

[25] Michael Holden & Sam Tobin, *Donald Trump fails to pay $360,000 legal bill over failed 'Steele dossier' lawsuit, UK court told*, Reuters (Jan. 29, 2025), https://www.reuters.com/world/donald-trump-fails-pay-360000-legal-bill-over-failed-steele-dossier-lawsuit-uk-2025-01-29. The invocation of the presidency as a shield in a case he initiated demonstrates the need for a stay of this action until his finite time in office ends.

duplicative of an existing suit and was filed to undermine both a federal court's jurisdiction and Iowa's new anti-SLAPP statute.

The potential attorney fees are substantial, particularly if this action proceeds beyond a motion to dismiss. In *Trump v. Clinton*, a defendant was awarded more than $60,000 in fees for a complaint dismissed at the pleading stage. *Trump v. Clinton*, 640 F.Supp.3d at 1332–35. And the *New York Times* was awarded $392,000 for an early dismissal under an anti-SLAPP statute. *Trump v. Trump*, 81 Misc.3d 1228(A) at *1–2 (Ex. 20). If Selzer is forced to defend dismissal of this action (whether following a motion to dismiss or summary judgment) through an appeal, the attorney time incurred in her defense will undoubtedly exceed $300,000. This Court should accordingly require Trump to post an undertaking of at least that amount and stay this action until that order is satisfied.

CONCLUSION

This Court should stay this duplicative action until the pending federal action is fully resolved, until President Trump no longer holds executive office, and until Trump posts an undertaking to cover the costs of his frivolous and vexatious claims.

Dated: July 28, 2025

Respectfully Submitted,

/s/ *Robert Corn-Revere* .

Robert Corn-Revere*†
(DC Bar No. 375415)
Conor T. Fitzpatrick*
(Mich. Bar No. P78981)
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION (FIRE)
700 Pennsylvania Ave., SE; Suite 340
Washington, DC 20003
(215) 717-3473
bob.corn-revere@thefire.org
conor.fitzpatrick@thefire.org

Greg Greubel
(Iowa Bar No. AT0015474)
Adam Steinbaugh*
(Cal. Bar No. 304829)
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION (FIRE)
510 Walnut St., Suite 900
Philadelphia, PA 19106
(215) 717-3473
greg.greubel@thefire.org
adam@thefire.org

Matthew A. McGuire, AT0011932
NYEMASTER GOODE, P.C.
700 Walnut St., Suite 1300
Des Moines, IA 50309
(515) 283-8014
mmcguire@nyemaster.com

Attorneys for Defendants J. Ann Selzer and Selzer & Company

* *Admitted pro hac vice.*
† *Lead counsel*

CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2025, I electronically filed the foregoing document with the Clerk of Court by using the Iowa Judicial Branch electronic filing system which will send a notice of electronic filing to the following:

Edward Andrew Paltzik
TAYLOR DYKEMA PLLC
914 E. 25th Street
Houston, TX 77009
Email: edward@taylordykema.com

Alan R. Ostergren
ALAN R. OSTERGREN, PC
500 East Court Avenue, Suite 420
Des Moines, IA 50309
Email: alan.ostergren@ostergrenlaw.com

/s/ Matthew A. McGuire

EXHIBIT 1

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

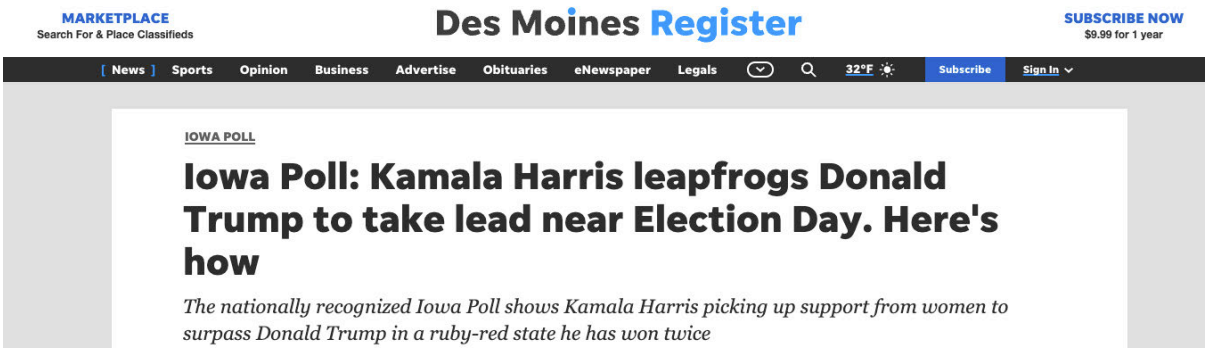
PRESIDENT DONALD J. TRUMP, an individual, Plaintiff, v. J. ANN SELZER, SELZER & COMPANY, DES MOINES REGISTER AND TRIBUNE COMPANY, and GANNETT CO., INC., Defendants.	Case No.: _____ **PETITION** **JURY TRIAL DEMANDED**

Plaintiff, PRESIDENT DONALD J. TRUMP ("President Trump"), by and through undersigned counsel, brings this action against Defendants J. ANN SELZER ("Selzer"), SELZER & COMPANY ("S&C"), DES MOINES REGISTER AND TRIBUNE COMPANY ("DMR"), and GANNETT CO., INC. ("Gannett") (together "Defendants"), and alleges as follows:

NATURE OF THE ACTION

1. This action, which arises under the Iowa Consumer Fraud Act, Iowa Code Chapter 714H, including § 714H.3(1) and related provisions, seeks accountability for brazen election interference committed by the Defendants in favor of now-defeated former Democrat candidate Kamala Harris ("Harris") through use of a leaked and manipulated Des Moines Register/Mediacom Iowa Poll conducted by Selzer and S&C, and published by DMR and Gannett in the *Des Moines Register* on November 2, 2024 (the "Harris Poll"). *See* Brianne Pfannenstiel, *Iowa Poll: Kamala Harris leapfrogs Donald Trump to take lead near Election Day. Here's how*. DES MOINES REGISTER (Nov. 2, 2024), https://www.desmoinesregister.com/story/news/politics/iowa-poll/2024/11/02/iowa-poll-kamala-

harris-leads-donald-trump-2024-presidential-race/75354033007/ (last visited Dec. 16, 2024) (the "Register Article").



2. Contrary to reality and defying credulity, Defendants' Harris Poll was published three days before Election Day and purported to show Harris leading President Trump in Iowa by three points (*see* Register Article); President Trump ultimately won Iowa by *over thirteen* points. *See Iowa President*, ASSOCIATED PRESS, https://apnews.com/projects/election-results-2024/iowa/?r=0 (last visited Dec. 16, 2024). Before this astonishing sixteen-point polling miss Selzer brazenly claimed: "It's hard for anybody to say they saw this coming . . . . Harris has clearly leaped into a leading position." (*See* Register Article). However, as Selzer well knew, there was a perfectly good reason nobody "saw this coming": because a three-point lead for Harris in deep-red Iowa was not reality, it was election-interfering fiction.

3. Yet, Selzer—who had prided herself on a mainstream reputation for accuracy despite several far less publicized egregious polling misses in favor of Democrats—discussed *infra*—would have the public believe it was merely a coincidence that one of the worst polling misses of her career came just days before the most consequential election in memory, was leaked, *and* happened to go against the Republican candidate. The Harris Poll was no "miss" but rather an attempt to influence the outcome of the 2024 Presidential Election.

4. President Trump's resounding victory was consistent with Iowa's recent electoral history: he won Iowa by over eight points and nearly ten points, respectively, in the 2020 and 2016 Presidential Elections. *See Iowa*, CNN, https://www.cnn.com/election/2016/results/states/iowa (last visited Dec. 16, 2024); *Iowa*, CNN, https://www.cnn.com/election/2020/results/state/iowa (last visited Dec. 16, 2024).

5. Defendants and their cohorts in the Democrat Party hoped that the Harris Poll would create a false narrative of inevitability for Harris in the final week of the 2024 Presidential Election. Instead, the November 5 Election was a monumental victory for President Trump in both the Electoral College and the Popular Vote, an overwhelming mandate for his America First principles, and the consignment of the radical socialist agenda to the dustbin of history.

6. Selzer, after over 35 years in the industry, retired in disgrace from polling less than two weeks after this embarrassing rout. *See* Ben Brasch, *Ann Selzer to step away from Iowa Poll with the Des Moines Register*, WASHINGTON POST (Nov. 17, 2024), https://www.washingtonpost.com/politics/2024/11/17/selzer-poll-iowa-election/ (last visited Dec. 16, 2024).

7. As Iowa Republican Party Chairman Jeff Kaufman observed: "Not only did [Selzer] disrespect Iowa and our voters, but she caused Iowa to be laughed at by the entire country." *See* Jeff Kaufman, *Trump wins, Ann Selzer loses*, WASHINGTON EXAMINER (Nov. 13, 2024), https://www.washingtonexaminer.com/opinion/3227498/trump-wins-ann-selzer-loses/#google_vignette (last visited Dec. 16, 2024).

8. For too long, left-wing pollsters have attempted to influence electoral outcomes through manipulated polls that have unacceptable error rates and are not grounded in widely accepted polling methodologies. While Selzer is not the only pollster to engage in this corrupt

practice, she had a huge platform and following and, thus, a significant and impactful opportunity to deceive voters. As Selzer knows, this type of manipulation creates a narrative of inevitability for Democrat candidates, increases enthusiasm among Democrats, compels Republicans to divert campaign time and money to areas in which they are ahead, and deceives the public into believing that Democrat candidates are performing better than they really are.

9. The Democrat need for fake polling was even more acute than usual in the 2024 Election, given Harris's many fatal weaknesses as a candidate and lack of appeal to critical swaths of the traditional Democrat base. Her incessant use of "word salads"—*i.e.*, jumbles of exceptionally incoherent speech—only underscored the urgency for left-wing pollsters to try and rescue Harris's candidacy. *See, e.g.*, Hanna Panreck, *CNN panel critical of Kamala Harris' town hall performance: 'World salad city'*, CNN (Oct. 24, 2024) https://www.foxnews.com/media/cnn-panel-critical-kamala-harris-town-hall-performance-word-salad-city (last visited Dec. 16, 2024); Ian Hanchett, *Van Jones: Harris Had Needless 'Evasions' During CNN Town Hall, 'Word Salad Stuff' Is Annoying*, BREITBART (Oct. 24, 2024), https://www.breitbart.com/clips/2024/10/24/van-jones-harris-had-needless-evasions-during-cnn-town-hall-word-salad-stuff-is-annoying/ (last visited Dec. 16, 2024); Ian Hanchett, *Axelrod: Harris Gives a 'Kind of' 'Word Salad' 'When She Doesn't Want to Answer a Question' Like on Israel*, BREITBART (Oct. 24, 2024), https://www.breitbart.com/clips/2024/10/24/axelrod-harris-gives-a-kind-of-word-salad-when-she-doesnt-want-to-answer-a-question-like-on-israel/ (last visited Dec. 16, 2024).

10. Millions of Americans, including Plaintiff, residents of Iowa, and Iowans who contributed to President Trump's Campaign and its affiliated entities (the "Trump 2024 Campaign"), were deceived by the doctored Harris Poll. President Trump has made impactful, widely read statements on the matter, writing on Truth Social, *inter alia*, that Selzer's misconduct

caused "great distrust and uncertainty at a very critical time." *See* President Donald J. Trump, Truth Social (Dec. 9, 2024); *see also Harris Now Leads Trump*, DES MOINES REGISTER (Nov. 3, 2024), at 1, 6A (excerpt shown below).

11. Selzer's polling "miss" was not an astonishing coincidence—it was intentional. As President Trump observed: "She knew exactly what she was doing." *Id*.

12. Defendants' conduct violated Iowa Code § 714H.3(1), pursuant to which "a person shall not engage in a practice or act the person knows or reasonably should know is an unfair practice, deception, fraud, false pretense, or false promise, or the misrepresentation, concealment, suppression, or omission of a material fact, with intent that others rely upon [same] . . . . "

13. Accordingly, President Trump brings this action to redress the immense harm caused to himself, to the Trump 2024 Campaign, and to millions of citizens in Iowa and across America by the Harris Poll and the Defendants.

14. Further, this action is necessary to deter Defendants and their fellow radicals from continuing to act with corrupt intent in releasing polls manufactured for the purpose of skewing election results in favor of Democrats.

PARTIES

15. President Trump is a citizen of the United States, a resident of the State of Florida, the 45th President of the United States of America, and, as the landslide winner of the 2024 Presidential Election, the President-elect and incoming 47th President of the United States.

16. Defendant Selzer is a natural person, a citizen of Iowa, and is the founder and president of S&C. Selzer worked as the pollster for the *Des Moines Register* for many years, overseeing all the *Register's* polls from 1987 to 2024. She has also conducted polls for *The Detroit Free Press*, *Bloomberg News*, and the *Indianapolis Star*.

17. Defendant S&C is an Iowa domestic corporation that does business in Iowa generally, and in Polk County specifically. Selzer has published and released her polls to the public by and through S&C.

18. Defendant DMR is an Iowa domestic corporation that does business in Iowa generally and in Polk County specifically. DMR owns and publishes the *Des Moines Register*.

19. Defendant Gannett is a Delaware corporation headquartered in Virginia that does business in Iowa generally, and in Polk County specifically. Gannett owns DMR and myriad other publications, including the widely read and nationally distributed *USA Today*, and participates in the operations of the *Des Moines Register*, as evidenced by its investigation of the leak of the Harris Poll, discussed *infra*.

JURISDICTION AND VENUE

20. This Court has jurisdiction over this action under Iowa Code § 714.16(7). The amount in controversy exceeds the jurisdictional amount for a small claims action. Polk County is a proper venue because this is a "county where the transaction or any substantial portion of the transaction occurred" and where Defendants are "doing business." Iowa Code § 714.16(10).

21. Defendants reside in Iowa or are incorporated in Iowa, engage in substantial business in Iowa, and target Iowa consumers in the conduct of their business.

FACTUAL ALLEGATIONS

Selzer's Misleading Reputation for Objectivity

22. Selzer has long enjoyed a celebrated mainstream reputation for accurate polling. For example, in 2016, Clare Malone of *FiveThirtyEight* described Selzer as "the best pollster in politics." *See* Clare Malone, *Ann Selzer Is The Best Pollster In Politics*, FIVETHIRTYEIGHT (Jan. 27, 2016), https://fivethirtyeight.com/features/selzer/ (last visited Dec. 16, 2024). In a June 2024 rating of 25 pollsters, Nate Silver rated Selzer first with an A+ score. *See* Nate Silver, *Pollster ratings, Silver Bulletin style*, SILVER BULLETIN (June 12, 2024), https://www.natesilver.net/p/pollster-ratings-silver-bulletin (last visited Dec. 16, 2024).

23. However, underneath the surface, Selzer has quietly used her polls to try and influence recent races in favor of Democrats, receiving ample cover from the legacy media and thus lacking accountability. As Chairman Kaufman observed after President Trump's commanding victory: "For too long, we have let Ann Selzer use her polls to influence races. She is fully aware that her polls can influence voters." *See* Kaufman, *Trump wins, Ann Selzer loses*, *supra*.

24. In 2022, Selzer attempted to influence the outcome of the Iowa Attorney General Election between current Republican Attorney General Brenna Bird and then-Democrat incumbent

Tom Miller (who had served in that capacity for a cumulative total of 40 years). To do so, Selzer released a poll that missed the mark by an even more astonishing amount than the Harris Poll—*eighteen* points. *See* Stephen Gruber-Miller, *Iowa Poll: Tom Miller leads Brenna Bird by 16 percentage points in attorney general race*, DES MOINES REGISTER (Oct. 25, 2022), https://www.desmoinesregister.com/story/news/politics/iowa-poll/2022/10/25/iowa-poll-attorney-general-election-tom-miller-brenna-bird-2022/69563197007/ (last visited Dec. 16, 2024) ("The poll was conducted Oct. 9-12 by Selzer & Co."). Yet, two weeks after Selzer declared that Bird trailed Miller by sixteen points, Bird defeated Miller by two points. *See* Stephen Gruber-Miller, *Republican Brenna Bird defeats Tom Miller in Iowa attorney general race*, DES MOINES REGISTER (Nov. 9, 2022), https://www.desmoinesregister.com/story/news/politics/elections/2022/11/09/brenna-bird-topples-incumbent-tom-miller-in-iowa-attorney-general-race/69610291007/ (last visited Dec. 16, 2024).

25. In the 2018 Iowa governor's race between Democrat Fred Hubbell and Republican Kim Reynolds, Selzer showed Hubbell up by two points in the final November poll. *See* Brianne Pfannestiel, *Just days before election*, *Iowa poll shows Fred Hubbell with 2-point lead over Kim Reynolds*, DES MOINES REGISTER (Nov. 3, 2018), https://www.desmoinesregister.com/story/news/politics/iowa-poll/2018/11/03/iowa-poll-governor-race-kim-reynolds-fred-hubbell-jake-porter-selzer-iowa-election-2018-medicaid/1871874002/ (last visited Dec. 16, 2024). Reynolds won by three points. *See Iowa Governor Election Results 2018,* POLITICO (Dec. 9, 2018), https://www.politico.com/election-results/2018/iowa/governor/ (last visited Dec. 16, 2024).

26. In the 2020 U.S. Senate race, Selzer showed Republican Joni Ernst behind Democrat Theresa Greenfield by three points in June and three points in September. *See* Brianne Pfannestiel, *Iowa Poll: Theresa Greenfield narrowly leads Joni Ernst in hyper-competitive Senate race*, DES MOINES REGISTER (Sept. 19, 2020), https://www.desmoinesregister.com/story/news/politics/iowa-poll/2020/09/19/iowa-poll-theresa-greenfield-narrowly-leads-joni-ernst-senate-race/3486994001/ (last visited Dec. 16, 2024). Selzer then belatedly put Ernst ahead by four points a little over a month later in the final poll. *See* Brianne Pfannestiel, *Iowa Poll: Republican Joni Ernst pulls ahead of Democrat Theresa Greenfield in closing days of U.S. Senate Race*, DES MOINES REGISTER (Oct. 31, 2020), https://www.desmoinesregister.com/story/news/politics/iowa-poll/2020/10/31/election-2020-iowa-poll-greenfield-ernst-us-senate-race-voters/6055545002/ (last visited Dec. 16, 2024). Notwithstanding Selzer's efforts to create suspense where there was none, Ernst won the race by a very comfortable seven points. *See Iowa U.S. Senate Results 2020,* POLITICO (Jan. 6, 2021), https://www.politico.com/2020-election/results/iowa/senate/ (last visited Dec. 16, 2024).

27. These races were not a matter of being wrong in the end—they exposed that Selzer and the rest of the Defendants were manufacturing fake support for Democrat candidates.

The Harris Poll

28. On the evening of November 2, 2024, when the Harris Poll was unveiled in the Register Article, President Trump led Harris in Iowa by any objective, reasonable, and reliable measure.

29. Notably, up until Defendants released the Harris Poll, Selzer's previous 2024 Presidential Election polls published in the *Des Moines Register* showed President Trump leading. *See* Brianne Pfannestiel, *Trump's Iowa lead shrinks significantly as Kamala Harris replaced Biden, Iowa Poll shows*, DES MOINES REGISTER (Sept. 15, 2024),

https://www.desmoinesregister.com/story/news/politics/iowa-poll/2024/09/15/iowa-poll-donald-trump-iowa-lead-shrinks-as-kamala-harris-replaces-joe-biden/75180245007/ (last visited Dec. 16, 2024). Although Selzer was trying to generate fake enthusiasm and momentum for Harris—she characterized Harris's supposed four-point deficit as a "dramatic turnaround from Joe Biden's double-digit deficit"—this September poll still had President Trump up by four points. *Id*.


MARKETPLACE
Search For & Place Classifieds

Des Moines Register

SUBSCRIBE NOW
$9.99 for 1 year

[News] Sports Opinion Business Advertise Obituaries eNewspaper Legals 37°F Subscribe Sign In

IOWA POLL

Trump's Iowa lead shrinks significantly as Kamala Harris replaces Biden, Iowa Poll shows

The nationally recognized Iowa Poll's first test of Kamala Harris' strength against Donald Trump indicates she's a more formidable opponent than President Biden in solid-red Iowa

30. The premise of Selzer's poll—that Harris had somehow turned Joe Biden's eighteen-point deficit into a mere four-point deficit—was so implausible that no objective pollster could have honestly advanced it. "'I wouldn't say 4 points is comfortable' for Trump, said pollster J. Ann Selzer, president of Selzer & Co. 'The race has tightened significantly.'" *Id*.

31. This poll—purporting to show that President Trump's commanding lead all but vanished upon Harris's entry into the race—was indicative of Defendants' intent, even as early as September, to paint an incorrect and cynical picture of the downward trajectory for President Trump in the face of a supposedly turbocharged Harris Campaign. In truth, Harris's hollow message of "joy" was missing badly with voters across all demographics and regions, who craved actual policy changes that only President Trump can and will deliver. *See* Herald readers, *Message of 'joy' at Democratic Convention hides Kamala Harris' poor track record*, MIAMI HERALD (Aug. 27, 2024), https://www.miamiherald.com/opinion/article291479270.html (last visited Dec. 16, 2024).

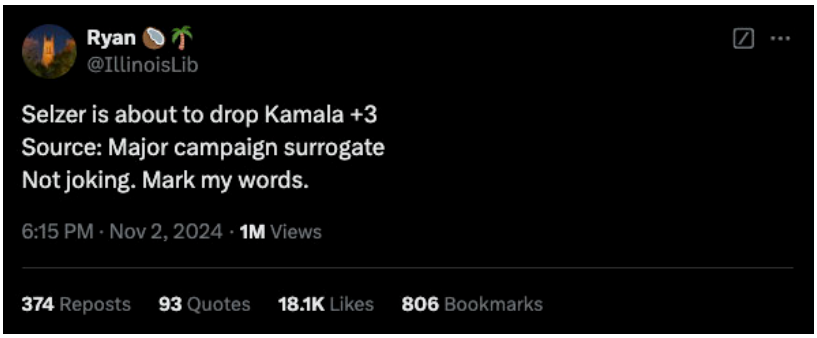
32. Meanwhile, *every other* mainstream Iowa poll also showed President Trump comfortably ahead by significantly more than Selzer presented. A poll conducted September 27-28, 2024 by Cygnal showed President Trump ahead by seven points; a poll conducted November 1-2, 2024 by Emerson College showed President Trump ahead by nine points; a poll conducted November 2-3, 2024 by InsiderAdvantage showed President Trump ahead by seven points; a poll conducted November 2-3, 2024 by SoCal Strategies showed President Trump ahead by seven points; and a second poll conducted November 2-3, 2024 by SoCal Strategies showed President Trump ahead by eight points. *See Iowa Latest Polls*, FIVETHIRTYEIGHT, https://projects.fivethirtyeight.com/polls/iowa/ (last visited Dec. 16, 2024).

33. In sharp contrast, the Harris Poll then falsely showed Harris leading President Trump in Iowa with just three days to go, which suggested major, in reality nonexistent, momentum for Harris nationwide. In truth, the Harris Poll, was just a piece of political theater concocted by an individual—Selzer—who, as a supposedly legendary pollster with the power to shape public perception of elections, should have known better than to poison the electorate with a poll that was nothing more than a work of fantasy. *See* Shelby Talcott, *Gannett probes possible leak of bombshell Iowa poll*, SEMAFOR (Nov. 10, 2024), https://www.semafor.com/article/11/10/2024/gannett-probes-possible-leak-of-bombshell-iowa-poll (last visited Dec. 16, 2024) ("The Des Moines Register is legendarily careful with Selzer's polls, which shape perceptions of crucial early caucuses in both parties . . . .").

34. The Harris Poll wasn't irregular just because it was wrong by an appalling sixteen points—indeed, not coincidentally, the circumstances under which the Harris Poll became public also broke DMR's longstanding policy of secrecy with Selzer's polls, giving rise to a clear inference that the Harris Poll was intended to aid Harris and harm President Trump.

35. The Harris Poll, a bombshell "making nationwide news and giving Democrats what would turn out to be false hope," was leaked by Defendants to Democrat operatives earlier in the day on November 2, many hours before the Register Article appeared. *Id*. ("But roughly 45 minutes prior to the poll's public release, a stray tweet predicted the poll's findings. Its author said that Illinois Governor JB Pritzker, a Duke University alumnus, had mentioned the not-yet-released poll during a Duke Democrats meeting that day."). This breach resulted in Gannett, DMR's parent company, investigating "how Pritzker and possibly other political actors could have learned of the poll early, and is reviewing employees' emails . . . ." *See* Talcott, *Gannett probes possible leak of bombshell Iowa poll*, *supra*; Yael Halon, *Company behind Selzer poll launches probe into potential leak after results published on X prior to publishing*, FOX NEWS (Nov. 11, 2024), https://www.foxnews.com/media/company-behind-seltzer-poll-launches-probe-potential-leak-after-results-posted-x-prior-publishing (last visited Dec. 16, 2024) ("The company behind the Des Moines Register, which published Ann Selzer's poorly-aged Iowa poll, has launched an investigation after the poll's findings were allegedly leaked on X prior to publishing . . . .").

36. The "stray tweet" referenced in the *Semafor* article was posted by "Ryan@IllinoisLib" at 6:15 p.m. EST on November 2, 2024, and has now been viewed over 1,000,000 times, stating:



See https://x.com/IllinoisLib/status/1852837036597948760 (last visited Dec. 16, 2024).

37. It is clear that the Harris Poll, unlike Defendants' other polls, was leaked because the Harris Poll was created by Selzer and published by DMR for maximum "shock and awe" political impact rather than accuracy or reliability. It is indeed no coincidence that Defendants' most significant polling "miss" also happened to be the one that would be leaked to cause as much harm to the electoral process as possible—and one that induced the legacy media to go "all in" and treat the Harris Poll as a "canary in the coal mine" for President Trump. *See* Montage, *Media goes all in on Iowa poll showing Harris lead, sees 'canary in the coal mine' for Trump*, FOX NEWS (Nov. 4, 2024), https://www.foxnews.com/video/6364191963112 (last visited Dec. 16, 2024) ("MSNBC, CNN and the hosts of 'The View' went all in on the results of a new Des Moines Register poll that found Vice President Kamala Harris leading Donald Trump by three points in Iowa.").

38. Indeed, as intended by Defendants, the Harris Poll grabbed national and international headlines. *See, e.g.,* Dan Mangan, *Shock poll shows Harris leading Trump in Iowa*, CNBC (Nov. 2, 2024), https://www.nbcbayarea.com/news/business/money-report/shock-poll-shows-harris-leading-trump-in-iowa/3697783/?os=io...&ref=app (last visited Dec. 16, 2024);


NEWS

Shock poll shows Harris leading Trump in Iowa

The Des Moines Register/Mediacom Iowa Poll's results came as a complete surprise to political observers

By Dan Mangan,CNBC • Published November 2, 2024 • Updated on November 5, 2024 at 10:21 am

Chidanand Rajghatta, *Ayya va! Shock poll in non-battleground state shows Kamala winning*, TIMES OF INDIA (Nov. 3, 2024), https://timesofindia.indiatimes.com/world/us/ayya-va-shock-poll-in-non-battleground-state-shows-kamala-winning/articleshow/114914960.cms (last visited Dec. 16, 2024);


Printed from
THE TIMES OF INDIA

Ayya va! Shock poll in non-battleground state shows Kamala winning

TNN | Nov 3, 2024, 08.12 PM IST

Nate Silver, *What 'Shocking New Iowa Poll Means for Kamala Harris' Chances*, NEWSWEEK (Nov. 2, 2024) https://www.newsweek.com/what-shocking-new-iowa-poll-means-kamala-harris-chances-nate-silver-1979244 (last visited Dec. 16, 2024);


Newsweek

SUBSCRIBE FOR $1 Login

Politics | Nate Silver Kamala Harris Donald Trump U.S. Politics 2024 Election Iowa Poll Polls Polling

What 'Shocking' New Iowa Poll Means for Kamala Harris' Chances: Nate Silver

Published Nov 03, 2024 at 6:07 AM EST | Updated Nov 03, 2024 at 1:54 PM EST

Brie Stimson, *Shock Poll has Harris leading Trump in Iowa with 3-point shift toward vice president in red state,* FOX NEWS (Nov. 2, 2024) https://www.foxnews.com/politics/shock-poll-harris-leading-trump-iowa-3-point-shift-toward-vice-president-red-state.amp (last visited Dec. 16, 2024);


FOX NEWS

POLITICS

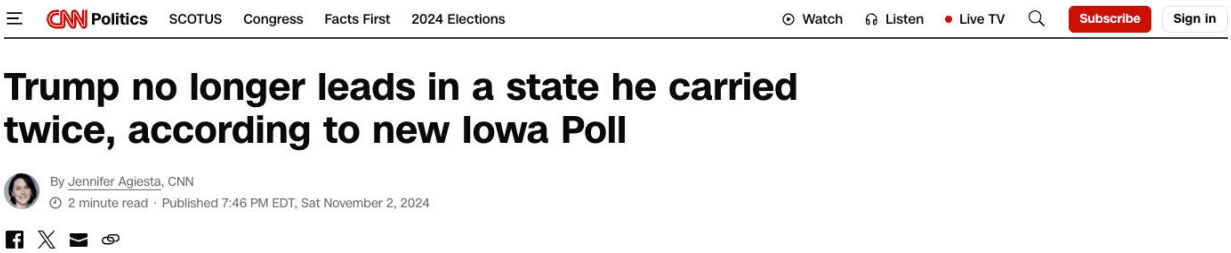
Shock poll has Harris leading Trump in Iowa with 3-point shift toward vice president in red state

Another poll from Emerson College released Saturday showed Trump with a 10-point lead in the Hawkeye State

By Brie Stimson · Fox News

Published November 2, 2024 9:14pm EDT Updated November 2, 2024 9:42pm EDT

Jennifer Agiesta, *Trump no longer leads in a state he carried twice, according to new Iowa Poll*, CNN POLITICS (Nov. 2, 2024), https://www.cnn.com/2024/11/02/politics/iowa-poll-harris-trump/index.html (last visited Dec. 16, 2024);



Sara Dorn, *Why Outler Poll Showing Harris Winning Iowa Could Spell Trouble For Trump*, FORBES (Nov. 3, 2024) https://www.forbes.com/sites/saradorn/2024/11/03/why-outlier-poll-showing-harris-winning-iowa-could-spell-trouble-for-trump/ (last visited Dec. 16, 2024).

39. After President Trump's historic victory, Selzer, aided and abetted by DMR and Gannett, attempted to sidestep her disastrous and deceitful Harris Poll with vacuous platitudes and discussion about her next career moves. *See* J. Ann Selzer, *Pollster Ann Selzer ending election polling, moving 'to other ventures and opportunities,'* DES MOINES REGISTER (Nov. 17, 2024), https://www.desmoinesregister.com/story/opinion/columnists/2024/11/17/ann-selzer-conducts-iowa-poll-ending-election-polling-moving-to-other-opportunities/76334909007/ (last visited Dec. 16, 2024). In reality, Selzer quit the polling industry in disgrace after an attempt at election interference.

40. Further, lacking any sensible or innocent explanation for the Harris Poll, the *Des Moines Register* could only weakly offer that "[t]o date, no likely single culprit has emerged to explain the wide disparity." *See* Carol Hunter, *An update from the editor: What a review of the pre-election Iowa Poll has found,* DES MOINES REGISTER (Nov. 17, 2024), https://www.desmoinesregister.com/story/opinion/columnists/from-the-editor/2024/11/17/editors-update-what-a-review-of-the-pre-election-iowa-poll-has-found/76300644007/ (last visited Dec. 16, 2024).

41. Selzer, aware that there is no innocent explanation for the Harris Poll, continues to try and talk her way out of the disastrous fiction she unleashed on the public. *See* Hanna Panreck, *Former pollster Ann Selzer hits back at criticisms over Iowa poll: 'They are accusing me of a crime,'* FOX NEWS (Dec. 15, 2024), https://www.foxnews.com/media/former-pollster-ann-selzer-hits-back-criticisms-over-iowa-poll-they-accusing-me-crime (last visited Dec. 16, 2024). Appearing on the *Iowa Press*, Selzer remarked: "Well, I'm not here to break any news. If you were hoping that I had landed one exactly why things went wrong, I have not." *See J. Ann Selzer,* IOWA PRESS (Dec. 13, 2024), https://www.iowapbs.org/shows/iowapress/iowa-press/episode/11885/j-ann-selzer (last visited Dec. 16, 2024). Later, Selzer inadvertently revealed the root of the problem, that the Harris Poll was bought and paid for: "And the polling industry is predicated on getting people to pay money for their products." *Id*.

42. The truth is that there is no sensible or innocent explanation for the Harris Poll since, as Manhattan Institute senior fellow James Piereson wrote, Selzer's "miss" was *beyond* extreme:

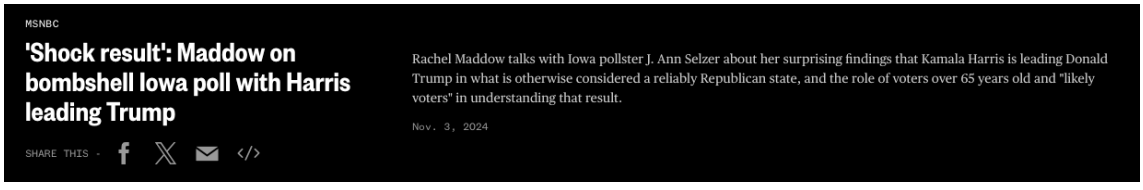
> The Selzer Poll, with a margin of error of 3.4, missed the real outcome by 16 points, or by as many as five standard deviations from the true result as revealed on election day. What are the odds of drawing such a sample by legitimate means? Answer:

> roughly one time in 3.5 million trials. In other words, given these odds, the results in the Iowa poll likely did not come about by "honest error."
>
> *See* James Piereson, *Statistical questions about the Iowa poll,* THE NEW CRITERION (Nov. 12, 2024), https://newcriterion.com/dispatch/statistical-questions-about-the-iowa-poll/ (last visited Dec. 16, 2024).

43. Selzer's deceptive "miss" caused extensive harm:

> It is more likely that someone deliberately manipulated the sample so that it included too many Democrats, or simply made up the numbers as they came in for the purpose of giving confidence to Harris voters and worry for Trump supporters, or to bring national attention to a poll taken in a state not regarded as competitive. The poll did receive national attention and was widely discussed. Selzer appeared on television interviews to talk about the poll and its implications. If the goal was to promote the poll, then the gambit succeeded—at least until election day, when it was revealed to be ridiculously far off the mark.
>
> *Id*.

44. Indeed, Selzer *did* appear on television interviews, where she shamelessly promoted her Harris Poll to drum up Democrat fervor while feigning shock at her own findings, most notably on MSNBC with left-wing extremist Rachel Maddow. As Selzer had intended, a giddy Maddow—like other Democrat-aligned commentators who reported on the Harris Poll —spread manufactured enthusiasm and hope to MSNBC's overwhelmingly Democrat viewers. "And the reason this is *consequential* to our psyche is that if this is accurate—and if anybody is accurate it is likely to be Ann Selzer in the Iowa poll—if this is accurate—this implies that Harris might be winning Iowa." *See* Rachel Maddow, *'Shock result': Maddow on bombshell Iowa poll with Harris leading Trump,* MSNBC (Nov. 3, 2024), https://www.msnbc.com/msnbc/watch/-shock-result-maddow-on-bombshell-iowa-poll-with-harris-leading-trump-223450181755 (last visited Dec. 16, 2024). (Emphasis added).



45. Maddow was perceptive about one thing: the Harris Poll *was* consequential, but for all the wrong reasons. Selzer, who Maddow breathlessly called a "living bullseye," carried more than enough weight to shift public perception about the race. *Id*.

46. Ironically, as Maddow attempted to put the magnitude of the Harris Poll in perspective for her suddenly rejuvenated audience, she only underscored why the Harris Poll was a partisan fiction. "Iowa is a State where neither campaign has spent any time or resources since the primaries. They don't have a ground game up there. They don't have ads up there. Trump won Iowa by eight points last time and nine points the time before that. Nobody thinks of it as a swing state . . . . but here she is with a lead?" *Id*.

47. Maddow then welcomed Selzer to the program, with the pollster immediately complimenting Maddow's perspective on the Harris Poll as "picture perfect." *Id*. Selzer added: "I don't see how anybody would look at those numbers and the history in Iowa in the past eight to twelve years and think that these numbers could have been foretold." *Id*. Of course, the numbers could not have been foretold because they weren't possible, they were fake.

48. Nor can Selzer hide behind feeble excuses about the purported difficulty of polling in races involving President Trump—the Harris Poll wasn't Selzer's only inexplicable, flagrant "miss" in favor of a Democrat candidate in the 2024 election cycle. The Harris Poll was one of *three* massive "misses" favoring Democrats this cycle.

49. In the race for Iowa's 1st Congressional District between incumbent Republican Mariannette Miller-Meeks and Democrat challenger Christina Bohannan, Selzer projected Bohannan with a sixteen-point lead over Miller-Meeks, according to a poll published by the Des Moines Register on November 3, 2024. *See* Stephen Gruber-Miller, *Iowa poll: Democrats are preferred over Republicans in 2 of 4 congressional districts,* DES MOINES REGISTER (Nov. 3, 2024), https://www.desmoinesregister.com/story/news/politics/iowa-poll/2024/11/03/iowa-poll-democrats-preferred-over-republicans-congress-nunn-baccam-miller-meeks-bohannan-hinson/75988058007/ (last visited Dec. 16, 2024).

50. Following a recount in what proved to be a historically tight race, Miller-Meeks prevailed by 0.2%. *See* Marissa Payne, *Recount affirms Mariannette Miller-Meeks' win over Christina Bohannan in 1st District,* DES MOINES REGISTER (Nov. 27, 2024), https://www.desmoinesregister.com/story/news/politics/elections/2024/11/27/iowa-election-results-mariannette-miller-meeks-wins-congressional-1st-district-recount/76595052007/ (last visited Dec. 16, 2024). This outcome meant that Selzer's poll had been off by a whopping sixteen points—the same amount of the "miss" in the Harris Poll, also favoring the Democrat.

51. But that was not all. In the race for Iowa's 3rd Congressional District between incumbent Republican Zach Nunn and Democrat challenger Lanon Baccam, Selzer projected Baccam with a seven-point lead over Nunn, according to another poll published by the Des Moines Register on November 3, 2024. *See* Stephen Gruber-Miller, *Iowa poll: Democrats are preferred*

over Republicans in 2 of 4 congressional districts, DES MOINES REGISTER (Nov. 3, 2024), https://www.desmoinesregister.com/story/news/politics/iowa-poll/2024/11/03/iowa-poll-democrats-preferred-over-republicans-congress-nunn-baccam-miller-meeks-bohannan-hinson/75988058007/ (last visited Dec. 16, 2024).

52. Notwithstanding Selzer's poll, Nunn prevailed by four points. *See* Stephen Gruber-Miller and Courtney Crowder, *Republican Zach Nunn defeats Lanon Baccam, wins reelection bid in Iowa's 3rd District,* DES MOINES REGISTER (Nov. 6, 2024), https://www.desmoinesregister.com/story/news/politics/elections/2024/11/05/zach-nunn-lanon-baccam-face-off-in-iowas-3rd-congressional-district/75777485007/ (last visited Dec. 16, 2024). This outcome meant Selzer's poll had been off by a disastrous eleven points—again in favor of the Democrat. The odds of a pollster with the experience and track record of Selzer innocently missing the presidential race, the 1st District race, and the 3rd District race by sixteen points, sixteen points, and eleven points, respectively, and favoring the Democrat candidates with all three "misses," are outside any reasonable range of error. *See* Piereson, *Statistical questions about the Iowa poll, supra.* This is proof of intentional wrongdoing.

CLAIMS FOR RELIEF

COUNT I

Violation of Iowa Consumer Fraud Act
Iowa Code Chapter 714H
(All Defendants)

53. Plaintiff realleges his allegations contained in paragraphs 1 through 52 as if set fully forth herein.

54. This action is brought pursuant to Iowa Code Chapter 714H and its relevant provisions.

55. Iowa Code § 714H.3(1) provides:

> A person shall not engage in a practice or act the person knows or reasonably should know is an unfair practice, deception, fraud, false pretense, or false promise, or the misrepresentation, concealment, suppression, or omission of a material fact, with intent that others rely upon the unfair practice, deception, fraud, false pretense, false promise, misrepresentation, concealment, suppression, or omission in connection with the advertisement, sale, or lease of consumer merchandise . . . .

56. Iowa Code § 714H.2(3) defines a consumer as "a natural person or the person's legal representative."

57. Iowa Code § 714H.2(5) defines "deception" as "an act or practice that is likely to mislead a substantial number of consumers as to a material fact or facts."

58. Iowa Code § 714H.2(6) defines "merchandise" the same as the definition contained in Iowa Code § 714.16, under which the term includes "any objects, wares, goods, commodities, intangibles, securities, bonds, debentures, stocks, real estate or *services*." (Emphasis added).

59. Iowa Code § 714H.2(9) defines "unfair practice" the same as the definition contained in Iowa Code § 714.16, under which the term "means an act or practice which causes substantial, unavoidable injury to consumers that is not outweighed by any consumer or competitive benefits which the practice produces."

60. Iowa Code § 714H.5 provides for a private right of action for consumers damaged by violations of § 714H.3(1):

> 1. A consumer who suffers a sustainable loss of money or property as the result of a prohibited practice or act in violation of this chapter may bring an action at law to recover actual damages. The court may order such equitable relief as it deems necessary to protect the public from further violations, including temporary and permanent injunctive relief.
>
> 2. If the court finds that a person has violated this chapter and the consumer is awarded actual damages, the court shall award to the consumer the costs of the action and the consumer's attorney reasonable fees.

61. As to the nature of the conduct that constitutes an "unfair practice," the "Iowa Consumer Fraud Act 'is not a codification of common law fraud principles.'" *Moeller v. Samsung*

Electronics America, Inc., 623 F.Supp.3d 978, 985 (2002) (quoting *State ex rel. Miller v. Pace*, 677 N.W. 2d 761, 770 (Iowa 2004). "It permits relief upon a lesser showing that the defendant made a misrepresentation or omitted a material fact 'with the intent that others rely upon the . . . omission.'" *Id*. (quoting § 714.16(2)(a)). "A course of conduct contrary to what an ordinary consumer would anticipate contributes to a finding of an unfair practice. *State ex rel. Miller v. Vertrue, Inc*., 834 N.W.2d 12, 37 (Iowa 2023).

62. President Trump, together with all Iowa and American voters, is a "consumer" within the meaning of the statute.

63. Defendants furnished "merchandise" to consumers within the broad meaning of the statute since they provided a service: physical newspapers, online newspapers, and other content that contained the Harris Poll.

64. Defendants engaged in "deception" because the Harris Poll was "likely to mislead a substantial number of consumers as to a material fact or facts," to wit: the actual position of the respective candidates in the Iowa Presidential race.

65. Defendants engaged in an "unfair act or practice" because the publication and release of the Harris Poll "cause[d] substantial, unavoidable injury to consumers that [was] not outweighed by any consumer or competitive benefits which the practice produced," to wit: consumers, including Plaintiff, were badly deceived and misled as to the actual position of the respective candidates in the Iowa Presidential race. Moreover, President Trump, the Trump 2024 Campaign, and other Republicans were forced to divert enormous campaign and financial resources to Iowa based on the deceptive Harris Poll. Consumers within Iowa who paid for subscriptions to the *Des Moines Register* or who otherwise purchased the publication were also

badly deceived. Additionally, Iowans who contributed to the Trump 2024 Campaign were similarly deceived.

66. The Harris Poll was deceptive and misleading, unfair, and the result of concealment, suppression, and omission of material facts about the true respective positions of President Trump and Harris in the Presidential race, all of which were known to Defendants and should have been disclosed to the public.

67. Moreover, as demonstrated by the leak of the Harris Poll before publication in the Register Article, Defendants created, published, and released the Harris Poll for the improper purpose of deceptively influencing the outcome of the 2024 Presidential Election.

68. Pollsters such as Selzer, polling companies such as S&C, and news organizations such as DMR and Gannett, are responsible for accurately representing the truth of events, not distorting polls to try and falsely make their preferred candidate appear to be in the lead. Due to Defendants' actions, the public could not discern who was truly leading in the Iowa Presidential race and, as a result, were, or could have been, badly deceived into thinking that Harris was leading the race.

69. Defendants' misconduct here gives rise to liability under the Iowa Consumer Fraud Act because the Harris Poll was deceptive and misleading and involved concealment, suppression, and omission of material facts. Defendants engaged in this misconduct to improperly influence the outcome of the 2024 Presidential Election.

70. Because of Defendants' false, misleading, and deceptive conduct, President Trump has sustained actual damages due to the need to expend extensive time and resources, including direct federal campaign expenditures, to mitigate and counteract the harms of the Defendants'

conduct. Because the Defendants' conduct was willful and wanton, President Trump is also entitled to statutory damages three times the actual damages suffered.

71. Additionally, because the Iowa Consumer Fraud Act is equitable in nature, President Trump is entitled to injunctive relief, including an order enjoining Defendants and their associates from publishing or releasing any further deceptive polls designed to influence the outcome of an election and requiring Defendants to disclose all data and information upon which they relied in creating, publishing, and releasing the Harris Poll.

CONCLUSION AND PRAYER

WHEREFORE, Plaintiff PRESIDENT DONALD J. TRUMP demands judgment against Defendants J. ANN SELZER, SELZER & COMPANY, DES MOINES REGISTER AND TRIBUNE COMPANY, and GANNETT CO., INC. as follows:

(a) On Count One, actual damages to be determined upon trial of this action;

(b) On Count One, statutory damages three times the actual damages suffered;

(c) On Count One, an order enjoining Defendants' ongoing deceptive and misleading acts and practices relating to the Harris Poll and compelling Defendants to disclose all information upon which they relied to engage in the deceptive and misleading acts relating to the Harris Poll;

(d) The attorneys' fees and costs associated with this action; and

(e) Such other relief as the Court deems just and proper.

Date: December 16, 2024

Respectfully submitted,

/s/Edward Andrew Paltzik
EDWARD ANDREW PALTZIK
Bochner PLLC
1040 Avenue of the Americas
15th Floor
New York, NY 10018

(516) 526-0341
edward@bochner.law
(pro hac vice forthcoming*)*

/s/ Alan R. Ostergren
ALAN R. OSTERGREN
Attorney at Law
Alan R. Ostergren, PC
500 East Court Avenue
Suite 420
Des Moines, Iowa 50309
(515) 297-0134
alan.ostergren@ostergrenlaw.com

Attorneys for Plaintiff

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

PRESIDENT DONALD J. TRUMP, an individual,

Plaintiff,

v.

J. ANN SELZER, SELZER & COMPANY, DES MOINES REGISTER AND TRIBUNE COMPANY, and GANNETT CO., INC.,

Defendants.

Case No. 24-449

DEFENDANT GANNETT CO., INC.'S NOTICE OF REMOVAL

Defendant Gannett Co., Inc. ("Gannett") hereby removes the above-captioned civil action from the Iowa District Court in and for Polk County, Case No. CVCV068364 ("State Court Action"), to the United States District Court for the Southern District of Iowa, Central Division, pursuant to 28 U.S.C. §§ 1332, 1441, and 1446; Fed. R. Civ. P. 81; and L.R. 81.

As grounds for removal, Gannett states:

1. Plaintiff President Donald J. Trump, an individual ("President Trump") filed his Petition on December 16, 2024, in the Iowa District Court for Polk County. In the State Court Action, President Trump generally alleges that Gannett and co-defendants J. Ann Selzer ("Selzer"), Selzer & Company ("S&C"), and Des Moines Register and Tribune Company ("The Register") violated the Iowa Consumer Protection Act and the Iowa Private Right of Action for Consumer Frauds Act *as codified* Iowa Code § 714H, *et seq.* (Petition, ¶¶ 53–71.)

2. Defendant Gannett has reviewed the docket in the State Court Action and determined that the following pleadings have been filed: (a) a Petition; (b) an Original Notice; and (c) a second, substantially identical copy of the Petition. Pursuant to L.R. 81(a), copies of all

filings in the State Court Action are attached to this Notice of Removal as Exhibit A and by this reference are incorporated herein.

3. This Court has original jurisdiction of this action under 28 U.S.C. § 1332(a), and this action may be removed under 28 U.S.C. § 1441. As required by Local Rule 81(a)(4), Gannett states that for purposes of removal of this action from state court and as more fully set forth below, this is an action where the amount in controversy for Plaintiff's claims exceeds the sum of $75,000, exclusive of interest and costs, and is between citizens of different states.

4. There is complete diversity of citizenship between the parties.

5. The Petition alleges that President Trump is a citizen of Florida. (Petition ¶ 15.) President Trump is therefore a citizen of Florida for the purposes of diversity jurisdiction.

6. The Petition alleges that Selzer is a natural person and a citizen of Iowa. (*Id.* ¶ 16.) Selzer is therefore a citizen of Iowa for the purposes of diversity jurisdiction.

7. The Petition alleges that S&C is a domestic corporation that does business in Iowa. (*Id.* ¶ 17.) Upon information and belief, S&C is an Iowa corporation with a principal place of business in West Des Moines, Iowa. S&C is therefore a citizen of Iowa for the purposes of diversity jurisdiction.

8. The Register is an Iowa corporation with a principal place of business in New York. (*Id.* ¶ 18.) The Register is therefore a citizen of Iowa and New York for the purposes of diversity jurisdiction.

9. Gannett is a Delaware corporation with a principal place of business in New York. (*Id.* ¶ 19.) Gannett is therefore a citizen of Delaware and New York for the purposes of diversity jurisdiction.

10. President Trump seeks a wide array of damages, including actual damages, statutory treble damages, and injunctive relief that would have a significant impact on Gannett and The Register's operations. The combined value of the claimed damages in this case would exceed $75,000, exclusive of costs and interest.

11. In diversity cases, there is an additional limitation on removal, known as the forum-defendant rule, which provides that:

> [a] civil action otherwise removable solely on the basis of the jurisdiction under [28 U.S.C. § 1332(a)] may not be removed if any of the parties in interest ***properly joined and served*** as defendants is a citizen of the State in which such action is brought.

§ 1441(b)(2) (emphasis added).

12. The forum-defendant rule, however, does not prohibit a defendant from removing a case where the forum defendants have not yet been served. *Id.*; *see also Tex. Brine Co., LLC*, 955 F.3d 482 (5th Cir. 2020); *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699 (2d Cir. 2019); *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147 (3d Cir. 2018); *McCall v. Scott*, 239 F.3d 808, 813 n.2 (6th Cir. 2001); *M & B Oil, Inc. v. Federated Mut. Ins. Co.*, No. 21-3817, 2023 WL 3163326, at *3 (8th Cir. May 1, 2023) (noting that Eighth Circuit has "yet to weigh in on the question," but recognizing that "many courts have held that the forum-defendant rule does not apply" if the action is removed prior to service). Removal in this manner is typically referred to as "snap removal."

13. This Court has not directly addressed snap removal; however, consistent with the cases cited above, this Notice of Removal is proper under the § 1441. Further, this case is distinguishable from other cases within the Eighth Circuit and in the Northern District of Iowa. *Cf. M & B Oil*, 2023 WL 3163326, at *2 (recognizing that "[s]nap removal has nothing to do with the complete-diversity requirement."); *Spreitzer Properties, LLC v. Travelers Corp.*, No.

21-CV-00106, 2022 WL 1137091 (N.D. Iowa Apr. 18, 2022) (remanding a snap removal case because the parties lacked complete diversity). Here, there is complete diversity between the parties as set forth above.

14. On information and belief, as of the time of this filing, none of Selzer, S&C, and/or The Register have been served.

15. Thus, because complete diversity of the parties exists and the amount in controversy exceeds $75,000, this Court has original jurisdiction over the action under 28 U.S.C. § 1332(a) diversity jurisdiction. *See Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303 (2006). This action is properly removable to this Court pursuant to § 1441(a).

16. Based upon the allegations in Plaintiff's Petition, the proper venue for removal of this action is to the United States District Court for the Southern District of Iowa, Central Division, because it is the "district and division embracing the place where such action is pending." *See* 28 U.S.C. § 1441(a).

17. In accordance with 28 U.S.C. § 1446(d), a copy of this Notice of Removal is being filed with the Clerk of the Iowa District Court for Polk County and is being served on all adverse parties.

18. Pursuant to L.R. 81(a), there are currently no motions pending in the state court that will require resolution by this Court.

19. Pursuant to L.R. 81(c), Defendants will file a disclosure statement in compliance with L.R. 7.1(d) within 21 days of filing this Notice of Removal, or at any other such time the Court orders.

20. Undersigned counsel further certifies that in accordance with 28 U.S.C. § 1446(d), concurrent with the filing and service of this Notice of Removal, notice is being served upon counsel for President Trump, by electronic mail.

12. By removing this action from the Iowa District Court for Polk County, Iowa, to this Court, Defendants do not waive and specifically reserve any and all defenses available to them.

13. By removing this action from the Iowa District Court for Polk County, Iowa, to this Court, Defendants do not admit any of the allegations in the Petition.

WHEREFORE, Defendant Gannett Co., Inc. hereby gives notice that the above-entitled action is removed from the Iowa District Court in and for Polk County.

Dated: December 17, 2023

FAEGRE DRINKER BIDDLE & REATH LLP

/s/ Nicholas Klinefeldt

Nicholas Klinefeldt
nick.klinefeldt@faegredrinker.com
Jacob Bylund
jacob.bylund@faegredrinker.com
Andrew Anderson
andrew.anderson@faegredrinker.com
David Yoshimura
david.yoshimura@faegredrinker.com
Joseph Quinn
joe.quinn@faegredrinker.com
801 Grand Avenue, 33rd Floor
Des Moines, Iowa 50309-8003
Telephone: (515) 248-9000
Facsimile: (515) 248-9010

ATTORNEYS FOR DEFENDANT GANNETT CO., INC.

Certificate of Service

The undersigned certifies that a true copy of **Defendant Gannett Co., Inc.'s Notice of Removal** was served upon all parties of record through the court's CM/ECF electronic filing system with copies to the below named individuals by electronic mail on December 17, 2024.

/s/ Paulette Ohnemus

Copy to:

EDWARD ANDREW PALTZIK
Bochner PLLC
1040 Avenue of the Americas 15th Floor
New York, NY 10018
(516) 526-0341
edward@bochner.law

ALAN R. OSTERGREN
Attorney at Law
Alan R. Ostergren, PC 500 East Court Avenue Suite 420
Des Moines, Iowa 50309
(515) 297-0134
alan.ostergren@ostergrenlaw.com

Attorneys for Plaintiff

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

PRESIDENT DONALD J. TRUMP, an individual, REPRESENTATIVE MARIANNETTE MILLER-MEEKS, an individual, and FORMER STATE SENATOR BRADLEY ZAUN, an individual, Plaintiffs, v. J. ANN SELZER, an individual, SELZER & COMPANY, DES MOINES REGISTER AND TRIBUNE COMPANY, and GANNETT CO., INC., Defendants.	Case 4:24-cv-00449-RGE-WPK **AMENDED COMPLAINT** **Jury Trial Demanded**

Plaintiffs, PRESIDENT DONALD J. TRUMP ("President Trump"), REPRESENTATIVE MARIANNETTE MILLER-MEEKS ("Representative Miller-Meeks"), and FORMER STATE SENATOR BRADLEY ZAUN ("Zaun"), by and through undersigned counsel, bring this action against Defendants J. ANN SELZER ("Selzer"), SELZER & COMPANY ("S&C"), DES MOINES REGISTER AND TRIBUNE COMPANY ("DMR"), and GANNETT CO., INC. ("Gannett") (together "Defendants"), and allege as follows:

NATURE OF THE ACTION

1. This action, which arises under the Iowa Consumer Fraud Act, Iowa Code Chapter 714H, including § 714H.3(1) and related provisions, as well as under Iowa common law, including, without limitation, fraudulent misrepresentation and negligent misrepresentation, seeks accountability for brazen election interference committed by the Defendants in favor of now-

defeated former Democratic presidential candidate Kamala Harris ("Harris"), along with other Democrat candidates, through use of a manipulated, incorrect, and improperly leaked Des Moines Register/Mediacom Iowa Poll conducted by Selzer and S&C, and published online by DMR and Gannett in the *Des Moines Register* and other Gannett-owned outlets including nationally distributed *USA Today*, on November 2, 2024, and in print on November 3, 2024 (the "Harris Poll"). *See* Brianne Pfannenstiel, *Iowa Poll: Kamala Harris leapfrogs Donald Trump to take lead near Election Day. Here's how*. DES MOINES REGISTER (Nov. 2, 2024), previously available at https://www.desmoinesregister.com/story/news/politics/iowa-poll/2024/11/02/iowa-poll-kamala-harris-leads-donald-trump-2024-presidential-race/75354033007/ (last attempted visit Jan. 31, 2025)[1] (the "Harris Poll Article"); Brianne Pfannenstiel, *Kamala Harris leapfrogs Donald Trump to take lead in ruby red Iowa near Election Day*. USA TODAY (Nov. 3, 2024), https://www.usatoday.com/story/news/politics/elections/2024/11/03/iowa-poll-kamala-harris-leads-trump/76018358007/ (last visited Jan. 31, 2025).

[1] Notably, at the time this action was commenced, the Harris Poll Article was publicly available on DMR's website. Defendants, contrary to their claims of transparency, appear to have hidden the Article behind a paywall during the pendency of this litigation. Attempts to access the Article through the above link now take online users to the following address: https://subscribe.desmoinesregister.com/restricted?return=https%3A%2F%2Fwww.desmoinesregister.com%2Fstory%2Fnews%2Fpolitics%2Fiowa-poll%2F2024%2F11%2F02%2Fiowa-poll-kamala-harris-leads-donald-trump-2024-presidential-race%2F75354033007%2F&gps-source=CPROADBLOCKDH&itm_source=roadblock&itm_medium=onsite&itm_campaign=premiumroadblock&gca-cat=p&gca-uir=true&gca-epti=z116463e007800v116463b0064xxd006465&gca-ft=11&gca-ds=sophi&theme=twentyfour&hideGrid=true&gnt-eid=control (last visited Jan. 31, 2025).


MARKETPLACE
Search For & Place Classifieds

Des Moines Register

SUBSCRIBE NOW
$9.99 for 1 year

[News] Sports Opinion Business Advertise Obituaries eNewspaper Legals 32°F Subscribe Sign In

IOWA POLL

Iowa Poll: Kamala Harris leapfrogs Donald Trump to take lead near Election Day. Here's how

The nationally recognized Iowa Poll shows Kamala Harris picking up support from women to surpass Donald Trump in a ruby-red state he has won twice

2. Contrary to reality and tortiously defying credulity, Defendants' Harris Poll was published three days before Election Day, purporting to show Harris leading President Trump in Iowa by three points (47%-44%) (*see* Harris Poll Article). The Poll was utterly wrong and intentionally misleading. President Trump won Iowa by *over thirteen* points (56%-42.7%)[2]. *See Iowa President*, ASSOCIATED PRESS, https://apnews.com/projects/election-results-2024/iowa/?r=0 (last visited Jan. 31, 2025). Before this astonishing *sixteen-point* polling miss, Selzer brazenly claimed: "It's hard for anybody to say they saw this coming . . . . Harris has clearly leaped into a leading position." (*See* Harris Poll Article). However, as Selzer knew, there was a perfectly good reason nobody "saw this coming"—because a three-point lead for Harris in deep-red Iowa was not reality; it was election-interfering fiction.

3. Defendants' brazen 2024 election interference was not limited to the Harris Poll. Also on November 2, 2024 and November 3, 2024, DMR and Gannett published another poll in the online and print versions of the *Des Moines Register*, which purported to show that incumbent Representative Miller-Meeks trailed by sixteen points (53%-37%) against Democrat challenger Christina Bohannan in the race for Iowa's 1st Congressional District (the "Congressional Poll")

[2] President Trump won 927,019 votes in Iowa to 707,278 votes for Harris, and thereby captured Iowa's six electoral votes with an overwhelming 13.3% margin of victory. *See Iowa President*, ASSOCIATED PRESS, https://apnews.com/projects/election-results-2024/iowa/?r=0 (last visited Jan. 30, 2025).

(the Harris Poll and Congressional Poll together, the "Defendant Polls" or the "Polls"); Representative Miller-Meeks ultimately won the 1st District by two-tenths of a point (50.1%-49.9%).[3] *See* Stephen Gruber-Miller, *Iowa poll: Democrats are preferred over Republicans in 2 of 4 congressional districts,* DES MOINES REGISTER (Nov. 3, 2024), previously available at https://www.desmoinesregister.com/story/news/politics/iowa-poll/2024/11/03/iowa-poll-democrats-preferred-over-republicans-congress-nunn-baccam-miller-meeks-bohannan-hinson/75988058007/ (last attempted visit Jan. 31, 2025) (the "Congressional Poll Article")[4]; Marissa Payne, *Recount affirms Mariannette Miller-Meeks' win over Christina Bohannan in 1st District,* DES MOINES REGISTER (Nov. 27, 2024), previously available at https://www.desmoinesregister.com/story/news/politics/elections/2024/11/27/iowa-election-results-mariannette-miller-meeks-wins-congressional-1st-district-recount/76595052007/ (last attempted visit Jan. 31, 2025).[5]

4. The odds of a pollster with Selzer's experience and track record innocently missing *both* President Trump's *and* Representative Miller-Meeks' races by the same margin, sixteen

[3] Representative Miller-Meeks won re-election with 206,955 votes to 206,156 for Bohannan. *See Iowa First Congressional District Results*, NEW YORK TIMES, https://www.nytimes.com/interactive/2024/11/05/us/elections/results-iowa-us-house-1.html (last visited Jan. 30, 2025).

[4] Notably, at the time this action was commenced, the Congressional Poll Article was publicly available on DMR's website. Defendants, contrary to their claims of transparency, appear to have hidden the Article behind a paywall during the pendency of this litigation. Attempts to access the Article through the above link now take online users to the following address: https://subscribe.desmoinesregister.com/restricted?return=https%3A%2F%2Fwww.desmoinesregister.com%2Fstory%2Fnews%2Fpolitics%2Fiowa-poll%2F2024%2F11%2F02%2Fiowa-poll-kamala-harris-leads-donald-trump-2024-presidential-race%2F75354033007%2F&gps-source=CPROADBLOCKDH&itm_source=roadblock&itm_medium=onsite&itm_campaign=premiumroadblock&gca-cat=p&gca-uir=true&gca-epti=z116463e007800v116463b0064xxd006465&gca-ft=11&gca-ds=sophi&theme=twentyfour&hideGrid=true&gnt-eid=control (last visited Jan. 31, 2025).

[5] Also put behind a paywall by Defendants since the commencement of this action.

points, and favoring the Democrat candidates with both "misses," are outside any reasonable range of error.

5. Yet, Selzer—who had brandished and relied on her mainstream reputation for accuracy despite several other, far less publicized, egregious polling misses in favor of Democrats—discussed *infra*—would have the public believe it was merely a coincidence that two of the worst polling misses of her career came just days before the most consequential election in memory, that one was leaked, *and* both happened to go against Republican candidates. The Harris Poll and the Congressional Poll were no "misses," but rather attempts to corruptly influence and interfere in the outcome of the 2024 Presidential Election and other key elections, including the Iowa 1st District.

6. As intended, Selzer's manipulated Harris Poll impacted many other elections, including Representative Miller-Meeks' contest against Bohannan and Zaun's race against Democrat challenger Matt Blake in Iowa Senate District 22, in which Blake narrowly emerged victorious by a margin of four points. *See* Donnelle Eller, *Democratic challenger Matt Blake upsets Republican incumbent Brad Zaun in Iowa Senate race,* DES MOINES REGISTER (Nov. 5, 2024), previously available at https://www.desmoinesregister.com/story/news/politics/elections/2024/11/05/iowa-election-results-brad-zaun-matt-blake-senate-district-22/75722250007/# (last attempted visit Jan. 31, 2025).

7. President Trump's resounding victory was consistent with Iowa's recent electoral history: he won Iowa by over eight points and nearly ten points, respectively, in the 2020 and 2016 Presidential Elections. President Trump certainly could not have trailed Harris by three points in Iowa at any time in the 2024 cycle. *See Iowa*, CNN (Feb. 16, 2017),

https://www.cnn.com/election/2016/results/states/iowa (last visited Jan. 31, 2025); *Iowa*, CNN (Dec. 15, 2020), (https://www.cnn.com/election/2020/results/state/iowa (last visited Jan. 31, 2025).

8. Defendants and their cohorts in the Democrat Party hoped that the Harris Poll would create a false narrative of inevitability for Harris in the final week of the 2024 Presidential Election, to drive down enthusiasm among Republicans; they had similar hopes for the Congressional Poll. Instead, the November 5 Election was a monumental victory for President Trump in the Electoral College and the Popular Vote, resulting in an overwhelming mandate for his America First principles and the consignment of the radical socialist agenda to the dustbin of history. Representative Miller-Meeks also secured a hard-fought victory despite substantial headwinds caused by the Congressional Poll, while Zaun suffered the aforementioned defeat.

9. After over 35 years in the industry, Selzer retired in disgrace from polling less than two weeks after Harris's resounding defeat. Selzer quitting polling is an admission of her guilt and liability for the Defendant Polls. *See* Ben Brasch, *Ann Selzer to step away from Iowa Poll with the Des Moines Register*, WASHINGTON POST (Nov. 17, 2024), https://www.washingtonpost.com/politics/2024/11/17/selzer-poll-iowa-election/ (last visited Jan. 31, 2025).

10. As Iowa Republican Party Chairman Jeff Kaufman observed: "Not only did [Selzer] disrespect Iowa and our voters, but she caused Iowa to be laughed at by the entire country." *See* Jeff Kaufman, *Trump wins, Ann Selzer loses*, WASHINGTON EXAMINER (Nov. 13, 2024), https://www.washingtonexaminer.com/opinion/3227498/trump-wins-ann-selzer-loses/#google_vignette (last visited Jan. 31, 2025).

11. For too long, left-wing pollsters—knowing that polls *can, and often do,* materially impact elections—have attempted to influence electoral outcomes through manipulated polls that are not grounded in widely accepted polling methodologies and have unacceptable error rates. While Selzer is not the only pollster to engage in this corrupt practice, she had a huge platform and following, resulting in a significant and impactful opportunity to deceive voters.

12. The need for Democrats to produce fake polls was even more acute than usual in the 2024 Election, given Harris's many fatal weaknesses as a candidate and lack of appeal to critical swaths of the traditional Democrat base. Her incessant use of "word salads"—i.e., jumbles of exceptionally incoherent speech—only underscored the urgency for left-wing pollsters to try and rescue Harris's candidacy. *See, e.g.*, Hanna Panreck, *CNN panel critical of Kamala Harris' town hall performance: 'World salad city'*, CNN (Oct. 24, 2024) https://www.foxnews.com/media/cnn-panel-critical-kamala-harris-town-hall-performance-word-salad-city (last visited Jan. 31, 2025); Ian Hanchett, *Van Jones: Harris Had Needless 'Evasions' During CNN Town Hall, 'Word Salad Stuff' Is Annoying*, BREITBART (Oct. 24, 2024), https://www.breitbart.com/clips/2024/10/24/van-jones-harris-had-needless-evasions-during-cnn-town-hall-word-salad-stuff-is-annoying/ (last visited Jan. 31, 2025); Ian Hanchett, *Axelrod: Harris Gives a 'Kind of' 'Word Salad' 'When She Doesn't Want to Answer a Question' Like on Israel*, BREITBART (Oct. 24, 2024), https://www.breitbart.com/clips/2024/10/24/axelrod-harris-gives-a-kind-of-word-salad-when-she-doesnt-want-to-answer-a-question-like-on-israel/ (last visited Jan. 31, 2025).

13. Millions of Americans, including President Trump, Iowans including but not limited to Representative Miller-Meeks and Zaun, and others who contributed to President Trump's campaign and its affiliated entities (the "Trump 2024 Campaign"), were lied to, deceived,

and maligned by the doctored Harris Poll. President Trump has made impactful, widely read statements on the matter, writing on Truth Social, *inter alia*, that Selzer's misconduct caused "great distrust and uncertainty at a very critical time." *See* President Donald J. Trump, @realDonaldTrump, TRUTH SOCIAL (Dec. 9, 2024), https://truthsocial.com/@realDonaldTrump (last visited Jan. 31, 2025); *see also Harris Now Leads Trump*, DES MOINES REGISTER (Nov. 3, 2024), at 1, 6A (excerpt shown below).

14. Selzer's polling "miss" was not an astonishing coincidence—it was intentional. As President Trump observed: "She knew exactly what she was doing." *Id.*

15. In addition, hundreds of thousands of Iowans, including but not limited to Representative Miller-Meeks and Zaun, and others who contributed to their Campaigns and affiliated entities, were lied to, deceived, and maligned by the doctored Congressional Poll.

16. Defendants' conduct violated Iowa Code § 714H.3(1), pursuant to which "a person shall not engage in a practice or act the person knows or reasonably should know is an unfair practice, deception, fraud, false pretense, or false promise, or the misrepresentation, concealment, suppression, or omission of a material fact, with intent that others rely upon [same] . . . . "

17. Defendants' conduct was also tortious at common law in that Defendants engaged in fraudulent and/or negligent misrepresentation.

18. Accordingly, President Trump and his co-Plaintiffs, Representative Miller-Meeks and Zaun, bring this action to redress the immense harm caused to them as individual candidates and as individual consumers, to the Trump 2024 Campaign, to Representative Miller-Meeks' Campaign, to Zaun's Campaign, and to millions of citizens in Iowa and across America by the Defendant Polls.

19. Further, this action is necessary to deter Defendants and their fellow radicals from continuing to act with corrupt intent in releasing polls manufactured for the purpose of skewing election results in favor of Democrats.

PARTIES

20. President Trump is an individual, a citizen of Florida, the 45th President of the United States of America, and, as the landslide winner of the 2024 Presidential Election and having been inaugurated on January 20, 2025, the 47th President of the United States. President Trump read the election coverage at issue in this action in the *Des Moines Register*.

21. Representative Miller-Meeks is an individual, a citizen of Iowa, and represents Iowa's 1st District in the House of Representatives. A physician, she has served as a United States Representative since 2021, having previously represented the Iowa Senate 41st District from 2019 to 2021. Representative Miller-Meeks is a regular reader of the *Des Moines Register*, read the

election coverage at issue in this action, and purchased the *Des Moines Register* newspaper issue containing the election coverage at issue.

22. Zaun is an individual, a citizen of Iowa, representing Iowa Senate District 22, serving in the Iowa Senate from 2005 through January 12, 2025. He also served as the mayor of Urbandale from 1998 to 2005. Zaun read the election coverage at issue in this action.

23. Defendant Selzer is an individual, a citizen of Iowa, resides in the Des Moines area, and is the founder and president of S&C. Selzer worked as the pollster for the *Des Moines Register* for many years, overseeing all the *Register's* polls from 1987 to 2024. She has also conducted polls for *The Detroit Free Press*, *Bloomberg News*, and the *Indianapolis Star*. Selzer holds a Ph.D. in Communication Theory and Research from the University of Iowa.

24. Defendant S&C is an Iowa domestic for-profit corporation that does business in Iowa generally, and in Polk County specifically, and is registered with the Iowa Secretary of State (No. 200824), with an office at 308 Fifth Street, West Des Moines, IA 50265. Selzer has published and released her polls to the public by and through S&C, which conducts polling for the Des Moines Register and other clients.

25. Defendant DMR is an Iowa domestic corporation that does business in Iowa generally and in Polk County specifically. DMR owns and publishes the *Des Moines Register*. DMR is a wholly owned subsidiary of Gannett and a domestic for-profit corporation registered with the Iowa Secretary of State (No. 8971).

26. Defendant Gannett is a Delaware corporation headquartered in New York that does business in Iowa generally, and Polk County specifically, and is publicly traded. Gannett owns DMR and myriad other publications, including the widely read and nationally distributed *USA*

Today, and participates in the operations of the *Des Moines Register*, as evidenced by its investigation of the leak of the Harris Poll, discussed *infra*.

JURISDICTION, VENUE, REMOVAL, AND REMAND

27. On December 16, 2024, President Trump commenced this action against Defendants Selzer, S&C, DMR, and Gannett by filing a Petition in the Iowa District Court for Polk County containing one claim under the Iowa Consumer Fraud Act.

28. On December 17, 2024, prior to service of the Petition on any Defendant, Gannett raced to the courthouse and filed a Notice of Removal of this action with accompanying documents (the "Removal Notice"), disregarding the forum defendant rule. *See* 28 U.S.C. § 1441(b)(2).

29. The Iowa District Court for Polk County had, and still has, subject matter jurisdiction over this action under Iowa Code § 714.16(7). The amount in controversy exceeds the jurisdictional amount for a small claims action in Iowa.

30. The Iowa District Court for Polk County was, and still is, a proper venue because Polk County is a "county where the transaction or any substantial portion of the transaction occurred" and where Defendants are "doing business." Iowa Code § 714.16(10). Three Defendants are citizens of Iowa (Selzer, S&C, and DMR), and a fourth Defendant (Gannett) engages in substantial business in Iowa and targets Iowa consumers in the conduct of its business.

31. In contrast, this Court, the United States District Court for the Southern District of Iowa, is not the proper venue and does not have subject matter jurisdiction over this action.

32. This action is not between citizens of different States. *See* 28 U.S.C. § 1332. Two Plaintiffs—Representative Miller-Meeks and Zaun—are citizens of Iowa; three Defendants—Selzer, S&C, and DMR—are also citizens of Iowa.

33. This action does not arise under the Constitution, laws, or treaties of the United States. *See* 28 U.S.C. § 1331. Rather, the action arises under the Iowa Consumer Fraud Act and Iowa common law.

34. Moreover, presently before the Iowa District Court for Polk County is a class action lawsuit captioned *Dennis Donnelly, on behalf of himself and all others similarly situated v. Des Moines Register and Tribune Co., Inc.; Ann Selzer; Selzer & Company; and Gannett Co., Inc*., Case No. CVCV068445 (filed Jan. 6, 2025), which involves the same subject matter—the Defendant Polls and other inaccurate polls—as well as the same Defendants as this action. This action and the *Donnelly* class action only involve Iowa statutory and common law matters.

35. "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." *See* 28 U.S.C. § 1447(c). Accordingly, this action must be remanded to the Iowa District Court for Polk County, as will be addressed in greater detail in Plaintiffs' forthcoming Motion to Remand.

FACTUAL ALLEGATIONS

Selzer's Misleading Reputation for Objectivity

36. Selzer has long enjoyed a celebrated, if not based on results, mainstream reputation for accurate polling. For example, in 2016, Clare Malone of *FiveThirtyEight* described Selzer as "the best pollster in politics." *See* Clare Malone, *Ann Selzer Is The Best Pollster In Politics*, FIVETHIRTYEIGHT (Jan. 27, 2016), https://fivethirtyeight.com/features/selzer/ (last visited Jan. 31, 2025). In a June 2024 rating of 25 pollsters, Nate Silver rated Selzer first with an A+ score. *See* Nate Silver, *Pollster ratings*, *Silver Bulletin style*, SILVER BULLETIN (June 12, 2024), https://www.natesilver.net/p/pollster-ratings-silver-bulletin (last visited Jan. 31, 2025).

37. However, underneath the surface, Selzer has quietly used her polls to attempt to influence recent elections in favor of Democrats, receiving ample cover from the legacy media and

thus lacking accountability. As Chairman Kaufman observed after President Trump's commanding victory: "For too long, we have let Ann Selzer use her polls to influence races. She is fully aware that her polls can influence voters." *See* Kaufman, *Trump wins, Ann Selzer loses*, *supra*.

38. In 2022, Selzer attempted to influence the outcome of the Iowa Attorney General Election between current Republican Attorney General Brenna Bird and then-Democrat incumbent Tom Miller (who had served in that capacity for 40 years). To do so, Selzer released a poll that missed the mark by an even more astonishing amount than the Harris Poll and the Congressional Poll—*eighteen* points. *See* Stephen Gruber-Miller, *Iowa Poll: Tom Miller leads Brenna Bird by 16 percentage points in attorney general race*, DES MOINES REGISTER (Oct. 25, 2022), https://www.desmoinesregister.com/story/news/politics/iowa-poll/2022/10/25/iowa-poll-attorney-general-election-tom-miller-brenna-bird-2022/69563197007/ (last visited Jan. 31, 2025) ("The poll was conducted Oct. 9-12 by Selzer & Co.").[6] Yet, two weeks after Selzer declared that Bird trailed Miller by sixteen points, Bird defeated Miller by two points. *See* Stephen Gruber-Miller, *Republican Brenna Bird defeats Tom Miller in Iowa attorney general race*, DES MOINES REGISTER (Nov. 9, 2022), https://www.desmoinesregister.com/story/news/politics/elections/2022/11/09/brenna-bird-topples-incumbent-tom-miller-in-iowa-attorney-general-race/69610291007/ (last visited Jan. 31, 2025).

39. In another example of Selzer's pattern of malicious deceit and election interference, in the 2018 Iowa governor's race between Democrat Fred Hubbell and Republican Kim Reynolds, Selzer showed Hubbell up by two points in the final November poll. *See* Brianne Pfannestiel, *Just*

[6] Also put behind a paywall by Defendants since the commencement of this action.

days before election, *Iowa poll shows Fred Hubbell with 2-point lead over Kim Reynolds*, DES MOINES REGISTER (Nov. 3, 2018), previously available at https://www.desmoinesregister.com/story/news/politics/iowa-poll/2018/11/03/iowa-poll-governor-race-kim-reynolds-fred-hubbell-jake-porter-selzer-iowa-election-2018-medicaid/1871874002/ (last attempted visit Jan. 31, 2025).[7] Reynolds won by almost three points (50.3%-47.5%). *See Iowa Governor Election Results 2018,* POLITICO (Dec. 9, 2018), https://www.politico.com/election-results/2018/iowa/governor/ (last visited Jan. 31, 2025).

40. In the 2020 U.S. Senate race, Selzer showed Republican Joni Ernst behind Democrat Theresa Greenfield by three points in June and three points in September. *See* Brianne Pfannestiel, *Iowa Poll: Theresa Greenfield narrowly leads Joni Ernst in hyper-competitive Senate race*, DES MOINES REGISTER (Sept. 19, 2020), previously available at https://www.desmoinesregister.com/story/news/politics/iowa-poll/2020/09/19/iowa-poll-theresa-greenfield-narrowly-leads-joni-ernst-senate-race/3486994001/ (last attempted visit Jan. 31, 2025).[8] Selzer then belatedly put Ernst ahead by four points a little over a month later in the final poll. *See* Brianne Pfannestiel, *Iowa Poll: Republican Joni Ernst pulls ahead of Democrat Theresa Greenfield in closing days of U.S. Senate Race*, DES MOINES REGISTER (Oct. 31, 2020), previously available at https://www.desmoinesregister.com/story/news/politics/iowa-poll/2020/10/31/election-2020-iowa-poll-greenfield-ernst-us-senate-race-voters/6055545002/ (last attempted visit Jan. 31, 2025).[9] Notwithstanding Selzer's efforts to create suspense where there was none, Ernst won the race by a comfortable margin of nearly seven points (51.8%-45.2%).

[7]Also put behind a paywall by Defendants since the commencement of this action.
[8] Also put behind a paywall by Defendants since the commencement of this action.
[9] Also put behind a paywall by Defendants since the commencement of this action.

See Iowa U.S. Senate Results 2020, POLITICO (Jan. 6, 2021), https://www.politico.com/2020-election/results/iowa/senate/ (last visited Jan. 31, 2025).

41. These races were not a matter of being wrong in the end—they exposed that Defendants, led by Selzer, were manufacturing fake support for Democrat candidates in order to interfere in the elections.

Selzer's Polling Materially Impacted Elections

42. As Selzer knows, manipulated polls create a narrative of inevitability for Democrat candidates, increases enthusiasm and turnout among Democrats, decreases enthusiasm and turnout among Republicans, and deceives the public into believing that Democratic candidates are performing better than they really are.

43. And, given Selzer's position of trust before November 5, 2024, she had the power to influence campaign spending and strategy, change public perception of races, and even impact the outcome of elections. Her polls most certainly had a material impact on the electoral process both in Iowa and nationally, a fact that candidates and their teams long knew—and anticipated. Iowa's outsized importance on the national political stage only added to Selzer's influence while lengthening her shadow over Presidential, Congressional, and State races.

44. As a reverent *New York Times* reminisced: "The Surveys of J. Ann Selzer *once carried the hopes and fears of the men and women who sought to lead the nation*, recording with uncanny accuracy the views of Iowa voters who exercised outsize influence in the choosing of American presidents." *See* Jonathan Weisman, *A Famed Iowa Pollster's Career Ends With a 'Spectacular Miss' and a Trump Lawsuit*, NEW YORK TIMES (Dec. 19, 2024), https://www.nytimes.com/2024/12/19/us/politics/ann-selzer-iowa-trump.html (last visited Jan. 31, 2025) (emphasis added).

45. Lis Smith, senior adviser to Pete Buttigieg's 2020 Presidential Campaign, was among the many seasoned political operatives who acknowledged Selzer's sway over election outcomes. In 2020, Selzer's "highly anticipated poll of Iowa Democrats" was "shelved" after Smith raised concerns "about irregularities in the methodology" when it came to light that Buttigieg's name was left off the menu of options presented during a phone survey. *See* Lisa Lerer, Jonathan Martin and Michael M. Grynbaum, *Des Moines Register Poll of Iowa Caucusgoers Abruptly Shelved*, NEW YORK TIMES (Feb. 3, 2020), https://www.nytimes.com/2020/02/01/us/politics/des-moines-register-polls-iowa-caucus.html (last visited Jan. 31, 2025).

46. Recalled Smith: "This was *the most impactful and important poll* in presidential primary politics. It would *set the narrative* for the caucuses, dominating the media coverage and *dictating caucus choices . . . .*" *See* Weisman, *A Famed Iowa Pollster's Career Ends With a 'Spectacular Miss' and a Trump Lawsuit.* (Emphasis added).

47. Given Selzer's power, Smith was right to fear for her candidate. "The late-breaking nature of the state's political culture len[t] the poll outsized influence, with the power to fuel a last-minute surge in the state . . . ." *See* Lerer, Martin and Grynbaum, *Des Moines Register Poll of Iowa Caucusgoers Abruptly Shelved*.

48. Selzer and her handlers at DMR and Gannett knew she had the power to materially impact election outcomes. By unleashing the Harris Poll, Defendants "jolted the nation" and "set off a torrent of predictions that the vice president could be swept to a convincing victory by angry women other polls may not have captured." *Id*. Of course, these predictions proved to be in direct contradiction to reality.

49. Furthermore, academic studies show that polling data on a race affects voter choices and turnout. Such polling may also change the candidates that voters select based on their assessment of their viability (for instance, a voter may cast a third-party protest vote in a race that he thinks won't be close). *See generally* Andre Blais, *et al.*, *Do Polls Influence the Vote?*, in HENRY E. BRADY & RICHARD G. C. JOHNSTON, eds., CAPTURING CAMPAIGN EFFECTS (2009).

50. Moreover, "[b]esides receiving national news coverage, [the Harris Poll] had a significant impact on the expectations of Iowans themselves. Such dramatic public findings, which this Iowa Poll represents, can mislead voters and undermine trust in the polling enterprise itself." Samantha J. DeRagon, Tracy Osborn, and Michael S. Lewis-Beck, *The 2024 Iowa Poll for President: A Cautionary Tale*, The Center for Politics at the Univ. of Virginia (Dec. 12, 2024), https://centerforpolitics.org/crystalball/the-2024-iowa-poll-for-president-a-cautionary-tale/ (last visited Jan. 31, 2025)

51. "The notion that published vote intention polls influence voter behavior expresses [a] hypothesis of long standing. Normally, it would be difficult to trace out the effect of this last minute, single poll on would-be voters in a single state. However, we had in the field our own poll of Iowa voters, namely a sample of 214 University of Iowa students. . . . The results show a statistically significant 9-percentage-point rise ($p < .05$, one-tailed) in expectations of a Harris victory among those who said Iowa was their home state (150 respondents). While these data are observational, they are nevertheless highly suggestive. It looks like the *Iowa Poll* did, in fact, increase Iowa public opinion favoring Harris to win the state." *Id.* (emphasis in original).

The Harris Poll

52. On the evening of November 2, 2024, when the Harris Poll was unveiled in the *Des Moines Register*, President Trump led Harris in Iowa by any objective, reasonable, and reliable measure.

53. Notably, until Defendants released the Harris Poll, Selzer's previous 2024 Presidential Election polls published in the *Des Moines Register* showed President Trump leading. *See* Brianne Pfannestiel, *Trump's Iowa lead shrinks significantly as Kamala Harris replaced Biden, Iowa Poll shows*, DES MOINES REGISTER (Sept. 15, 2024), previously available at https://www.desmoinesregister.com/story/news/politics/iowa-poll/2024/09/15/iowa-poll-donald-trump-iowa-lead-shrinks-as-kamala-harris-replaces-joe-biden/75180245007/ (last attempted visit Jan. 31, 2025).[10] Although Selzer was already trying to generate fake enthusiasm and momentum for Harris—she characterized Harris's supposed four-point deficit as a "dramatic turnaround from Joe Biden's double-digit deficit"—this September poll still had President Trump up by four points. *Id*.

54. The premise of Selzer's poll, that Harris had somehow turned Joe Biden's eighteen-point deficit (50%-32%) into a mere four-point deficit (47%-43%), was so implausible that no objective pollster could have honestly advanced it. "'I wouldn't say 4 points is comfortable' for Trump, said pollster J. Ann Selzer, president of Selzer & Co. 'The race has tightened significantly.'" *Id*.

55. This poll, purporting to show that President Trump's commanding lead all but vanished upon Harris's entry into the race, was indicative of Defendants' intent, even as early as

[10] Also put behind a paywall by Defendants since the commencement of this action.

September, to paint an incorrect and cynical picture of the downward trajectory for President Trump in the face of a supposedly turbocharged Harris Campaign. In truth, Harris's hollow message of "joy" was missing badly with voters across all demographics and regions, who craved actual policy changes that only President Trump can and will deliver. *See* Herald readers, *Message of 'joy' at Democratic Convention hides Kamala Harris' poor track record*, MIAMI HERALD (Aug. 27, 2024), https://www.miamiherald.com/opinion/article291479270.html (last visited Jan. 31, 2025).

56. Meanwhile, *every other* mainstream Iowa poll also showed President Trump comfortably ahead, and by significantly more than Selzer presented. A poll conducted September 27-28, 2024 by Cygnal showed President Trump ahead by seven points; a poll conducted November 1-2, 2024 by Emerson College showed President Trump ahead by nine points; a poll conducted November 2-3, 2024 by InsiderAdvantage showed President Trump ahead by seven points; a poll conducted November 2-3, 2024 by SoCal Strategies showed President Trump ahead by seven points; and a second poll conducted November 2-3, 2024 by SoCal Strategies showed President Trump ahead by eight points. *See Iowa Latest Polls*, FIVETHIRTYEIGHT, https://projects.fivethirtyeight.com/polls/iowa/ (last visited Jan. 31, 2025).

57. Moreover, as revealed after the Election, even Harris's internal polling showed that she was never leading President Trump, and could not possibly have been ahead in Iowa. Diana Glebova, *Harris camp's own polling never showed VP leading Trump, team 'surprised' by reports showing her ahead: top adviser*, NEW YORK POST (Nov. 27, 2024) https://nypost.com/2024/11/27/us-news/harris-camps-own-polling-never-showed-vp-leading-trump-team-surprised-by-reports-showing-her-ahead-sr-adviser/(last visited Jan. 31, 2024); Sam Woodward, *Kamala Harris advisers: Internal polling never showed VP ahead,* USA TODAY (Nov.

27, 2024) https://www.usatoday.com/story/news/politics/elections/2024/11/27/kamala-harris-advisers-internal-polling/76626278007/ (last visited Jan. 31, 2024).

58. Further demonstrating Selzer's departure from reality, in each of the highest-stakes races—President, Governor, Senator—from 2016 to 2022, the Republican won in Iowa and did so by a convincing margin. A three-point lead by a Democrat candidate for President would have been remarkably out of line compared to election results in the prior four cycles.

59. Other pollsters who frequently work in swing states, such as Quinnipiac University, did not even poll Iowa in 2024, assuming, correctly, that it was a lock for President Trump. When major news outlets reported on swing states, Iowa was never included.

60. In sharp contrast to common sense, electoral history, all other public polls, and Harris's internal polling, the Harris Poll falsely showed Harris leading President Trump in Iowa with just three days to go, which suggested major, but in reality nonexistent, momentum for Harris nationwide. In truth, the Harris Poll was just a piece of political theater concocted by an individual—Selzer—who, as a supposedly legendary pollster with the power to shape public perception of elections, should have known better than to poison the electorate with a poll that was nothing more than a work of fantasy. *See* Shelby Talcott, *Gannett probes possible leak of bombshell Iowa poll*, SEMAFOR (Nov. 10, 2024), https://www.semafor.com/article/11/10/2024/gannett-probes-possible-leak-of-bombshell-iowa-poll (last visited Jan. 31, 2025) ("The Des Moines Register is legendarily careful with Selzer's polls, which shape perceptions of crucial early caucuses in both parties . . . .").

61. The Harris Poll wasn't irregular just because it was wrong by an appalling sixteen points. Indeed, not coincidentally, the circumstances under which the Harris Poll became public

via an unprecedented leak also broke DMR's longstanding policy of secrecy with Selzer's polls, proving that the Harris Poll was intended to aid Harris and harm President Trump.

62. Defendants' misconduct should have surprised no one, given Gannett, DMR, and Selzer's increasing abandonment of objectivity in recent years. Their election interference was a long time in the making.

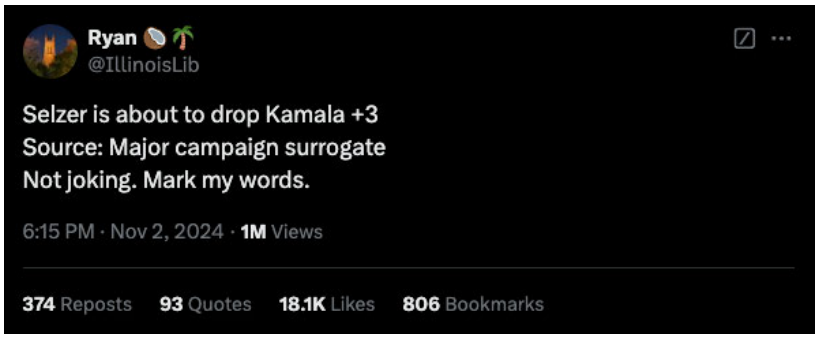
63. As reported by the *New York Times*, the *Register's* "liberal editorial board has become increasingly out of step with the conservative state [Iowa]." *See* Weisman, *A Famed Iowa Pollster's Career Ends With a 'Spectacular Miss' and a Trump Lawsuit*, *supra*.

64. Moreover, as the *Times* also acknowledged, Selzer "revealed a slight but consistent lean toward Democrats" in "her last *eight* final Iowa presidential polls . . . ." *Id*. In truth, Selzer has not just leaned toward Democrats, but has outright favored Democrats.

65. The Harris Poll, a bombshell "making nationwide news and giving Democrats what would turn out to be false hope," was leaked by Defendants to Democrat operatives earlier in the day on November 2, 2024, many hours before the Harris Poll Article appeared. *Id*. ("But roughly 45 minutes prior to the poll's public release, a stray tweet predicted the poll's findings. Its author said that Illinois Governor JB Pritzker, a Duke University alumnus, had mentioned the not-yet-released poll during a Duke Democrats meeting that day."). This breach resulted in Gannett, DMR's parent company, being forced to investigate "how Pritzker and possibly other political actors could have learned of the poll early, and is reviewing employees' emails . . . ." *See* Talcott, *Gannett probes possible leak of bombshell Iowa poll*, *supra*; Yael Halon, *Company behind Selzer poll launches probe into potential leak after results published on X prior to publishing*, FOX NEWS (Nov. 11, 2024), https://www.foxnews.com/media/company-behind-seltzer-poll-launches-probe-potential-leak-after-results-posted-x-prior-publishing (last visited Jan. 31, 2025) ("The company

behind the Des Moines Register, which published Ann Selzer's poorly-aged Iowa poll, has launched an investigation after the poll's findings were allegedly leaked on X prior to publishing . . . .").

66. The "stray tweet" referenced in the *Semafor* article was posted by "Ryan@IllinoisLib" at 6:15 p.m. EST on November 2, 2024, and has now been viewed over 1,100,000 times, stating:



See https://x.com/IllinoisLib/status/1852837036597948760 (last visited Jan. 31, 2025).

67. Moreover, this leak was not the only security breach that occurred in connection with the Harris Poll.

68. On October 31, 2024, two days before the malicious leak and publication of the Harris Poll Article, Selzer became so uncontrollably excited about the Poll that, in an unfathomable breach of professional polling standards and lapse of judgment, she allowed her nephew—who was not employed by S&C or the *Des Moines Register*—to view the Poll. Admitted Selzer: "I will say that my nephew is a senior at the University of Nebraska and currently interning at Gallup, interestingly enough. And I [sic] he wanted to come and I wanted to have him here for this and he walked in Thursday night and I had a folder and I had to swear him to secrecy [sic] has to take the oath and he opened the folder and and [sic] he he [sic] couldn't believe what he was looking at. And his mouth sort of fell down to the kitchen counter and it took him a while to wrap his head around it . . . ." *See* Tim Miller, *Kamala Harris DOMINATES in Final Polls (w/J. Ann Selzer)*,

THE BULWARK PODCAST (Nov. 3, 2024) (time stamp: 16:15), https://www.youtube.com/watch?si=LECNF1OBr2S2HnZU&v=P-ysKh_Gyd0&feature=youtu.be (last visited Jan. 31, 2025).

69. Clearly, the Harris Poll, unlike Defendants' other polls, was leaked and disclosed to unauthorized third parties because the Harris Poll was created by Selzer and published by Gannett and DMR for maximum "shock and awe" political impact rather than accuracy or reliability. It is indeed no coincidence that Defendants' most significant polling "miss" also happened to be the one that would be leaked in order to cause as much harm to the electoral process as possible—and one that induced the legacy media to go "all in" and treat the Harris Poll as a "canary in the coal mine" for President Trump. *See* Montage, *Media goes all in on Iowa poll showing Harris lead, sees 'canary in the coal mine' for Trump*, FOX NEWS (Nov. 4, 2024), https://www.foxnews.com/video/6364191963112 (last visited Jan. 31, 2025) ("MSNBC, CNN and the hosts of 'The View' went all in on the results of a new *Des Moines Register* poll that found Vice President Kamala Harris leading Donald Trump by three points in Iowa.").

70. Indeed, as intended by Defendants, the Harris Poll grabbed national and international headlines. *See, e.g.,* Dan Mangan, *Shock poll shows Harris leading Trump in Iowa*, CNBC (Nov. 2, 2024), https://www.nbcbayarea.com/news/business/money-report/shock-poll-shows-harris-leading-trump-in-iowa/3697783/?os=io...&ref=app (last visited Jan. 31, 2025);


NEWS

Shock poll shows Harris leading Trump in Iowa

The Des Moines Register/Mediacom Iowa Poll's results came as a complete surprise to political observers

By Dan Mangan,CNBC • Published November 2, 2024 • Updated on November 5, 2024 at 10:21 am

Chidanand Rajghatta, *Ayya va! Shock poll in non-battleground state shows Kamala winning*, TIMES OF INDIA (Nov. 3, 2024), https://timesofindia.indiatimes.com/world/us/ayya-va-

shock-poll-in-non-battleground-state-shows-kamala-winning/articleshow/114914960.cms (last visited Jan. 31, 2025);


Printed from
THE TIMES OF INDIA

Ayya va! Shock poll in non-battleground state shows Kamala winning

TNN | Nov 3, 2024, 08.12 PM IST

Nate Silver, *What 'Shocking New Iowa Poll Means for Kamala Harris' Chances*, NEWSWEEK (Nov. 2, 2024) https://www.newsweek.com/what-shocking-new-iowa-poll-means-kamala-harris-chances-nate-silver-1979244 (last visited Jan. 31, 2025);


Newsweek

SUBSCRIBE FOR $1 Login

Politics | Nate Silver Kamala Harris Donald Trump U.S. Politics 2024 Election Iowa Poll Polls Polling

What 'Shocking' New Iowa Poll Means for Kamala Harris' Chances: Nate Silver

Published Nov 03, 2024 at 6:07 AM EST | Updated Nov 03, 2024 at 1:54 PM EST

Brie Stimson, *Shock Poll has Harris leading Trump in Iowa with 3-point shift toward vice president in red state,* FOX NEWS (Nov. 2, 2024) https://www.foxnews.com/politics/shock-poll-harris-leading-trump-iowa-3-point-shift-toward-vice-president-red-state.amp (last visited Jan. 31, 2025);


FOX NEWS

POLITICS

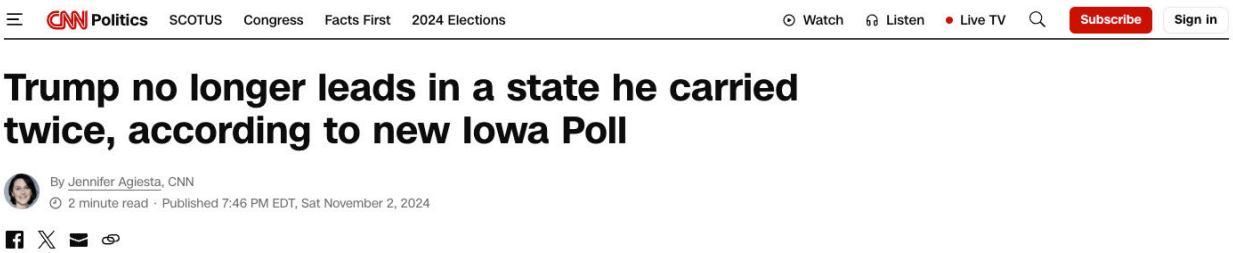
Shock poll has Harris leading Trump in Iowa with 3-point shift toward vice president in red state

Another poll from Emerson College released Saturday showed Trump with a 10-point lead in the Hawkeye State

By Brie Stimson · Fox News

Published November 2, 2024 9:14pm EDT Updated November 2, 2024 9:42pm EDT

Jennifer Agiesta, *Trump no longer leads in a state he carried twice, according to new Iowa Poll*, CNN POLITICS (Nov. 2, 2024), https://www.cnn.com/2024/11/02/politics/iowa-poll-harris-trump/index.html (last visited Jan. 31, 2025);



Sara Dorn, *Why Outlier Poll Showing Harris Winning Iowa Could Spell Trouble For Trump*, FORBES (Nov. 3, 2024), https://www.forbes.com/sites/saradorn/2024/11/03/why-outlier-poll-showing-harris-winning-iowa-could-spell-trouble-for-trump/ (last visited Jan. 31, 2025).

.

71. After President Trump's historic victory and Representative Miller-Meeks' triumph, Selzer, aided and abetted by DMR and Gannett, attempted to sidestep her disastrous and deceitful Harris Poll, Congressional Poll, and polling on other races with vacuous platitudes and discussion about her next career moves. *See* J. Ann Selzer, *Pollster Ann Selzer ending election polling, moving 'to other ventures and opportunities,'* DES MOINES REGISTER (Nov. 17, 2024), previously available at https://www.desmoinesregister.com/story/opinion/columnists/2024/11/17/ann-selzer-conducts-

iowa-poll-ending-election-polling-moving-to-other-opportunities/76334909007/ (last attempted visit Jan. 31, 2025).[11]

72. In reality, Selzer quit the polling industry in disgrace after an attempt at election interference. Such action is an admission of Selzer's guilt and liability for the fake, election-interfering poll.

73. Further, lacking any sensible or innocent explanation for the Harris Poll, the *Des Moines Register* could only weakly offer that "[t]o date, no likely single culprit has emerged to explain the wide disparity." *See* Carol Hunter, *An update from the editor: What a review of the pre-election Iowa Poll has found,* DES MOINES REGISTER (Nov. 17, 2024), https://www.desmoinesregister.com/story/opinion/columnists/from-the-editor/2024/11/17/editors-update-what-a-review-of-the-pre-election-iowa-poll-has-found/76300644007/ (last visited Jan. 31, 2025).

74. Selzer, aware that there is no innocent explanation for the Harris Poll, continues to try and talk her way out of the malignant fiction she unleashed on the public. *See* Hanna Panreck, *Former pollster Ann Selzer hits back at criticisms over Iowa poll: 'They are accusing me of a crime,'* FOX NEWS (Dec. 15, 2024), https://www.foxnews.com/media/former-pollster-ann-selzer-hits-back-criticisms-over-iowa-poll-they-accusing-me-crime (last visited Jan. 31, 2025). Appearing on the *Iowa Press*, Selzer remarked: "Well, I'm not here to break any news. If you were hoping that I had landed one exactly why things went wrong, I have not." *See J. Ann Selzer,* IOWA PRESS (Dec. 13, 2024), https://www.iowapbs.org/shows/iowapress/iowa-press/episode/11885/j-ann-selzer (last visited Jan. 31, 2025). Later, Selzer inadvertently revealed the root of the problem,

[11] Also put behind a paywall by Defendants since the commencement of this action.

that the Harris Poll was bought and paid for: "And the polling industry is predicated on getting people to pay money for their products." *Id*.

75. Notably, *PollFair*, an online polling analyst that reweighs polls based on historic exit poll data, took the Harris Poll and reweighted it according to historical data. Selzer weighed her sample at R+2, while *PollFair* weighted its sample at R+10. Doing so moved the results from Harris +3 (47-44) to President Trump +6 (50-44). *See* https://x.com/poll_fair/status/1852857893307158678 (last visited Jan. 31, 2025).

76. The truth is that there is no sensible or innocent explanation for the Harris Poll since, as Manhattan Institute senior fellow James Piereson wrote, Selzer's "miss" was *beyond* extreme:

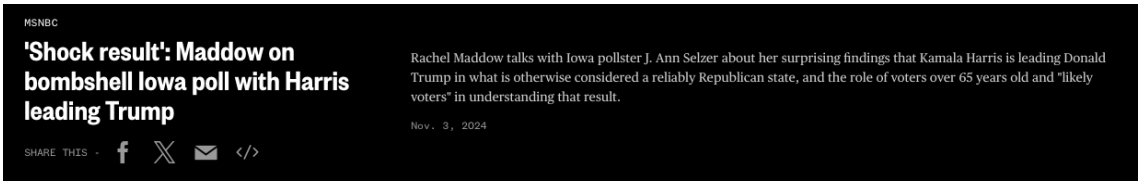
> The Selzer Poll, with a margin of error of 3.4, missed the real outcome by 16 points, or by as many as five standard deviations from the true result as revealed on election day. What are the odds of drawing such a sample by legitimate means? Answer: roughly one time in 3.5 million trials. In other words, given these odds, the results in the Iowa poll likely did not come about by "honest error."
>
> *See* James Piereson, *Statistical questions about the Iowa poll,* THE NEW CRITERION (Nov. 12, 2024), https://newcriterion.com/dispatch/statistical-questions-about-the-iowa-poll/ (last visited Jan. 31, 2025).

77. Selzer's deceptive "miss" caused extensive harm:

> It is more likely that someone deliberately manipulated the sample so that it included too many Democrats, or simply made up the numbers as they came in for the purpose of giving confidence to Harris voters and worry for Trump supporters, or to bring national attention to a poll taken in a state not regarded as competitive. The poll did receive national attention and was widely discussed. Selzer appeared on television interviews to talk about the poll and its implications. If the goal was to promote the poll, then the gambit succeeded—at least until election day, when it was revealed to be ridiculously far off the mark.
>
> *Id*.

78. Indeed, Selzer *widely* appear on television interviews, where she shamelessly promoted her Harris Poll to drum up Democrat fervor while feigning shock at her own findings,

most notably on MSNBC with left-wing extremist Rachel Maddow. As Selzer had intended, a giddy Maddow—like other Democrat-aligned commentators who reported on the Harris Poll—spread manufactured enthusiasm and hope to MSNBC's overwhelmingly Democrat viewers. "And the reason this is *consequential* to our psyche is that if this is accurate—and if anybody is accurate it is likely to be Ann Selzer in the Iowa poll—if this is accurate—this implies that Harris might be winning Iowa." *See* Rachel Maddow, *'Shock result': Maddow on bombshell Iowa poll with Harris leading Trump,* MSNBC (Nov. 3, 2024), https://www.msnbc.com/msnbc/watch/-shock-result-maddow-on-bombshell-iowa-poll-with-harris-leading-trump-223450181755 (last visited Jan. 31, 2025). (Emphasis added).



79. Maddow was perceptive about one thing: the Harris Poll *was* consequential, but for all the wrong reasons. Selzer, who Maddow breathlessly called a "living bullseye," carried more than enough weight to shift public perception about the race. *Id*.

80. Ironically, as Maddow attempted to put the magnitude of the Harris Poll in perspective for her suddenly rejuvenated audience, she only underscored why the Harris Poll was a partisan fiction. "Iowa is a State where neither campaign has spent any time or resources since the primaries. They don't have a ground game up there. They don't have ads up there. Trump won Iowa by eight points last time and nine points the time before that. Nobody thinks of it as a swing state . . . . but here she is with a lead?" *Id*.

81. Maddow then welcomed Selzer to the program, with the pollster immediately complimenting Maddow's perspective on the Harris Poll as "picture perfect." *Id*. Selzer added: "I don't see how anybody would look at those numbers and the history in Iowa in the past eight to twelve years and think that these numbers could have been foretold." *Id*. Of course, the numbers could not have been foretold because they weren't possible or real, they were fake.

82. Nor can Selzer hide behind feeble excuses about the purported difficulty of polling in races involving President Trump—the Harris Poll wasn't Selzer's only inexplicable, flagrant "miss" in favor of a Democrat candidate in the 2024 election cycle. The Harris Poll was one of *five* massive "misses" favoring Democrats this cycle.

The Congressional Poll

83. The Congressional Poll was another of Selzer's five massive "misses" favoring Democrats this cycle.

84. Regarding the Congressional Poll, the DMR, aided by Gannett, reported in the Congressional Poll Article:

> Now, voters prefer a Democratic candidate by a 16-point margin in the 1st District, where Democrat Christina Bohannan, a law professor and former state representative, is in a rematch with Republican U.S. Rep. Mariannette Miller-

> Meeks, who is seeking her third term. Miller-Meeks defeated Bohannan in 2022 by nearly 7 percentage points.
>
> *See* Gruber-Miller, *Iowa poll: Democrats are preferred over Republicans in 2 of 4 congressional districts, supra.*

85. Given that Representative Miller-Meeks defeated Bohannan by nearly seven points in 2022 (53.4%-46.6%), Selzer's projection that Bohannan led Miller-Meeks by sixteen points in the rematch constituted a *twenty-three-point* swing in Bohannan's favor—virtually a statistical impossibility and an absurd suggestion given the absence of any significant events or developments that might explain such a dramatic change. *See 2022 Iowa U.S. House – District 1 Election Results*, DES MOINES REGISTER, https://www.desmoinesregister.com/elections/results/race/2022-11-08-house-IA-17071 (last visited Jan. 31, 2025).

86. Selzer also disregarded Representative Miller-Meeks' recent electoral history as two-time Congressional incumbent: having eked out a 6-vote victory in 2020 and defeated Bohannan handily in 2022, Miller-Meeks certainly could not have trailed Bohannan by sixteen points this cycle. *See 2020 Iowa U.S. House – District 2 Election Results*, DES MOINES REGISTER (Jan. 11, 2021), https://www.desmoinesregister.com/elections/results/race/2020-11-03-house-IA-17072/ (last visited Jan. 31, 2025); *See 2022 Iowa U.S. House – District 1 Election Results*, *supra*.

87. Even a poll from a few weeks earlier (Sept. 30 to Oct. 1, 2024) by the Democrat Party had Bohannan up only four points (50%-46%). *See* https://projects.fivethirtyeight.com/polls/house/2024/iowa/1/ (last visited Jan. 31, 2025).

88. Further, a poll from the end of August by Normington, Petts & Associates for the Bohannan Campaign had showed the race tied at 47% each. *See id*.

89. The Selzer Congressional Poll was twelve points off from even the Democrats' optimistic projection. Furthermore, Iowa's 1st District is normally an R+3 seat, according to the Cook Political Report. President Trump had won it in 2020 by three points, and Kim Reynolds won it in 2018 by three points.

90. Following a bruising and costly recount in what proved to be a historically tight race, Miller-Meeks prevailed by two-tenths of a point. *See* Payne, *Recount affirms Mariannette Miller-Meeks' win over Christina Bohannan in 1st District, supra.* This outcome meant that the Congressional Poll had been off by a whopping *sixteen* points—the same amount of the "miss" in the Harris Poll, also favoring the Democrat.

91. Representative Miller-Meeks never should have been subjected to a recount—and a costly recount at that—and would not have been if not for the combined impact of the Harris Poll and the Congressional Poll on her race.

92. Not only did the Harris Poll and the Congressional Poll substantially contribute to forcing Representative Miller-Meeks into an electoral struggle, but she, like many other consumers who read the *Des Moines Register*, was also deceived by the Harris Poll and the Congressional Poll.

93. But that was not all. In the race for Iowa's 3rd Congressional District—rated by the Cook Political Report as R+3—between incumbent Republican Zach Nunn and Democrat challenger Lanon Baccam, Selzer projected Baccam with a seven-point lead over Nunn (48%-41%), according to another poll published by the Des Moines Register on November 3, 2024. *See* Gruber-Miller, *Iowa poll: Democrats are preferred over Republicans in 2 of 4 congressional districts, supra.*

94. Notwithstanding Selzer's poll, Nunn prevailed by four points. *See* Stephen Gruber-Miller and Courtney Crowder, *Republican Zach Nunn defeats Lanon Baccam, wins reelection bid in Iowa's 3rd District,* DES MOINES REGISTER (Nov. 6, 2024), previously available at https://www.desmoinesregister.com/story/news/politics/elections/2024/11/05/zach-nunn-lanon-baccam-face-off-in-iowas-3rd-congressional-district/75777485007/ (last attempted visit Jan. 31, 2025).[12] This outcome meant Selzer's poll had been off by a disastrous eleven points—again in favor of the Democrat.

95. In the race for Iowa's 2nd Congressional District between incumbent Republican Ashley Hinson and Democrat challenger Sarah Corkery, Selzer projected Hinson with a tight three-point lead over Corkery (45%-42%), according to another poll published by the Des Moines Register on November 3, 2024. *See* Gruber-Miller, *Iowa poll: Democrats are preferred over Republicans in 2 of 4 congressional districts, supra.*

96. Notwithstanding Selzer's poll, Hinson prevailed by over *fifteen* points. *See* Sabine Martin, *Republican U.S. Rep. Ashley Hinson wins third term, vows to back President Trump's agenda,* DES MOINES REGISTER (Nov. 5, 2024), previously available at https://www.desmoinesregister.com/story/news/politics/elections/2024/11/05/iowa-election-results-ashley-hinson-sarah-corkery-jody-puffett-2nd-congressional-district/75721251007/ (last attempted visit Jan. 31, 2025).[13] This outcome meant Selzer's poll had been off by a disastrous twelve points—again in favor of the Democrat.

97. In the race for Iowa's 4th Congressional District between incumbent Republican Randy Feenstra and Democrat challenger Ryan Melton, Selzer projected Feenstra would win with

[12] Also put behind a paywall by Defendants since the commencement of this action.
[13] Also put behind a paywall by Defendants since the commencement of this action.

the same sixteen-point lead over Melton (53%-37%) that she projected for Bohannan over Representative Miller-Meeks, according to another poll published by the *Des Moines Register* on November 3, 2024. *See* Gruber-Miller, *Iowa poll: Democrats are preferred over Republicans in 2 of 4 congressional districts, supra.*

98. Notwithstanding Selzer's poll, Feenstra prevailed by over *thirty-four* points. *See* Philip Joens, *Randy Feenstra defeats Ryan Melton in Iowa's Fourth Congressional District,* DES MOINES REGISTER (Nov. 5, 2024), previously available at https://www.desmoinesregister.com/story/news/politics/elections/2024/11/05/randy-feenstra-ryan-melton-vie-for-iowas-4th-congressional-district/75721620007/ (last attempted visit Jan. 31, 2025).[14] This outcome meant Selzer's poll had been off by a disastrous eighteen points—again in favor of the Democrat.

99. The odds of a pollster with the experience and track record of Selzer innocently missing the presidential race by sixteen points and all four Iowa Congressional races by sixteen points (1st District), eleven points (2nd District), twelve points (Third District), and eighteen points (Fourth District), respectively, and favoring the Democratic candidates with all five "misses," are outside any reasonable range of error. *See, e.g.,* Piereson, *Statistical questions about the Iowa poll, supra.* This is proof of intentional wrongdoing.

Impact of the Harris Poll on Zaun

100. Zaun served in the Iowa Senate from 2005 through January 12, 2025. In his two most recent victories, he won re-election to the 20th District by nineteen points and over two points in 2016 and 2020, respectively. *See Brad Zaun,* https://ballotpedia.org/Brad_Zaun (last visited Jan. 31, 2025).

[14] Also put behind a paywall by Defendants since the commencement of this action.

101. However, this cycle, Matt Blake defeated Zaun by four points for the 22nd District Seat, upon information and belief fueled by momentum from the Harris Poll. *See* Eller, *Democratic challenger Matt Blake upsets Republican incumbent Brad Zaun in Iowa Senate race, supra.*

102. Not only did the Harris Poll substantially contribute to Zaun's election defeat, but he, like many other consumers, was also deceived by the Harris Poll.

CLAIMS FOR RELIEF

COUNT ONE

Violation of Iowa Consumer Fraud Act
Iowa Code Chapter 714H
(All Plaintiffs v. All Defendants)

103. Plaintiffs reallege their allegations contained in paragraphs 1 through 102 as if set fully forth herein.

104. This action is brought pursuant to Iowa Code Chapter 714H and its relevant provisions.

105. Iowa Code § 714H.3(1) provides:

> A person shall not engage in a practice or act the person knows or reasonably should know is an unfair practice, deception, fraud, false pretense, or false promise, or the misrepresentation, concealment, suppression, or omission of a material fact, with intent that others rely upon the unfair practice, deception, fraud, false pretense, false promise, misrepresentation, concealment, suppression, or omission in connection with the advertisement, sale, or lease of consumer merchandise . . . .

106. Iowa Code § 714H.2(3) defines a consumer as "a natural person or the person's legal representative."

107. Iowa Code § 714H.2(5) defines "deception" as "an act or practice that is likely to mislead a substantial number of consumers as to a material fact or facts."

108. Iowa Code § 714H.2(6) defines "merchandise" the same as the definition contained in Iowa Code § 714.16, under which the term includes "any objects, wares, goods, commodities, intangibles, securities, bonds, debentures, stocks, real estate or *services*." (Emphasis added).

109. Iowa Code § 714H.2(9) defines "unfair practice" the same as the definition contained in Iowa Code § 714.16, under which the term "means an act or practice which causes substantial, unavoidable injury to consumers that is not outweighed by any consumer or competitive benefits which the practice produces."

110. Iowa Code § 714H.5 provides for a private right of action for consumers damaged by violations of § 714H.3(1):

> 1. A consumer who suffers a sustainable loss of money or property as the result of a prohibited practice or act in violation of this chapter may bring an action at law to recover actual damages. The court may order such equitable relief as it deems necessary to protect the public from further violations, including temporary and permanent injunctive relief.
>
> 2. If the court finds that a person has violated this chapter and the consumer is awarded actual damages, the court shall award to the consumer the costs of the action and the consumer's attorney reasonable fees.

111. As to the nature of the conduct that constitutes an "unfair practice," the "Iowa Consumer Fraud Act 'is not a codification of common law fraud principles.'" *Moeller v. Samsung Electronics America, Inc*., 623 F.Supp.3d 978, 985 (2002) (quoting *State ex rel. Miller v. Pace*, 677 N.W. 2d 761, 770 (Iowa 2004). "It permits relief upon a lesser showing that the defendant made a misrepresentation or omitted a material fact 'with the intent that others rely upon the . . . omission.'" *Id*. (quoting § 714.16(2)(a)). "A course of conduct contrary to what an ordinary consumer would anticipate contributes to a finding of an unfair practice. *State ex rel. Miller v. Vertrue, Inc*., 834 N.W.2d 12, 37 (Iowa 2023).

112. President Trump, together with all voters in Iowa and across America impacted by the Harris Poll, is a "consumer" within the meaning of the statute, having acquired, read, and been deceived by the *Des Moines Register*, in particular the Harris Poll Article and the Congressional Poll Article.

113. Representative Miller-Meeks, together with all voters in Iowa impacted by the Harris Poll and the Congressional Poll, is a "consumer" within the meaning of the statute, having acquired, read, and been deceived by the *Des Moines Register*, in particular the Harris Poll Article and the Congressional Poll Article.

114. Zaun, together with all voters in Iowa impacted by the Harris Poll, is a "consumer" within the meaning of the statute, having read and been deceived by the *Des Moines Register*, in particular the Harris Poll Article and the Congressional Poll Article.

115. Defendants furnished "merchandise" to consumers, including Plaintiffs, within the broad meaning of the statute since they provided a service: physical newspapers, online newspapers, and other content that contained the Defendant Polls.

116. Defendants engaged in "deception" because the Defendant Polls were "likely to mislead a substantial number of consumers as to a material fact or facts"; in this case, consumers were misled into believing that Harris was leading President Trump in the Iowa Presidential race and were also misled into believing that Bohannan was leading Representative Miller-Meeks in the 1st Congressional District race. The Defendant Polls were misleading about the only material facts that matter when it comes to polling: who is winning the race in question and by how much.

117. Defendants engaged in an "unfair act or practice" because the publication and release of the Harris Poll "cause[d] substantial, unavoidable injury to consumers that [was] not outweighed by any consumer or competitive benefits which the practice produced," to wit: consumers, including Plaintiffs, were badly deceived and misled as to the actual position of the respective candidates in the Iowa Presidential race. Moreover, President Trump, the Trump 2024 Campaign, and other Republicans were forced to divert campaign and financial resources to Iowa based on the deceptive Harris Poll. Consumers within and without Iowa who paid for subscriptions

to the *Des Moines Register, USA Today,* and other Gannett-owned publications, or who otherwise purchased the publication, including Plaintiffs, were also badly deceived. Additionally, Iowans who contributed to the Trump 2024 Campaign were similarly deceived.

118. Additionally, Defendants engaged in a further "unfair act or practice" because the publication and release of the Congressional Poll "cause[d] substantial, unavoidable injury to consumers that [was] not outweighed by any consumer or competitive benefits which the practice produced," to wit: consumers, including Plaintiffs, were badly deceived and misled as to the actual position of the respective candidates in the Iowa 1st Congressional District race. Moreover, Representative Miller-Meeks and her Campaign were forced to fight a recount that never should have happened, and was caused by the deceptive Congressional Poll. Consumers within and without Iowa who paid for subscriptions to the *Des Moines Register, USA Today,* and other Gannett-owned publications, or who otherwise purchased the publication, including Plaintiffs, were also badly deceived. Additionally, Iowans who contributed to Representative Miller-Meeks' 2024 Campaign were similarly deceived.

119. Exacerbating their deception and unfair acts and practices, Defendants originally made the Harris Poll Article and Congressional Poll Article publicly available, but then deceptively concealed both Articles behind a paywall after this action was commenced. This completely undermines their disingenuous claims of fairness and transparency and shows consciousness of guilt.

120. The Harris Poll was deceptive, misleading, unfair, and the result of concealment, suppression, and omission of material facts about the true respective positions of President Trump and Harris in the Presidential race, all of which were known to Defendants and should have been disclosed to the public.

121. The Congressional Poll was deceptive, misleading, and unfair. It resulted from the concealment, suppression, and omission of material facts about Representative Miller-Meeks' and Bohannan's true respective positions in the 1st District race, all of which were known to the Defendants and should have been disclosed to the public.

122. Moreover, as demonstrated by the leak of the Harris Poll before publication in the *Des Moines Register*, Defendants created, published, and released the Harris Poll for the improper purpose of deceptively influencing the outcome of the 2024 Presidential Election.

123. Defendants also created, published, and released the Harris Poll for the improper purpose of deceptively influencing the outcome of other electoral races, such as those involving Representative Miller-Meeks and Zaun.

124. Similarly, Defendants created, published, and released the Congressional Poll for the improper purpose of deceptively influencing the outcome of the 1st Congressional District race and other electoral races.

125. Pollsters such as Selzer, polling companies such as S&C, and news organizations such as DMR and Gannett, are responsible for accurately representing the truth of events, not distorting polls to try and falsely make their preferred candidate appear to be in the lead.

126. Due to Defendants' actions, the public could not discern who was truly leading in the Iowa Presidential race and, as a result, were, or could have been, badly deceived into thinking that Harris was leading the race.

127. Also due to Defendants' actions, the public could not discern who was truly leading in the 1st District race and, as a result, were, or could have been, badly deceived into thinking Bohannan was leading the race.

128. Further, due to Defendants' actions, other down-ballot races such as Zaun's were maliciously impacted.

129. Defendants' broad misconduct gives rise to liability under the Iowa Consumer Fraud Act because the Harris Poll was deceptive, misleading, and involved concealment, suppression, and omission of material facts. Defendants engaged in this misconduct to try to improperly influence the outcome of the 2024 Presidential Election and other electoral races.

130. Defendants' misconduct here also gives rise to liability under the Iowa Consumer Fraud Act because the Congressional Poll was deceptive, misleading, and involved concealment, suppression, and omission of material facts. Defendants engaged in this misconduct to improperly influence the outcome of the 1st Congressional District race.

131. Because of Defendants' false, misleading, and deceptive conduct, President Trump has sustained actual damages by having to expend extensive time and resources, including direct federal campaign expenditures, to mitigate and counteract the harms of the Defendants' conduct. Because the Defendants' conduct was willful and wanton, President Trump is also entitled to statutory damages three times the actual damages suffered.

132. Also because of Defendants' false, misleading, and deceptive conduct, Representative Miller-Meeks has sustained actual damages due to the need to expend extensive time and resources, to mitigate and counteract the harms of the Defendants' conduct. Because the Defendants' conduct was willful and wanton, Representative Miller-Meeks is also entitled to statutory damages three times the actual damages suffered.

133. Further, because of Defendants' false, misleading, and deceptive conduct, Zaun has sustained actual damages due to the loss of his Senate seat. Because the Defendants' conduct was willful, Zaun is also entitled to statutory damages three times the actual damages suffered.

134. Additionally, because the Iowa Consumer Fraud Act is equitable in nature, Plaintiffs are entitled to injunctive relief, including an order enjoining Defendants and their associates, affiliates, or any related entities, from publishing or releasing any further deceptive polls designed to influence the outcome of an election, and requiring Defendants to disclose all data and information upon which they relied in creating, publishing, and releasing the false, misleading, and deceptive Harris Poll and the Congressional Poll.

COUNT TWO

Fraudulent Misrepresentation

(All Plaintiffs v. All Defendants)

135. Plaintiffs reallege their allegations contained in paragraphs 1 through 134 as if fully set forth herein.

136. The elements of fraudulent misrepresentation are: (1) representation; (2) falsity; (3) materiality; (4) scienter; (5) intent to deceive; (6) justifiable reliance; and (7) resulting injury. *Midwest Home Distributor, Inc. v. Domco Indust. Ltd.,* 585 N.W.2d 735 (Iowa 1998).

137. The Defendant Polls were misrepresentations of the state of the respective races at the time they were taken and published. These Polls were more than outliers—they were statistically impossible.

138. The Defendant Polls were false misrepresentations of the state of the races. They were not even close to accurate.

139. The Defendant Polls were material misrepresentations. Selzer's polling was long wrongfully regarded as the gold standard nationally and in Iowa, and predictably generated enormous media attention. Numerous media outlets at the state, national, and global level reported on the Polls.

140. The Defendant Polls were knowingly false misrepresentations of the races. Any responsible pollster or journalist with experience in Iowa politics would recognize the clear inaccuracy of the Defendant Polls, yet Defendants chose to publish the Polls anyway. Statistically, the results of the Harris Poll have a 1 in 3,500,000 chance of being the result of honest error, and the odds of the Congressional Poll being the result of honest error are similar. This was not honest error.

141. The Defendant Polls were intentionally deceptive misrepresentations. Selzer and Gannett's senior staff at the *Des Moines Register*, all of whom lean strongly toward Democrats, knew that the Defendant Polls were considered an accurate representation of the Iowa electorate and that these Polls were inaccurate, and yet they decided to publish the Polls anyway, showing their intent to deceive Plaintiffs, other candidates for elected office, their readers, and the broader electorate with false Polls.

142. Worse still, exacerbating their intentionally deceptive misrepresentations, Defendants originally made the Harris Poll Article and Congressional Poll Article publicly available, but then deceptively concealed both Articles behind a paywall after this action was commenced, which shows consciousness of guilt.

143. Given Selzer's historic accuracy and the *Des Moines Register's* general reputation for accuracy, Plaintiffs justifiably relied on the Defendant Polls.

144. Plaintiffs were injured by the fraudulence of the Defendant Polls: not only did these Polls impact Plaintiffs' races, but Plaintiffs, as readers of the *Des Moines Register* and Selzer's polls, were entitled to accurate information, not to be misled by fraudulent misrepresentations.

145. Defendants are liable for presenting false Polls.

COUNT THREE

Negligent Misrepresentation

(All Plaintiffs v. All Defendants)

146. Plaintiffs reallege their allegations contained in paragraphs 1 through 145 as if fully set forth herein.

147. If the Court finds that the misrepresentations were not intentional, as it should, then in the alternative Plaintiffs plead the tort of reckless negligent misrepresentation.

148. Negligent misrepresentation is also sometimes described as "the tort of negligently giving misinformation." *Sain v. Cedar Rapids Cmty. Sch. Dist*., 626 N.W.2d 115, 123 (2001).

149. "[P]rofessionals such as accountants, abstractors, and attorneys owe a duty of care in supplying information to foreseeable third parties as members of a limited class of persons who would be contemplated to use and rely upon the information." *Id*.

150. The "duty [of care for negligent misrepresentation] arises only when the information is provided by persons in the business or profession of supplying information to others." *Id*.

151. "[T]he foreseeability of harm helps support the imposition of a duty of care." *Id*.

152. "[T]he pecuniary interest which a person has in a business, profession, or employment which supplies information serves as an additional basis for imposing a duty of care." *Id.*

153. Newspaper journalists and pollsters are professionals with at least a bachelor's degree and some years of experience, if not advanced degrees in journalism, political science, or statistics. Selzer, for example, has a Ph.D. in Communication Theory and Research.

154. Consumers and readers of newspapers and online media content, as well as political candidates who are covered by the media and polling, are part of the limited class of foreseeable third parties who rely on the information provided by these professionals.

155. Newspaper journalists and pollsters are supposed and expected to be in the business of supplying accurate, reliable information to others.

156. Newspaper journalists and pollsters are not supposed to provide information to their readers in an adversarial or arms-length setting.

157. Defendants could foresee that reporting obviously inaccurate polling results would harm their readers and the subjects of their polls by delivering a product other than the one that those individuals expected or were entitled to, an honest snapshot of the election being polled. The product to which those receiving information are entitled to is accurate news and data—not wildly inaccurate polls calculated to interfere with elections.

158. Defendants have a pecuniary interest in their business of supplying information—this is how they get and keep readers, and how Selzer and S&C get and keep clients.

159. The inaccurate information supplied by Defendants harmed Plaintiffs as both consumers and candidates—it gave them a false impression of the state of the world at a critical moment in their races.

160. The information supplied by the Defendants was a false portrayal of the facts, not a statement of opinion or future intentions.

161. The decision of Defendants to publish this information was not reasonable. In fact, given Defendants' knowledge of previous elections in Iowa and other polling data in Iowa at the time, it was reckless or at minimum, negligent.

162. Worse still, exacerbating their recklessness and negligence, Defendants originally made the Harris Poll Article and Congressional Poll Article publicly available, but then deceptively concealed both Articles behind a paywall after this action was commenced, which shows consciousness of guilt.

163. Defendants' recklessness or negligence created an ascertainable pecuniary loss: the value of the false content that they acquired, purchased, and consumed as well as expenditures and losses relating to their races.

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a jury trial as to all issues so triable.

WHEREFORE, Plaintiffs PRESIDENT DONALD J. TRUMP, REPRESENTATIVE MARIANNETTE MILLER-MEEKS, and FORMER STATE SENATOR BRADLEY ZAUN, demand judgment against Defendants J. ANN SELZER, SELZER & COMPANY, DES MOINES REGISTER AND TRIBUNE COMPANY, and GANNETT CO., INC. as follows:

(a) On Counts One, Two, and Three, actual damages to be determined upon trial of this action;

(b) On Counts One, statutory damages three times the actual damages suffered;

(c) On Count One, an injunction enjoining Defendants' ongoing deceptive and misleading acts and practices relating to the Harris Poll and compelling Defendants to disclose all information upon which they relied to engage in the deceptive and misleading acts relating to the Harris Poll

(d) On Count One, an injunction enjoining Defendants' ongoing deceptive and misleading acts and practices relating to the Congressional Poll and compelling Defendants to

disclose all information upon which they relied to engage in the deceptive and misleading acts relating to the Congressional Poll;

(e) The attorneys' fees and costs associated with this action; and

(f) Such other relief as the Court deems just and proper.

Date: January 31, 2025

Respectfully submitted,

/s/ Edward Andrew Paltzik
EDWARD ANDREW PALTZIK
Bochner PLLC
1040 Avenue of the Americas
15th Floor
New York, NY 10018
(516) 526-0341
edward@bochner.law
*(admitted **pro hac vice**)*

/s/ Alan R. Ostergren
ALAN R. OSTERGREN
Attorney at Law
Alan R. Ostergren, PC
500 East Court Avenue
Suite 420
Des Moines, Iowa 50309
(515) 297-0134
alan.ostergren@ostergrenlaw.com

Attorneys for Plaintiffs

EXHIBIT 4

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

PRESIDENT DONALD J. TRUMP, an individual, REPRESENTATIVE MARIANNETTE MILLER-MEEKS, an individual, and FORMER STATE SENATOR BRADLEY ZAUN, an individual, *Plaintiffs*, v. J. ANN SELZER, SELZER & COMPANY, DES MOINES REGISTER AND TRIBUNE COMPANY, and GANNETT CO., INC., *Defendants*.	Civil Case No. 4:24-cv-449-RGE-WPK **DEFENDANTS J. ANN SELZER AND SELZER & COMPANY'S BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS UNDER RULE 12(b)(6)** **ORAL ARGUMENT REQUESTED**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

Rules

INTRODUCTION

Plaintiffs' claims are barred by the First Amendment and the Court should dismiss them with prejudice. In the United States there is no such thing as a claim for "fraudulent news." No court in any jurisdiction has ever held such a cause of action might be valid, and few plaintiffs have ever attempted to bring such outlandish claims. Those who have were promptly dismissed. *E.g.*, *Hollander v. CBS News, Inc.*, 2017 WL 1957485 (S.D.N.Y. May 10, 2017) (dismissing wire fraud claims based on allegedly false and misleading news stories about candidate Donald Trump) *aff'd but vacated on other grounds sub nom. Hollander v. Garrett*, 710 Fed. Appx. 35 (2d Cir. 2018); *Wash. League for Increased Transparency & Ethics v. Fox News*, 2021 WL 3910574 (Wash. Ct. App. Aug. 30, 2021) (affirming dismissal of claims under the Washington Consumer Protection Act against Fox News for allegedly false reporting about COVID-19); *cf. Nat'l Inst. of Fam. & Life Advocs. v. Raoul*, 685 F. Supp. 3d 688, 695 (N.D. Ill. 2023) (enjoining application of Illinois Consumer Fraud Act to anti-abortion advocacy as "both stupid and very likely unconstitutional").

There is good reason for this. History's judgment repudiated the 1798 Sedition Act which prohibited "false, scandalous and malicious … writings against the government of the United States" or its president, and that fraught episode "first crystallized a national awareness of the central meaning of the First Amendment." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964). Since then, courts at all levels have confirmed our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *id.* at 270, holding that speech is presumptively protected unless it falls within one of a few limited and narrowly defined categories. *United States v. Stevens*, 559 U.S. 460, 468–70 (2010). Those categories do not include a general exception for "false speech," *United States v. Alvarez*, 567 U.S. 709, 722 (2012).

Plaintiffs seek to illegitimately expand them to include "fake news," a tag line that may play well for some on the campaign trail but has no place in America's constitutional jurisprudence. In this regard, civil damages, no less than criminal sanctions, cannot lie against protected speech. *Snyder v. Phelps*, 562 U.S. 443 (2011); *Sullivan*, 376 U.S. at 277.

Even if such a cause of action existed, the Amended Complaint is fatally flawed on every level: Plaintiffs fail at the threshold to allege any recoverable damages, and do not state plausible claims, either on the law or on the facts as alleged. No court has ever accepted claims like these, and this Court should not be the first.

ALLEGATIONS IN PLAINTIFFS' AMENDED COMPLAINT

Defendant J. Ann Selzer is a resident of Des Moines, Iowa, and holds a Ph.D. in Communication Theory and Research from the University of Iowa. (Am. Compl. ¶ 23.) She is the founder and president of Selzer & Company ("Selzer"), which conducts opinion research, including polls. (*Id.* at ¶ 23.) Selzer has been the *Des Moines Register*'s primary pollster for four decades, overseeing all its polls—including its Iowa Poll. (*Id.*)

Selzer's polls have a reputation for consistency and accuracy. (*Id.* at ¶ 36.) In 2016, "Clare Malone of *FiveThirtyEight* described Selzer as 'the best pollster in politics.'" (*Id.*) And "in a June 2024 rating of 25 pollsters, Nate Silver rated Selzer first with an A+ score." (*Id.*) Indeed, Selzer's polls were "regarded as the gold standard nationally and in Iowa." (*Id.* at ¶ 139.)

Pollsters, however, are not seers. Every election has outlier polls, and the results of polls do not always conform to the final election tally. (*See id.* at ¶¶ 70 (news reports describing Selzer's November 2024 poll as an "outlier"), 137.) In 2018, Selzer's final poll of the Iowa gubernatorial race between Democrat Fred Hubbell and Republican Kim Reynolds showed Hubbell up by two points, but Reynolds prevailed by three. (*Id.* at ¶ 39.) In 2020, Selzer's final Senate poll showed

Republican Joni Ernst ahead by four points, and Ernst prevailed by seven. (*Id.* at ¶ 40.) Occasionally, polls miss by larger margins. In 2022, Selzer released a poll the October before the general election for Iowa Attorney General showing Republican Brenna Bird trailing Democratic incumbent Tom Miller by sixteen points, but Bird defeated Miller by two. (*Id.* at ¶ 38.)

The *Des Moines Register* published its final Iowa Poll of the 2024 presidential race on November 2 and 3, 2024. (*Id.* at ¶ 3.)[1] The poll surveyed 808 likely voters in Iowa. (*Id.* at ¶¶ 1, 3.) It showed Plaintiff Donald J. Trump trailing Kamala Harris by three points. (*Id.* at ¶ 2.) It also asked whether respondents preferred a Republican or Democrat in their congressional race. (*Id.* at ¶ 1.) In Iowa's First Congressional District, where incumbent Congresswoman Plaintiff Mariannette Miller-Meeks faced former state representative Democrat Christina Bohannan, the "Republican Party" response trailed the "Democratic Party" option by sixteen points. (*Id.* at ¶ 84.) The poll results were surprising because Selzer's preceding polls showed Mr. Trump leading the race, and other contemporaneous polls showed him with a seven- to nine-point lead. (*Id.* at ¶¶ 53, 56.) The *Des Moines Register* published Selzer's methodology along with a detailed analysis of the poll which compared the latest results to previous polls. (*Id.* at ¶¶ 1, 3.)

Mr. Trump and other Republicans immediately disputed the poll's results. The same day Selzer released the poll, *PollFair* "reweighted" the poll with its own metrics and calculated Mr. Trump leading Iowa by six points. (*Id.* at ¶ 75.) Ultimately, President Trump won Iowa by thirteen points, and Miller-Meeks won by two-tenths of a point—meaning the poll was approximately sixteen points off from the election results in both races. (*Id.* at ¶ 4.)

[1] Brianne Pfannenstiel, *Iowa Poll: Kamala Harris Leapfrogs Donald Trump to Take Lead Near Election Day. Here's How*, Des Moines Reg. (Nov. 2, 2024, 6:01PM), https://www.desmoinesregister.com/story/news/politics/iowa-poll/2024/11/02/iowa-poll-kamala-harris-leads-donald-trump-2024-presidential-race/75354033007 (last updated Nov. 7, 2024), *archived at* https://archive.is/UqdGz. Because the article releasing the poll is central to Plaintiffs' claims, the Court may consider its contents on a motion to dismiss. *See Gorog v. Best Buy Co.*, 760 F.3d 787, 791 (8th Cir. 2014).

Winning, however, wasn't enough for Mr. Trump or Ms. Miller-Meeks. Joined by Defendant Bradley Zaun, an Iowa state senator who lost his re-election bid (but whose race Selzer did not poll), they sued Ms. Selzer, Selzer & Company, and the *Des Moines Register* and its parent, Gannett. Plaintiffs allege the final 2024 Iowa Poll was "fake" and sought to foster enthusiasm for Democrats. (*Id.* at ¶¶ 19, 81.) Selzer denies these conspiracies, but must treat them as true herein.

Mr. Trump and Ms. Miller-Meeks allege their campaigns "expend[ed] extensive time and resources to mitigate and counteract the harms" of the Iowa Poll, though they do not allege what those resources or expenditures were. (*Id.* at ¶¶ 131–32.) Rep. Miller-Meeks alleges her close race triggered a "costly recount." (*Id.* at ¶ 91.) Under Iowa law, the State of Iowa—not Rep. Miller-Meeks or her campaign—paid for the recount. Iowa Code § 50.48(2)(a). Mr. Zaun, who lost his state senate seat to Democrat Matt Blake by four points, alleges Blake's victory "upon information and belief [was] fueled by momentum from" the Iowa Poll. (*Id.* at ¶ 101.) Plaintiffs also allege the poll "deceived Iowans who contributed to their campaigns." (*Id.* at ¶¶ 117–18.)

Mr. Trump filed this action in Iowa state court on December 16, 2024, raising one claim under the Iowa Consumer Fraud Act. Gannett removed the case to this Court based on diversity jurisdiction. (*Id.* at ¶ 28.) On January 31, 2025, Mr. Trump filed an Amended Complaint, which added Ms. Miller-Meeks and Mr. Zaun as plaintiffs as well as common law claims for fraudulent and negligent misrepresentation. This motion followed.

LEGAL STANDARD

Plaintiffs' Amended Complaint fails because it does not "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted). While this Court must draw reasonable inferences in Plaintiffs' favor, it is "free to ignore legal conclusions, unsupported conclusions, unwarranted

inferences, and sweeping legal conclusions cast in the form of factual allegations." *Monson v. DEA*, 589 F.3d 952, 961 (8th Cir. 2009) (quotation omitted).

Plaintiffs' fraud claims face a heightened pleading standard under Rule 9(b). *See E-Shops Corp v. U.S. Bank Nat'l Ass'n*, 678 F.3d 659, 665 (8th Cir. 2012) ("Rule 9(b)'s heightened pleading requirement applies to statutory fraud claims.") Plaintiffs "must state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b), including, "such facts as the time, place, and content of the defendant's false representations, as well as the details of the defendant's fraudulent acts, including when the acts occurred, who engaged in them, and what was obtained as a result." *United States ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552, 556 (8th Cir. 2006).

ARGUMENT

I. The First Amendment Bars Plaintiffs' Claims.

This Court need not even address the elements of Plaintiffs' claims because the First Amendment bars the action. It is a transparent attempt to punish news coverage and analysis of a political campaign, speech that not only is presumptively protected but "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder*, 562 U.S. at 451–52 (quotation omitted). Given the obvious affront to basic constitutional values, Plaintiffs try to change to subject by framing their claims around a state consumer protection law applicable to misrepresentations "in connection with the advertisement, sale, or lease of consumer merchandise." Iowa Code § 714H.3(1). Undaunted by the poor fit between commercial transactions and speech on public affairs, Plaintiffs try to pound their square peg into a round hole without any attempt to reconcile the constitutional mismatch. But as the Supreme Court has made clear, "simply labeling an action one for 'fraud' … will not carry the day." *Illinois, ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 617 (2003).

Plaintiffs are hardly the first to use artful pleading seeking to evade the First Amendment, and courts are adept at seeing through such artifice. Even at the dawn of modern First Amendment jurisprudence, the Supreme Court recognized government could not suppress a "malicious, scandalous and defamatory newspaper" simply by labeling it a "public nuisance." *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 706–08, 720 (1931) ("Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint.") The Court similarly barred another demagogue—Governor Huey Long—from imposing a "tax on lying" on big city newspapers that criticized him. *Grosjean v. American Press Co.*, 297 U.S. 233, 245–50 (1936). *See Minn. Star & Trib. Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 579–80 (1983) (Long denounced "'lying newspapers' as conducting 'a vicious campaign' and the tax as 'a tax on lying'"). In *New York Times v. Sullivan*, the Court barred segregationists from using defamation law as a tool to cripple the civil rights movement, giving no weight "to the epithet 'libel' than … to other 'mere labels' of state law." 376 U.S. at 268–69 (citation omitted). The Amended Complaint fits squarely within this rogue's gallery.

A. Plaintiffs Illegitimately Seek to Create a New First Amendment Exception.

Mr. Trump and his co-plaintiffs assume "false news" falls outside the First Amendment's protection, but over 200 years of American free speech law and practice prove otherwise. "Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker." *Id.* at 271. As the Supreme Court recently explained, "[o]ur constitutional tradition stands against the idea that we need Oceania's Ministry of Truth." *Alvarez*, 567 U.S. at 723.

"From 1791 to the present, … the First Amendment has permitted restrictions upon the content of speech in a few limited areas, and has never include[d] a freedom to disregard these

traditional limitations." *Stevens*, 559 U.S. at 468 (cleaned up). These "historic and traditional categories long familiar to the bar" include obscenity, child pornography, defamation, fraud, incitement, fighting words, and speech integral to criminal activity. *Id*. (cleaned up) (collecting cases). Former Justice Souter observed that "[r]eviewing speech regulations under fairly strict categorical rules keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said." *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 774 (1996) (Souter, J., concurring). Consequently, the Court steadfastly resists efforts to increase or expand the boundaries of these categories as "startling and dangerous" and has rejected any "freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *Stevens*, 559 U.S. at 470, 472.

Plaintiffs try to shoehorn their claims into an existing category by calling the Iowa Poll "fake" and asserting actionable "fraud" occurred. But "in the famous words of Inigo Montoya from the movie *The Princess Bride*, 'You keep using that word. I do not think it means what you think it means.'" *Pro Com., LLC v. K & L Custom Farms, Inc.*, 870 N.W.2d 273, 2015 WL 2406782, at *5 n.3 (Iowa. Ct. App. 2015) (table). As a matter of basic law, Plaintiffs' allegations about polls and news stories they dislike have nothing to do with fraud. *See infra* Section I.B. They also sprinkle the complaint with loose talk of "election interference," (Am. Compl. ¶¶ 1, 3, 39, 62, 72), although they stop short of including a separate claim on that basis, perhaps out of awareness that "no court has held that a scheme to rig an election itself constitutes money or property fraud." *Westchester Cnty. Indep. Party v. Astorino*, 137 F. Supp. 3d 586, 604 (S.D.N.Y. 2015).

Categories of unprotected speech are defined by precise legal tests, and Plaintiffs cannot stretch those boundaries to serve a political narrative. The Supreme Court routinely rejects attempts to broaden those limits based on assertions that the speech at issue is somehow "like" a

recognized exception. *See*, *e.g.*, *Stevens*, 559 U.S. at 470–71 (Other "descriptions are just that—descriptive. They do not set forth a test that may be applied as a general matter …."); *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 793–96 (2011) (rejecting "attempt to shoehorn speech about violence into obscenity," citing a lack of "longstanding tradition in this country" restricting such speech); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 55–56 (1988) (rejecting bid to leave "outrageous" speech unprotected because it "does not seem to us to be governed by any exception to the … First Amendment"); *Alvarez*, 567 U.S. at 721–22 ("The Government has not demonstrated that false statements … should constitute a new category of unprotected speech" based on a "tradition of proscription.") (quotation omitted).

Because the categories are governed by history and tradition, the Plaintiffs could not have chosen a *worse* candidate for inclusion than "fake news." America's first experience with prohibiting false news—the Sedition Act of 1798—expired under its own terms, and all fines assessed under that misbegotten law were remitted. President Thomas Jefferson denounced it as an unconstitutional "nullity, as absolute and palpable as if Congress had ordered us to fall down and worship a golden image." *Sullivan*, 376 U.S. at 272–76. While the Supreme Court never adjudicated the Sedition Act's attempt to punish "false" writings about public officials, "the attack upon its validity has carried the day in the court of history," defined "the central meaning of the First Amendment," *id.*, and conditioned "the fabric of jurisprudence woven across the years," *Commonwealth v. Lucas*, 34 N.E.3d 1242, 1253 (Mass. 2015).

Plaintiffs' quest to punish "fake news" not only ignores this history, it also fumbles the conceptual basis for unprotected speech categories, which the Court first described as speech "of slight social value." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). Here, Plaintiffs seek

to create a new First Amendment exception for speech that has always received the *highest* level of constitutional protection—political speech and commentary. In a word, it just doesn't fit.

The Supreme Court has repeatedly reaffirmed that the First Amendment "'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Citizens United v. FEC*, 558 U.S. 310, 339 (2010) (citation omitted). Speech about the political process is "at the core of our First Amendment freedoms," *Republican Party of Minn. v. White*, 536 U.S. 765, 774 (2002), because a "major purpose" of the First Amendment was to protect "free discussion of … candidates." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). Accordingly, the "First Amendment affords the broadest protection" to "[d]iscussion of public issues and debate on" the political process. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995) (citation omitted). Political polling is "speech protected by the First Amendment" both because it "requires a discussion between pollster and voter" and the resulting poll itself "is speech." *Daily Herald Co. v. Munro*, 838 F.2d 380, 384 (9th Cir. 1988).

The First Amendment accords speech in this area wide berth because "erroneous statement[s] [are] inevitable in free debate, and [they] must be protected if the freedoms of expression are to have the breathing space that they need to survive." *Sullivan*, 376 U.S. at 271–72 (cleaned up). Efforts to regulate "truth" in political commentary are thus presumptively unconstitutional and subject to strict scrutiny. *See 281 Care Comm. v. Arneson*, 766 F.3d 774, 784-85 (8th Cir. 2014) (invalidating Minnesota law prohibiting knowingly false statements on ballot measures); *Grimmett v. Freeman*, 59 F.4th 689, 692 (4th Cir. 2023) (invalidating North Carolina statute prohibiting false statements about candidates "knowing such report to be false or in reckless disregard of its truth or falsity"); *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 476 (6th Cir. 2016) (invalidating Ohio law prohibiting knowingly false statements about candidates); *Lucas*, 34

N.E.3d at 1253 (invalidating Massachusetts law prohibiting false statements about candidates and ballot measures); *Rickert v. State Pub. Disclosure Comm'n*, 168 P.3d 826 (Wash. 2007) (en banc) (invalidating Washington law prohibiting false statements of material fact about political candidates). Bottom line, political polls and news reports are not the stuff of which First Amendment exceptions are made.

Beyond that, Plaintiffs compound the constitutional problem by asking this Court for an injunction to prevent the publication of "any further deceptive polls." (Am. Compl. ¶ 134.) Such an order is a classic prior restraint—"the most serious and the least tolerable infringement on First Amendment rights," *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976), and "the essence of censorship." *Near*, 283 U.S. at 713. As a matter of basic law, this Court cannot censor future speech because of Plaintiffs' hunch it will be "deceptive." *See, e.g.*, *Cognitest Corp. v. Riverside Publ'g Co.*, 1995 WL 382984, at *2 (N.D. Ill. June 22, 1995) (granting Rule 12(b)(6) dismissal of request "to enjoin future, as yet unspoken and unidentified speech which the plaintiffs assert will be false if spoken."); *Murray Energy Holdings Co. v. Mergermarket USA, Inc.*, 2016 WL 3365422, at *8 (S.D. Ohio June 17, 2016) (granting Rule 12(b)(6) dismissal of request for an order prohibiting defendants from future statements, noting "it operates as an unconstitutional prior restraint on speech"). Plaintiffs do not allege any legal basis for a prior restraint.

B. Plaintiffs Cannot Plead Around the First Amendment by Alleging Fraud.

Plaintiffs wield the terms "election interference" and "fraud" like an alchemist's incantation, hoping to transform their political dross into legal gold. But no amount of vacuous repetition can convert their expansive concept of "fake news" to the very limited and specific *legal* concept of fraud. The Supreme Court has made clear that slapping the "fraud" label on a claim cannot satisfy the specific showing required or extinguish the First Amendment. *Madigan*, 538

U.S. at 617. Fraud has "exacting" requirements in order "to provide sufficient breathing room for protected speech," so a "[f]alse statement alone" cannot trigger liability. *Id.* at 620.

Plaintiffs' lawsuit simply misunderstands fraud. Fraud is "[a] knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment." *Fraud*, Black's Law Dictionary (12th ed. 2024). Fraud requires not just a false statement, but one made by the defendant in the context of persuading the plaintiff to "part[] with money, or property of value in reliance upon the defendant's representations." William L. Prosser, *Handbook of the Law of Torts* § 105, at 684 (4th ed. 1971); *see Alvarez*, 567 U.S. at 722–23 (distinguishing false statements generally from fraud, which is designed to "secure moneys or other valuable considerations, [like] offers of employment"). The classic example of fraud is a crooked used-car salesman rolling back an odometer. *See* Restatement (Second) of Torts § 525, cmt.b, illus. 1.

Plaintiffs allege no representations by Selzer for the purpose of inducing them into a transaction. Instead, Plaintiffs skip (several) steps. They allege Selzer made false statements and tack on conclusory allegations that Plaintiffs later "relied on" and were "damaged" by the statements. Even accepting such unspecific allegations as true, *that's not fraud*. There is no transactional nexus between the parties and no purpose by Selzer to induce Plaintiffs into doing anything. Being wrong (even intentionally) does not become fraud when someone listens and acts.

This Court illustrated the difference between falsity and fraud in *United States v. Kepler*, where it rejected the argument that a statute prohibiting false claims of receiving Army medals could survive First Amendment scrutiny through the "fraud" exception. 879 F. Supp. 2d 1006, 1012 (S.D. Iowa 2011). The Court explained "fraud is not mere lying," because lying, by itself, "lacks an essential element of a fraud claim: proof of detrimental reliance or actual harm to the plaintiff." *Id.* at 1009 n. 1 (citing *Madigan*, 538 U.S. at 620–21).

The elements of Plaintiffs' fraud claims reflect these commonsense boundaries. To state a claim under the Iowa Consumer Fraud Act ("ICFA"), Plaintiffs must allege a false statement "of a material fact, with the intent that others rely upon [it], … in connection with the advertisement, sale, or lease of consumer merchandise." Iowa Code § 714H.3(1). Similarly, fraudulent misrepresentation covers only those situations where a defendant "fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it." *Kirk v. Farm & City Ins. Co.*, 457 N.W.2d 906, 909 (Iowa 1990) (quoting Restatement (Second) of Torts § 525). Both claims require a false statement from the defendant about a critical aspect of a proposed transaction *for the purpose of* inducing the plaintiff to enter that transaction. That is what fraud is and what Plaintiffs' "false news" claims against Selzer lack, both conceptually and in the pled facts, as described in Section II below.

C. Plaintiffs' Theory of Liability Would Eviscerate the First Amendment.

No court has ever adopted Plaintiffs' extraordinary theory of liability for "false news" because it has no limiting principle. Admittedly, it required casting a wide net to find litigants even proposing a similar theory, but those claims have uniformly failed. For example, the Southern District of Florida, affirmed by the Eleventh Circuit, rejected a "novel and unprecedented expansion of the scope of tort law" seeking to hold the Weather Channel liable for damage caused by an incorrect forecast. *Brandt v. Weather Channel, Inc.*, 42 F. Supp. 2d 1344, 1345–46 (S.D. Fla.), *aff'd*, 204 F.3d 1123 (11th Cir. 1999)).

The court explained the plaintiffs' theory contravened core First Amendment principles and declined, as a matter of law, to impose a "forecaster's duty." *Id.* at 1346. "If the court were to impose such a duty … [it] could extend to farmers who plant their crops based on a forecast of no rain, construction workers who pour concrete or lay foundation based on the forecast of dry weather, or families who go to the beach for a week based on a forecast of sunny weather." *Id.* Just

as with the election coverage here, "[p]redicting possible future events whose outcome is uncertain is not an exact science for which a [publisher] should be held liable." *Id*.

Similarly, the Eastern District of New York rejected an attempt to contort the elements of fraud against protected speech. *Demuth Dev. Corp. v. Merck & Co.*, 432 F. Supp. 990 (E.D.N.Y. 1977). *Demuth* involved a "novel claim" against chemical encyclopedia publisher Merck for "willful misrepresentation" of the toxicity of a chemical used in Demuth's equipment that it alleged scared away purchasers. *Id.* at 991. The court explained Demuth could not "point to any relationship of the parties, arising out of contract or otherwise, which in morals or good conscience, placed Merck under any duty towards plaintiff or its business." *Id.* at 993 (quotation marks omitted). The court held "Merck's right to publish free of fear of liability is guaranteed by the First Amendment, and the overriding societal interest in the untrammeled dissemination of knowledge." *Id.* (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)).

"Fraud" does not exist when someone believes dishonest behavior took place and they lost money. If it did, courthouses would overflow on Monday mornings with claims against National Football League referees. Especially in debate over public affairs, "every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us." *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

America's history and tradition protects political commentary; it does not subject "false" reports to liability. Plaintiffs' claims are barred by the First Amendment.

II. Plaintiffs' Claims Are Facially Deficient.

A. Plaintiffs Fail to Allege Recoverable Damages.

Even if the First Amendment did not bar Plaintiffs' claims, each claim fails at the starting gate because Plaintiffs do not plead legally cognizable damages. *See Briehl v. Gen. Motors Corp.*, 172 F.3d 623, 630 (8th Cir. 1999) (damages are an "essential element" of a tort claim). First, stating

the obvious: President Trump and Congresswoman Miller-Meeks won their elections, and Selzer did not poll Mr. Zaun's race *at all*. Plaintiffs' attempt to plead monetary damage rests on vague allegations of harm to nonparties and violates core principles of causation.

Mr. Trump and Ms. Miller-Meeks allege that, as candidates, they "expend[ed] extensive time and resources," including "direct federal campaign expenditures" to "counteract the harms" of the Iowa Poll.[2] But they filed this lawsuit in their personal capacities, and the Supreme Court has made clear that a campaign is "a legal entity distinct from the candidate." *FEC v. Cruz*, 596 U.S. 289, 294 (2022). Mr. Trump and Ms. Miller-Meeks allege no cognizable harm to them *as individuals* from the Iowa Poll, so they have not plead the element of damages.

Mr. Zaun's claims are even more implausible (if that is possible). Mr. Zaun alleges he "sustained actual damages due to the loss of his Senate seat." (Am. Compl. ¶ 133.) Mr. Zaun does not explain what those damages are, nor does he explain how he could have suffered financial damage from a poll *that did not mention him or poll his race*. Even if he had offered some explanation, there's no causation for damages consisting of losing elections. "Federal courts do not sit to award post-election damages to defeated candidates." *Hutchinson v. Miller*, 797 F.2d 1279, 1287–88 (4th Cir. 1986); *see also Sw. Publ'g Co. v. Horsey*, 230 F.2d 319, 322–23 (9th Cir. 1956) (holding "loss of an election" damages are "speculative and conjectural" because "there may be not less than a thousand factors which enter into the vagaries of an election").

Plaintiffs' Amended Complaint also does not support legally cognizable causation between the Iowa Poll and the alleged damages. For fraud to be the legal cause of Plaintiffs' damages, their loss must "connect[] to the misrepresentation in a way to which the law attaches legal

[2] (Am. Compl. ¶¶ 131–132; *see also id.* at ¶¶ 13, 15 [harm to "their Campaigns and affiliated entities"]; ¶ 18 [action brought to redress harm "to the Trump 2024 Campaign, to Representative Miller-Meeks' Campaign, to Zaun's Campaign, and to millions of citizens in Iowa and across America"].).

significance." *Spreitzer v. Hawkeye State Bank*, 779 N.W.2d 726, 740 (Iowa 2009) (citing Restatement (Second) of Torts § 548A, cmt. a). Relying on statements by a speaker who (1) did not direct them to the complaining party and (2) made them for a purpose unrelated to the alleged damages is not a connection with a legal significance. *See, e.g.*, *Charles Schwab Corp. v. Bank of Am. Corp.*, 883 F.3d 68, 91–92 (2d Cir. 2018) (third-party reliance on a statement being merely "foreseeable" is insufficient because it would trigger "boundless liability"). Plaintiffs can no more sue a newspaper pollster for diverted resources than a farmer could sue a TV weatherman for crop damage due to unexpected frost. *Brandt*, 42 F. Supp. 2d at 1345–46.

The remaining "damages" Plaintiffs assert are not cognizable. Plaintiffs allege "millions of Americans … were lied to, deceived, and maligned by" the Iowa Poll. (Am. Compl. ¶ 13.) But courts are not "a vehicle for the vindication of the value interests of concerned bystanders." *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 382 (2024) (citation omitted). Plaintiffs feeling "deceived," "lied to," and "maligned" by a poll are not cognizable damages because, as explained above, even intentionally false statements, without more, do not provide a basis for liability. *See also* Iowa Code § 714H.2(1) ("[a]ctual damages" must be ascertainable amounts and do not include "mental distress".) A plaintiff still must adequately allege a cognizable cause of action. *Madigan*, 538 U.S. at 620. Plaintiffs have not.

B. Plaintiffs Fail to State a Claim Under the ICFA.

1. Plaintiffs do not have a claim under the ICFA because they allege no actual or contemplated transaction between them and Selzer.

Plaintiffs have no claim under the ICFA against Selzer because they do not allege that they purchased or leased anything from Selzer. The ICFA is a consumer fraud statute designed to protect Iowa consumers deceived into buying or leasing a product. It provides a cause of action for victims of "deception" and "fraud" "in connection with the advertisement, sale, or lease of

consumer merchandise." Iowa Code § 714H.3. And it allows consumers to recover damages if they suffer an "ascertainable loss of money or property as the result" of that deception or fraud. Iowa Code § 714H.5(1). Plaintiffs allege no "fraud" or "deception" to induce them into a transaction with Selzer, nor do they allege any "ascertainable loss of money or property." And Plaintiffs' Amended Complaint identifies no instance of the ICFA ever being applied to a context other than actual or attempted contractual privity between a seller/lessor and a consumer.

2. Plaintiffs cannot invoke the ICFA, which covers only "consumer merchandise" bought or leased for "personal purposes."

The Court should also dismiss Plaintiffs' ICFA claim based on the statute's unambiguous text. When interpreting state statues, federal courts "appl[y] that state's rules of statutory construction." *Behlmann v. Century Sur. Co.*, 794 F.3d 960, 963 (8th Cir. 2015). "The first step in ascertaining the true intent of the legislature is to look at the statute's language." *Mulhern v. Catholic Health Initiatives*, 799 N.W.2d 104, 113 (Iowa 2011) (citation omitted). When that "language is plain and unambiguous, [courts] will look no further." *Id.* The ICFA's plain text forecloses Plaintiffs' ICFA claim against Selzer.[3]

First, Plaintiffs do not allege Selzer sold or leased anything to them. And the ICFA defines "advertisement" as "the attempt by publication, dissemination, solicitation, or circulation to induce directly or indirectly any person to enter into any obligation or acquire any title or interest in any merchandise." Iowa Code § 714H.2(2) (citing and incorporating Iowa Code § 714.16(1)(a)). The Iowa Poll offered and induced no obligation or transaction; *it's an opinion poll.* It did nothing more

[3] By its plain terms, the ICFA applies to commercial transactions, not political commentary. Plaintiffs' attempt to extend the law outside its traditional context renders it unconstitutional as applied because it would reach political speech and news coverage the speaker "reasonably should know" are false. *Sullivan*, 376 U.S. at 288 (evidence of negligently false speech is constitutionally insufficient); *Bertrand v. Mullin*, 846 N.W.2d 884, 894 (Iowa 2014) (same).

than explain its view on which candidates were leading and set out its methodology for how it arrived at that opinion. (Am. Compl. ¶¶ 1, 3.) The Iowa Poll is textually outside the ICFA's scope.

Second, a political opinion poll of the Iowa electorate is not "consumer merchandise." Under Iowa law, "courts generally presume words contained in a statute or rule are used in their ordinary and usual sense with the meaning commonly attributed to them." *Off. of Consumer Advoc. v. Iowa Utils. Bd.*, 744 N.W.2d 640, 643 (Iowa 2008). And in the ICFA, "consumer merchandise" is "merchandise offered for sale or lease, or sold or leased, *primarily for personal, family, or household purposes*." Iowa Code § 714H.2(4) (emphasis added). Merriam-Webster defines the possessory form of "personal" as "intended for private use or use by one person." It defines "family" as "the basic unit in society traditionally consisting of two parents rearing their children." And "household" means "those who dwell under the same roof and compose a family."[4] Bars of soap and minivans—purchases everyday Iowans make while taking care of themselves and their families—are "consumer merchandise." Any logical and plain reading of the ICFA shows a comprehensive opinion poll of the Iowa electorate intended for general publication is not "merchandise" "primarily for personal, family, or household purposes." *See Butts v. Iowa Health Sys.*, 863 N.W.2d 36, 2015 WL 1046119, at *8 (Iowa Ct. App. 2015) (table) (ICFA does not apply when defendant "does not offer or sell consumer merchandise").

Finally, the Iowa Poll did not "relate[] to a material fact or facts" in an advertisement, sale, or lease. Iowa Code § 714H.3(1). Under the ICFA, it is not enough to allege a "deceptive" or "fraudulent" representation generally. Instead, a plaintiff "must prove that the prohibited practice related to a material fact" conveyed "in connection with the advertisement, sale, or lease of

[4] *Personal*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/personal (updated Feb. 20, 2025); *Family*, https://www.merriam-webster.com/dictionary/family (updated Feb. 20, 2025); *Household*, https://www.merriam-webster.com/dictionary/household (updated Feb. 20, 2025).

merchandise." *Id.* The representation Plaintiffs rely upon is the polling results. But those results are not, and do not relate to, "a material fact or facts" in an advertisement, sale, or lease. Material facts in consumer transactions are representations about facts like price, use restrictions, a car's gas mileage, or bedding thread count. Not only is the poll not a representation in connection with an advertisement or sale/lease, but it plays no role as a material fact in a representation. Plaintiffs' ICFA claim is misplaced: it is not a consumer fraud claim, and this Court should dismiss it.

C. Plaintiffs Fail to State a Claim for Fraudulent Misrepresentation.

Plaintiffs' allegations likewise cannot support a common law claim for fraudulent misrepresentation. For such a claim, "a plaintiff must prove (1) defendant made a representation to the plaintiff, (2) the representation was false, (3) the representation was material, (4) the defendant knew the representation was false, (5) the defendant intended to deceive the plaintiff, (6) the plaintiff acted in reliance on the truth of the representation and was justified in relying on the representation, (7) the representation was a proximate cause of plaintiff's damages, and (8) the amount of damages." *Gibson v. ITT Hartford Ins. Co.*, 621 N.W.2d 388, 400 (Iowa 2001). Even crediting Plaintiffs' allegations and conspiracies as true, they don't even satisfy half the elements.

First, as explained in Section I.B, Plaintiffs butcher the concept of fraud. Representations, falsity, reliance, scienter, and damages are components of a claim arising in a situation where a defendant lies to induce a plaintiff into a transaction to the plaintiff's detriment. Here, Selzer made no actionable representation "to the Plaintiffs." And Plaintiffs have not alleged the Iowa Poll was "material" to an inducement directed to Plaintiffs by Selzer. Plaintiffs similarly do not allege Selzer intended to induce them into a transaction. Nor, as explained in Section II.A, do they allege cognizable damages. Plaintiffs thus fail to even plead elements (1), (3), (5), (7), or (8).

Plaintiffs also fail to plead element (6), justifiable reliance. In Iowa, the "justifiable-reliance standard does not mean a plaintiff can blindly rely on a representation." *Spreitzer*, 779

N.W.2d at 737. Rather, "[a] person may not justifiably rely on a professional representation if 'red flags' signal such reliance is unwarranted." *Young ex rel. Young v. Rally Appraisal, L.L.C.*, 928 N.W.2d 660, 2019 WL 1486608, at *4 (Iowa Ct. App. 2019) (table). Here, according to Plaintiffs, the Iowa Poll defied "common sense, electoral history, [and] all other public polls." (Am. Compl. ¶ 60.) They allege media coverage identified the poll as an "outlier." (*Id.* at ¶ 70.) Plaintiffs also allege Selzer had a history of undercounting Republican support. (*Id.* at ¶¶ 36–40.) And Plaintiffs allege that "any responsible pollster or journalist with experience in Iowa politics would recognize the clear inaccuracy of" the poll. (*Id.* at ¶ 140.) In short, so desperate to spike the football regarding Selzer's polling inaccuracies, Plaintiffs aggressively concede the element of reliance.

Moreover, in contrast to their repetitive allegations that everyone with experience in Iowa politics recognized the poll as an unreliable outlier, Plaintiffs assert (remarkably) that they "justifiably relied on" the polls. (*Id.* at ¶ 143.) That allegation is both conclusory and contradicted by Plaintiffs' *actual* allegations. "Parties alleging fraud must plead reliance with 'sufficient particularity to state a plausible claim of justifiable reliance,'" and "[c]onclusory allegations that a plaintiff detrimentally relied on" representations do not provide "sufficient factual matter to state a claim of relief plausible on its face." *Ambassador Press, Inc. v. Durst Image Techn. U.S., LLC*, 949 F.3d 417, 423 (8th Cir. 2020) (citation omitted). As Plaintiffs fail to adequately allege six out of the eight elements of fraudulent misrepresentation, the Court should dismiss the claim.

D. Plaintiffs Fail to State a Claim for Negligent Misrepresentation.

The same infirmities infecting Plaintiffs' fraudulent misrepresentation claim undermine their negligent misrepresentation claim. In Iowa, plaintiffs asserting negligent misrepresentation must establish: "(1) the defendant was in the business or profession of supplying information to others; (2) the defendant intended to supply information to the plaintiff or knew that the recipient intended to supply it to the plaintiff; (3) the information was false; (4) the defendant knew or

reasonably should have known that the information was false; (5) the plaintiff reasonably relied on the information in the transaction that the defendant intended the information to influence; (6) and the false information was the proximate cause of damage to the plaintiff." *Doe v. Grinnell Coll.*, 473 F. Supp. 3d 909, 937 (S.D. Iowa. 2019) (citation omitted).

When, as here, a plaintiff's claim involves only "intangible economic interests," it is subject to "more restrictive rules of recovery." *Id.* (quoting *Pitts v. Farm Bureau Life Ins. Co.*, 818 N.W.2d 91, 111 (Iowa. 2012)). That is due to "the extent to which misinformation may be, and may be expected to be, circulated, and the magnitude of losses which may follow from reliance on it." *Van Sickle Const. Co. v. Wachovia Comm. Mortg., Inc.*, 783 N.W.2d 684, 690 (Iowa 1990) (quoting Restatement (Second) of Torts § 522 cmt. a). It is not enough to allege Selzer's awareness that the poll might reach Plaintiffs and influence them. Instead, recovery is limited to "the person or one of a limited group of persons whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it." *Id.* at 691. In short, Plaintiffs must allege a cognizable legal duty by Selzer to supply *Plaintiffs* with accurate information. *Id.*

But Selzer owed Plaintiffs no legal duty. As the Fifth Circuit explained: "If a newspaper prints incorrect information, if a scientist publishes careless statements in a treatise, or if an oil company prints an inaccurate road map, they cannot be 'liable' to those of the general public who read their works absent some special relationship between [the] writer and reader." *De Bardeleben Marine Corp. v. United States*, 451 F.2d 140, 148 (5th Cir. 1971); *see also Stancik v. CNBC*, 420 F. Supp. 2d 800, 808 (N.D. Ohio 2006) ("News broadcasters do not owe the general public a heightened duty of care."); *Brandt*, 42 F. Supp. 2d at 1345–46 (refusing to "impose on a television broadcaster of weather forecasts a general duty to viewers"). As another federal court explained, "accuracy in news reporting is certainly a desideratum, but the chilling effect of imposing a high

duty of care on those in the business of news dissemination and making that duty run to a wide range of readers or TV viewers would have a chilling effect which is unacceptable under our Constitution." *Tumminello v. Bergen Evening Rec., Inc.*, 454 F. Supp. 1156, 1159–60 (D.N.J. 1978). Without duty, there is no negligence. And the First Amendment bars states from imposing a common law duty on news suppliers to "get it right." *See Sullivan*, 376 U.S. at 288; *Bertrand v. Mullin*, 846 N.W.2d 884, 894 (Iowa 2014).

Plus, Plaintiffs do not allege Selzer "intended to supply information" *to* Plaintiffs or knew any recipients intended to supply it to them (element (2)). Similarly, Plaintiffs do not allege Selzer intended to influence their decision-making, nor do they allege adequate facts supporting justifiable reliance (element (5)). The claim is facially and constitutionally deficient.

III. The Court Should Dismiss Claims Against Ms. Selzer as an Individual.

The Court should dismiss Plaintiffs' claims against Ms. Selzer as an individual because Plaintiffs do not allege sufficient facts to pierce the corporate veil between Selzer & Company and Ms. Selzer. *HOK Sport, Inc. v. FC Des Moines, L.C.*, 495 F.3d 927, 935 (8th Cir. 2007) ("[T]ypically, a corporate entity and its owners are separate and distinct.") Plaintiffs "bear the burden of proving that exceptional circumstances exist which warrant piercing the corporate veil." *C. Mac. Chambers Co. v. Iowa Tae Kwon Do Acad., Inc.*, 412 N.W.2d 593, 598 (Iowa 1987). Such circumstances may exist "where the corporation is a mere shell, serving no legitimate business purpose, and used primarily as an intermediary to perpetuate fraud or promote injustice." *Id.* at 597 (citation omitted). Here, Plaintiffs do not allege any of the exceptions apply, much less facts supporting an exception. The Court should dismiss the claims against Ms. Selzer individually.

CONCLUSION

Defendants J. Ann Selzer and Selzer & Company respectfully request this Court grant their motion to dismiss Plaintiffs' claims with prejudice and request oral argument on the motion.

Dated: February 21, 2025

Respectfully Submitted,

/s/ *Robert Corn-Revere* .

Robert Corn-Revere*†
(DC Bar No. 375415)
Conor T. Fitzpatrick*
(Mich. Bar No. P78981)
FOUNDATION FOR INDIVIDUAL
RIGHTS AND EXPRESSION (FIRE)
700 Pennsylvania Ave., SE; Suite 340
Washington, DC 20003
(215) 717-3473
bob.corn-revere@thefire.org
conor.fitzpatrick@thefire.org

Greg Greubel
(Iowa Bar No. AT0015474)
Adam Steinbaugh*
(Cal. Bar No. 304829)
FOUNDATION FOR INDIVIDUAL
RIGHTS AND EXPRESSION (FIRE)
510 Walnut St., Suite 900
Philadelphia, PA 19106
(215) 717-3473
greg.greubel@thefire.org
adam@thefire.org

Matthew A. McGuire
(Iowa Bar No. AT0011932)
NYEMASTER GOODE, P.C.
700 Walnut St., Suite 1300
Des Moines, IA 50309
(515) 283-8014
mmcguire@nyemaster.com

Attorneys for Defendants J. Ann Selzer and Selzer & Company

* *Admitted pro hac vice.*
† *Lead counsel*

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing document was served upon all parties of record through the Court's CM/ECF electronic filing system, with copies sent to the below-named individuals by electronic mail on February 21, 2025.

/s/ *Robert Corn-Revere*

Copy to:

EDWARD ANDREW PALTZIK
Bochner PLLC
1040 Avenue of the Americas
15th Floor
New York, NY 10018
(516) 526-0341
edward@bochner.law

ALAN R. OSTERGREN
Attorney at Law
Alan R. Ostergren, PC
500 East Court Avenue Suite 420
Des Moines, Iowa 50309
(515) 297-0134
alan.ostergren@ostergrenlaw.com

Attorneys for Plaintiffs

EXHIBIT 5

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

PRESIDENT DONALD J. TRUMP, an individual, REPRESENTATIVE MARIANNETTE MILLER-MEEKS, an individual, and FORMER STATE SENATOR BRADLEY ZAUN, an individual,

Plaintiffs,

v.

J. ANN SELZER, an individual, SELZER & COMPANY, DES MOINES REGISTER AND TRIBUNE COMPANY, and GANNETT CO., INC.,

Defendants.

Case No.: 4:24-cv-00449-RGE-WPK

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS J. ANN SELZER AND SELZER & COMPANY'S MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Rules

Other Authorities

I. PRELIMINARY STATEMENT

Plaintiffs, President Donald J. Trump ("President Trump"), Representative Mariannette Miller-Meeks ("Representative Miller-Meeks"), and Former State Senator Bradley Zaun ("Zaun") submit this Memorandum of Law in Opposition to the Motion to Dismiss pursuant to Fed R. Civ. P. 12(b)(6) (the "12b6 Motion") filed by Defendants J. Ann Selzer ("Selzer") and Selzer & Company's ("S&C") (Selzer and S&C together the "Moving Defendants"). (Dkt. 33). All arguments herein apply with equal force against and should be considered by this Court with respect to the Motion to Dismiss filed by the other Defendants, Des Moines Register and Tribune Company ("DMR") and Gannett Co., Inc. ("Gannett") (Dkt. 35).

As an initial matter, the Court no longer has subject matter jurisdiction and, as a matter of law, must deny Moving Defendants' 12b6 Motion as moot, without any consideration on the merits. Indeed, Plaintiffs have already filed their Motion for Remand to Iowa District Court for Polk County (the "Remand Motion") [Dkt. 30], which presents an open-and-shut argument: two of the three Plaintiffs (Representative Miller-Meeks and Zaun) are citizens of Iowa, while three of the four Defendants (Selzer, S&C, and DMR) are also citizens of Iowa. Therefore, the parties are not completely diverse, thus remand to State Court is required, and Moving Defendants' 12b6 Motion may not be litigated in this Court—full stop.

Alternatively, if this Court had subject matter jurisdiction and the ability to consider the merits (which it does not), Moving Defendants' First Amendment arguments are red herrings that are inapplicable to Plaintiffs' allegations, or in the alternative, are premature without discovery. And many of Moving Defendants' arguments go to the sufficiency and weight of the evidence that will be adduced as the case moves forward, and not to the adequacy of Plaintiffs' allegations of wrongdoing against Defendants, which are all assumed to be true at this stage. Moving Defendants

try to reframe and trivialize Plaintiffs' well-pleaded consumer fraud, fraudulent misrepresentation, and negligent misrepresentation claims (*see* Amended Complaint, [Dkt. 23], "Am. Compl."), as non-actionable "fraudulent news" grievances, while hiding behind a blanket First Amendment immunity defense created from whole cloth. (Moving Defendants' Memorandum of Law ("Def. Mem.") [Dkt. 33-1], p.1). But no such blanket immunity exists.

Accordingly, the 12b6 Motion must be denied.

II. BACKGROUND

A. Procedural History

Plaintiff President Trump filed this lawsuit in the Iowa District Court for Polk County on December 16, 2024. [Dkt. 1-1]. Defendants then removed the case to the United States District Court for the Southern District of Iowa, Central Division, utilizing the controversial "snap removal" tactic. [Dkt. 1]. Plaintiffs filed their Amended Complaint on January 31, 2025. [Dkt. 23]. Plaintiffs filed their Remand Motion on February 21, 2025. [Dkt. 30]. That same day, Defendants filed their respective 12b6 Motions. [Dkt. 33; Dkt. 35].

B. Facts Set Forth in Plaintiffs' Amended Complaint

This action, which arises under the Iowa Consumer Fraud Act, Iowa Code Chapter 714H, including § 714H.3(1) and related provisions, as well as under Iowa common law, including fraudulent misrepresentation and negligent misrepresentation, relates to Defendants' deliberate publication of multiple manipulated and incorrect polls mere days before Election Day last year. Critically, Representative Miller-Meeks and Zaun are citizens of Iowa; Selzer, S&C, and DMR are also citizens of Iowa. (Am. Compl. ¶¶ 21-25).

The first poll at issue was conducted by Selzer and S&C, and published online by DMR and Gannett in the *Des Moines Register* and other Gannett-owned outlets including nationally distributed *USA Today*, on November 2, 2024, and in print on November 3, 2024, relating to the

presidential race between President Trump and former Vice President Kamala Harris ("Harris") (the "Harris Poll"). *Id*. ¶ 1. Contrary to reality and tortiously defying credulity, Defendants' Harris Poll, published three days before Election Day, purported to show Harris leading President Trump in Iowa by three points (47%-44%) (*Id.* ¶ 2). The Poll was a sham and intentionally misleading. President Trump won Iowa by *over thirteen* points (56%-42.7%). *Id*. ¶ 2. Before this astonishing *sixteen-point* polling miss, Selzer brazenly claimed: "It's hard for anybody to say they saw this coming . . . . Harris has clearly leaped into a leading position." *Id*. However, as Selzer knew, there was a perfectly good reason nobody "saw this coming"—because a three-point lead for Harris in deep-red Iowa was not reality; it was election-manipulating fiction. *Id*.

The second poll at issue was also conducted by Selzer and S&C, and published by DMR and Gannett in the online and print versions of the *Des Moines Register* on November 2, 2024 and November 3, 2024, respectively, and purported to show that incumbent Representative Miller-Meeks trailed by sixteen points (53%-37%) against Democrat challenger Christina Bohannan in the race for Iowa's 1st Congressional District (the "Congressional Poll") (the Harris Poll and Congressional Poll together, the "Defendant Polls" or the "Polls"); Representative Miller-Meeks ultimately won the 1st District by two-tenths of a point (50.1%-49.9%). *Id*. ¶ 3. Defendants also intentionally published multiple other wildly incorrect polls about the Iowa Congressional races just before Election Day—all favoring Democrats. *Id*. ¶¶ 93-98

As pled in the Amended Complaint, there is overwhelming evidence that the Defendant Polls were not statistical anomalies but instead were deliberately manipulated. *Id*. ¶¶ 76-77. As Manhattan Institute senior fellow James Piereson wrote, Selzer's "miss" was *beyond* extreme:

> The Selzer Poll, with a margin of error of 3.4, missed the real outcome by 16 points, or by as many as five standard deviations from the true result as revealed on election day. What are the odds of drawing such a sample by legitimate means? Answer:

> roughly one time in 3.5 million trials. In other words, given these odds, the results in the Iowa poll likely did not come about by "honest error."

Selzer's deceptive "miss" caused extensive harm:

> It is more likely that someone deliberately manipulated the sample so that it included too many Democrats, or simply made up the numbers as they came in for the purpose of giving confidence to Harris voters and worry for Trump supporters, or to bring national attention to a poll taken in a state not regarded as competitive. The poll did receive national attention and was widely discussed. Selzer appeared on television interviews to talk about the poll and its implications. If the goal was to promote the poll, then the gambit succeeded—at least until election day, when it was revealed to be ridiculously far off the mark.

Id. (quoting James Piereson, *Statistical questions about the Iowa poll,* THE NEW CRITERION (Nov. 12, 2024), https://newcriterion.com/dispatch/statistical-questions-about-the-iowa-poll/).

But that's not all—the Defendant Polls were premised upon a statistical improbability and were plagued by unprecedented and foreseeable security breaches.

First, President Trump won Iowa by over eight points and nearly ten points, respectively, in the 2020 and 2016 Presidential Elections. President Trump certainly could not have trailed Harris by three points in Iowa at any time in the 2024 cycle. (Am. Compl. ¶ 7).

Second, Selzer's polling in the presidential race was completely disconnected from all other mainstream polling. Although Selzer had polled President Trump leading Joe Biden by eighteen points, she suddenly claimed after Harris supplanted Biden that President Trump's lead was only four points. *Id*. ¶¶ 53-55. Meanwhile*, every other* mainstream Iowa poll showed President Trump comfortably ahead, and by significantly more than Selzer presented. A poll conducted September 27-28, 2024 by Cygnal showed President Trump ahead by seven points; a poll conducted November 1-2, 2024 by Emerson College showed President Trump ahead by nine points; a poll conducted November 2-3, 2024 by InsiderAdvantage showed President Trump ahead by seven points; a poll conducted November 2-3, 2024 by SoCal Strategies showed President

Trump ahead by seven points; and a second poll conducted November 2-3, 2024 by SoCal Strategies showed President Trump ahead by eight points. *Id*. ¶ 56.

Third, even Harris's internal polling showed that she never led President Trump. *Id*. ¶ 57.

Fourth, in each of the highest-stakes races—President, Governor, and Senator—from 2016 to 2022, the Republican won in Iowa and did so by a convincing margin. *Id*. ¶ 58. A three-point lead by a Democrat candidate for President would have been remarkably out of line compared to election results in the prior four cycles. *Id*.

Fifth, other pollsters who frequently work in swing states, such as Quinnipiac University, did not even poll Iowa in 2024, assuming, correctly, that it was a lock for President Trump. When major news outlets reported on swing states, Iowa was never included. *Id*. ¶ 59.

Sixth, given that Representative Miller-Meeks defeated Bohannan by nearly seven points in 2022 (53.4%-46.6%), Selzer's projection that Bohannan led Miller-Meeks by sixteen points in the rematch constituted a *twenty-three-point* swing in Bohannan's favor—a statistical improbability and an absurd inference given the absence of any significant events or developments that might explain such a dramatic change. *Id*. ¶ 85. Even a poll from a few weeks earlier (Sept. 30 to Oct. 1, 2024) by the Democrat Party had Bohannan up only four points (50%-46%); a poll from the end of August by Normington, Petts & Associates *for the Bohannan Campaign* had showed the race tied at 47% each—Selzer's Congressional Poll was twelve points off from even the Democrats' optimistic projection; indeed, Iowa's 1st District is normally an R+3 seat, according to the Cook Political Report, as confirmed by the fact that President Trump had won it in 2020 by three points, and Kim Reynolds won it in 2018 by three points. *Id*. ¶¶ 86-89.

And, to top it all off, Defendants leaked the Harris Poll to Democrat operatives before publication. *Id*. ¶ 65. Selzer also leaked the Harris Poll to her nephew, an intern at Gallup. *Id*. ¶ 68. This was the only time Defendants breached their policy of secrecy with Selzer's polls. *Id*. ¶ 61.

The fabricated Defendant Polls had the foreseeable and intended effect of influencing voter behavior, demoralizing Republican supporters, and distorting media narratives in the final stretch before voting. *Id*. ¶¶ 3, 5–6, 42–51. Defendants, led by Selzer, fanned the flames even further by grabbing national headlines with a carefully orchestrated all-out media blitz. *Id*. ¶¶ 70-71.

Plaintiffs were damaged by the Defendant Polls, in multiple respects. President Trump sustained actual damages by having to expend extensive time and resources, including direct federal campaign expenditures, to mitigate and counteract the harms of the Defendants' conduct. *Id*. ¶ 131.

Representative Miller-Meeks was subjected to a costly recount that would not have occurred if not for the combined impact of the Harris Poll and the Congressional Poll on her race. Not only did the Harris Poll and the Congressional Poll substantially contribute to forcing Representative Miller-Meeks into an electoral struggle, but she, like many other consumers who read the *Des Moines Register*, was also deceived by the Harris Poll and the Congressional Poll. *Id*. ¶¶ 90-92, 132.

Similarly, Zaun, a longtime Iowa State Senator, was negatively impacted by the fraudulent polling released by Defendants. *Id*. ¶¶ 6, 100–102, 133. However, Zaun was not as fortunate as President Trump and Representative Miller-Meeks, as he was defeated in his re-election bid after the Harris Poll gave an artificial boost to Democratic turnout and morale. *Id*. Plaintiff Zaun was deceived by Defendants' conduct. *Id*.

Defendant Selzer ultimately retired in disgrace less than two weeks after the election, a tacit admission of her culpability. *Id*. ¶¶ 9, 72.

The Amended Complaint, on its face, sufficiently sets forth Plaintiffs' case for damages in the wake of Defendants' choice to weaponize polling as a tool for manipulating elections and securing increased profit. *Id*. ¶ 18.

III. ARGUMENT

A. This Court Does Not Have Subject Matter Jurisdiction to Decide Moving Defendants' 12b6 Motion, Which Must be Denied as Moot

For the reasons set forth in the Remand Motion, this Court does not have jurisdiction to decide the 12b6 Motion, and the case must be remanded to Iowa District Court for Polk County. [Dkt. 30].

1. Remand is Required as a Matter of Law

This case presents an extremely straightforward, black-and-white configuration of non-diverse party citizenship that unequivocally requires remand as a matter of law. Plaintiff President Trump is a citizen of Florida, Plaintiffs Representative Miller-Meeks and Zaun are citizens of Iowa, Defendants Selzer, S&C, and DMR are citizens of Iowa, and Defendant Gannett is citizen of Delaware and New York. (Am. Compl. at ¶¶ 20-26). Therefore, this case has citizens of Iowa on both the Plaintiff and Defendant sides. Since there is not complete diversity of citizenship between and among the parties, this Court does not have subject matter jurisdiction, and the action must be remanded to the Iowa District Court for Polk County. There is no discretion available to the Court; with subject matter jurisdiction lacking, remand is required—full stop. This Court may not adjudicate *any* dispute in the absence of subject matter jurisdiction, let alone *this* dispute between non-diverse parties on matters of state law.

"Complete diversity of citizenship exists where no defendant holds citizenship in the state where any plaintiff holds citizenship." *OnePoint Solutions, LLC v. Borchert*, 486 F. 3d 342, 346 (8th Cir. 2007). Diversity of citizenship jurisdiction under 28 U.S.C. § 1332 requires an amount in controversy greater than $75,000 *and* complete diversity among the litigants. Regardless of how a case got to federal court, the case *must* be remanded if, at any time, it appears that the district court lacks subject matter jurisdiction, which means that both the amount in controversy and complete diversity requirements must be met for a case to be removed to, and remain in, federal court. 28 U.S.C. § 1447(c); *see also* Fed. R. Civ. P. 12(h)(3). "[A]n absence of complete diversity makes a federal forum unavailable." *M&B Oil, Inc. v. Federated Mutual Insurance Company*, 2023 WL 3163326, at *3 (8th Cir. May 1, 2023).

"If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case *shall* be remanded." *Id*. (emphasis added). As Section 1447(c) makes plain, [this] matter [lack of diversity] can be brought to the court at any time before final judgment is entered." *Spreitzer Properties, LLC v. Travelers Corp*., 539 F. Supp. 3d 774, 784 (N.D. Iowa 2022) (granting remand for lack of diversity) (emphasis added). It matters not whether diversity existed in the first instance. *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978) ("Thus it is clear that the respondent could not originally have brought suit in federal court . . . since citizens of Iowa would have been on both sides of the litigation. Yet the identical lawsuit resulted when she amended her complaint. Complete diversity was destroyed just as surely as if she had sued [an Iowa defendant] initially."). In other words, loss of diversity upon amendment of a lawsuit deprives a federal district court of subject matter jurisdiction just the same as if diversity had not existed at the time the suit was commenced, because "in the plain language of the statute, the

'matter in controversy' could not be 'between . . . citizens of different States." *Id*. (quoting 28 U.S.C. § 1332(a)(1)).

Therefore, even *arguendo*, if this Court found that Gannett properly removed the case in the first instance, this Court no longer has subject matter jurisdiction. As the Eighth Circuit has observed, "[t]he language of section 1447(c) *mandates* a remand of the case (to the state court from which it was removed) whenever the district court concludes that subject-matter jurisdiction is nonexistent." *Filla v. Norfolk Southern Ry. Co*., 336 F.3d 806, 809 (2003) (emphasis added). This non-discretionary mandate is based on the immutable principle that "[w]hen there is a lack of complete diversity of citizenship among the parties, the Court *cannot exercise jurisdiction* over the case, and it *must be remanded* to state court where plaintiffs chose to sue defendants and where it belongs." *Spreitzer Properties*, 539 F. Supp. 3d at 784; *see also Foslip Pharmaceuticals, v. Metabolife Intern.*, 92 F. Supp. 2d 891, 909 (N.D. Iowa 2000) (granting remand for lack of diversity). Accordingly, this case must be remanded to the Iowa District Court for Polk County.

2. This Court Cannot Reach Moving Defendants' 12b6 Motion on the Merits

It is black-letter law that the Court must rule on the Remand Motion without reaching Moving Defendants' 12b6 Motion on the merits. This is because the Court cannot issue orders on other motions unless the Court has subject matter jurisdiction. *See, Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93–95 (1998) ("assuming jurisdiction for the purpose of deciding the merits . . . carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers"); *Carlson v. Arrowhead Concrete Works*, 445 F.3d 1046, 1052-53 (8th Cir. 2006) ("In every federal case the court must be satisfied that it has jurisdiction before it turns to the merits of other legal arguments."); *Warner v. Chase Home Fin. LLC*, 530 F. App'x 614, 614-15 (8th Cir. 2013); *Larsen v. Pioneer Hi-Bred Int'l*, No. 4:06-CV-0077-JAJ, 2007 WL 3341698, at *1 (S.D. Iowa Nov. 9, 2007); *Mujahid v. City of Kan. City*, 2019 U.S. Dist. LEXIS

250422, at *2 (W.D. Mo. Sep. 12, 2019) ("The question of subject matter jurisdiction must be resolved before the defendant's motion to dismiss may be considered, and a federal court must remand for lack of subject matter jurisdiction notwithstanding the presence of other motions pending before the court"); *Young v. Midwest Div. RMC*, 2022 U.S. Dist. LEXIS 100987, at *4 (W.D. Mo. June 3, 2022) ("The question of subject matter jurisdiction must be resolved before the defendant's motion to dismiss may be considered, and a federal court must remand for lack of subject matter jurisdiction notwithstanding the presence of other motions pending before the court"); *Heuton v. Ford Motor Co.*, 2016 U.S. Dist. LEXIS 203289, at *3 (W.D. Mo. Aug. 4, 2016) ("Initially it is noted that although plaintiff's motion for remand was filed subsequent to the motion to dismiss, this issue will be considered first in order to resolve the question of subject matter jurisdiction."); *Samland v. Turner Enters*., 2012 U.S. Dist. LEXIS 106408, at *7 (D. Neb. June 18, 2012); *All. Energy Servs. v. Kinder Morgan Cochin*, 80 F. Supp. 3d 963, 973 (D. Minn. 2015) ("because the Court grants Plaintiff's Motion to Remand, it does not address the merits of Defendants' Partial Motion to Dismiss"); *Vincent v. Dakota, Minnesota & E. R.R. Corp.*, 200 F.3d 580, 582 (8th Cir. 2000) ("[The District Court] recognized that if the RLA did not preempt Vincent's claims, no subject matter jurisdiction would exist, and therefore remand would be required").

B. Plaintiffs' Claims Are Not Barred by the First Amendment

Selzer and S&C argue that "Plaintiffs' claims are barred by the First Amendment," purportedly because "there is no such thing as a claim for 'fraudulent news.'" (Def. Mem. at 1). But it is these Moving Defendants who fabricate a "cause of action" for an imaginary tort of "fraudulent news," when in fact, Plaintiffs have not brought a claim for "fraudulent news" or for that matter, *any claim* involving news—Defendants were not engaged in any news reporting. Rather, Defendants intentionally (or at minimum, negligently) disseminated false polling data for

increased profit and readership. As Selzer herself said: "*And the polling industry is predicated on getting people to pay money for their products*." (Am. Compl. ¶ 74) (emphasis added). Defendants were selling a *product* to consumers—polls—not reporting the news. This is why Plaintiffs' claims are justifiably pled as statutory consumer fraud, fraudulent misrepresentation, and negligent misrepresentation—not as a disagreement with a news story. Merely because false material (in this case the for-profit Defendant Polls) appeared in a newspaper does not transform that material into news. In fact, one does not *promote* the news. One *reports* the news. Selzer did not engage in reporting—she went on a whirlwind promotional tour across numerous mainstream media outlets to advertise and hype the Defendant Polls. *Id*. ¶¶ 70, 78-81. Her business, and the business of S&C, is for-profit polling, and the business of DMR and Gannett is selling newspapers and subscriptions for profit. *Id*. ¶¶ 24, 25, 115. Selzer's sensationalized and fabricated Defendant Polls helped Defendants do exactly that—sell products and profit. Simply put, the Defendant Polls were *false* speech, and *commercial* speech at that. The Defendant Polls were, on their own, not news events in any sense of the word "news"; these Polls, like any other poll, were for-profit *products* that were paid for by DMR and Gannett, and *created* by Selzer and S&C in exchange for payment.

1. The Defendant Polls are False Speech Not Immunized by the First Amendment

As an initial matter, the Amended Complaint pleads extensive facts that at minimum, give rise to an inference that the Defendant Polls were false. And, at the motion to dismiss stage, the issue is not whether the Defendant Polls *were* false, but whether Plaintiffs have *pled* that the Polls were false, since Plaintiffs' allegations must be treated as true. "[F]alse statements are not immunized by the First Amendment right to freedom of speech." *Bill Johnson's Restaurants, Inc.*, 461 U.S. at 743 (1983). Moreover, the First Amendment does not protect aiding, abetting, or committing a tort or other civil violation. *IBEW v. NLRB*, 341 U.S. 694, 705 (1951); *Rice v.*

Paladin Enters., 128 F.3d 233, 267 (4th Cir. 1997). And, pertinent here, the First Amendment does not protect the myriad conduct associated with fraudulent speech. *Illinois ex rel. Madigan v. Telemarketing Associates, Inc*., 538 U.S. 600, 612 (2003) ("the First Amendment does not shield fraud"). There are many species of fraud: common law fraud, statutory types of fraud, and the torts of intentional misrepresentation and negligent misrepresentation (Restatement (Second) of Torts §§ 525-552). At issue here is Iowa statutory consumer fraud and fraudulent misrepresentation.

False statements—whether on the pages of a newspaper or elsewhere—are a species of fraud and do not enjoy immunity from tort liability when the speaker makes the statements with knowledge of falsity or reckless disregard for truth or falsity, as Plaintiffs have more than sufficiently pleaded here. As alleged in the Amended Complaint, Defendants disseminated to Plaintiffs and other consumers multiple polls—including the Defendant Polls—that were so utterly divorced from reality, so statistically unsupportable, and so inconsistent with any objective data, and on top of that subject to security breaches, that it can reasonably be inferred that Defendants knew or should have known that the content of the polls was false. (Am. Compl. ¶¶ 52-61, 65-68, 73, 76, 77, 83-89). Misconduct of this nature has nothing to do with the First Amendment and everything to do with spreading falsehoods to unsuspecting consumers for profit.

The Supreme Court articulated the guiding principle underpinning false speech: "There is 'no constitutional value in false statements of fact.'" *Keeton v. Hustler Magazine, Inc*., 465 U.S. 770, 776 (1984) (quoting *Gertz v. Robert Welch, Inc*., 418 U.S. 323, 340 (1974)). Thus, "untruthful speech" is not "protected for its own sake." *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc*., 425 U.S. 748, 771 (1976). In summary, "the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection." *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

2. The Defendant Polls are Commercial Speech Not Warranting Any Heightened First Amendment Protection

"[C]ommercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position on in the scale of First Amendment values,' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.'" *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989) (quoting *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978)); *see also Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 620 (1995)."There is no longer any room to doubt that what has come to be known as 'commercial speech' is entitled to the protection of the First Amendment, albeit to protection somewhat less extensive than that afforded 'noncommercial speech.'" *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 637 (1985). And, "much of the material in ordinary newspapers is commercial speech." *Cincinnati v. Discovery Network*, 507 U.S. 410, 423 (1993). With commercial speech, the government may in appropriate circumstances regulate both "inherently misleading" speech and even "potentially misleading" speech. *Peel v. Atty. Registration & Disciplinary Comm'n*, 496 U.S. 91, 110 (1990).

Here, the Moving Defendants argue that the Defendant Polls were political speech. (Def. Mem. at 9-10). But the Defendant Polls were commercial speech—and false speech at that. As set forth *supra*, Defendants were not reporting news. Selzer and S&C created the Defendant Polls, then promoted them, no different than the promotion of any other commercial product. Selzer's media blitz across numerous mainstream media outlets in the aftermath of the release of the Harris Poll provides ample evidence of these commercial promotional efforts. (Am. Compl. ¶¶ 70, 78-81). For example, on Rachel Maddow's MSNBC television program, Selzer breathlessly declared of the Harris Poll: "I don't see how anybody would look at those numbers and the history in Iowa in the past eight to twelve years and think that these numbers could have been foretold." *Id.* ¶ 81.

Selzer's numerous television and other media appearances were in the service of promoting her polling and her polling business. Merely because the Defendant Polls garnered news coverage does not mean the Polls themselves were news; the Polls were created by Selzer's for-profit polling business, S&C, which, as Selzer admits "*is predicated on getting people to pay money for their products*." *Id*. ¶ 74) (emphasis added).

3. Moving Defendants' First Amendment Cases Are Distinguishable and Inapplicable to the Case at Bar

The Moving Defendants cite multiple inapplicable cases in support of their erroneous assertion that Plaintiffs' claims are barred by the First Amendment. They hide behind their blanket assertion that the Defendant Polls are "news," even though the Polls were—by Selzer's own admission—for-profit products created to attract attention and revenue. Selzer and S&C seek to retroactively characterize the Polls as bona fide "news" (*see* Def. Mem. at 6-12) rather than as the paid-for products that the Polls really are and were intended to be from the beginning. Indeed, their position that the Polls were "news" is impossible to square with the fact that Gannett and DMR *paid* Selzer and S&C to create the Polls; and for that matter, they pay Selzer and S&C for *all* the polls that they create for Gannett and DMR because creating polls is Selzer's job. At bottom, the Moving Defendants urge this Court to accept that the paid polling products and services they provide are somehow "news." But legitimate "news" *is not bought and paid for*, or created in exchange for money; legitimate "news" involves events of public interest that occur at the local, regional, national, or world levels. Newspapers report on events that occur due to the actions of *other* parties ranging from ordinary people to world leaders—but creating a product for public consumption, such as a sensationalized incorrect poll that attracts attention, does not transform that created product into "news." Newspapers cannot create "news" out of thin air by paying for a consumer product to fill their pages. Ironically, the Moving Defendants argue that "Plaintiffs try

to pound their square peg into a round hole without any attempt to reconcile the constitutional mismatch" (Def. Mem. at 5); but it is these Defendants who are moving the goal posts as to what constitutes "news' by trying to fit their square peg of a for-profit consumer product into a round hole of "news."

None of the cases cited by the Moving Defendants change this paradigm. (Def. Mem. at 1, 6) (citing *Hollander v. CBS News*, 2017 WL 1957485 (S.D.N.Y. May 10, 2017), *aff'd but vacated on other grounds sub nom. Hollander v. Garrett*, 710 Fed. Appx. 35 (2d Cir. 2018) (dismissal of RICO claim predicated on alleged wire fraud against various news organizations for their reporting on the 2016 presidential election); *Wash. League for Increased Transparency & Ethics v. Fox News*, 2021 WL 3910574 (Wash. Ct. App. Aug. 30, 2021) (affirming dismissal of claims under the Washington Consumer Protection Act against Fox News for allegedly false reporting about COVID-19); *Nat'l Inst. of Fam. & Life Advocs. v. Raoul*, 685 F. Supp. 3d 688, 695 (N.D. Ill. 2023) (enjoining application of Illinois Consumer Fraud Act to anti-abortion advocacy); *Grosjean v. American Press Co*., 297 U.S. 233, 245-50 (1936) (striking down "tax on lying" against newspapers); *Brandt v. Weather Channel, Inc*., 42 F. Supp. 2d 1344, 1345-46 (S.D. Fla. 1999), *aff'd*, 204 F.3d 1123 (11th Cir. 1999) (seeking to hold the Weather Channel liable for incorrect forecast). Moving Defendants' cases all have features that makes them easily distinguishable from the case at bar: they involved either (i) grievances about *reporting* on legitimate *news* matters, not on a matter that a newspaper itself created out of thin air, (ii) nakedly content-based speech discrimination by the government, (iii) taxation of speech, or (iv) speech that was alleged to be intentionally false or fraudulent.

In *Hollander*, the plaintiff labeled "various articles, commentary, and broadcasts" as "wire fraud," but could not make his RICO case because he failed to identify any "scheme or artifice to

defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises[.]" 2017 WL 1957485, at *4. That was a different case altogether because the plaintiff's grievance related to reporting about actual news, not to a product created by the media defendants themselves. *Hollander* is further inapplicable because RICO is an altogether different theory of recovery that involves establishing a predicate *crime*. *Id*. Similarly, *Wash. League for Increased Transparency* also involved grievances about the manner of reporting on the subject of COVID-19, one of the most substantial and legitimate news stories in recent history. 2021 WL 3910574, at *1. *Grosjean* involved a challenge by newspaper publishers to a Louisiana state law that required them to pay a tax for the mere privilege of engaging in their business, an obviously impermissible government restraint on the freedom of the press that has no bearing on the case at bar. 297 U.S. 233, 245. And *Brandt* is distinguishable because there was no allegation there of intentional fraud or falsity, and in any event, weather is clearly a news event that occurs naturally rather than by creation of a service provider. 42 F. Supp.2d at 1345-46.

Lastly, *Raoul* (which, as discussed below, actually furthers Plaintiffs' case) is distinguishable for a different reason: it involved an application for a preliminary injunction in the context of a facial challenge to a particular provision of the Illinois Consumer Fraud Act known as SB 1909, which regulated statements about reproductive health made by "limited service pregnancy centers" but did not regulate such statements by abortion clinics and other medical providers, making the law a form of content-based discrimination that was not narrowly tailored—an issue that has no bearing whatsoever on the matters at bar. 685 F. Supp. at 696, 703. If anything, *Raoul* supports Plaintiffs' position that consumer fraud laws do apply to deceptive statements: the Court there opined that Illinois's Consumer Fraud Act *would* still apply to regulating false statements by the pregnancy centers so long as there was no content-based discrimination.

> But, more importantly, another way to address this alleged deception or failure to provide material facts is by enforcing the Consumer Fraud Act as it existed without SB 1909. Defendant Raoul's [Illinois Attorney General] own Deputy Attorney General publicly stated that the Consumer Fraud Act—without SB 1909's explicit inclusion of Centers and sidewalk counselors and explicit exclusion of abortion providers—would address the alleged concerns. And it would do so without blatant content and viewpoint discrimination.

Id. at 704-705.

In summary, none of these cases related to a product or service that any of the media outlets in question created for profit; instead, Moving Defendants' cases related either to impermissible restraints on legitimate news reporting or to plainly protected expressive conduct lacking any element of fraud or falsity.

C. Plaintiffs Satisfied the Heightened Pleading Standards for Fraud

Plaintiffs satisfied any heightened pleading standards that may apply in the present case to their various claims. Under Rule 9(b), to plead fraud with particularity, "the complaint must plead such facts as the time, place, and content of the defendant's false representations, as well as the details of the defendant's fraudulent acts, including when the acts occurred, who engaged in them, and what was obtained as a result." *U.S. ex rel. Raynor v. Nat'l Rural Utils. Co-op. Fin. Corp.*, 690 F.3d 951, 955 (8th Cir. 2012). Where multiple defendants are involved, the complaint must "inform each defendant of the nature of his alleged participation in the fraud," and "specify the time, place, and content of" each defendant's false representations. *Streambend Props. II, LLC v. Ivy Tower Minneapolis, LLC*, 781 F.3d 1003, 1013 (8th Cir. 2015). In short, the complaint must allege the "who, what, when, where, and how" of the alleged fraud. *Summerhill v. Terminix, Inc*., 637 F.3d 877, 880 (8th Cir. 2011).

Here, despite Defendants' claims to the contrary, (Def. Mem. at 5, 15-19), the Amended Complaint satisfies this standard in full. The Amended Complaint alleges that Selzer and her company S&C created a manipulable Harris Poll and Congressional Poll, and then actually

manipulated them. (Am. Comp. ¶¶ 1–4, 53, 76–77). It further alleges that DMR and Gannett purchased those Defendant Polls for publication and used them to boost profits, e.g. drive subscriptions and web traffic. *Id*. ¶¶ 24–26, 74. Selzer is alleged to have acted with knowledge of the falsity of the Defendant Polls, including to inflate Democratic support, and by altering her methodology to favor Harris and other Democratic candidates. *Id*. ¶¶ 55–56, 76–77. DMR and Gannett are alleged to have knowingly disseminated those results despite their inaccuracy. *Id*. ¶¶ 1, 25–26, 60.

Defendants' assertion that "Plaintiffs fail to state a cognizable ICFA claim because they do not plead . . . [that] the Iowa Poll[s] were done in connection with the sale of consumer merchandise," Dkt. 35 p. 24, is without merit. The Supreme Court of Iowa has recognized that ICFA claims "are not the same as common law fraud actions." *State ex rel. Att'y Gen. of Iowa v. Autor*, 991 N.W.2d 159, 167 (Iowa 2023) (quoting *State ex rel. Miller v. Hydro Mag, Ltd.*, 436 N.W.2d 617, 622 (Iowa 1989) ("We conclude the Iowa Consumer Fraud Act was not merely a codification of common-law fraud . . . [it] provides broader protection to the citizens of Iowa by eliminating common-law fraud elements of reliance and damages."). Simply stated, it is well-settled that the ICFA "permits relief upon a lesser showing that the defendant made a misrepresentation or omitted a material fact with the intent that others rely upon the . . . omission." *State ex rel. Miller v. Pace*, 677 N.W.2d 761, 770 (Iowa 2004) (cleaned up). Here, Plaintiffs have carried their burden of making such a showing and have adequately pleaded their ICFA claim in the Amended Complaint.

In fact, the false representations—which Defendants intended their audience to rely upon—are detailed in the Amended Complaint: the Harris Poll falsely reported that Harris was leading President Trump in Iowa by three points, when President Trump ultimately won by more than

thirteen. *Id*. ¶ 2. The Congressional Poll falsely claimed that Democrat Bohannan led Plaintiff Representative Miller-Meeks by sixteen points, when Miller-Meeks actually won by 0.2%. *Id*. ¶ 3. These representations were published on November 2 and 3, 2024—just three days before the election—and were featured prominently in the DMR's print and online editions. *Id*. ¶¶ 1–3.

The Amended Complaint provides substantial detail as to why these representations were not merely inaccurate but fraudulent—including that the polls contradicted every other major poll conducted at the time. (Am. Comp. ¶ 56). Even Harris's internal polling never showed her leading. *Id*. ¶ 57. Selzer's own prior polling had shown Trump leading Biden by eighteen points—yet, suddenly and without explanation, she claimed Trump's lead had reversed to a three-point deficit against Harris. *Id*. ¶ 53.

Taken together, these allegations provide far more than the minimal detail required by Rule 9(b). Plaintiffs have identified (1) the who—Selzer, S&C, DMR, Gannett; (2) the what—false polling data; (3) the when—November 2–3, 2024, (4) the where—published in DMR and elsewhere; and (5) the how—manipulated data, improper leaks, and financial motive. That is more than sufficient to meet the heightened pleading standards for fraud. *Summerhill*, 637 F.3d at 880 (8th Cir. 2011).

D. Plaintiffs' Claims are Sufficiently Pled

1. Standard of Review

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (cleaned up); *accord Braden v. Wal-Mart Stores*, 588 F.3d 585, 594 (8th Cir. 2009). "The essential function of a complaint under the Federal Rules of Civil Procedure is to give the opposing party fair notice of the nature and basis or grounds for a claim, and a general indication of the type of litigation involved." *Topchian v. JPMorgan Chase Bank, N.A.*, 760 F.3d

843, 848 (8th Cir. 2014) (cleaned up). The Court must accept as true all factual allegations in the complaint, but not its legal conclusions. *Iqbal*, 556 U.S. at 678–79.

A plausible claim for relief "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. at 678. A plaintiff must "nudge their claims across the line from conceivable to plausible, else their complaint must be dismissed." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)) (cleaned up). "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Iqbal*, 556 U.S. at 678 (cleaned up). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*; *see also Meredith v. Medtronic, Inc.*, No. 3:18-cv-127-RGE-HCA, 2019 WL 6330677, at *3 (S.D. Iowa Oct. 25, 2019) (providing a recitation of the standard on Fed. R. Civ. P. 12(b)(6) motions to dismiss).

2. Plaintiffs Properly Pled a Claim for Violation of The Iowa Consumer Fraud Act

Moving Defendants' primary argument with respect to Plaintiffs' claim for violation of the Iowa Consumer Fraud Act is that Plaintiffs did not suffer damages. [Dkt. 33, pp. 13-18]. This is not true—Plaintiffs adequately pled harm in support of their claim under the Iowa Consumer Fraud Act.

Plaintiffs seek redress for the significant harm they suffered not only as ordinary consumers, but as consumers with a dramatically heightened interest in the subject matter, since they were all candidates for public office directly impacted by the Defendant Polls, and all suffered harm directly attributable to Defendants' choice to weaponize polling as a tool for manipulating elections and driving profits. (Am. Comp. ¶¶ 13–15, 18, 92, 102).

First, with respect to Plaintiff President Trump, the Harris Poll falsely indicated that Harris was leading President Trump in Iowa by three points, just days before the election, despite President Trump ultimately winning the state by 13%. *Id*. ¶¶ 2, 13-14. This false representation created a misleading narrative of Democratic momentum leading into election day and harmed President Trump's reputation, his image, and his viability as a candidate. It was an issue he had to address publicly at a moment when he was tremendously strained for time and each minute of his day had a direct impact on his personal and political future. *Id*. The Harris Poll was intended to and did in fact dampen enthusiasm and turnout among Republican voters, impacting an extensive effort by President Trump to do the exact opposite. *Id*. As a politician, President Trump's individual reputation is very much interrelated and tied up in his professional reputation, and so the damage to him politically also hurt him individually, and vice versa. Finally, President Trump read the false poll in the Des Moines Register and was harmed as a deceived consumer of Defendants' product. *Id*. ¶ 20.

Second, with respect to Plaintiff Representative Mariannette Miller-Meeks, the Congressional Poll falsely reported that she was trailing her Democratic opponent, Christina Bohannan, by sixteen points, just days before the election, despite her ultimately winning by a very tight margin of 0.2%. *Id*. ¶¶ 3, 90–91. Defendants' misrepresentations undermined Representative Miller-Meeks' viability as an incumbent and sent a false signal to voters and donors that her race was hopeless, damaging morale at a critical moment. *Id*. She was subjected to a costly and stressful recount process that would certainly would not have occurred but for Defendants' misconduct, and which imposed reputational, financial, and emotional costs to her in a variety of ways. *Id*. Defendants inappropriately attempt to introduce facts not set forth in the Amended Complaint and not properly before the Court on a motion to dismiss when they argue that "Under

Iowa law, the State of Iowa—not Rep. Miller-Meeks or her campaign—paid for the recount." (Def. Mem. of Law [Dkt. 33] at 4 (citing to Iowa Code § 50.48(2)(a))). But Defendants have mischaracterized Iowa's statute on recount expenses. While it is true that when the margin of an election is less than one percent the candidate requesting the recount need not post a $500 bond to the county auditor, Iowa Code § 50.48(2)(a)(2, this says nothing about the significant legal costs the winning candidate incurs to defend her victory. The 2024 recount process involved a recount conducted in each of the First Congressional District of Iowa's twenty counties, and each recount board was staffed by a lawyer retained by the winning campaign. Thus, Congresswoman Miller-Meeks did not get, as defendants claim, a "free" recount.

As with President Trump, Congresswoman Miller-Meeks' reputation as a capable and competitive representative is inextricably linked to her personal identity, so the political damage she endured also constituted individual harm. *Id*. Last, but definitely not least, Representative Miller-Meeks is a regular consumer of the *Des Moines Register*, purchased the print edition containing the poll, and was misled and harmed by Defendants' false product. *Id*. ¶ 21.

Finally, with respect to Plaintiff Zaun, the Harris Poll and Congressional Poll falsely reported a strong surge in Democratic turnout and votes, just days before Zaun's race. *Id*. ¶ 2. This false narrative of Democratic momentum hurt Zaun's race in Iowa Senate District 22, where he ultimately lost to his Democratic challenger, Matt Blake, by a narrow margin of four points. *Id*. ¶ 6. As context, in his two most recent victories, Zaun won the race for the 20th District by nineteen points and over two points in 2016 and 2020, respectively. *Id*. ¶ 100. The Harris Poll was intended to and did in fact energize Democratic voters and depress Republican turnout, which directly undermined Zaun's campaign strategy and contributed to his defeat. *Id*. ¶100-102. As with the other Plaintiffs, Zaun's reputation and professional standing were bound up in his role as an elected

official, and the political loss caused by the Defendants' conduct inflicted personal, reputational, and professional harm. *Id*. Finally, Zaun read the Harris Poll coverage in the Des Moines Register and was harmed as a consumer of Defendants' product. *Id*. ¶ 102.

3. Plaintiffs Properly Pled a Claim for Fraudulent Misrepresentation

Plaintiffs properly pled a claim for fraudulent misrepresentation. The elements of fraudulent misrepresentation are: (1) representation; (2) falsity; (3) materiality; (4) scienter; (5) intent to deceive; (6) justifiable reliance; and (7) resulting injury. *Midwest Home Distributor, Inc. v. Domco Indust. Ltd.*, 585 N.W.2d 735 (Iowa 1998). Each of the factors for fraudulent misrepresentation are plausibly and compellingly alleged with specificity in Plaintiff's Amended Complaint.

a) Defendants Made Representations When They Published their Polls in the Des Moines Register

Defendants made express representations to consumers, including Plaintiffs, in the most attention-grabbing manner possible. (Am. Compl. ¶¶ 66, 13). The Defendant Polls were presented as authoritative, data-driven assessments of voter preferences. *Id*. ¶¶ 3, 49-51, 78. Defendants promoted these Polls with headlines and editorial commentary endorsing their accuracy. *Id*. ¶ 78. This conduct constitutes a representation under applicable Iowa law. *Midwest Home Distributor*, 585 N.W.2d at 735.

b) Defendants' Representations Were False

President Trump won Iowa by more than thirteen points, consistent with all available election data, electoral reality, and the findings of all mainstream polling other than Selzer, demonstrating that the Harris Poll—and the three-point deficit reported therein—was false information. (Am. Comp. ¶ 2). Representative Miller-Meeks won her race by a margin of 0.2%, a

result that is unreconcilable with the sixteen-point deficit reflected in the Congressional Poll. *Id*. ¶ 3. Thus, the results of the polls were false.

c) The False Representations Made by Defendants Were Material

The evidence shows the materiality of the false representations made by Defendants outlined in the foregoing paragraphs. Polling affects voter turnout and enthusiasm, and Defendants ensured their false polling data was material: they calculated the timing, manner and damaging effect of its release. (Am. Comp. ¶¶ 42, 61, 65–66, 78). Selzer was known for her extraordinary influence over expectations for the results of Iowa and national elections. *Id*. ¶ 44. Political strategists and campaign advisors explicitly acknowledged that Selzer's polling shaped voter perception. *Id*. ¶¶ 45–46. The false polling data was released strategically just three days before the election, styled as a "leak," and employed the use of social media, all demonstrating a design to make the poll results go "viral" and be as impactful as possible. *Id*. ¶¶ 1, 2, 3, 65, 66. The strategy was in fact effective, and the Harris Poll dominated national and international headlines in the days before the election. *Id*. ¶ 70.

d) Defendants Made the False Representations With Scienter

Defendants knew that their polling results were implausible and contradicted by all reliable information available at the time. *Id*. ¶¶ 38, 56-60, 80. Statistical analysis conducted after the inaccuracy of the polls was exposed, indicates that the odds of Selzer's 2024 polling errors occurring by chance were 1 in 3.5 million. *Id*. ¶ 76. This alone is certainly demonstrative of scienter sufficient to proceed past the motion to dismiss stage.

But the facts as pled show far more than just likelihood with respect to Defendants' scienter. Selzer had a growing pattern of polling errors that favored Democrats in recent years. *Id*. ¶ 38. She inaccurately reported outcomes in 2018, 2020, and 2022 races—always in favor of Democratic candidates. *Id*. ¶¶ 38–40. This is a pattern of inaccuracy that a professional pollster

like Selzer could not have plausibly failed to observe. It shows that Selzer—and Defendants generally—knew or should have known her polling process was broken and no longer yielding accurate results. This is important context, because when Selzer obtained such an absurd result in the Harris Poll and Congressional Poll—far beyond the scope of what is reasonability—her choice to release the results despite her knowledge of her growing pattern of unreliability shows exactly the type of scienter required under Iowa law for a claim of fraudulent misrepresentation. Selzer abruptly retired from polling within two weeks of the election, a common indicator of a guilty mindset and further support for Defendants' scienter in making such false representations. *Id*. ¶¶ 9, 72.

e) Defendants Intended to Deceive With Their False Representations

Defendants had an intent to deceive the public and improperly influence the elections when they published the false polling data in the *Des Moines Register*. As set forth in the Amended Complaint, the Harris Poll was leaked by Defendants early to Democratic operatives in violation of Defendants' long-established confidentiality practices. *Id*. ¶ 65. For the same reasons explained above with respect to the scienter requirement, Selzer knew the polling information was false. Despite this, working together with the other Defendants, there was an organized and concerted effort to maximize the impact of false and fraudulent poll information, including a media blitz. *Id*. ¶¶ 78-81.

f) Plaintiffs Justifiably Relied on Defendants' False Representations

Plaintiffs, like millions of other citizens, justifiably relied on the Defendant Polls. Importantly, Plaintiffs President Trump, Representative Miller-Meeks, and Zaun all consumed (i.e. read) the polls through the *Des Moines Register*. *Id*. ¶¶ 20-22. Each Plaintiff read and relied on the election coverage at issue, and had every right to do so, given Defendants' reputation. *Id*. The Defendant Polls were published in a manner that solicited trust from the reader and Selzer had

an industry-wide reputation for accuracy that the Moving Defendants traded on. *Id*. ¶¶ 3, 36. Her polling for DMR and Gannett had long been thought of as the gold standard. *Id*. ¶ 139.

g) Plaintiffs Were Injured as a Result of Defendants' Misrepresentations

Plaintiffs previously outlined in Section II.B.2. titled "Plaintiffs Properly Pled a Claim for Violation of The Iowa Consumer Fraud Act," how each Plaintiff was harmed by Defendants' conduct. To avoid redundancy, Plaintiffs incorporate these arguments by reference and will not repeat them here.

In view of the foregoing, Plaintiffs have set forth a plausible claim for fraudulent misrepresentation under Iowa state law.

4. Plaintiffs Properly Pled a Claim for Negligent Misrepresentation

Plaintiffs properly pled a claim for negligent misrepresentation. "Iowa has adopted the definition of the tort of negligent misrepresentation found in the Restatement (Second) of Torts." *Bagelmann v. First Nat. Bank*, 823 N.W.2d 18, 30 (Iowa 2012) (citing *Pitts v. Farm Bureau Life Ins. Co.*, 818 N.W.2d 91, 111 (Iowa 2012). The elements include:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
>
> > (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
> >
> > (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

Id. The Supreme Court of Iowa has explicitly held that when it comes to negligent misrepresentation, "those liable are only those who supply information in an advisory capacity and are manifestly aware of how the information will be used and intend to supply it for that purpose." *Van Sickle Const. Co. v. Wachovia Com. Mortg.*, 783 N.W.2d 684, 691 (Iowa 2010) (cleaned up).

While the breakdown of the elements differs, essentially all the analysis with respect to Plaintiffs having properly pled a claim for fraudulent misrepresentation applies to the claim for negligent misrepresentation, and for the sake of brevity, will not be repeated.

Defendants contend that they "cannot be said to be 'recognized professionals' who acted in an 'advisory Capacity,'" because Plaintiffs cannot plead that "Defendants conducted the poll and published its results for the purpose and intent of advising Plaintiffs or their respective campaigns." [Dkt. 35], p. 38 (quoting *The Conveyor Co. v. Sunsource Tech. Servs.*, 398 F.Supp.2d 992, 1014 (N.D. Iowa 2005)). Yet, the *Conveyor* court recognizes no such prerequisite for a successful negligent misrepresentation claim. *The Conveyor*, 398 F.Supp.2d at 1014. On the contrary, the court in *Conveyor* recognized the position of the Iowa Court of Appeals, which stated that "[n]o clear guideline exists to define whether a party is in the business of supplying information." *Conveyor Co.*, 398 F. Supp. 2d at 1015 (quoting *Greatbatch v. Metropolitan Federal Bank*, 534 N.W.2d 115, 117 (Iowa App.1995)). The court concluded that "the court, not the jury, decides whether defendants were in the business of supplying information as a matter of law, in light of the facts, because the defendants' duty is always a matter for the court to decide." *Id*. (quotations omitted).

Here, the Court should certainly exercise its discretion to conclude that Defendants are parties "in the business of supplying information." *Id.* As publishers in the private sector, Moving Defendants are the very embodiment of "professional purveyors of information." *Id*. at 1016.

In addition, Plaintiffs note that Defendants were acting in their professional capacity when they prepared and published the Defendant Polls, and there can be no dispute that the facts as pled support that Defendants each had a pecuniary interest in the Harris Poll and the Congressional Poll. (Am. Comp. ¶ 1-4). Specifically, Selzer and S&C prepared the poll for DMR and Gannett to help DMR and Gannett sell newspapers and digital subscriptions and each Defendant was doing their job with the underlying goal of making money on the polling enterprise. *Id*. ¶¶ 1, 23–26; *Id*. ¶ 1 fn. 1. Selzer has even admitted the financial incentive behind her work—"*[a]nd the polling industry is predicated on getting people to pay money for their products*." *Id*. ¶ 74. Defendants intended and succeeded in generating enormous buzz across the nation and around the world just days before a presidential election from their publication of the false poll data. *Id*. ¶ 70. Under the circumstances, Defendants were exactly the type of entities that "supply information in an advisory capacity . . . [and] are in a position to weigh the use for the information against the magnitude and probability of the loss that might attend the use of the information if it is incorrect." *Van Sickle Const. Co. v. Wachovia Com. Mortg.*, 783 N.W.2d 684, 691 (Iowa 2010).

Further, the facts pled in Plaintiffs' Amended Complaint also establish that, even assuming *arguendo* that Defendants can establish there was no intentional misconduct, there can be no doubt that their conduct was grossly negligent and breached a duty owed to Plaintiffs.

First, the results of the Defendant Polls were so absurdly inaccurate that—while best explained by intentional conduct—are impossible to explain without at least negligent conduct in designing, executing, and analyzing the data from the Polls. (Am. Comp. ¶¶ 2-4, 76). Selzer herself was unable to explain the inaccuracy of the Harris Poll or otherwise provide an explanation to the public—leaving no explanation other than intentional misconduct or negligence. *Id*. ¶¶ 73-74. Thus, the facts as pled establish that Defendants were at least negligent in preparing the poll. *See,*

e.g. Burbach v. Radon Analytical Lab'ys, 652 N.W.2d 135, 138 (Iowa 2002), *as amended on denial of reh'g* (Oct. 25, 2002) (explaining that the lower court erred in dismissing a negligent misrepresentation case where the Defendants had "knowledge that its report would be reviewed and potentially relied upon by a limited but foreseeable class of persons.").

Second, there are ample facts pled supporting Defendants' negligence in protecting the Harris Poll from leaking. First, as pled by Plaintiff, DMR had a "longstanding policy of secrecy" and there were likewise industry standards for protection of polling information, a policy they didn't adhere to in this case. (Am. Comp. ¶¶ 61, 68). Selzer admitted she showed the Harris Poll to her nephew. *Id*. ¶ 68. She did this, despite knowing her nephew worked at a competing polling company, and that the information was highly valuable and sensitive. *Id.* ¶ 61, 65-66, 68. Such conduct is a clear breach of even the lowest standards of care for protecting sensitive information. *Id*.; s*ee, e.g. Davidson & Jones, Inc. v. New Hanover Cnty.*, 41 N.C. App. 661 (1979) (explaining that "a complete binding contract between the parties is not a prerequisite to a duty to use due care in one's actions . . . [and an] architect, in the performance of his contract with his employer, is required to exercise the ability, skill, and care customarily used by architects upon such projects.").

Moreover, both the results of the Defendant Polls and the leak of the Harris Poll are the types of events that would not have occurred absent a failure to exercise ordinary care, and so the doctrine of *res ipsa loquitur* applies here to both forms of negligence. A *res ipsa* inference is appropriate where "(1) the injury is caused by an instrumentality under the exclusive control of the defendant, and (2) the occurrence is such as in the ordinary course of things would not happen if reasonable care had been used." *Brewster v. United States*, 542 N.W.2d 524, 529 (Iowa 1996). Here, Defendants alone possessed the polling data since they themselves collected, analyzed, and

published this information. (Am. Comp. ¶ 3). In addition, the statistical odds of the error, 1 in 3.5 million, make the results of poll something that cannot be explained absent intentional conduct or negligence. *Id*. ¶ 76. Likewise, despite a thorough investigation into the matter after the fact, Defendants have not publicly suggested that there was any hack or other interference by third parties that could explain the leak of the poll absent negligence. *Id*. ¶ 65. Thus, Plaintiffs have adequately pled Defendants' negligent conduct, and in general, properly pled a claim for negligent misrepresentation.

5. Plaintiffs Have Alleged Facts and Claims Justifying Piercing the Corporate Veil and so Claims Against Selzer as an Individual Should Not be Dismissed

The Court should not dismiss Plaintiffs' claims against Selzer as an individual. Defendants' primary argument in support of dismissal against Selzer individually are that the circumstances for piercing do not apply here and that Plaintiffs have not pled facts in support of piercing the corporate veil. Dkt 33 at 21. This is not true. Defendants Selzer and S&C misstate and misapply the law. "A corporate officer is individually liable for fraudulent corporate acts which he or she participated in or committed." *Briggs Transp. Co. v. Starr Sales Co.*, 262 N.W.2d 805, 808 (Iowa 1978). Here, Selzer is accused of fraud no less than 8 times in Plaintiffs' Amended Complaint—it is the very basis of the entire lawsuit. (Am. Comp. ¶¶ 1-5, 14, 16, 38, 41, 76, 77). As just one example, Defendants pled that the results of the various races, compared to the Defendant Polls, showed that "Defendants, led by Selzer, were manufacturing fake support for Democrat candidates in order to interfere in the elections." *Id.* ¶ 41. Having pled sufficient facts for piercing the corporate veil, there is no basis to dismiss the claims against Selzer individually.

IV. CONCLUSION

For the foregoing reasons, the Court should decline to decide Moving Defendants' motion to dismiss; but should it reach the merits, the motion lacks any legal or factual basis and should be denied in its entirety.

Dated: April 1, 2025

Respectfully Submitted,

By: /s/ Edward Andrew Paltzik
Edward Andrew Paltzik (*pro hac vice*)
BOCHNER PLLC
1040 Avenue of the Americas, 15th Fl.
New York, New York 10018
516-526-0341
edward@bochner.law

/s/ Alan R. Ostergren
ALAN R. OSTERGREN
Attorney at Law
Alan R. Ostergren, PC
500 East Court Avenue
Suite 420
Des Moines, Iowa 50309
(515) 297-0134
alan.ostergren@ostergrenlaw.com

Counsel to Plaintiffs President Donald J. Trump, Representative Mariannette Miller-Meeks, and Former State Senator Bradley Zaun

CERTIFICATE OF SERVICE

I hereby certify that on April 1 2025, I caused a true and correct copy of the foregoing Plaintiffs' Memorandum of Law in Opposition to Defendants J. Ann Selzer and Selzer & Company's Motion to Dismiss to be served on all counsel of record via the Court's CM/ECF system.

Dated: April 1, 2025

/s/ Edward Andrew Paltzik
Edward Andrew Paltzik, Esq.

EXHIBIT 6

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

PRESIDENT DONALD J. TRUMP, an individual, REPRESENTATIVE MARIANNETTE MILLER-MEEKS, an individual, and FORMER STATE SENATOR BRADLEY ZAUN, an individual, *Plaintiffs*, v. J. ANN SELZER, SELZER & COMPANY, DES MOINES REGISTER AND TRIBUNE COMPANY, and GANNETT CO., INC., *Defendants*.	Civil Case No. 4:24-cv-449-RGE-WPK **DEFENDANTS J. ANN SELZER AND SELZER & COMPANY'S REPLY BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS UNDER RULE 12(b)(6)**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

Rules

INTRODUCTION

Plaintiffs' claim that election polling and reporting can be sanctioned as "consumer fraud" is frivolous, lacking any basis in law or fact. Defendant J. Ann Selzer's Motion to Dismiss explained that the First Amendment bars such a cause of action for "false news" because it is antithetical to constitutional history and tradition, ignores decades of jurisprudence where litigants attempted to expand the limited categories of unprotected speech, and lacks precedent in any jurisdiction. Selzer Defs.' Br. Supp. Mot. to Dismiss ("Br."), ECF No. 33 at 1-2, 5-13. Plaintiffs fail to address any of these issues, and their opposition makes it painfully clear the claims were never "warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." Fed. R. Civ. P. 11(b)(2). Not only are they unable to name *a single case* applying or approving their theory of liability, Plaintiffs *fail even to cite* the leading Supreme Court case rejecting a generalized First Amendment exception for "false speech," *United States v. Alvarez*, 567 U.S. 709, 718 (2012) (plurality opinion) (*see* Br. 1, 6, 8, 11). When Plaintiffs bother to cite any authority at all, they offer a mashup of out-of-context case references and misleading partial citations that misapply some of the most rudimentary First Amendment concepts.[1]

[1] The absence of any good faith basis for bringing this case is ironic given President Trump's directive that the Attorney General "seek sanctions against those who engage in frivolous, unreasonable, and vexatious litigation," Presidential Memoranda, *Preventing Abuses of the Legal System and the Federal Court*, March 22, 2025 (https://www.whitehouse.gov/presidential-actions/2025/03/preventing-abuses-of-the-legal-system-and-the-federal-court/) (quoting Fed. R. Civ. P. 11(b)(2)). It is doubly ironic given lead Plaintiff's litigation history. *See*, *e.g.*, *Trump v. Clinton*, 653 F.Supp.3d 1198, 1210, 1233 (S.D. Fla. 2023) (finding lead Plaintiff to be a "prolific and sophisticated litigant who is repeatedly using the courts to seek revenge on political adversaries" and awarding $937,989.39 in sanctions for a "completely frivolous" defamation suit), *appeal docketed* 23-10387; *Trump v. Trump*, 189 N.Y.S.3d 430, 432-33, 446 (N.Y. Sup. Ct. 2023) (ordering payment of defendant's legal fees for bringing for an action targeting "ordinary newsgathering activities … at the very core of protected First Amendment activity").

This case is built entirely on a tissue of shopworn campaign rhetoric and fever-dream conspiracy theories, yet even accepting Plaintiffs' wild factual assertions as true, the Complaint lacks any plausible legal theory on which to grant relief. The allegations of "fraudulent news" are an affront to basic First Amendment law, and Plaintiffs continue to butcher elementary concepts like duty, reliance, causation, and damages under Iowa law. The Court should dismiss the Amended Complaint.

ARGUMENT

I. Plaintiffs' Claim That Election Polls and the News Coverage They Generate Can Be Labelled "Fraud" Unprotected by the First Amendment is Utterly Baseless.

Plaintiffs complain that Selzer's motion attempts to "trivialize" their claims but that would be a redundancy. Pls.' Mem. Opp. Selzer Defs.' Mot. to Dismiss ("Pl. Opp."), ECF No. 52 at 2. Their effort to mask the plain fact they are seeking to penalize "false news" contrary to our constitutional traditions boils down to two risible propositions: (1) that polls are "products" and must be analyzed as "commercial speech" because "creating polls is Selzer's job," and (2) that polls conducted to assess voter sentiment as part of election coverage are not "news." Pl. Opp. 14. Plaintiffs cite nothing to support these astonishing conclusions that fly in the face of hornbook First Amendment law, and they entirely ignore the constitutional analysis in the Motion to Dismiss. *See* Br. at 6-13.

A. There is No General First Amendment Exception for False Speech.

Plaintiffs assert Defendants are "hiding behind a blanket First Amendment immunity defense created from whole cloth," Pl. Opp. 2, but they overlook entirely the historic constitutional bar against penalizing "false news" and the First Amendment rule that speech is presumptively protected unless it falls into a specific exception. Br. at 6-10. True, the unprotected categories include two that turn on falsity—defamation and fraud—but the Supreme Court has expressly

rejected attempts to borrow from those categories to create a broader exception applicable to false statements. *Alvarez*, 567 U.S. at 718 (there is no "general exception to the First Amendment for false statements"). This case does not involve any claim for defamation, nor does it involve any actual allegation of fraud, as previously explained. Br. at 7-8, 10-12. Plaintiffs repeatedly use the word "fraud" as an incantation, but as the Court made clear, "[s]imply labeling an action one for 'fraud' … will not carry the day." *Madigan v. Telemarketing Assoc., Inc.*, 538 U.S. 600, 617 (2003). Any attempt to bring a fraud claim without satisfying its essential elements "would support swift dismissal." *Id*.

Rather than address Defendants' analysis or any of the cases cited, Plaintiffs offer a random collection of one-liners from defamation and commercial speech cases to suggest false speech generally lacks First Amendment protection. Pl. Opp. 12. The obvious problem with this is that it is *precisely* the line of argument the Supreme Court rejected in *Alvarez*. Responding to the government's citation of *the same cases* that now appear in Plaintiffs' opposition—*Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Garrison v. Louisiana*, 379 U.S. 64 (1964); *Va. Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); and *Madigan*, 538 U.S. 600—the Court explained that "isolated statements in some earlier decisions do not support the Government's submission that false statements, as a general rule, are beyond constitutional protection." *Alvarez*, 567 U.S. at 718-19. It emphasized that the Court "has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection." *Id*. at 719. The Eighth Circuit reached the same conclusion in another case that neither Plaintiffs nor their supporting *Amicus* cite, noting "Supreme Court precedent does not currently recognize knowingly false speech as a category of unprotected speech." *281 Care Comm. v. Arneson*, 638 F.3d 621, 635 (8th Cir. 2011).

Undaunted by this, and without the slightest whiff of legal authority, Plaintiffs posit that "[f]alse statements—whether on the pages of a newspaper or elsewhere—are a species of fraud and do not enjoy immunity from tort liability when the speaker makes the statements with knowledge of falsity or reckless disregard for truth or falsity." Pl. Opp. 12. *Really?* No court has ever said so, and *Alvarez* explained why it is illegitimate to mix and match theories as Plaintiffs do here in an attempt to create a general category of unprotected false speech. The Court observed that the "knowing falsity and reckless disregard" standard was drawn from defamation law and exists to ensure the *narrowness* of that exception. It refused to extend defamation liability rules outside that specific category because doing so would "expand[] liability in a different, far greater realm of discourse and expression." *Alvarez*, 567 U.S. at 719. Doing so "inverts the rationale for the exception," and the Court concluded "[a] rule designed to tolerate certain speech ought not to blossom to become a rationale for a rule restricting it." *Id*. at 720. The Eighth Circuit specifically rejected applying defamation principles to "false" political speech because it would create "an unprecedented and vast exception to First Amendment guarantees." *Arneson*, 638 F.3d at 634-35 (quotation omitted).

The Court likewise explained that fraud is a different and unique category because it is confined to false claims made to "secure moneys or other valuable considerations [such as] offers of employment." *Alvarez*, 567 U.S. at 723; *see also id*. at 734 (Breyer, J., concurring) ("Fraud statutes…typically require proof of a misrepresentation that is material, upon which the victim relied, and which caused actual injury."). To expand the concept of fraud "absent any evidence that the speech was used to gain a material advantage" would unleash "a broad censorial power unprecedented in this Court's cases or in our constitutional tradition." *Id*. at 723; *see also Arneson*, 638 F.3d at 634 n.2 (rejecting application of fraud principles "to all knowingly false speech"

because "the Supreme Court has carefully limited the boundaries of what is considered fraudulent speech"). Expanding the concept of fraud in the way Plaintiffs advocate here would cast a chilling effect that "the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom." *Alvarez*, 567 U.S. at 723.

Defendants explained the limited nature of the fraud exception and how Plaintiffs cannot avoid the First Amendment by merely crying fraud. Br. at 10-12. And, consistent with the reasoning in *Alvarez* and *Arneson*, Defendants also observed that accepting Plaintiffs' theory of liability would eviscerate the First Amendment because it has no limiting principle. *Id*. at 12-13. Plaintiffs' response? Silence, except for the argument that would (or should) embarrass a first-year law student—that Selzer's polls and the *Register* are "consumer products" and "commercial speech" because they operate for-profit businesses. Pl. Opp. 11-14. *See also Amicus* Br. of Center for American Rights at 4 ("CAR Br."). That is no response at all.

B. Election Polling is Not Commercial Speech and is Fully Protected Election News Coverage.

Plaintiffs' opposition is littered with assertions that election polls are not "news" but are "for profit *products* that were paid for by DMR and Gannett, and *created* by Selzer and S&C in exchange for payment." Pl. Opp. 11 (overemphasis in original). They describe Selzer's discussion of her findings in news interviews as "commercial promotional efforts." *Id*. at 13. And they conclude Selzer's polls "were *false* speech, and *commercial* speech at that." *Id*. at 11 (again, overemphasis in original). Plaintiffs are so committed to this line of argument that they quote three times (with underscoring and in italics) a statement Selzer made in a Fox News interview that "the polling industry is predicated on getting people to pay money for their products." *Id*. at 11, 14, 28. But this is not the mic-drop moment Plaintiffs assume it is.

Instead, as with "fraud," it is another example of where a word does not mean what Plaintiffs seem to think it means. *See*, *e.g.*, Inigo Montoya; Br. 7. And it reveals the central flaw at the core of Plaintiffs' case. They assume that because Selzer & Company and the *Register* are for-profit businesses, "Plaintiffs' claims are justifiably pled as statutory consumer fraud, fraudulent misrepresentation, and negligent misrepresentation—not as a disagreement with a news story." Pl. Opp. 11. Plaintiffs cite no authority to support this obvious fallacy—for none exists—and the few cases they do cite merely attest to the existence of the commercial speech doctrine. *Id*. at 13. "Commercial speech" is not speech someone was paid to produce, as Plaintiffs evidently think. The commercial speech doctrine set forth in *Central Hudson Gas & Electric Corp. v. Public Services Commission,* 447 U.S. 557 (1980), applies to advertising—speech proposing commercial transactions. Worse still, Plaintiffs fail to quote those parts of the cases they cite that undermine the bases for their argument.[2] And Plaintiffs' errors are not limited to sins of omission.[3] Lacking any support for their central load-bearing premise about commercial speech, Plaintiffs' case collapses.

---

[2] *See*, *e.g.*, *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 482 (1989) ("[S]peech that proposes a commercial transaction…is what defines commercial speech" and not just "speech for profit …. Some of our most valued forms of fully protected speech are uttered for a profit.") (citations omitted); *Ohralik v. Ohio State Bar Assn*., 436 U.S. 447, 457-58 (1978) (distinguishing between regulation of in-person solicitation by lawyers and "political expression or an exercise of associational freedom"); *Florida Bar v. Went For It, Inc*., 515 U.S. 618, 634-35 (1995) ("[T]his case … concerns pure commercial advertising.").

[3] Both Plaintiffs and supporting *Amicus* quote part of a sentence from *Cincinnati v. Discovery Network*, 507 U.S. 410, 423 (1993) that "much of the material in ordinary newspapers is commercial speech," presumably to support their position that newspapers and those who provide news analysis are, or can be, "commercial speakers" subject to fraud claims. Pl. Opp. 13; CAR Br. 4. However, far from supporting their argument, the Supreme Court made that observation solely to explain why the commercial speech doctrine was irrelevant to an ordinance governing the placement of news boxes on city streets. *Discovery Network*, 507 U.S. at 426-28 ("[T]he distinction Cincinnati has drawn has absolutely no bearing on the interests it has asserted").

But wait, there's more. The problem is not just that Plaintiffs lack any legal authority for their baseless legal assertions; it is that they aggressively ignore overwhelming precedent to the contrary. The Supreme Court and the Eighth Circuit frequently reaffirm the very basic concept that speakers do not "shed their First Amendment protections by employing the corporate form to disseminate their speech. This fact underlies our cases involving everything from movie producers to book publishers to newspapers." *303 Creative v. Elenis*, 600 U.S. 570, 594 (2023). Rather, "commercial and corporate entities, including utility companies and newspapers, have received First Amendment protection" because they "contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster." *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 751-52 (8th Cir. 2019) (citations omitted). Cases supporting this constitutional truism are almost too numerous to mention.[4]

Plaintiffs' bald assertion that opinion polling during a presidential election is not "news" is even more nonsensical. Like its other core premises, this claim is backed by zero authority, except this time, Plaintiffs don't even go through the motion of citing case law. Rather, they issue the imperious decree that "legitimate 'news' is *not bought and paid for*, or created in exchange for money," Pl. Opp. 14, which merely restates the fallacy that for-profit news organizations lack

[4] *See*, *e.g, United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 465, 470 (1995) (the First Amendment protects federal employees' right to "seek compensation for their expressive activities in their capacity as citizens" as well as "the public's right to read and hear what the employees [produce]"); *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 117 (1973) ("The power of a privately-owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success; and, second, the journalistic integrity of its editors and publishers."); *N.Y. Times Co. v. Sullivan,* 376 U.S. 254, 266 (1964) ("That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold."); *Joseph Burstyn v. Wilson*, 343 U.S. 495, 501 (1952) ("That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment."). There are no contrary cases.

constitutional protection. Under Plaintiffs' theory, the First Amendment excludes news organizations if they pay opinion writers, expert analysts, or, as in this case, a top-notch pollster to measure voter sentiment.

"[L]egitimate 'news,'" Plaintiffs proclaim, "involves events of public interest that occur at the local, national, or world levels." *Id*. This is a bizarre assertion given that presidential elections obviously fit the bill and in light of the "practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs" including "discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes." *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966). Election polling is part of this process and is protected by the First Amendment. *Daily Herald, Inc. v. Munro*, 838 F.2d 380, 384 (9th Cir. 1988). As the Supreme Court observed, the Constitution "specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars … to play an important role in the discussion of public affairs." *Mills*, 384 U.S. at 219 (invalidating Alabama Corrupt Practices Act prohibition of publishing political editorials on election day) (citation omitted). Defendants' activities are the essence of what is historically understood to be "legitimate news."

But that is the problem with this case in a nutshell. Plaintiffs throw around terms like "fraud," "product," and "election interference" without any serious attempt to connect them to relevant legal doctrines and, for the most part, without citation to any legal authority. Contrary to the thrust of Plaintiffs' opposition, the use of italics cannot substitute for citing cases.

C. No Case Law Supports Plaintiffs' Theory of Liability.

Neither Plaintiffs nor their supporting *Amicus* cites a single case supporting their theory of liability, while Defendants identified the smattering of cases that quickly dismissed attempts to

bring such frivolous claims. Br. 1, 7, 12-13. Plaintiffs group the cases together to try to distinguish them *en masse*, but to no avail. Pl. Opp. 15-16. Their main argument is that each of the cited cases involved "*reporting* on legitimate *news* matters, not on a matter that a newspaper itself created out of thin air," but that merely reinforces Plaintiffs' fundamental misunderstanding of the "news" concept. They also posit that the cited cases involved "speech that was alleged to be intentionally false or fraudulent," *id*. at 15, which is not different from what Plaintiffs allege here and only confirms why dismissal of those cases is so on-point. Otherwise, Plaintiffs merely try to nitpick nonmaterial factual differences without addressing the ways the cases undermine their central premise that news can be punished as "fraud."

Notably, Plaintiffs try to distinguish *Washington League for Increased Transparency & Ethics v. Fox News*, 2021 WL 3910574 (Wash. Ct. App. 2021) ("*WASHLITE*") by observing it involved "grievances about the manner of reporting on the subject of COVID-19, one of the most substantial and legitimate news stories in recent history." Pl. Opp. at 16. But one might say the same thing about reporting on the 2024 presidential election. *See*, *e.g.*, *Amicus* CAR at 4-5 ("In this instance, the Register's reporting on a presidential campaign is reporting on a 'particularly newsworthy fact' … which is not commercial speech, even when run in a newspaper."). For its part, *Amicus* suggests that the *WASHLITE* plaintiff's inability to cite any authority "for the proposition that false statements about threats to public health, even if recklessly made, fall within any exception to the First Amendment … does not mean that such authority does not exist." CAR Br. 5-6 n.1. Perhaps. But if any cases that support their claims are out there, it is incumbent on

Plaintiffs or *Amicus* to cite them, but they have not.[5] In the United States there is no such thing as a claim for "fraudulent news," Br. at 1, so the Amended Complaint should be dismissed.

II. Plaintiffs' Claims are Facially Deficient Under Iowa Law.

Even setting aside the First Amendment barriers to each of Plaintiffs' claims, they fail on their own accord, as Plaintiffs continue to butcher elementary concepts like duty, reliance, causation, and damages.

A. Plaintiffs Fail to Plead a Cognizable ICFA Claim.

The Court can easily resolve the ICFA claim because Plaintiffs concede the absence of a necessary element. An ICFA claim lies for victims of "deception" and "fraud" only when "in connection with the advertisement, sale, or lease of *consumer merchandise*." Iowa Code § 714H.3 (2020) (emphasis added). But as Defendants' opening brief explained, Selzer's polls are not "consumer merchandise" because they are not sold or leased "primarily for personal, family, or household purposes." Br. at 17 (quoting Iowa Code § 714H.2(4) (ICFA section defining "consumer merchandise")). In response, Plaintiffs do not assert Selzer's polls qualify as "consumer merchandise" but only that "the Supreme Court of Iowa has recognized that ICFA claims 'are not the same as common law fraud actions.'" Pl. Opp. at 18 (quoting *State ex rel. Att'y Gen. of Iowa v. Autor*, 991 N.W.2d 159, 167 (Iowa 2023)).

[5] Plaintiffs make much of *National Institute of Family and Life Advocates v. Raoul*, 685 F.Supp.3d 688, 695 (N.D. Ill. 2023), a *cf* cite in Defendants' motion to dismiss. Pl. Opp. 16-17. But the dictum they quote refers to a hypothetical application of a consumer fraud law to misrepresentations about the provision of medical services. 685 F.Supp.3d at 704-05. It provides no helpful authority here.

This is true—and it is precisely why their ICFA claim fails. Common law fraud need not involve "consumer merchandise,"[6] but a claim under the ICFA does. Iowa Code § 714H.3. Plaintiffs' response does not even attempt to argue Selzer's polls qualify under the statute, so their ICFA claim is facially deficient. *See Butts v. Iowa Health Sys.*, 863 N.W.2d 36, 2015 WL 1046119, at *8 (Iowa Ct. App. 2015) (table) (ICFA does not apply when defendant "does not offer or sell consumer merchandise").

Plaintiffs' remaining arguments fare no better. With respect to damages, Selzer's brief explained that because Plaintiffs filed this suit in their individual capacities they are precluded from claiming "damage" to their campaigns. Br. at 14 (citing *FEC v. Cruz*, 596 U.S. 289, 294 (2022) (a campaign is "a legal entity distinct from the candidate."")). In response, Plaintiffs assert Mr. Trump had to "address" the Selzer poll "publicly at a moment when he was tremendously strained for time" and Ms. Miller-Meeks had to endure a "stressful" recount. Pl. Opp. at 21. Plaintiffs have confused "distraction" with legal harm. Separately, Ms. Miller-Meeks protests that the Court should accept her allegation that she paid for a recount, yet under Iowa law the government, not Miller-Meeks' campaign, covers those costs. Ms. Miller-Meeks insists that by citing the Iowa statute Defendants "inappropriately attempt to introduce facts not set forth in the Amended Complaint." Pl. Opp. at 12. But this is a matter of law, not fact, and, in any event, statutes are subject to judicial notice. *Lamar v. Micou*, 114 U.S. 218, 223 (1885). To the extent Miller-Meeks suggests the recount may have added legal expenses, this, again, at most affected her campaign, which is not a party to this case.

[6] *See McGough v. Gabus*, 526 N.W.2d 328, 331 (Iowa 1995) ("The elements of fraud are: (1) representation, (2) falsity, (3) materiality, (4) scienter, (5) intent to deceive, (6) justifiable reliance, and (7) resulting injury and damage.").

For Zaun, Plaintiffs' damages theory boils down to an assertion that Selzer's poll affected how Iowans voted. But "Federal courts do not sit to award post-election damages to defeated candidates." *Hutchinson v. Miller*, 797 F.2d 1279, 1287-88 (4th Cir. 1986); *see also Sw. Publ'g Co. v. Horsey*, 230 F.2d 319, 322-23 (9th Cir. 1956) (noting "there may be not less than a thousand factors which enter into the vagaries of an election" and holding that "loss of an election" damages are unrecoverable because they are "speculative and conjectural"). Based on the plain text of the ICFA and under basic principles of tort law, the Court must dismiss Plaintiffs' statutory fraud claim.

B. Plaintiffs Fail to Plead a Fraudulent Misrepresentation Claim.

Plaintiffs' fraudulent misrepresentation claim also fails at the threshold. The "representations" they purport to rely on are the findings of Selzer's poll, but that has nothing to do with fraud. The "representation" element pertains to a statement made to induce another into entering a transaction, such as a false statement made by a seller to a buyer. William L. Prosser, *Handbook of the Law of Torts* § 105, at 684 (4th ed. 1971); *see Alvarez*, 567 U.S. at 722-23 (distinguishing false statements generally from fraud, which is designed to "secure moneys or other valuable considerations, [like] offers of employment"). Yet Plaintiffs point to no representations by Selzer for the purpose of inducing *anyone* (much less Plaintiffs) into a purchase.

Plaintiffs also botch the elements of materiality, scienter, and intent to deceive. They insist "[p]olling affects voter turnout and enthusiasm," Pl. Opp. at 24, apparently under the belief that "material" means "something important to the public." It doesn't. Rather, materiality refers to whether a defendant made a false representation about a sufficiently critical aspect of a transaction that affected the plaintiff's decision about whether to proceed. Restatement (Second) of Torts § 538 (Am. L. Inst. 1977). Same with scienter. A plaintiff must establish that the defendant not only made a knowingly false material statement but did so while making a representation to plaintiff

about a contemplated transaction.[7] Likewise with intent to deceive. The plaintiff must show not just that the defendant made false representation with knowledge of its falsity, but did so in the context of attempting to deceive a plaintiff into entering into a transaction.[8] On all three elements, Plaintiffs are cutting out the transaction inducement element of fraud—the *sine qua non* ingredient that makes fraud a cognizable cause of action—and hoping the Court doesn't notice the misdirection.

On justifiable reliance, Plaintiffs assert they and "millions of other citizens" relied on Selzer's poll. Pl. Opp. at 25. Yet again, Plaintiffs attempt to bypass the transaction aspect of fraud. Justifiable reliance means that a defendant justifiably relied on a representation by a plaintiff when deciding whether to enter a transaction. *See Spreitzer v. Hawkeye State Bank*, 779 N.W.2d 726, 737 (Iowa 2009) ("[T]he entire context *of the transaction* is considered to determine if the justifiable-reliance element has been met." (emphasis added)); *Lockard v. Carson*, 287 N.W.2d 871, 878 (Iowa 1980) (describing justifiable reliance element by reference to "a party to a transaction"). If justifiable reliance were not tethered to an induced transaction, gamblers would sue ESPN analysts for failed sports bets, claiming they "justifiably relied" on the sports expertise of the network's on-air talent. That is not how tort law works.

C. Plaintiffs Fail to Plead a Negligent Misrepresentation Claim.

Plaintiffs' negligent misrepresentation claim also fails out of the gate because Selzer had no legal duty to supply them with information. Plaintiffs correctly note that under Iowa law "those

[7] *See* Restatement (Second) of Torts § 531 ("One who makes a fraudulent misrepresentation is subject to liability … for pecuniary loss suffered by [plaintiff] through their justifiable reliance in the type of transaction in which he intends or has reason to expect their conduct to be influenced.").

[8] *See B & B Asphalt Co. v. T. S. McShane Co., Inc.*, 242 N.W.2d 279, 284 (Iowa 1976) ("The element of intent to deceive is closely related" to scienter and "is ordinarily established from the same evidence which proves the element of scienter.").

liable are only those who supply information in an advisory capacity and are manifestly aware of how the information will be used and intend to supply it for that purpose." Pl. Opp. at 27 (quoting *Van Sickle Const. Co. v. Wachovia Com. Mortg.*, 783 N.W.2d 684, 691 (Iowa 2010) (cleaned up)). But Plaintiffs ignore their own statement of the law and never explain how Selzer "supplied information" to them "in an advisory capacity."

Selzer had no contract with Plaintiffs, express or implied, and Plaintiffs do not argue otherwise. The cases they cite hold that when a party hires an expert to supply information, that expert can be liable to the one who engaged them if the performance of those duties falls below the standard of care. Plaintiffs claim "[n]o clear guideline exists to define whether a party is in the business of supplying information." Pl. Opp., at 27 (quoting *Conveyor Co. v. Sunsource Tech. Servs.*, 398 F.Supp.2d 992, 1015 (N.D. Iowa 2005)), but that is irrelevant. The pertinent question is whether Selzer had a legal duty to supply *Plaintiffs* with information.[9] She did not, and Plaintiffs offer no authority creating a legal duty between a pollster and the politicians whose public support the pollster measures.

Plaintiffs ask the Court to hold that newspapers and pollsters are, for purposes of negligent misrepresentation, "in the business of supplying information." Pl. Opp. at 27. In short, they are asking the Court to hold that consumers of news should have a cause of action against news providers that get a story wrong through negligence. But that request is squarely foreclosed by *New York Times v. Sullivan*. 376 U.S. at 287-88 (evidence against newspaper supporting "at most a finding of negligence" was "constitutionally insufficient to show the recklessness … required

[9] *See* Restatement (Second) of Torts § 552 cmt. h (liability for negligent misrepresentation exists only as "to those persons for whose benefit and guidance it is supplied").

for a finding of actual malice"). In any event, Plaintiffs provide no case law to support their position.

Plaintiffs shift to a new theory for their negligent misrepresentation claim, now arguing Selzer negligently failed to prevent the poll from "leaking." But there are several problems with this. First, it's not in the Amended Complaint. Second, Selzer owed no legal duty to Plaintiffs not to "leak" the poll; it's *Selzer's poll*, and Plaintiffs do not allege Selzer had any contractual or legal duty to keep the results a secret. Third, the theory fails basic logic: Plaintiffs fail to explain how they possibly could have suffered legal harm from a poll *intended* for public release that was released just hours after the alleged "leak." And fourth, Plaintiffs argue "a complete binding contract between the parties is not a prerequisite to a duty to use due care," Pl. Opp. 29 (quoting *Davidson & Jones, Inc. v. New Hanover Cnty.*, 41 N.C. App. 661, 666 (1979)), but there must be *some* relationship between the parties (for example, quasi-contract) for a duty to exist, but there is none here.

Nor may Plaintiffs create a duty between the parties by invoking *res ipsa loquitur*. This narrow doctrine allows a fact-finder to infer a breached legal duty when an injury happens which (1) was caused by an instrumentality under the exclusive control and management of the defendant, and (2) ordinarily would not occur if reasonable care had been used. *Banks v. Beckwith*, 762 N.W.2d 149 (Iowa 2009). Medical instruments left inside surgery patients and barrels falling on building occupants are classic examples. *See* Restatement (Second) of Torts § 328D cmt. a (barrels); *id.* cmt. d (surgical sponges). But *res ipsa loquitur* cannot *create* a legal duty, it is simply a method of establishing a breach of an existing duty. *See Palleson v. Jewell Co-op. Elevator*, 219 N.W.2d 8, 13 (Iowa 1974) ("The doctrine of *res ipsa loquitur* is only a rule of evidence, not of substantive tort law."). Plaintiffs fail to plead a plausible cause of action under any theory.

III. Piercing the Corporate Veil.

The Court should also reject Plaintiffs' attempt to pierce the corporate veil by citing the "fraud" exception to the protection of the corporate form. Pl. Opp. at 30. As explained above, what Plaintiffs allege in this case is not "fraud" and even had they identified a relevant cause of action, they have not come close to supporting its elements. Therefore, they cannot pierce the corporate veil on claims I and II. *See Ceran v. Reisch*, 2020 WL 6074114, at *9 (N.D. Iowa. Sept. 9, 2020) (dismissing attempt to pierce the corporate veil when the plaintiff could not sustain the underlying fraud claim). Finally, Plaintiffs provide no explanation for how the negligent misrepresentation claim (claim III) can support piercing the corporate veil. There is no exception to the corporate veil for claims based in negligence.

CONCLUSION

This lawsuit is, as the Bard put it, a tale "full of sound and fury, signifying nothing." William Shakespeare, *Macbeth*, Act 5, Scene 5. Once you get past the groundless assertions, campaign-style hyperbole, and overheated conspiracy theories, there is nothing left. No legal basis whatsoever supports the claims, and Plaintiffs' opposition to the motions to dismiss reveals both shocking unfamiliarity with basic concepts of First Amendment law and a disregard of the pleading requirements for fraud or misrepresentation under Iowa law. As one court summed it up in another of President Trump's attacks on free speech: "This case should never have been brought. Its inadequacy as a legal claim was evident from the start. No reasonable lawyer would have filed it. Intended for a political purpose, none of the counts of the amended complaint stated a cognizable legal claim." *Trump v. Clinton*, 653 F.Supp.3d at 1207. The Court should dismiss this case with prejudice.

Dated: April 15, 2025

Respectfully Submitted,

/s/ *Robert Corn-Revere*

Robert Corn-Revere*†
(DC Bar No. 375415)
Conor T. Fitzpatrick*
(Mich. Bar No. P78981)
FOUNDATION FOR INDIVIDUAL
RIGHTS AND EXPRESSION (FIRE)
700 Pennsylvania Ave., SE; Suite 340
Washington, DC 20003
(215) 717-3473
bob.corn-revere@thefire.org
conor.fitzpatrick@thefire.org

Greg H. Greubel
(Iowa Bar No. AT0015474)
Adam Steinbaugh*
(Cal. Bar No. 304829)
FOUNDATION FOR INDIVIDUAL
RIGHTS AND EXPRESSION (FIRE)
510 Walnut St., Suite 900
Philadelphia, PA 19106
(215) 717-3473
greg.greubel@thefire.org
adam@thefire.org

Matthew A. McGuire
(Iowa Bar No. AT0011932)
NYEMASTER GOODE, P.C.
700 Walnut St., Suite 1300
Des Moines, IA 50309
(515) 283-8014
mmcguire@nyemaster.com

Attorneys for Defendants J. Ann Selzer and Selzer & Company

* *Admitted pro hac vice.*
† *Lead counsel*

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing document was served upon all parties of record through the Court's CM/ECF electronic filing system.

/s/ *Robert Corn-Revere*

EXHIBIT 7

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

PRESIDENT DONALD J. TRUMP, an individual, REPRESENTATIVE MARIANNETTE MILLER-MEEKS, an individual, and FORMER STATE SENATOR BRADLEY ZAUN, an individual, Plaintiffs, v. J. ANN SELZER, an individual, SELZER & COMPANY, DES MOINES REGISTER AND TRIBUNE COMPANY, and GANNETT CO., INC., Defendants.	Case No. 4:24-cv-00449-RGE-WPK **DEFENDANTS DES MOINES REGISTER AND TRIBUNE COMPANY AND GANNETT CO., INC.'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS**

TABLE OF CONTENTS

INTRODUCTION

Plaintiffs' Opposition (Dkt. 51, "Opposition") to Press Defendants' Motion to Dismiss, (*see* Dkts. 28, 35, jointly the "Motion"), highlights the legal defects of Plaintiffs' claims. Specifically, the Opposition fails to explain how Plaintiffs have alleged viable claims under the Iowa Consumer Fraud Act or for fraudulent or negligent misrepresentation under any legal standard. The laws that Plaintiffs claim Press Defendants violated were designed to regulate commercial business practices and consumer transactions, not to constrain news reporting by a community newspaper. A simple, straight-forward application of the law requires dismissal of the Amended Complaint.

LEGAL STANDARDS

The correct standards of review are undisputed. (*Compare* Dkt. 35 at 11–12, *with* Dkt. 51 at 10–12.) The Parties agree that "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to survive a motion to dismiss, *see Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and that the heightened pleading requirements of Rule 9(b) mandate that fraud be pleaded with particularity. *See E-Shops Corp. v. U.S. Bank Nat'l Ass'n*, 678 F.3d 659, 663 (8th Cir. 2012); Fed. R. Civ. P. 9(b). Plaintiffs do not contest that *The Register* articles and attachments appended to the Motion to Dismiss as Exhibits A–K are both incorporated by reference in the pleadings and integral to the claim. They are therefore properly in the scope of the Court's review. (Dkt. 35 at 3 n.1.)

Nevertheless, Plaintiffs declined to respond to many of the arguments raised in the Motion to Dismiss. (*See, e.g.*, Dkt. 51 at 14 (stating that the Opposition responds to only one so-called "primary argument" regarding Plaintiffs' ICFA claim).) "Courts in the Eighth Circuit have consistently acknowledged that failure to respond to arguments raised in a motion to dismiss constitutes an abandonment of that claim or concession to the opposing arguments." *Muller v. Blue*

Diamond Growers, 683 F. Supp. 3d 933, 937 (E.D. Mo. 2023) (quoting *Little v. U.S. Dep't of Def.*, No. 4:21-CV-1309, 2022 WL 1302759, at *3 (E.D. Mo. May 2, 2022)). This rule applies even to individual arguments on particular claims. *See, e.g.*, *Maloney v. Ameristar Casinos, Inc.*, No. 4:09-CV-0673, 2010 WL 11508769, at *2 (W.D. Mo. Mar. 9, 2010); *Espey v. Nationstar Mortg., LLC*, No. 13-2979, 2014 WL 2818657, at *11 (D. Minn. June 19, 2014). Therefore, Plaintiffs' failure to respond to Press Defendants' arguments identified below constitutes a concession regarding the correctness of Press Defendants' positions.

ARGUMENT

I. PLAINTIFFS' MOTION FOR REMAND DOES NOT MOOT PRESS DEFENDANTS' MOTION TO DISMISS

Plaintiffs attempt to avoid review of the merits of their claims by arguing that Press Defendants' Motion to Dismiss is moot in light of Plaintiffs' pending Motion for Remand. (Dkt. 51 at 7–9.) For the reasons stated in Press Defendants' Opposition to Motion for Remand, incorporated herein by reference, this is not correct. (*See* Dkt. 48.) This case was properly removed via snap removal; the Court had diversity jurisdiction at the time of removal; and President Trump's subsequent attempt to destroy diversity jurisdiction is not permitted, *inter alia*, under Rule 15. (*Id.*) As such, the Court should rule on Press Defendants' Motion to Dismiss with respect to each of Plaintiffs' claims.

II. PLAINTIFFS' IOWA CONSUMER FRAUD ACT CLAIMS MUST BE DISMISSED

A. Plaintiffs' Claims Do Not Relate to a Consumer Transaction

Plaintiffs do not state a claim under the Iowa Consumer Fraud Act, and the Opposition does nothing to change that fact. The heart and soul of ICFA is that the plaintiff is *required* to bring the claim as a consumer of the actionable consumer merchandise. *Mannino v. McKee Auto Ctr.,*

Inc., No. 4:23-cv-00262, 2024 WL 4884440, at *3 (S.D. Iowa Sept. 5, 2024). This is not what Plaintiffs pleaded, and their Opposition does not explain or cure these pleading deficiencies.

First, Plaintiffs do not contest that they are not "consumers" of "consumer merchandise" as required to state a claim under ICFA. (Dkt. 35 at 13–16.) ICFA limits a cause of action only to a "*consumer* who suffers an ascertainable loss of money or property" with respect to some "*consumer merchandise*." Iowa Code §§ 714H.3(1), .5(1) (emphasis added). But Plaintiffs do not—and cannot—allege they have been harmed through a consumer transaction with Press Defendants. No Plaintiff asserts that his or her claims are based on purchasing *The Register* for his or her personal benefit, nor do Plaintiffs attempt to explain why they should not be required to do so to state a claim under ICFA.

Second, the Motion demonstrates that Plaintiffs made no competent allegation that the Iowa Poll was done "in connection with the . . . sale . . . of consumer merchandise" as required under ICFA. *Id.* § 714H.3; *see also Butts v. Iowa Health Sys.*, No. 13-1034, 2015 WL 1046119, at *9 (Iowa Ct. App. Mar. 11, 2015) (affirming summary judgment on ICFA claim where defendant did "not offer or sell consumer merchandise"). Plaintiffs offer conclusory denials of their pleading deficiencies, but they present no well-pleaded factual allegations or arguments to support these denials. (Dkt. 51 at 12.) Instead, Plaintiffs only claim that ICFA as a general matter requires a lesser showing than common law fraud. (*Id.*) But this comparison of legal standards is irrelevant when the pleaded allegations fail to satisfy the ICFA standard under the private-right-of-action provisions of Iowa Code chapter 714H. (Dkt. 35 at 24–28.)

Plaintiffs attempt to avoid these pleading deficiencies by arguing for the first time in their Opposition that they suffered some kind of personal harm, even though such purported personal harm is not alleged in the Amended Complaint. They now claim that their "individual

reputation[s]" or "personal identit[ies]" are interrelated or otherwise linked to their professional reputations and identities such that any harm they suffered in their professional capacities is also harm they suffered in their individual capacities. (Dkt. 51 at 14–16.) This misses the mark. The alleged harm Plaintiffs claim to have suffered had nothing to do with whether they purchased or even read *The Register* or the Iowa Poll results. Moreover, as noted, these allegations are not contained in Plaintiffs' Amended Complaint, so this Court may not consider them. *See Seneca Cos., Inc. v. D&H United Fueling Sols., Inc.*, No. 4:24-cv-00023, 2024 WL 5440858, at *4 (S.D. Iowa July 29, 2024) (allegations of fact "outside the pleading"—including those stated "in support of . . . the pleading"—that seek to "provide[] some substantiation for" the Complaint "are not considered" (quoting *Gibb v. Scott*, 958 F.2d 814, 816 (8th Cir. 1992))).

B. The Iowa Poll Cannot Form the Basis of an ICFA Claim

Plaintiffs allege the conduct that violated ICFA was the Iowa Poll, claiming it was: (1) a prohibited "deception"; or (2) an "unfair act or practice." (Am. Compl. ¶¶ 116–17.) In their Opposition, Plaintiffs characterize the Iowa Poll as "false" because it: (1) "falsely portrayed that [Vice President] Harris was leading President Trump in Iowa by three points, just days before the election, despite President Trump ultimately winning in Iowa by 13%"; (2) "falsely reported that [Rep. Miller-Meeks] was trailing her Democratic opponent . . . by sixteen points, . . . despite her ultimately winning by a very tight margin of 0.2%"; and (3) "falsely reported a strong surge in Democratic turnout and votes, just days before Zaun's race," causing him to lose. (Dkt. 51 at 14–16.)

The Iowa Poll is a non-actionable opinion and cannot form the basis for Plaintiffs' "deception" and "unfair practice" claim. Plaintiffs do not substantively contest that the Iowa Poll results are non-actionable statements of opinion. (*See* Dkt. 35 at 16–24.) Nor do they contest in

any way that the Iowa Poll and reporting on it cannot constitute "material facts" as required under ICFA. (*Id.*) Under ICFA, "a claimant alleging an unfair practice, deception, fraud, false pretense, false promise, or misrepresentation *must prove that the prohibited practice related to a material fact or facts*." Iowa Code § 714H.3(1) (emphasis added). The determination of whether a statement is an opinion or potentially actionable statement of fact is a question of law for this Court to decide. *Others First, Inc. v. Better Bus. Bureau of Greater St. Louis, Inc.*, 829 F.3d 576, 580–81 (8th Cir. 2016); *Andrew v. Hamilton Cnty. Pub. Hosp.*, 960 N.W.2d 481, 489 (Iowa 2021). Because it is undisputed that the polls are not "material facts" for purposes of ICFA, Plaintiffs fail to state a claim under the statute.

C. Plaintiffs Do Not Allege Any Facts to Establish ICFA's Proximate Cause Element

Plaintiffs do not contest that the Iowa Poll did not proximately cause them any consumer injury. ICFA requires that any loss be the "result of a practice or act prohibited" by the statute. *Mannino*, 2024 WL 4884440, at *3. If Plaintiffs did not "rel[y] on the statement"—*i.e.*, rely on the Iowa Poll results—they "cannot prove that the statement was the proximate cause of [their] injury." *Tri-Plex Tech. Servs., Ltd. v. Jon-Don, LLC*, 241 N.E.3d 454, 462 (Ill. 2024); *see also State ex rel. Miller v. Hydro Mag, Ltd.*, 436 N.W.2d 617, 621 (Iowa 1989). Though they argue they were each "harmed" in various abstract ways, (Dkt. 35 at 14–17), none of them so much as insinuates that they engaged in any consumer conduct in reliance on the polls. As there are no allegations that Plaintiffs *relied* on the Iowa Poll, there is no proximate causation pleaded and thus no ICFA claim.

D. Plaintiffs Do Not Allege Any Legally Cognizable Damages as Required by ICFA

Finally, ICFA provides a private right of action only for consumers who have "suffer[ed] an ascertainable loss of money or property as the result of a prohibited practice or act." Iowa Code

§ 714H.5(1).[1] ICFA itself defines "actual damages" as "all compensatory damages proximately caused by the prohibited practice or act that are reasonably ascertainable in amount." *Id.* § 714H.2.

In responding to Press Defendants' so-called "primary" argument regarding their ICFA claim, Plaintiffs recount their alleged injuries: (1) President Trump suffered harm to his "reputation, his image, and his viability as a candidate"; (2) Rep. Miller-Meeks "was subjected to a costly and stressful recount process . . . which imposed reputational, financial, and emotional costs to her in a variety of ways"; and (3) Zaun suffered "personal, reputational, and professional harm." (Dkt. 51 at 14–16.) Regardless of how many times Plaintiffs reiterate these alleged injuries, none of them are remediable under ICFA as a matter of law.

Courts analyzing ICFA have rejected claims when a party has neither a contractual nor property interest in the consumer merchandise in dispute. *See McKee v. Isle of Capri Casinos, Inc.*, 864 N.W.2d 518, 533 (Iowa 2015); *Mannino*, 2024 WL 4884440, at *9; *cf. Blackford v. Prairie Meadows Racetrack & Casino, Inc.*, 778 N.W.2d 184, 190 (Iowa 2010). Courts likewise conclude that a plaintiff fails to show an ascertainable loss as a matter of law where the plaintiff does not incur any out-of-pocket expenses. *See Poller v. Okoboji Classic Cars, LLC*, 960 N.W.2d 496, 523 (Iowa 2021); *McKee*, 864 N.W.2d at 533; *Becirovic v. Malic*, No. 24-0219, 2024 WL 4759228, at *10 (Iowa Ct. App. Nov. 13, 2024).

Here, Plaintiffs have not, as a matter of law, adequately alleged "an ascertainable loss of money or property" or out-of-pocket expenses that is redressable through an ICFA claim. Indeed,

[1] Plaintiffs parenthetically suggest they do not need to show damages to establish an ICFA claim. (Dkt. 51 at 12 (quoting *State ex rel. Miller*, 436 N.W.2d at 622).) This suggestion is based on an inapplicable citation to case law under the Attorney General ICFA statute, *not* the private-right-of-action ICFA statute which indisputably controls the present case. *Compare* Iowa Code § 714.16, *with id.* § 714H.5. Given that Plaintiffs proceed to acknowledge that they are required to "ple[a]d harm in support of their [ICFA] claim," (*see* Dkt. 51 at 14), their misplaced citation to a case interpreting the Attorney General ICFA statute should be ignored.

President Trump and Zaun concede that their only harm was reputational and professional, and neither allege they ever purchased *The Register*. (Dkt. 51 at 14–16.) Rep. Miller-Meeks alleges that she "was subjected to a costly . . . recount process" and purchased the print edition containing the Iowa Poll, (*id.* at 15), but nowhere in the Amended Complaint do Plaintiffs allege that Rep. Miller-Meeks personally incurred any out-of-pocket expenses in the recount or that the value of the print edition purchased is somehow less than the product as represented. Accordingly, Plaintiffs' ICFA claim should be dismissed as a matter of law.

III. PLAINTIFFS' FRAUDULENT MISREPRESENTATION CLAIMS MUST BE DISMISSED

Given their inability to establish a violation of the ICFA, Plaintiffs have added claims for fraudulent misrepresentation and negligent misrepresentation to their Amended Complaint. These claims are also deficiently pleaded.

First, Plaintiffs do not meaningfully engage with Press Defendants' argument that Plaintiffs failed to plead an actionable representation because the Iowa Poll results are non-actionable statements of opinion, not of fact. (*See* Dkt. 35 at 31.) Plaintiffs argue that the Iowa Poll should be considered a "representation" because it was "presented as [an] authoritative, data-driven assessment[] of voter preferences" and was "promoted . . . with headlines and editorial commentary endorsing [its] accuracy."[2] (Dkt. 51 at 16.) But none of these new arguments—to the extent they can be considered—counter or are inconsistent with the reality that the Iowa Poll results are non-actionable statements of opinion. (*See* Dkt. 35 at 17–22.) Further, Plaintiffs mischaracterize their own pleading with these new claims. Plaintiffs' support for their claims about the way in which the Iowa Poll was "presented" are quotes from *third parties* like Rachel Maddow,

[2] Plaintiffs' citation to the *Midwest Home Distributor* case for their proposition is inapt; the questions of representation, materiality, and falsity were expressly not in dispute in that case. *Midwest Home Distrib., Inc. v. Domco Indust. Ltd.*, 585 N.W.2d 735, 742 (Iowa 1998).

not from Defendants. (*See* Am. Compl. ¶ 78.) Plaintiffs do not explain how a statement by a third party could transform the Iowa Poll results into an actionable representation.

Second, Plaintiffs have not alleged in any cognizable fashion how the Iowa Poll or its results were false. Plaintiffs allege that the poll results were false simply because they deviated from the final election results. (Dkt. 51 at 16–17.) But they have not alleged any falsity *with respect to the poll itself*. To state a cognizable claim with particularity, Plaintiffs must allege a false representation, but a polling "error" is not a falsehood, and disagreement with a poll is not enough to establish a false representation with particularity as required by Rule 9(b). *See BJC Health Sys. v. Columbia Cas. Co.*, 478 F.3d 908, 918 (8th Cir. 2007) (finding allegations deficient under Rule 9(b) where "complaint expresses disagreement with the conclusion of the second actuarial analysis, but it does not specify where and how the analysis falls short").

Third, Plaintiffs fail to allege facts supporting that the representations at issue are material as a matter of law. Plaintiffs instead rely on the wholly conclusory assertion that the Iowa Poll results were "material" because "[p]olling affects voter turnout and enthusiasm" and "Selzer [is] known for her extraordinary influence over expectations for the results of Iowa and national elections." (Dkt. 51 at 17.) However, with respect to fraudulent misrepresentation, a fact is only material if it is "likely to affect [a consumer's] choice of, or conduct regarding, *a product*." *State ex rel. Miller v. Vertrue, Inc.*, 834 N.W.2d 12, 34 (Iowa 2013) (emphasis added) (internal quotations omitted). Plaintiffs did not allege that the Iowa Poll results affected their choice to purchase *The Register* or any other consumer product. They have therefore failed to sufficiently allege materiality.

Fourth, Plaintiffs do not contest Press Defendants' argument that Plaintiffs failed to plead the requisite justifiable reliance on the Iowa Poll results. Under Iowa law, Plaintiffs must have

affirmatively "acted in reliance on the truth of the representation and [been] justified in relying on the representation." *Gibson v. ITT Hartford Ins. Co.*, 621 N.W.2d 388, 400 (Iowa 2001). Plaintiffs cannot satisfy this requirement with only their conclusory assertion that "[e]ach Plaintiff read and relied on the election coverage at issue, and had every right to do so." (Dkt. 51 at 19.) They must allege the specific actions they undertook in reliance on the poll results as "truth" and why they were justified in doing so. Plaintiffs allege no such acts. Rep. Miller-Meeks alleges she purchased a newspaper, President Trump alleges his campaign incurred unidentified expenditures, and Zaun alleges no responsive acts whatsoever. (Am. Compl. ¶¶ 21, 101, 131.) No act by any Plaintiff is alleged to have been undertaken *in reliance on* the poll as a statement of truth. *Cf. Gibson*, 621 N.W.2d at 400. Further, Plaintiffs do not allege that their reliance was justified; rather, they allege the opposite, claiming the poll results were not credible on their face. (Am. Compl. ¶¶ 56–62.)

Finally, Plaintiffs fail to plausibly state an injury redressable by a claim for fraudulent misrepresentation. Instead, they merely refer the Court to their arguments under ICFA "[t]o avoid redundancy." (Dkt. 51 at 19.) But fraudulent misrepresentation only allows for two specific types of damages: the loss of the benefit of a bargain or the loss of out-of-pocket expenses. *Midwest Home Distrib.*, 585 N.W.2d at 741. Plaintiffs allege neither.

IV. PLAINTIFFS' NEGLIGENT MISREPRESENTATION CLAIMS MUST BE DISMISSED

The elements of fraudulent misrepresentation and negligent misrepresentation are similar, and Plaintiffs plead their negligent misrepresentation claim as an alternative to their fraudulent misrepresentation claim if the Court finds that the alleged "misrepresentations were not intentional." (Am. Compl. ¶ 147.) As with their ICFA and fraudulent misrepresentation claims, Plaintiffs have failed to adequately plead this claim.

First, Plaintiffs did not sufficiently plead that Press Defendants are "in the business or profession of supplying information" to Plaintiffs such that Press Defendants owed them any duty. Plaintiffs' only response is that Press Defendants had a generic pecuniary interest in the dissemination of the Iowa Poll, and therefore were acting in their "professional capacity." (Dkt. 51 at 21.) But this argument misses the point: Plaintiffs have not pleaded—and could not plead—that Press Defendants (1) acted in an advisory capacity for Plaintiffs' benefit; (2) were aware that Plaintiffs would rely on the Iowa Poll results; or (3) *intended* for Plaintiffs to use said information in any way, shape, or form. *Conveyor Co. v. Sunsource Tech. Servs., Inc.*, 398 F.Supp.2d 992, 1013–14 (N.D. Iowa 2005). Plaintiffs attempt to avoid dismissal by claiming that there is "no clear guidance" as to whether a party is in the business or profession of supplying information to others, and that the Court should accordingly use its discretion to find that Press Defendants were in fact in such business or profession as a matter of law. (Dkt. 51 at 20–21.) This is impermissible. Press Defendants have cited ample guidance clarifying that they are *not* in the class of defendants contemplated by the Iowa courts. (Dkt. 35 at 37–38 (collecting cases).)

Second, Plaintiffs claim the difference between the Iowa Poll results and the later election results "leav[e] no other explanation" than misconduct or negligence consistent with the *res ipsa loquitur* doctrine. (Dkt. 51 at 22–23.) Plaintiffs' invocation of *res ipsa loquitur* is nonsensical; the doctrine is only implicated in situations where circumstances make it impossible to prove causation. *Norberg v. Labor Ready, Inc.*, 384 F. Supp. 2d 1328, 1332 (S.D. Iowa 2005) ("*Res ipsa loquitur* . . . fills the gap where there is no direct evidence of causation and an inference of negligence is permissible from the fact of injury itself."). This is not such a case. Plaintiffs identify no injury requiring a causation analysis; even if they had, Plaintiffs make no effort to explain why their claim is cannot be pleaded by direct allegations. *Res ipsa loquitur* has no place in this case.

Third, Plaintiffs continue to rely on conclusory allegations by third parties in making their *res ipsa* argument. (*See* Dkt. 51 at 21, 23 (citing Am. Compl. ¶ 76).) Specifically, in paragraphs 76 and 77 of their Amended Complaint, Plaintiffs quote an opinion piece by pundit James Piereson regarding his view of the likelihood of the Iowa Poll result's departure from the election results. (Am. Compl. ¶¶ 76–77.) Plaintiffs do not make their own independent allegations on these points, but instead appear to rely on Mr. Piereson's quotes for the truth of the matter asserted. (Dkt. 51 at 23.) A third party's politically motivated opinion about likelihoods does not support Plaintiffs' conclusory legal claim that it is "impossible to explain" the results without presuming negligence. Plaintiffs' mere conclusion—that statistical improbability establishes negligence—is entitled no deference. *See McDonough v. Anoka Cnty.*, 799 F.3d 931, 945 (8th Cir. 2015) ("[A]llegations that are no more than conclusions . . . are not entitled to the assumption of truth.").

Fourth, to plead a negligent misrepresentation claim, Plaintiffs must allege that they are the type of people for whose benefit and guidance the information at issue was intended. (Dkt. 35 at 38 (citing *Sain v. Cedar Rapids Cmty. Sch. Dist.*, 626 N.W.2d 115, 123 (Iowa 2001)).) Plaintiffs did not and cannot in good faith plead that Press Defendants supplied the results of the Iowa Poll to Plaintiffs for their benefit or guidance, which alone is fatal to their claim. *See McLeodUSA Telecomm. Servs., Inc. v. Qwest Corp.*, 469 F. Supp. 2d 677, 692 (N.D. Iowa 2007). Nowhere in their Opposition do Plaintiffs attempt to address this fundamental defect. Indeed, they cannot: courts routinely dismiss claims for negligent misrepresentation against general circulation news publications for this reason. (*See* Dkt. 35 at 39 (collecting cases).)

Finally, as discussed *supra*, Plaintiffs do not and cannot reasonably plead any justifiable reliance on the Iowa Poll or that the Iowa Poll was the proximate cause of any recoverable damages. (Dkt. 35 at 39–40.) Plaintiffs do not address these defects in their Opposition.

In the absence of any argument as to the elements of their claim, Plaintiffs suggest instead that their allegations regarding a "leak" of the Iowa Poll results (while nearly contemporaneous with the publication of the same) is alone sufficient to plead a claim for negligent misrepresentation. (Dkt. 51 at 22.) But they offer no explanation of the alleged leak's impact on any of the elements of a negligent misrepresentation claim. It has no bearing on the nature of Press Defendants' business, their intent as to Plaintiffs' reliance, the alleged falsity of the Iowa Poll results or knowledge thereof, Plaintiffs' lack of reliance, or proximate causation of any damages. In other words, allegations about the "leak" are nothing more than vague aspersions with no relevance whatsoever to the claims at issue. Plaintiffs completely fail to state a claim for negligent misrepresentation.

V. PLAINTIFFS' CLAIMS ARE BARRED BY THE FIRST AMENDMENT

The arguments advanced in Plaintiffs' Opposition are squarely at odds with established First Amendment principles. The complete lack of supporting legal authority for numerous propositions proclaimed throughout the Opposition should not escape this Court's notice. As set forth below, the First Amendment requires dismissal of Plaintiffs' claims.

A. *The Register*'s News Reporting on the Iowa Poll Is Editorial, Not Commercial, Speech

Apparently recognizing the First Amendment problems with challenging editorial speech, Plaintiffs frame *The Register*'s news coverage of the Iowa Poll as "no different than the promotion of any other commercial product" subject to the lesser protections of commercial speech. (Dkt. 51 at 28.) Plaintiffs are wrong. They cite no authority for their position because none exists.[3] Even

[3] Plaintiffs' argument is incorrect as a matter of law. A "journalist's article is not commercial advertising, commercial promotion, or commercial speech." *Gmurzynska v. Hutton*, 355 F.3d 206, 210 (2d Cir. 2004). The "non-commercial nature of a journalist's article cannot be overcome by [a] plaintiff claiming [that] an improper purpose motivated the publisher to run the article." *Croton*

their *amicus* supporter disagrees with them: "the Register's reporting on a presidential campaign is reporting on a 'particularly newsworthy fact,' . . . *which is not commercial speech, even when run in a newspaper*." (Dkt. 38-1 at 4–5 (emphasis added) (citation omitted).)

Commercial speech is speech that "does no more than propose a commercial transaction." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 421 (1993)[4]; *accord Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n. 24 (1976) ("There are common sense differences between speech that does no more than propose a commercial transaction and other varieties."). *The Register*'s challenged reporting did not propose *any* commercial transaction, let alone "solely" a commercial transaction. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980). The newspaper's campaign coverage was unquestionably news reporting on the upcoming federal election campaigns in Iowa, and Plaintiffs repeatedly concede as much. (Am. Compl. ¶¶ 1–3, 84, 157; Dkt. 51 at 2–3.) Contrary to Plaintiffs' argument, *The Register*'s reporting on the Iowa Poll results in the midst of the 2024 presidential and congressional election cycles is core political speech that "occupies the highest rung of the hierarchy of First Amendment values[,] and is entitled to special protection." *Snyder v. Phelps*, 562 U.S. 443, 451–52 (2011) (quotation omitted); *Republican Party of Minn. v. White*, 536 U.S. 765, 774 (2002) (speech about electoral process is "at the core of our First Amendment freedoms") (quotation omitted).

Watch Co. v. Nat'l Jeweler Mag., Inc., No. 06 Civ. 662, 2006 WL 2254818, at *10 (S.D.N.Y. Aug. 7, 2006).

[4] Plaintiffs' citation to *City of Cincinnati* on page 27 of their Opposition misleadingly omits the following italicized portion from the sentence they quote, which also compels the rejection of their commercial speech argument here: "[M]uch of the material in ordinary newspapers is commercial speech and, conversely . . . *the editorial content in respondents' promotional publications is not what we have described as 'core' commercial speech*." 507 U.S. at 423 (emphasis added).

To support their flawed argument that the challenged reporting constitutes commercial speech, Plaintiffs next attempt to expand the definition of commercial speech far beyond its well-established reach—*i.e.*, ads proposing a commercial transaction—to cover any speech by a for-profit entity. However, Plaintiffs cannot sidestep the First Amendment by proclaiming without authority that Press Defendants were "selling a *product* to consumers—polls—not reporting the news." (Dkt. 51 at 24.) This theory was invalidated decades ago, and for good reason. It ignores that both the conduct of the underlying polls themselves and *The Register*'s reporting of their results are protected under the First Amendment. *See Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("major purpose" of the First Amendment [i]s to protect "free discussion of . . . [political] candidates"); *Daily Herald Co. v. Munro*, 838 F.2d 380, 384 (9th Cir. 1988) (political polling "requires a discussion between pollster and voter" and the poll itself is "speech protected by the First Amendment"). That the "business" of Press Defendants is "selling newspapers and subscriptions for profit" is of no moment. (Dkt. 51 at 24.) The Supreme Court has repeatedly held that speech is "protected even though it is carried in a form that is 'sold' for profit[.]" *City of Cincinnati*, 507 U.S. at 420; *see also Smith v. California*, 361 U.S. 147, 150 (1959) (books); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (motion pictures); *Murdock v. Pennsylvania*, 319 U.S. 105, 110 (1943) (religious pamphlets "invit[ing] the purchase of books"); *New York Times v. Sullivan*, 376 U.S. 254, 266 (1964) (political issue advertisement).

If civil liability could be triggered merely by alleging publication with a profit motive, the First Amendment's protection for political campaign speech would be rendered meaningless. *See Harte Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989) ("If a profit motive could somehow strip communications of the otherwise available constitutional protection, our [protective precedents] . . . would be little more than empty vessels."). As the Supreme Court has

emphasized, "[i]f a newspaper's profit motive were determinative, all aspects of its operations—from the selection of news stories to the choice of editorial position—would be subject to regulation if it could be established that they were conducted with a view toward increased sales. ***Such a basis for regulation would clearly be incompatible with the First Amendment***." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels.*, 413 U.S. 376, 385 (1973) (emphasis added).

B. The Court Should Reject Plaintiffs' Attempt to Create a First Amendment Exception for "False" Political Speech

In our constitutional system, a claim for "fraudulent news" does not exist. Full stop. The remedy for disagreement with political speech one does not like is counter-speech—not court-enforced damages under the guise of commercial regulations. *281 Care Comm. v. Arneson*, 766 F.3d 774, 793 (8th Cir. 2014) ("Especially as to political speech, counterspeech is the tried and true buffer and elixir.").

In derogation of these principles, Plaintiffs are pursuing an action against Press Defendants for "distorting media narratives in the final stretch before voting." (Dkt. 51 at 6.) In *United States v. Alvarez*, 567 U.S. 709, 718 (2012), however, the Supreme Court reaffirmed there is no "general exception to the First Amendment for false statements." "This comports with the common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee." *Id.* Accordingly, to safeguard our "profound national commitment to the principle that debate on public issues should be uninhibited robust, and wide-open," *Sullivan*, 376 U.S. at 270, speech is presumptively shielded by the First Amendment unless it falls within one of a small number of narrowly defined categories. *Alvarez*, 576 U.S. at 717. Those categories, informed by history and tradition, do not include a general proscription of "false speech." *Id.* at 719 ("The Court

has never endorsed the categorial rule . . . that false statements receive no First Amendment protection."). Without question, these narrow categories may not be elasticized to include "fake news" about election campaigns, as the First Amendment stands resolutely against demands to regulate "truth" in political reporting. Such attempts are subject to strict scrutiny and are presumptively unconstitutional—even when the alleged fraud in political speech consists of "knowingly false speech." *281 Care Comm. v. Arneson*, 638 F.3d 621, 634. n.2 (8th Cir. 2011).

In *Alvarez*, the Court reiterated that false statements are only unprotected when there is some "legally cognizable harm associated with [the] false statement." *Alvarez*, 567 U.S. at 719. Accordingly, Plaintiffs' claims based on "false speech" cannot be maintained unless they demonstrate a legally cognizable harm.[5] To do so, Plaintiffs claim that this suit fits into one of the *Alvarez* exceptions because it rises to the level of fraud. *Id*. Although on the surface "fraud" is a category of speech outside the First Amendment's protection, "[simply] labeling an action one for 'fraud,' of course, will not carry the day." *Illinois ex. rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 617 (2003). A fraud claim imposes "exacting" requirements to ensure "sufficient breathing room for protected speech[,]" and a "[f]alse statement alone" does not result in liability. *Id*. at 620. Needless to say, even accepting as true that Plaintiffs decided to devote unplanned time and money to their respective campaigns for office, inspired by their own speculation that *The*

[5] Plaintiffs claim that the alleged "cognizable injury" animating this lawsuit is not election interference attributable to purported "fake news," but rather injury to "President Trump's individual reputation[, which] is very much interrelated and tied up in his professional reputation[.]" (Dkt. 51 at 14.) This argument suggests that the Amended Complaint's consumer fraud and common law misrepresentation claims attempt to evade the strict First Amendment limitations and defenses applicable to allegations of reputational injury by a public official, which is governed by defamation law. Of course, no defamation claim has been or could be asserted here based on *The Register*'s truthful and accurate reporting.

Register's reporting of the Iowa Poll results might sway voters, that is of course not a legally cognizable injury. It is how democracy works.

A claim of "fraud" based on news reporting should not withstand scrutiny under the First Amendment. Permitting Plaintiffs' claim to proceed on this basis would violate a fundamental premise of free speech by granting Plaintiffs "freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *United States v. Stevens*, 559 U.S. 460, 472 (2010). That would be a "startling and dangerous" proposition, subject to no principled limitation. *Id*. at 470. The First Amendment will not tolerate such a result.

C. In the Alternative, the Amended Complaint Should Be Dismissed for Failure to Satisfy Controlling First Amendment Principles

Even assuming—contrary to established First Amendment principles—that *The Register*'s political campaign reporting is not endowed with immunity from an ICFA or misrepresentation claim, the Amended Complaint nevertheless cannot evade the constitutional privileges and defenses that otherwise apply to tort claims premised on speech about public officials. In *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988), the Supreme Court made clear that the same First Amendment defenses applicable to defamation suits govern intentional tort claims arising out of published statements concerning a public official-plaintiff. Namely, public officials cannot recover on such a claim without showing that the publication (i) "contains a false statement of fact," (ii) "made with 'actual malice,' *i.e.*, with knowledge that the statement was false or with reckless disregard as to whether or not it was true." 485 U.S. at 56 (emphasis added) (citation omitted). *Hustler*'s logic is dispositive of Plaintiffs' claims here.

First, Plaintiffs cannot, as a matter of law, establish that Press Defendants' reporting of poll results of which Plaintiffs disapprove are "provably false" because the statements at issue necessarily relate to the future: the outcome of presidential and congressional elections in Iowa

that had not yet occurred. *See 281 Care Comm. II*, 766 F.3d at 795 (invalidating a Minnesota campaign law penalizing allegedly knowingly false communications about ballot initiatives, holding that such speech was a "statement of conjecture about the future state of affairs should the ballot question pass or fail" and, thus, could not be deemed provably false). The poll results published by *The Register* on November 2 and 3, 2024, represent an inherently evaluative assessment of public sentiment about the respective candidates at a particular point in time. As a snapshot of randomized samples of voter support subject to the vicissitudes of the electorate, polling results do not qualify as falsified facts for First Amendment purposes merely because they did not align with the ultimate election outcome. *See Scott v. Roberts*, 612 F.3d 1279, 1283 (11th Cir. 2010) ("[O]pinion polls of random selections of voters are *snapshots with margins of error*, and campaigns are, to say the least, dynamic projects." (emphasis added)).

Second, the Constitutional "actual malice" standard forecloses Plaintiffs' claims. To carve out the "breathing space" needed such that "protected speech is not discouraged," *Harte-Hanks Commc'ns*, 491 U.S. at 686 (internal quotation omitted), the *Sullivan* Court established the "actual malice" standard, 376 U.S. at 279–80—which both Plaintiffs and their *amicus* acknowledge governs the Amended Complaint's speech-based tort claims. (Dkt. 51 at 26-27; Dkt. 38-1 at 5, 7.) This standard requires proof that the defendant published a false statement with knowledge that it was false, or with reckless disregard as to its truth or falsity.[6] *Sullivan*, 376 U.S. at 270; *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 511 n.30 (1984); *Carr v. Bankers Tr. Co.*, 546 N.W.2d 901, 904 (Iowa 1996).

[6] "Reckless disregard" has been defined as publishing while actually entertaining "serious doubts as to the truth of publication," *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), or publishing while subjectively possessing a "high degree of awareness of the probable falsity of the publication," *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).

"The standard of actual malice is a daunting one." *Howard v. Antilla*, 294 F.3d 244, 252 (1st Cir. 2002) (internal quotation omitted). It requires clear and convincing proof of Press Defendants' state of mind at the time the poll results were published. *Blessum v. Howard Cnty. Bd. of Supervisors,* 295 N.W.2d 836, 843 (Iowa 1980). Proof of negligence alone is insufficient. *Sullivan*, 376 U.S. at 279–80.

The Amended Complaint contains no specific factual allegations that support Plaintiffs' conclusory recitation that Press Defendants made "knowingly false misrepresentations." (Am. Compl. ¶ 140.) This omission *a fortiori* establishes the absence of actual malice. There are no allegations that support that *The Register* published the results of either a presidential or congressional election poll that intentionally erred in favor of the Democratic candidate. There are no allegations that Press Defendants purposefully relied on an unrepresentative sample or skewed demographics; used recklessly falsified or distorted polling data; deliberately prepared biased or misleading questionnaires; or knowingly adopted a flawed polling methodology. Nor are there any allegations that *The Register* had information from voters that contradicted the published poll results, or that the newspaper's personnel made any statements or conducted themselves in a manner indicating that they knew the polling results were incorrect.

In the absence of any such allegations, Plaintiffs make much of the pre-publication leak of the Iowa Poll's results, albeit without alleging any facts tying Press Defendants to the disclosure. (Am. Compl. ¶¶ 61, 65.) Plaintiffs' theory—that their allegations regarding the leak plausibly support a claim of an "abandonment of objectivity" in *The Register*'s reporting—is unavailing. (Am. Compl. ¶ 62.) As a matter of black-letter constitutional law, alleged political bias or slant in news coverage is insufficient to demonstrate actual malice. *See Donald J. Trump for President, Inc. v. WP Co. LLC*, No. 20-636, 2023 WL 1765193, *5 (D.D.C. Feb. 3, 2023) (reasoning that an

"unadorned claim of animus and bias cannot save [a] deficient pleading" of actual malice) (citation omitted); *Trump v. Cable News Network, Inc.*, No. 22-61842, 2023 WL 4845589, *5 (S.D. Fla. July 28, 2023) *reconsid. denied*, 2023 WL 8433599 (S.D. Fla. Dec. 5, 2023) ("Acknowledging that CNN acted with political enmity does not save this case; the Complaint alleges no false statement of fact."), *appeal pending*, No. 23-14044 (11th Cir. 2023).

All that remains is the Amended Complaint's speculation that *The Register* was part of a conspiracy "to paint an incorrect and cynical picture of the downward trajectory for President Trump" solely because the newspaper reported the results of a prominent Iowa poll that happened to get it wrong.[7] (Am. Compl. ¶ 55.) This amounts to mere conjecture and is precisely the sort of conclusory claim that courts have routinely rejected as insufficient to plead actual malice. *Nelson Auto Center, Inc. v. Multimedia Holdings Corp.*, 951 F.3d 952, 958 (8th Cir. 2020) ("[E]very circuit that has considered the matter has applied the *Iqbal/Twombly* standard and held that a defamation suit may be dismissed for failure to state a claim where the plaintiff has not pled facts sufficient to give rise to a reasonable inference of actual malice.") (internal quotations and citation omitted).

[7] The Amended Complaint's speculation about ill motives—supposedly evinced by Press Defendants' publication of the Iowa Poll "to improperly influence the outcome of the 2024 Presidential Election and other electoral races" (Am. Compl. ¶ 129)—misses the constitutional mark. "[W]hile such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, . . . the First Amendment prohibits such a result in the area of public debate about public figures." *Hustler*, 485 U.S. at 53. Further, as used in the First Amendment context, "actual malice" "has nothing to do with bad motive or ill will." *Harte-Hanks Commc'ns.*, 491 U.S. at 666 n.7. Thus, under *Sullivan*, a plaintiff cannot demonstrate actual malice "merely through a showing of ill will or 'malice' in the ordinary sense of the term." *Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 831 (Iowa 2007) (quoting *Harte-Hanks Commc'ns*, 491 U.S. at 666).

D. Plaintiffs Cannot Circumvent the First Amendment by Characterizing This Action as a "Case About Private Actors"

Plaintiffs repeatedly assert that because this suit involves private rights of action rather than direct government regulation of speech, the First Amendment does not apply. (*See* Dkt. 51 at 23-26.) This assertion is both puzzling and wrong. It is puzzling because Plaintiffs contend that this case has "nothing to do with the First Amendment," while also conceding that the actual malice standard set forth in *Sullivan*—a standard rooted in the First Amendment—is "the proper standard" to apply to *The Register*'s reporting. (*See* Dkt. 51 at 23, 26 (citing *Sullivan*, 376 U.S. at 254; *Harte-Hanks Comms.*, 491 U.S. at 666).) Plaintiffs' position thus contradicts itself: if *The Register*'s invocation of the First Amendment is nothing but a "red herring," as Plaintiffs claim, no basis would exist for the actual malice standard to apply. (*Cf.* Dkt. 51 at 1, 25)

Setting aside the internal dissonance of Plaintiffs' argument, it is also erroneous. When done pursuant to state law, the First Amendment does not concern itself with *who* is attempting to restrict speech but, rather, whether application of state law is appropriately limited pursuant to the First Amendment. Put another way, unconstitutional application of state law to suppress protected speech—whether by a private individual via a tort action or direct government regulation of speech—is tantamount to state suppression of speech. That is why in *Sullivan*, which itself involved a private tort cause of action, the Supreme Court analyzed whether the "law applied by the Alabama courts [was] constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press" required by the Constitution. 376 U.S. at 264; *see also Price v. Viking Penguin, Inc.*, 881 F.2d 1426, 1430 (8th Cir. 1989) ("As the Bill of Rights became applicable to the states, the [F]irst [A]mendment became increasingly viewed as a limit on state defamation law."); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) ("[T]he

need to encourage debate on public issues . . . in [] governmental-restriction cases is of concern in a similar manner in . . . case[s] involving a private suit for damages.").[8]

Indeed, state and federal courts across the country have consistently and routinely imposed constitutional constraints on tort liability for decades, especially in the First Amendment context. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (applying First Amendment to private defamation, invasion of privacy, and intentional infliction of emotional distress claims); *Falwell*, 485 U.S. at 46 (applying First Amendment to private intentional infliction of emotional distress claim); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916–17 (1982) (applying First Amendment to private tort claims arising from economic consequences of boycott); *Malin v. Quad-City Times*, 964 N.W.2d 10 (Iowa Ct. App. 2021) (affirming verdict in favor of newspaper and journalist defendants on intentional interference with contract claim where jury instructions "essentially precluded liability if the jury found the defendants' actions were protected by the First Amendment").

Here, then, the First Amendment is no "red herring." (*See* Dkt. 51 at 1, 25.) Rather, it is the rampart providing refuge for *The Register*'s protected political speech.

CONCLUSION

The Court should grant Press Defendants' Motion in full and dismiss all claims with prejudice.

[8] In fact, these "constitutional constraints on speech-based civil liability have deep roots, stretching back to the Framing era." Eugene Volokh, *Tort Liability and the Original Meaning of the Freedom of Speech, Press, and Petition*, 96 IOWA L. REV. 249, 250 (2010).

Dated: April 15, 2025

FAEGRE DRINKER BIDDLE & REATH LLP

/s/ Nick Klinefeldt

Nicholas A. Klinefeldt, AT0008771
David Yoshimura, AT0012422
801 Grand Avenue, 33rd Floor
Des Moines, Iowa 50309-8003
Telephone: (515) 248-9000
Facsimile: (515) 248-9010
Email: *nick.klinefeldt@faegredrinker.com*
david.yoshimura@faegredrinker.com

ATTORNEYS FOR PRESS DEFENDANTS DES MOINES REGISTER AND TRIBUTE COMPANY AND GANNETT CO., INC.

CERTIFICATE OF SERVICE

I certify that on April 15, 2025, I electronically filed the foregoing with the Clerk of Court using the ECF system, which will send notification of such filing to all parties participating in the Court's electronic filing system.

/s/ Paulette Ohnemus

EXHIBIT 8

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

DONALD J. TRUMP, BRADLEY ZAUN, and MARIANNETTE MILLER-MEEKS, Plaintiffs, v. J. ANN SELZER, SELZER & COMPANY, DES MOINES REGISTER AND TRIBUNE COMPANY, and GANNETT CO., INC., Defendants.	**No. 4:24-cv-00449-RGE-WPK** **ORDER RE: MOTIONS TO REMAND AND FOR ATTORNEYS' FEES**

I. INTRODUCTION

Defendant Gannett Co., Inc. removed this case from the Iowa District Court for Polk County. Originally, Donald J. Trump was the only Plaintiff in the case. After removal, Trump filed an amended complaint which added additional counts and Plaintiffs Bradley Zaun and Mariannette Miller-Meeks. Plaintiffs sue Defendants J. Ann Selzer, Selzer & Company, Des Moines Register and Tribune Company, and Gannett.

Plaintiffs move to remand the case to state court. Plaintiffs argue Defendants improperly removed the case and the Court lacks subject-matter jurisdiction after Zaun and Miller-Meeks were joined. Plaintiffs also seek attorneys' fees incurred based on the allegedly improper removal.

In response, Defendants assert the case was properly removed to federal court. Defendants also argue Trump needed to seek leave of the Court before filing an amended complaint that adds parties destroying the Court's jurisdiction. Defendants further contend Trump fraudulently joined Zaun and Miller-Meeks and thus their participation in the lawsuit should be disregarded when determining the Court's jurisdiction.

For the reasons set forth below, the Court denies Plaintiffs' motions to remand and for attorneys' fees.

II. PROCEDURAL BACKGROUND

Trump initially filed suit in the Iowa District Court for Polk County on December 16, 2024, and alleged a single claim of violation of the Iowa Consumer Fraud Act. Pet., ECF No. 1-1. Prior to being served, Gannett removed the case on the basis of diversity jurisdiction. ECF No. 1 ¶¶ 14–15.

The parties jointly moved for the Court to set deadlines regarding anticipated filings. Joint Mot. Deadlines Initial Mot. Prac., ECF No. 19. The Court granted the motion. Order Grant. Joint Mot. Deadlines Initial Mot. Prac., ECF No. 20. Trump subsequently moved the Court to extend the deadlines by a week. Pl.'s Mot. Exten. Deadlines Initial Mot. Prac., ECF No. 21. The Court granted this motion as well. Order Grant. Pl.'s Mot. Exten. Deadlines Initial Mot. Prac., ECF No. 22.

On January 31, 2025, Trump filed an amended complaint, adding Zaun and Miller-Meeks as plaintiffs, as well as claims for fraudulent misrepresentation (Count Two) and negligent misrepresentation (Count Three). Am. Compl., ECF No. 23. Shortly thereafter, Plaintiffs filed a motion to remand, which is now before the Court. Pls.' Mot. Remand, ECF No. 30; *see* Pls.' Br. Supp. Mot. Remand, ECF No. 32. Defendants resist, and Plaintiffs reply to Defendants' resistance. Defs. Selzer and Selzer & Co.'s Resist. Mot. Remand, ECF No. 45; Def. Gannett's Resist. Mot. Remand, ECF No. 48; Pls.' Reply Supp. Mot. Remand, ECF No. 60.[1] Though not addressed in this order, Defendants also move to dismiss the Amended Complaint and Plaintiffs resist the

[1] Selzer, Selzer & Company, and the Des Moines Register join Gannett's resistance to Plaintiffs' motion to remand. ECF No. 45; ECF No. 48 at 5 n.3. For ease of reading, the Court generally refers to Gannett's arguments as Defendants' arguments.

dismissal. Defs. Selzer and Selzer & Co.'s Mot. Dismiss, ECF No. 24; Defs. Des Moines Register and Gannett's Mot. Dismiss, ECF No. 28; Pls.' Resist. Defs. Des Moines Register and Gannett's Mot. Dismiss, ECF No. 51; Pls.' Resist. Defs. Selzer and Selzer & Co.'s Mot. Dismiss, ECF No. 52.

III. LEGAL STANDARD

Removal is permitted in "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a). Removable cases include those falling within the Court's diversity jurisdiction. *Id.* Diversity jurisdiction requires complete diversity of parties, which exists "where no defendant holds citizenship in the same state where any plaintiff holds citizenship." *Wagstaff & Cartmell, LLP v. Lewis*, 40 F.4th 830, 839 (8th Cir. 2022) (citation omitted); 28 U.S.C. § 1332(a). Additionally, the amount in controversy must exceed $75,000. 28 U.S.C. § 1332(a). "[T]he party seeking removal has the burden to establish federal subject matter jurisdiction, ..." *Cent. Iowa Power Co-op. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 561 F.3d 904, 912 (8th Cir. 2009).

Subject-matter jurisdiction based on the parties' diversity is determined "by the facts that existed at the time of filing" of the complaint. *Wagstaff*, 40 F.4th at 839 (internal quotation marks and citation omitted). "[A]n amendment can either destroy or create jurisdiction in an original diversity case. The addition of a nondiverse party in such a case typically destroys diversity jurisdiction, requiring the case's dismissal." *Royal Canin U. S. A., Inc. v. Wullschleger*, 604 U.S. 22, 37 (2025).

An individual is a citizen of the state where they are physically present and have the intent to make the state their home indefinitely. *Wagstaff*, 40 F.4th at 839 (citation omitted). For purposes of establishing diversity jurisdiction, "a corporation shall be deemed to be a citizen of every State

and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business." 28 U.S.C. § 1332(c)(1).

IV. DISCUSSION

Plaintiffs argue Defendants improperly removed the case due to the forum-defendant rule, and the Court must remand the case as a result. ECF No. 32 at 8–18. Plaintiffs further assert even if Defendants properly removed the case, the Court still must remand the case because complete diversity does not exist. *Id.* at 5–8. Plaintiffs also argue the Court should award them attorneys' fees incurred because of the allegedly improper removal. *Id.* at 19.

Defendants first argue removal was proper. ECF No. 48 at 8–17. Next, Defendants argue Trump was required to seek the Court's leave to add nondiverse parties. *Id.* at 17–23. Because Trump did not seek leave of the Court, Defendants argue the Amended Complaint is "a nullity," and the Court should thus deny the addition of Zaun and Miller-Meeks as plaintiffs. *Id.* If the Court considers the Amended Complaint, Defendants argue the Court should disregard the citizenship of Zaun and Miller-Meeks for purposes of diversity jurisdiction because they were fraudulently joined. *Id.* at 23–28.

The parties do not dispute the citizenship of Plaintiffs or Defendants. For purposes of diversity jurisdiction, Trump is a citizen of Florida; Zaun is a citizen of Iowa; Miller-Meeks is a citizen of Iowa; Selzer is a citizen of Iowa; Selzer & Company is a citizen of Iowa; the Des Moines Register is a citizen of Iowa and New York; and Gannett is a citizen of Delaware and New York. *See* Defs.' Rule 7.1 Disclosures, ECF Nos. 8–9, 16–17; ECF No. 23 ¶¶ 20–22; *see also* ECF No. 32 at 5.

The Court first considers Plaintiffs' arguments concerning whether removal was proper. Next, the Court turns to Defendants' arguments. The Court then turns to Plaintiffs' request for

attorneys' fees.

A. The Forum-Defendant Rule and Snap Removal

When a defendant removes a case on the basis of diversity jurisdiction, the defendant must satisfy the normal requirements for diversity jurisdiction and also abide by what is commonly known as the "forum-defendant rule." The forum-defendant rule is codified at 28 U.S.C. § 1441(b)(2) and provides, "A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."

Related to the forum-defendant rule is the procedure known as "snap removal." Snap removal occurs when a defendant removes a case before a forum defendant has been served. The Eighth Circuit has "yet to weigh in on the" propriety of snap removal, though it has stated snap removal "cannot cure a lack of complete diversity." *M & B Oil, Inc. v. Federated Mut. Ins. Co.*, 66 F.4th 1106, 1110 (8th Cir. 2023).

When interpreting a statute, courts within the Eighth Circuit "begin with the statute's plain language, ..." *United States v. Lester*, 92 F.4th 740, 742 (8th Cir. 2024) (quoting *United States v. Moreira-Bravo*, 56 F.4th 568, 571 (8th Cir. 2022)). "[I]f the intent of Congress can be clearly discerned from the statute's language, the judicial inquiry must end." *Id.* (quoting *United States v. Jungers*, 702 F.3d 1066, 1069 (8th Cir. 2013)). In addition, the Eighth Circuit "strives to maintain uniformity in the law among the circuits, wherever reasoned analysis will allow." *In re Mierkowski*, 580 F.3d 740, 743 (8th Cir. 2009) (citation and internal quotation marks removed).

Plaintiffs argue snap removal is invalid because it goes against Congress's intent and encourages defendants to "hawk" state-court dockets. ECF No. 32 at 11–12. In response,

Defendants argue the plain language of § 1441(b)(2) permits snap removal and concerns over docket hawking "are irrelevant." ECF No. 48 at 9–12, 16–17. Both parties assert the weight of authority supports their respective sides. *See* ECF No. 32 at 10–18; ECF No. 48 at 12–15; ECF No. 60 at 2.

The Court finds snap removal is a valid and appropriate procedure under § 1441(b)(2). First, the plain language of the statute permits removal in diversity cases so long as a forum defendant has not been "properly joined and served." 28 U.S.C. § 1441(b)(2). To disallow snap removal would go against the clear language in § 1441(b)(2) and would render the phrase "and served" mere surplusage. *See United States v. Zam Lian Mung*, 989 F.3d 639, 642 (8th Cir. 2021) ("[C]ourts must give effect, if possible, to every clause and word of a statute." (quotation marks omitted)).

Second, it appears all Circuit Courts of Appeals to have considered snap removal have found proper interpretation of the statute allows snap removal. *See Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147, 154 (3d Cir. 2018) ("In short, [the defendant] has availed itself of the plain meaning of the statute, for which there is precedential support."); *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699, 707 (2d Cir. 2019) ("Put simply, the result here—that a home-state defendant may in limited circumstances remove actions filed in state court on the basis of diversity of citizenship—is authorized by the text of Section 1441(b)(2) and is neither absurd nor fundamentally unfair."); *Texas Brine Co., L.L.C. v. Am. Arb. Ass'n, Inc.*, 955 F.3d 482, 487 (5th Cir. 2020) ("A non-forum defendant may remove an otherwise removable case even when a named defendant who has yet to be 'properly joined and served' is a citizen of the forum state."); *see also McCall v. Scott*, 239 F.3d 808, 813 n.2 (6th Cir.), *amended on denial of reh'g,* 250 F.3d 997 (6th Cir. 2001) ("Where there is complete diversity of citizenship, . . . the inclusion of an *unserved*

resident defendant in the action does not defeat removal under 28 U.S.C. § 1441(b).").

Third, Congress implicitly endorsed snap removal because "Congress did not revise [the properly joined and served language] when it amended Section 1441(b)(2) in 2011 even after some snap removals had occurred." *Texas Brine*, 955 F.3d at 486.

The Court does not opine as to Plaintiffs' concerns about defendants "hawking" state-court dockets. If this is an issue, it is for Congress to address—not this Court.

Joining with the Circuit Courts to have considered this issue, the Court concludes snap removal is consistent with § 1441(b)(2). Gannett's removal of the case before Trump served any forum defendant was proper.

B. Whether Trump Needed to Seek Leave to Add Nondiverse Plaintiffs When Amending the Complaint

Typically, a plaintiff may amend their complaint "once as a matter of course" under certain circumstances. Fed. R. Civ. P. 15(a). But where the amendment adds a party, the plaintiff must first seek leave of the Court pursuant to Federal Rule of Civil Procedure 21. *See* 7 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1688 (3d ed.) ("Most courts have held that the specific provision relating to joinder in Rule 21 governs over the more general text of Rule 15, and that an amendment changing parties requires leave of court even though made at a time when Rule 15 indicates it could be done as of course."). This is especially true if the amendment adds a nondiverse party to a removed case—the district court "should scrutinize that amendment more closely than an ordinary amendment." *Bailey v. Bayer CropScience L.P.*, 563 F.3d 302, 309 (8th Cir. 2009). Where a federal court has jurisdiction over a case, the court has a "'virtually unflagging' obligation to exercise it." *Holbein v. TA W Enters., Inc.*, 983 F.3d 1049, 1060 (8th Cir. 2020) (quoting *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013)).

In *Bailey*, the Eighth Circuit weighed whether a district court abused its discretion in

denying the plaintiff's motion to amend and join nondiverse parties. 563 F.3d at 307–09. First, the Eighth Circuit considered whether the joined parties were indispensable pursuant to Federal Rule of Civil Procedure 19. *Id.* at 308. After determining the parties were dispensable, the Eighth Circuit held "the district court had full discretionary authority to deny joinder and retain jurisdiction over the action." *Id.* The Eighth Circuit reiterated that "Rule 21 invests district courts with authority to allow a dispensable nondiverse party to be dropped at any time, even after judgment has been rendered." *Id.* (quoting *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 832 (1989)).

Lastly, the *Bailey* Court considered whether justice required the joinder of the dispensable nondiverse parties. *Id.* at 309. During this determination, the Eighth Circuit analyzed the following three factors: "1) the extent to which the joinder of the nondiverse party is sought to defeat federal jurisdiction, 2) whether [the] plaintiff has been dilatory in asking for amendment, and 3) whether [the] plaintiff will be significantly injured if amendment is not allowed." *Id.* at 309 (citation omitted). Although not procedurally identical, the Court finds the analytical structure utilized in *Bailey* applicable to the present case. Trump did not seek leave of the Court to join Zaun and Miller-Meeks—who undoubtedly defeat jurisdiction. The Court applies the *Bailey* analysis and considers the Amended Complaint a nullity. The Court therefore treats the Amended Complaint, ECF No. 23, as if it were a request for leave to amend. For the reasons set forth below, the Court denies this request.

As an initial matter, Plaintiffs do not contend Zaun and Miller-Meeks are indispensable parties under Rule 19. *See* ECF Nos. 32, 60. Instead, Plaintiffs argue Zaun and Miller-Meeks are permissively joined under Rule 20. *See* ECF No. 60 at 7–9. The Court determines Zaun and Miller-Meeks are dispensable parties. As such, the question is whether justice requires the Court to allow Trump to amend his complaint and join Zaun and Miller-Meeks. *Cf. Bailey*, 563 F.3d at 308–09.

Under the first *Bailey* factor, the addition of Zaun and Miller-Meeks appears intended to defeat diversity jurisdiction. The Amended Complaint itself—in perhaps what is most telling of Trump's intent—argues Defendants violated the forum-defendant rule, ECF No. 23 ¶ 28, and the Court lacks subject-matter jurisdiction because the case is not between citizens of different states, *id.* ¶¶ 31–32, 35. Next, Plaintiffs' counsel sent an email to Defendants' counsel four days after Trump filed the Amended Complaint "inquiring as to whether Defendants would stipulate to remand, given the addition of Iowa citizens as Plaintiffs and the resultant loss of diversity." ECF No. 30 at 1–2. The timing of this email and its contents suggest the addition of Zaun and Miller-Meeks was intended to defeat the Court's jurisdiction over the case. Lastly, Plaintiffs provide no legitimate rationale for Zaun and Miller-Meeks to join a federal lawsuit only to immediately move to remand. Zaun and Miller-Meeks could have sued Defendants in state court without fear of removal. Thus, the only apparent reason to have joined Trump's lawsuit is to destroy diversity jurisdiction. Given the above, the first *Bailey* factor weighs heavily in favor of denying the amendment to add Zaun and Miller-Meeks.

The second factor under *Bailey*—whether the plaintiff was dilatory in seeking to amend—does not weigh in favor of Trump or Defendants. Trump almost certainly knew of Zaun and Miller-Meeks prior to filing suit. Though Trump added the two as co-plaintiffs in the Amended Complaint less than two months after initially filing the underlying petition, Trump fails to provide a reason why the three did not initially file a petition together. As such, there was a short delay in adding the two as co-plaintiffs, but not to the extent seen in *Bailey* where the plaintiff waited over a year to join nondiverse parties to the lawsuit. *Bailey*, 563 F.3d at 309. Given the lack of reason provided by Trump, but the relatively short timeframe in joining Zaun and Miller-Meeks, the second factor is neutral.

Under the third factor, Trump will not be significantly injured if the Court denies leave to amend. Though there is a risk of parallel lawsuits between state and federal court, it seems unlikely any relief for Trump would be precluded by the absence of Zaun and Miller-Meeks. That is, Trump is capable of receiving full compensation for the injuries he alleges without the presence of Zaun and Miller-Meeks. This factor weighs in favor of denying the amendment.

Accordingly, the Court denies leave for amendment to join Zaun and Miller-Meeks. *Cf.* Wright & Miller, *supra*, § 1685 ("Courts frequently employ Federal Rule of Civil Procedure 21 to preserve diversity jurisdiction over a case by dropping a nondiverse party if the party's presence in the action is not required under Federal Rule of Civil Procedure 19."). The Court thus retains diversity jurisdiction, denies Plaintiffs' motion to remand, and declines to address Defendants' arguments concerning fraudulent joinder.

C. Attorneys' Fees

When a defendant has a "reasonable basis for removal," district courts are within their discretion to deny requests for attorneys' fees. *Convent Corp. v. City of N. Little Rock, Ark.*, 784 F.3d 479, 484 (8th Cir. 2015). Based on the above analysis, Defendants had a reasonable basis for removal and in resisting remand. The Court denies Plaintiffs' request for attorneys' fees.

V. CONCLUSION

An opinion that is interlocutory in nature and is not a final judgment typically is not immediately appealable. *See* 28 U.S.C. § 1292. However, because the "order involves a controlling question of law as to which there is substantial ground for difference of opinion"—concerning snap removal and the addition of a jurisdiction-defeating plaintiff after removal without leave of court—the Court determines "an immediate appeal . . . may materially advance the ultimate termination of the ligation . . . ." *Id.* § 1292(b). As such, the Court certifies this order as

immediately appealable under 28 U.S.C. § 1292(b).

For the foregoing reasons,

IT IS ORDERED that Plaintiffs Donald J. Trump, Bradley Zaun, and Mariannette Miller-Meeks's Motion to Remand, ECF No. 30, is **DENIED**.

IT IS FURTHER ORDERED that Plaintiffs Donald J. Trump, Bradley Zaun, and Mariannette Miller-Meeks's Motion for Attorneys' Fees, ECF No. 30, is **DENIED**.

IT IS FURTHER ORDERED that the Amended Complaint, ECF No. 23, is **VACATED** as a nullity. Bradley Zaun and Mariannette Miller-Meeks are terminated as plaintiffs.

IT IS FURTHER ORDERED that Plaintiff Donald J. Trump has seven days from the date of this order to file a revised version of the Amended Complaint, ECF No. 23, omitting Bradley Zaun and Miller-Meeks as plaintiffs, and deleting any allegations included solely to support their claims. No other alterations to the Amended Complaint filed on January 31, 2025, are permitted. Trump may not add new parties, allegations, or claims in the refiled amended complaint. Trump must also file a redline version of the refiled amended complaint showing the changes made from the now-null Amended Complaint, ECF No. 23, reflecting compliance with this order.

IT IS FURTHER ORDERED that this opinion is immediately appealable pursuant to 28 U.S.C. § 1292(b).

IT IS SO ORDERED.

Dated this 23rd day of May, 2025.

REBECCA GOODGAME EBINGER
UNITED STATES DISTRICT JUDGE

EXHIBIT 9

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

DONALD J. TRUMP, Plaintiff, v. J. ANN SELZER, SELZER & COMPANY, DES MOINES REGISTER AND TRIBUNE COMPANY, and GANNETT CO., INC., Defendants.	**No. 4:24-cv-00449-RGE-WPK** **ORDER DENYING MOTION TO STAY**

On May 23, 2025, the Court denied Plaintiff Donald J. Trump and former Plaintiffs Bradley Zaun and Mariannette Miller-Meeks's motion to remand to state court. ECF No. 65. In that order, the Court granted permission to seek an interlocutory appeal and ordered Trump to file an amended complaint removing former Plaintiffs Zaun and Miller-Meeks and eliminating claims exclusive to those Plaintiffs. *Id.* at 11.

Trump now seeks a stay as an interlocutory appeal is pursued. ECF No. 66. In the motion, Trump asks the Court to extend the deadline for filing an amended complaint until 14 days after resolution of any appellate proceedings. *Id.* The motion is identified as unresisted. *Id.*

Defendants respond to clarify they consent to a short extension of the deadline to file an amended complaint, but do not consent to a general stay or to an open-ended extension of the amended complaint deadline to a date following resolution of appellate proceedings. ECF No. 67. Trump replies, suggesting the timing of the filing of an amended complaint may interfere with appellate proceedings. ECF No. 68. The petition for an interlocutory appeal has been filed with the Eighth Circuit. ECF No. 69.

"A stay is not a matter of right, even if irreparable injury might otherwise result but instead is an exercise of judicial discretion . . . dependent upon the circumstances of the particular case." *Kansas v. United States*, 124 F.4th 529, 533 (8th Cir. 2024) (quoting *Nken v. Holder*, 556 U.S. 418, 433 (2009) (cleaned up)). The "sound legal principles" guiding judicial discretion in this context are similar to those governing the propriety of preliminary injunctions: "likelihood of success"; the presence of "irreparable" injury; injury "to other parties interested in the proceeding"; and "where the public interest lies." *Id.* (quoting *Nken*, 556 U.S. at 434). "[T]he party moving for the stay pending appeal, 'bears the burden of showing that the circumstances justify an exercise of that discretion.'" *Id.* (quoting Nken, 556 U.S. at 434).

Having considered all pertinent filings, including the petition for an interlocutory appeal, the Court denies the motion for a stay without prejudice. The Court concludes the movant has not, as yet, shown a strong likelihood of success or the presence of irreparable harm. The Court, however, extends the deadline for filing the previously ordered amended complaint to July 18, 2025.

IT IS ORDERED that Plaintiff Donald J. Trump's Motion to Stay, ECF No. 66, is **DENIED WITHOUT PREJUDICE**.

IT IS FURTHER ORDERED that Plaintiff Donald J. Trump shall file an amended complaint, as previously ordered by the Court, ECF No. 65, on or before July 18, 2025.

IT IS SO ORDERED.

Dated this 6th day of June, 2025.

REBECCA GOODGAME EBINGER
UNITED STATES DISTRICT JUDGE

EXHIBIT 10

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

DONALD J. TRUMP, Plaintiff, v. J. ANN SELZER, SELZER & COMPANY, DES MOINES REGISTER AND TRIBUNE COMPANY, and GANNETT CO., INC., Defendants.	**No. 4:24-cv-00449-RGE-WPK** **ORDER RE: DEFENDANTS' MOTION TO STRIKE**

On June 30, 2025, Plaintiff Donald J. Trump filed a notice of voluntary dismissal pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i). Pl.'s Notice Vol. Dismissal, ECF No. 71. The same day, Trump, Mariannette Miller-Meeks, and Bradley Zaun filed in the Iowa District Court for Polk County a petition in line with the Amended Complaint filed in this Court on January 31, 2025. *Compare* Pet., ECF No. 72-3 *with* Am. Compl., ECF No. 23. Defendants the Des Moines Register and Tribune Co. and Gannett Co., Inc. move to strike the voluntary dismissal and argue the Court should decline to terminate the case. The Register and Gannett's Mot. Strike, ECF No. 72. Defendants J. Ann Selzer and Selzer & Company join the motion to strike. Selzer and Selzer & Company's Notice of Joinder, ECF No. 74. The Court issued a text order requiring Trump to file a response to Defendants' motion to strike by June 2, 2025, at 12:00 p.m. ECF No. 73. Trump resists Defendants' motion to strike. Pl.'s Resist. Mot. Strike, ECF No. 77.

Previously, the Court denied Trump's motion to remand and vacated the Amended Complaint, ECF No. 23, as a nullity, ECF No. 65. The Court required Trump to file a newly amended complaint within seven days from the date the order was filed (i.e., by May 23, 2025) with certain stipulations. ECF No. 65 at 10–11. Due to the possibility of a substantial ground for

difference of opinion concerning 1) the propriety of snap removal and 2) the addition of a jurisdiction-defeating plaintiff after removal without leave of the court, the Court certified its order for immediate appeal under 28 U.S.C. § 1292(b). *Id.* Trump appealed and requested a stay of proceedings at the district court while his appeal with the Eighth Circuit was pending, and, in addition, Trump requested an extension of time to file the ordered amended complaint. Pl.'s Mot. Stay, ECF No. 66. The Court denied the stay without prejudice, but granted the extension, and provided Trump until July 18, 2025, to file a compliant amended complaint. Order Re. Mot. Stay, ECF No. 70.

On June 2, 2025, the circuit clerk of the Eighth Circuit notified counsel that a petition for permission to appeal was filed for this case. Notice U.S.C.A., ECF No. 69. The case number is 25-8003 and the case caption is "Donald J. Trump, et al v. J. Selzer et al." *Id.* at 1.

The Court strikes Trump's voluntary dismissal and declines to terminate the case. Because Trump's appeal confers jurisdiction to the Eighth Circuit over aspects of this case, Trump must first dismiss the appeal before voluntarily dismissing the district court case. *Cf. Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) ("The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."). Federal Rule of Appellate Procedure 42 governs the steps an appellant must take to dismiss an appeal. If the appeal has not been docketed by the circuit clerk, "the district court may dismiss the appeal on the filing of a stipulation signed by all parties or on the appellant's motion with notice to all parties." Fed. R. App. P. 42(a). If the circuit clerk has docketed the appeal, jurisdiction to dismiss the appeal lies with the circuit court. *Id.* 42(b).

The parties dispute whether Trump's appeal has been docketed by the circuit clerk. *See* ECF No. 72 at 2; ECF No. 77 at 5. Regardless of whether the appeal has been docketed, Trump

did not file a motion to dismiss the appeal in the district court, *see* Fed. R. App. P. 42(a), nor in the circuit court, *see id.* 42(b). Because Trump has not filed such motion in either the district court or the circuit court, this Court can take no action that would affect the pending matter before the Eighth Circuit. Giving effect to a notice of voluntary dismissal, for all practical purposes, would result in a dismissal of Trump's appeal—which is procedurally improper. *Cf. Griggs*, 459 U.S. at 58; Fed. R. App. P. 42.

As such, the Court grants Defendants' motion to strike.

IT IS ORDERED that Defendants J. Ann Selzer, Selzer & Company, Des Moines Register and Tribune Company, and Gannett Co., Inc.'s Motion to Strike, ECF No. 72, is **GRANTED**.

IT IS FURTHER ORDERED that Plaintiff Donald J. Trump's Notice of Voluntary Dismissal, ECF No. 71, is struck from the record.

IT IS SO ORDERED.

Dated this 2nd day of July, 2025.

REBECCA GOODGAME EBINGER
UNITED STATES DISTRICT JUDGE

EXHIBIT 11

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

DONALD J. TRUMP, Plaintiff, v. J. ANN SELZER, SELZER & COMPANY, DES MOINES REGISTER AND TRIBUNE COMPANY, and GANNETT CO., INC., Defendants.	**No. 4:24-cv-00449-RGE-WPK** **ORDER DENYING PLAINTIFF'S RENEWED MOTION TO STAY**

On May 23, 2025, the Court denied Plaintiff Donald J. Trump and former Plaintiffs Bradley Zaun and Mariannette Miller-Meeks's motion to remand to state court. ECF No. 65. In the order, the Court granted permission to seek an interlocutory appeal and ordered Trump to file an amended complaint within seven days, removing former Plaintiffs Zaun and Miller-Meeks and eliminating claims exclusive to those Plaintiffs. *Id.* at 11. On the deadline for filing the amended complaint, Trump moved to stay proceedings and extend the deadline while he pursued an interlocutory appeal. ECF No. 66. The Court denied the motion to stay, but extended the deadline for Trump to file an amended complaint to July 18, 2025. ECF No. 70.

On June 30, 2025, Trump filed a notice of voluntary dismissal. ECF No. 71. Defendants moved to strike the notice of voluntary dismissal. ECF Nos. 72, 74. Trump resisted. ECF No. 77. On July 2, 2025, the Court granted the motion to strike because Trump's appeal conferred jurisdiction to the Eighth Circuit over aspects of the case, and Trump had not taken the appropriate steps to dismiss the appeal. ECF No. 78. On July 3, 2025, the Eighth Circuit denied Trump's petition for permission to appeal and issued a mandate. ECF Nos. 81–82. On July 8, 2025, Trump

moved to recall the mandate and requested the Eighth Circuit note that his petition for permission to appeal did not confer jurisdiction on the Eighth Circuit. *See* ECF No. 83 ¶ 8.

Again, on the final day Trump was permitted to file the previously ordered amended complaint, Trump moved for "the Court [to] stay the requirement to file an amended complaint for 30 days following the Eighth Circuit's disposition of the motion" described above. *Id.* ¶ 10. Defendants resist. ECF Nos. 84–85.

"A stay is not a matter of right, even if irreparable injury might otherwise result but instead is an exercise of judicial discretion . . . dependent upon the circumstances of the particular case." *Kansas v. United States*, 124 F.4th 529, 533 (8th Cir. 2024) (cleaned up) (quoting *Nken v. Holder*, 556 U.S. 418, 433 (2009)). The "sound legal principles" guiding judicial discretion in this context are similar to those governing the propriety of preliminary injunctions: "likel[ihood of] success"; the presence of "irreparable" injury; injury to "other parties interested in the proceeding"; and "where the public interest lies." *Id.* (quoting *Nken*, 556 U.S. at 434). "[T]he party moving for the stay pending appeal, 'bears the burden of showing that the circumstances justify an exercise of that discretion.'" *Id.* (quoting *Nken*, 556 U.S. at 434).

Having considered all pertinent filings, including the filings surrounding the motion to recall the mandate before the Eighth Circuit Court of Appeals, the Court denies the renewed motion to stay. The Court concludes the movant has not shown a strong likelihood of success or the presence of irreparable harm.

The Court expects compliance with all court orders. Failure to comply with orders of the Court may result in sanctions. The parties must comport with all rules regulating this litigation, including the Local Rules and applicable deadlines.

Accordingly,

IT IS ORDERED that Plaintiff Donald J. Trump's Renewed Motion to Stay, ECF

No. 83, is **DENIED**.

IT IS FURTHER ORDERED that Plaintiff Donald J. Trump shall file an amended complaint, as previously ordered by the Court, ECF No. 65 at 11, no later than **5:00 p.m. Central Time on Friday, July 25, 2025.**

IT IS SO ORDERED.

Dated this 23rd day of July, 2025.

REBECCA GOODGAME EBINGER
UNITED STATES DISTRICT JUDGE

EXHIBIT 12

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

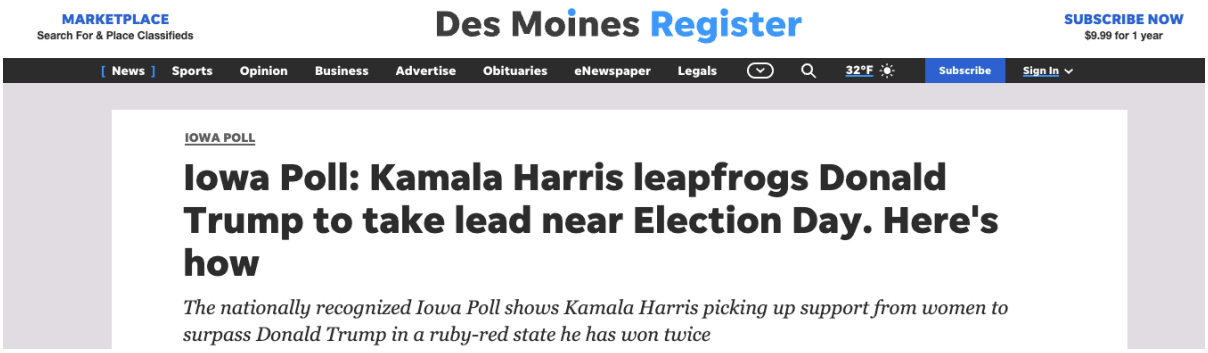
PRESIDENT DONALD J. TRUMP, an individual, Plaintiff, v. J. ANN SELZER, an individual, SELZER & COMPANY, DES MOINES REGISTER AND TRIBUNE COMPANY, and GANNETT CO., INC., Defendants.	Case 4:24-cv-00449-RGE-WPK **REVISED AMENDED COMPLAINT** **Jury Trial Demanded**

Plaintiff, PRESIDENT DONALD J. TRUMP ("President Trump"), by and through undersigned counsel, bring this action against Defendants J. ANN SELZER ("Selzer"), SELZER & COMPANY ("S&C"), DES MOINES REGISTER AND TRIBUNE COMPANY ("DMR"), and GANNETT CO., INC. ("Gannett") (together "Defendants"), and allege as follows:

NATURE OF THE ACTION

1. This action, which arises under the Iowa Consumer Fraud Act, Iowa Code Chapter 714H, including § 714H.3(1) and related provisions, as well as under Iowa common law, including, without limitation, fraudulent misrepresentation and negligent misrepresentation, seeks accountability for brazen election interference committed by the Defendants in favor of now-defeated former Democratic presidential candidate Kamala Harris ("Harris"), along with other Democrat candidates, through use of a manipulated, incorrect, and improperly leaked Des Moines

Register/Mediacom Iowa Poll conducted by Selzer and S&C, and published online by DMR and Gannett in the *Des Moines Register* and other Gannett-owned outlets including nationally distributed *USA Today*, on November 2, 2024, and in print on November 3, 2024 (the "Harris Poll"). *See* Brianne Pfannenstiel, *Iowa Poll: Kamala Harris leapfrogs Donald Trump to take lead near Election Day. Here's how*. DES MOINES REGISTER (Nov. 2, 2024), available at https://www.desmoinesregister.com/story/news/politics/iowa-poll/2024/11/02/iowa-poll-kamala-harris-leads-donald-trump-2024-presidential-race/75354033007/ (last visited June 29, 2025)[1] (the "Harris Poll Article"); Brianne Pfannenstiel, *Kamala Harris leapfrogs Donald Trump to take lead in ruby red Iowa near Election Day*, USA TODAY (Nov. 3, 2024), https://www.usatoday.com/story/news/politics/elections/2024/11/03/iowa-poll-kamala-harris-leads-trump/76018358007/ (last visited June 29, 2025).



2. Contrary to reality and tortiously defying credulity, Defendants' Harris Poll was published three days before Election Day, purporting to show Harris leading President Trump in Iowa by three points (47%-44%) (*see* Harris Poll Article). The Poll was utterly wrong and intentionally misleading. President Trump won Iowa by *over thirteen* points (13.3%; 56%-42.7%), with 927,019 votes in Iowa to 707,278 votes for Harris, and thereby captured Iowa's six electoral

[1] URLs for the Des Moines Register in this Revised Amended Complaint are accurate but are hidden behind a paywall at www.desmoinesregister.com.

votes. *See Iowa President*, ASSOCIATED PRESS, available at https://apnews.com/projects/election-results-2024/iowa/?r=0 (last visited June 29, 2025). Before this astonishing *sixteen-point* polling miss, Selzer brazenly claimed: "It's hard for anybody to say they saw this coming . . . . Harris has clearly leaped into a leading position." (*See* Harris Poll Article). However, as Selzer knew, there was a perfectly good reason nobody "saw this coming"—because a three-point lead for Harris in deep-red Iowa was not reality; it was election-interfering fiction.

3. President Trump's resounding victory was consistent with Iowa's recent electoral history: he won Iowa by over eight points and nearly ten points, respectively, in the 2020 and 2016 Presidential Elections. President Trump certainly could not have trailed Harris by three points in Iowa at any time in the 2024 cycle. *See Iowa*, CNN (Feb. 16, 2017), https://www.cnn.com/election/2016/results/states/iowa (last visited June 29, 2025); *Iowa*, CNN (Dec. 15, 2020), (https://www.cnn.com/election/2020/results/state/iowa (last visited July 24, 2025).

4. Defendants and their cohorts in the Democrat Party hoped that the Harris Poll would create a false narrative of inevitability for Harris in the final week of the 2024 Presidential Election, to drive down enthusiasm among Republicans; they had similar hopes for other contemporaneous polls manipulated by Defendants and set forth below. Instead, the November 5 Election was a monumental victory for President Trump in the Electoral College and the Popular Vote, resulting in an overwhelming mandate for his America First principles and the consignment of the radical socialist agenda to the dustbin of history.

5. After over 35 years in the industry, Selzer retired in disgrace from polling less than two weeks after Harris's resounding defeat. Selzer quitting polling is an admission of her guilt and liability for the Defendant Polls. *See* Ben Brasch, *Ann Selzer to step away from Iowa Poll with the*

Des Moines Register, WASHINGTON POST (Nov. 17, 2024), https://www.washingtonpost.com/politics/2024/11/17/selzer-poll-iowa-election/ (last visited July 24, 2025).

6. As Iowa Republican Party Chairman Jeff Kaufman observed: "Not only did [Selzer] disrespect Iowa and our voters, but she caused Iowa to be laughed at by the entire country." *See* Jeff Kaufman, *Trump wins, Ann Selzer loses*, WASHINGTON EXAMINER (Nov. 13, 2024), https://www.washingtonexaminer.com/opinion/3227498/trump-wins-ann-selzer-loses/#google_vignette (last visited July 24, 2025).

7. For too long, left-wing pollsters—knowing that polls *can, and often do,* materially harm elections—have attempted to influence electoral outcomes through manipulated polls that are not grounded in widely accepted polling methodologies and have unacceptable error rates. While Selzer is not the only pollster to engage in this corrupt practice, she had a huge platform and following, resulting in a significant and impactful opportunity to deceive voters.

8. The need for Democrats to produce fake polls was even more acute than usual in the 2024 Election, given Harris's many fatal weaknesses as a candidate and lack of appeal to critical swaths of the traditional Democrat base. Her incessant use of "word salads"—i.e., jumbles of exceptionally incoherent speech—only underscored the urgency for left-wing pollsters to try and rescue Harris's candidacy. *See, e.g.*, Hanna Panreck, *CNN panel critical of Kamala Harris' town hall performance: 'World salad city'*, CNN (Oct. 24, 2024) https://www.foxnews.com/media/cnn-panel-critical-kamala-harris-town-hall-performance-word-salad-city (last visited July 24, 2025); Ian Hanchett, *Van Jones: Harris Had Needless 'Evasions' During CNN Town Hall, 'Word Salad Stuff' Is Annoying*, BREITBART (Oct. 24, 2024), https://www.breitbart.com/clips/2024/10/24/van-jones-harris-had-needless-evasions-during-cnn-

town-hall-word-salad-stuff-is-annoying/ (last visited July 24, 2025); Ian Hanchett, *Axelrod: Harris Gives a 'Kind of' 'Word Salad' 'When She Doesn't Want to Answer a Question' Like on Israel*, BREITBART (Oct. 24, 2024), https://www.breitbart.com/clips/2024/10/24/axelrod-harris-gives-a-kind-of-word-salad-when-she-doesnt-want-to-answer-a-question-like-on-israel/ (last visited July 24, 2025).

9. Millions of Americans, including President Trump, Iowans, and others who contributed to President Trump's campaign and its affiliated entities (the "Trump 2024 Campaign"), were lied to, deceived, and maligned by the doctored Harris Poll. President Trump has made impactful, widely read statements on the matter, writing on Truth Social, *inter alia*, that Selzer's misconduct caused "great distrust and uncertainty at a very critical time." *See* President Donald J. Trump, @realDonaldTrump, TRUTH SOCIAL (Dec. 9, 2024), https://truthsocial.com/@realDonaldTrump (last visited July 24, 2025); *see also Harris Now Leads Trump*, DES MOINES REGISTER (Nov. 3, 2024), at 1, 6A (excerpt shown below).

10. Selzer's polling "miss" was not an astonishing coincidence—it was intentional. As President Trump observed: "She knew exactly what she was doing." *Id*.

11. Defendants' conduct violated Iowa Code § 714H.3(1), pursuant to which "a person shall not engage in a practice or act the person knows or reasonably should know is an unfair practice, deception, fraud, false pretense, or false promise, or the misrepresentation, concealment, suppression, or omission of a material fact, with intent that others rely upon [same] . . . . "

12. Defendants' conduct was also tortious at common law in that Defendants engaged in fraudulent and/or negligent misrepresentation.

13. Accordingly, President Trump brings this action to redress the immense harm caused to him as an individual candidate and as an individual consumer, to the Trump 2024

Campaign, and to millions of citizens in Iowa and across America by the Harris Poll and other manipulated polls set forth below (collectively, the "Defendant Polls")

14. Further, this action is necessary to deter Defendants and their fellow radicals from continuing to act with corrupt intent in releasing polls manufactured for the purpose of skewing election results in favor of Democrats.

PARTIES

15. President Trump is an individual, a citizen of Florida, the 45th President of the United States of America, and, as the landslide winner of the 2024 Presidential Election and having been inaugurated on January 20, 2025, the 47th President of the United States. President Trump read the election coverage at issue in this action in the *Des Moines Register*.

16. Defendant Selzer is an individual, a citizen of Iowa, resides in the Des Moines area, and is the founder and president of S&C. Selzer worked as the pollster for the *Des Moines Register* for many years, overseeing all the *Register's* polls from 1987 to 2024. She has also conducted polls for *The Detroit Free Press*, *Bloomberg News*, and the *Indianapolis Star*. Selzer holds a Ph.D. in Communication Theory and Research from the University of Iowa.

17. Defendant S&C is an Iowa domestic for-profit corporation that does business in Iowa generally, and in Polk County specifically, and is registered with the Iowa Secretary of State (No. 200824), with an office at 308 Fifth Street, West Des Moines, IA 50265. Selzer has published and released her polls to the public by and through S&C, which conducts polling for the Des Moines Register and other clients.

18. Defendant DMR is an Iowa domestic corporation that does business in Iowa generally and in Polk County specifically. DMR owns and publishes the *Des Moines Register*. DMR is a wholly owned subsidiary of Gannett and a domestic for-profit corporation registered with the Iowa Secretary of State (No. 8971).

19. Defendant Gannett is a Delaware corporation headquartered in New York that does business in Iowa generally, and Polk County specifically, and is publicly traded. Gannett owns DMR and myriad other publications, including the widely read and nationally distributed *USA Today*, and participates in the operations of the *Des Moines Register*, as evidenced by its investigation of the leak of the Harris Poll, discussed *infra*.

JURISDICTION, VENUE, REMOVAL, AND REMAND

20. On December 16, 2024, President Trump commenced this action against Defendants Selzer, S&C, DMR, and Gannett by filing a Petition in the Iowa District Court for Polk County containing one claim under the Iowa Consumer Fraud Act.

21. On December 17, 2024, prior to service of the Petition on any Defendant, Gannett raced to the courthouse and filed a Notice of Removal of this action with accompanying documents (the "Removal Notice"), disregarding the forum defendant rule. *See* 28 U.S.C. § 1441(b)(2).

22. The Iowa District Court for Polk County had, and still has, subject matter jurisdiction over this action under Iowa Code § 714.16(7). The amount in controversy exceeds the jurisdictional amount for a small claims action in Iowa.

23. The Iowa District Court for Polk County was, and still is, a proper venue because Polk County is a "county where the transaction or any substantial portion of the transaction occurred" and where Defendants are "doing business." Iowa Code § 714.16(10). Three Defendants are citizens of Iowa (Selzer, S&C, and DMR), and a fourth Defendant (Gannett) engages in substantial business in Iowa and targets Iowa consumers in the conduct of its business.

24. In contrast, this Court, the United States District Court for the Southern District of Iowa, is not the proper venue and does not have subject matter jurisdiction over this action.

25. This action was not between citizens of different States. *See* 28 U.S.C. § 1332. Two Plaintiffs in the original Amended Complaint filed January 31, 2025 (Dkt. 23)—U.S.

Representative Mariannette Miller-Meeks ("Representative Miller-Meeks") and Former State Senator Bradley Zaun—were and are citizens of Iowa; three Defendants in the Amended Complaint—Selzer, S&C, and DMR—were and are also citizens of Iowa.

26. This action does not arise under the Constitution, laws, or treaties of the United States. *See* 28 U.S.C. § 1331. Rather, the action arises under the Iowa Consumer Fraud Act and Iowa common law.

27. "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." *See* 28 U.S.C. § 1447(c). Accordingly, this action should be remanded to the Iowa District Court for Polk County.

FACTUAL ALLEGATIONS

Selzer's Misleading Reputation for Objectivity

28. Selzer has long enjoyed a celebrated, if not based on results, mainstream reputation for accurate polling. For example, in 2016, Clare Malone of *FiveThirtyEight* described Selzer as "the best pollster in politics." *See* Clare Malone, *Ann Selzer Is The Best Pollster In Politics*, FIVETHIRTYEIGHT (June 29, 2016), https://fivethirtyeight.com/features/selzer/ (last visited July 24, 2025). In a June 2024 rating of 25 pollsters, Nate Silver rated Selzer first with an A+ score. *See* Nate Silver, *Pollster ratings*, *Silver Bulletin style*, SILVER BULLETIN (June 12, 2024), https://www.natesilver.net/p/pollster-ratings-silver-bulletin (last visited July 24, 2025).

29. However, underneath the surface, Selzer has quietly used her polls to attempt to influence recent elections in favor of Democrats, receiving ample cover from the legacy media and thus lacking accountability. As Chairman Kaufman observed after President Trump's commanding victory: "For too long, we have let Ann Selzer use her polls to influence races. She is fully aware that her polls can influence voters." *See* Kaufman, *Trump wins, Ann Selzer loses*, *supra*.

30. In 2022, Selzer attempted to influence the outcome of the Iowa Attorney General Election between current Republican Attorney General Brenna Bird and then-Democrat incumbent Tom Miller (who had served in that capacity for 40 years). To do so, Selzer released a poll that missed the mark by an even more astonishing amount than the Harris Poll—*eighteen* points. *See* Stephen Gruber-Miller, *Iowa Poll: Tom Miller leads Brenna Bird by 16 percentage points in attorney general race*, DES MOINES REGISTER (Oct. 25, 2022), https://www.desmoinesregister.com/story/news/politics/iowa-poll/2022/10/25/iowa-poll-attorney-general-election-tom-miller-brenna-bird-2022/69563197007/ (last visited July 24, 2025) ("The poll was conducted Oct. 9-12 by Selzer & Co.").[2] Yet, two weeks after Selzer declared that Bird trailed Miller by sixteen points, Bird defeated Miller by two points. *See* Stephen Gruber-Miller, *Republican Brenna Bird defeats Tom Miller in Iowa attorney general race*, DES MOINES REGISTER (Nov. 9, 2022), https://www.desmoinesregister.com/story/news/politics/elections/2022/11/09/brenna-bird-topples-incumbent-tom-miller-in-iowa-attorney-general-race/69610291007/ (last visited July 24, 2025).

31. In another example of Selzer's pattern of malicious deceit and election interference, in the 2018 Iowa governor's race between Democrat Fred Hubbell and Republican Kim Reynolds, Selzer showed Hubbell up by two points in the final November poll. *See* Brianne Pfannestiel, *Just days before election, Iowa poll shows Fred Hubbell with 2-point lead over Kim Reynolds*, DES MOINES REGISTER (Nov. 3, 2018), available at https://www.desmoinesregister.com/story/news/politics/iowa-poll/2018/11/03/iowa-poll-governor-race-kim-reynolds-fred-hubbell-jake-porter-selzer-iowa-election-2018-

[2] Also put behind a paywall by Defendants since the commencement of this action.

medicaid/1871874002/ (last visited June 29, 2025). Reynolds won by almost three points (50.3%-47.5%). *See Iowa Governor Election Results 2018,* POLITICO (Dec. 9, 2018), https://www.politico.com/election-results/2018/iowa/governor/ (last visited July 24, 2025).

32. In the 2020 U.S. Senate race, Selzer showed Republican Joni Ernst behind Democrat Theresa Greenfield by three points in June and three points in September. *See* Brianne Pfannestiel, *Iowa Poll: Theresa Greenfield narrowly leads Joni Ernst in hyper-competitive Senate race*, DES MOINES REGISTER (Sept. 19, 2020), available at https://www.desmoinesregister.com/story/news/politics/iowa-poll/2020/09/19/iowa-poll-theresa-greenfield-narrowly-leads-joni-ernst-senate-race/3486994001/ (last visited June 29, 2025). Selzer then belatedly put Ernst ahead by four points a little over a month later in the final poll. *See* Brianne Pfannestiel, *Iowa Poll: Republican Joni Ernst pulls ahead of Democrat Theresa Greenfield in closing days of U.S. Senate Race*, DES MOINES REGISTER (Oct. 31, 2020), available at https://www.desmoinesregister.com/story/news/politics/iowa-poll/2020/10/31/election-2020-iowa-poll-greenfield-ernst-us-senate-race-voters/6055545002/ (last visited June 29, 2025). Notwithstanding Selzer's efforts to create suspense where there was none, Ernst won the race by a comfortable margin of nearly seven points (51.8%-45.2%). *See Iowa U.S. Senate Results 2020,* POLITICO (Jan. 6, 2021), https://www.politico.com/2020-election/results/iowa/senate/ (last visited June 29, 2025).

33. These races were not a matter of being wrong in the end—they exposed that Defendants, led by Selzer, were manufacturing fake support for Democrat candidates to interfere in the elections.

Selzer's Polling Materially Harmfully Impacted Elections

34. As Selzer knows, manipulated polls create a narrative of inevitability for Democrat candidates, increases enthusiasm and turnout among Democrats, decreases enthusiasm and turnout

among Republicans, and deceives the public into believing that Democratic candidates are performing better than they really are.

35. And, given Selzer's position of trust before November 5, 2024, she had the power to influence campaign spending and strategy, change public perception of races, and even harmfully impact the outcome of elections. Her polls most certainly had a material harmful impact on the electoral process both in Iowa and nationally, a fact that candidates and their teams long knew—and anticipated. Iowa's outsized importance on the national political stage only added to Selzer's influence while lengthening her shadow over Presidential, Congressional, and State races.

36. As a reverent *New York Times* reminisced: "The Surveys of J. Ann Selzer *once carried the hopes and fears of the men and women who sought to lead the nation*, recording with uncanny accuracy the views of Iowa voters who exercised outsize influence in the choosing of American presidents." *See* Jonathan Weisman, *A Famed Iowa Pollster's Career Ends With a 'Spectacular Miss' and a Trump Lawsuit*, NEW YORK TIMES (Dec. 19, 2024), https://www.nytimes.com/2024/12/19/us/politics/ann-selzer-iowa-trump.html (last visited July 24, 2025) (emphasis added).

37. Lis Smith, senior adviser to Pete Buttigieg's 2020 Presidential Campaign, was among the many seasoned political operatives who acknowledged Selzer's sway over election outcomes. In 2020, Selzer's "highly anticipated poll of Iowa Democrats" was "shelved" after Smith raised concerns "about irregularities in the methodology" when it came to light that Buttigieg's name was left off the menu of options presented during a phone survey. *See* Lisa Lerer, Jonathan Martin and Michael M. Grynbaum, *Des Moines Register Poll of Iowa Caucusgoers Abruptly Shelved*, NEW YORK TIMES (Feb. 3, 2020),

https://www.nytimes.com/2020/02/01/us/politics/des-moines-register-polls-iowa-caucus.html (last visited July 24, 2025).

38. Recalled Smith: "This was *the most impactful and important poll* in presidential primary politics. It would *set the narrative* for the caucuses, dominating the media coverage and *dictating caucus choices . . . .*" *See* Weisman, *A Famed Iowa Pollster's Career Ends With a 'Spectacular Miss' and a Trump Lawsuit.* (Emphasis added).

39. Given Selzer's power, Smith was right to fear for her candidate. "The late-breaking nature of the state's political culture len[t] the poll outsized influence, with the power to fuel a last-minute surge in the state . . . ." *See* Lerer, Martin and Grynbaum, *Des Moines Register Poll of Iowa Caucusgoers Abruptly Shelved*.

40. Selzer and her handlers at DMR and Gannett knew she had the power to materially impact election outcomes. By unleashing the Harris Poll, Defendants "jolted the nation" and "set off a torrent of predictions that the vice president could be swept to a convincing victory by angry women other polls may not have captured." *Id*. Of course, these predictions proved to be in direct contradiction to reality.

41. Furthermore, academic studies show that polling data on a race affects voter choices and turnout. Such polling may also change the candidates that voters select based on their assessment of their viability (for instance, a voter may cast a third-party protest vote in a race that he thinks won't be close). *See generally* Andre Blais, *et al.*, *Do Polls Influence the Vote?*, in HENRY E. BRADY & RICHARD G. C. JOHNSTON, eds., CAPTURING CAMPAIGN EFFECTS (2009).

42. Moreover, "[b]esides receiving national news coverage, [the Harris Poll] had a significant impact on the expectations of Iowans themselves. Such dramatic public findings, which this Iowa Poll represents, can mislead voters and undermine trust in the polling enterprise itself."

Samantha J. DeRagon, Tracy Osborn, and Michael S. Lewis-Beck, *The 2024 Iowa Poll for President: A Cautionary Tale*, The Center for Politics at the Univ. of Virginia (Dec. 12, 2024), https://centerforpolitics.org/crystalball/the-2024-iowa-poll-for-president-a-cautionary-tale/ (last visited July 24, 2025)

43. "The notion that published vote intention polls influence voter behavior expresses [a] hypothesis of long standing. Normally, it would be difficult to trace out the effect of this last minute, single poll on would-be voters in a single state. However, we had in the field our own poll of Iowa voters, namely a sample of 214 University of Iowa students. . . . The results show a statistically significant 9-percentage-point rise ($p < .05$, one-tailed) in expectations of a Harris victory among those who said Iowa was their home state (150 respondents). While these data are observational, they are nevertheless highly suggestive. It looks like the *Iowa Poll* did, in fact, increase Iowa public opinion favoring Harris to win the state." *Id.* (emphasis in original).

The Harris Poll

44. On the evening of November 2, 2024, when the Harris Poll was unveiled in the *Des Moines Register*, President Trump led Harris in Iowa by any objective, reasonable, and reliable measure.

45. Notably, until Defendants released the Harris Poll, Selzer's previous 2024 Presidential Election polls published in the *Des Moines Register* showed President Trump leading. *See* Brianne Pfannestiel, *Trump's Iowa lead shrinks significantly as Kamala Harris replaced Biden, Iowa Poll shows*, DES MOINES REGISTER (Sept. 15, 2024), available at https://www.desmoinesregister.com/story/news/politics/iowa-poll/2024/09/15/iowa-poll-donald-trump-iowa-lead-shrinks-as-kamala-harris-replaces-joe-biden/75180245007/ (last visited June 29, 2025). Although Selzer was already trying to generate fake enthusiasm and momentum for

Harris—she characterized Harris's supposed four-point deficit as a "dramatic turnaround from Joe Biden's double-digit deficit"—this September poll still had President Trump up by four points. *Id.*


MARKETPLACE
Search For & Place Classifieds

Des Moines Register

SUBSCRIBE NOW
$9.99 for 1 year

[News] Sports Opinion Business Advertise Obituaries eNewspaper Legals 37°F Subscribe Sign In

IOWA POLL

Trump's Iowa lead shrinks significantly as Kamala Harris replaces Biden, Iowa Poll shows

The nationally recognized Iowa Poll's first test of Kamala Harris' strength against Donald Trump indicates she's a more formidable opponent than President Biden in solid-red Iowa

46. The premise of Selzer's poll, that Harris had somehow turned Joe Biden's eighteen-point deficit (50%-32%) into a mere four-point deficit (47%-43%), was so implausible that no objective pollster could have honestly advanced it. "'I wouldn't say 4 points is comfortable' for Trump, said pollster J. Ann Selzer, president of Selzer & Co. 'The race has tightened significantly.'" *Id.*

47. This poll, purporting to show that President Trump's commanding lead all but vanished upon Harris's entry into the race, was indicative of Defendants' intent, even as early as September, to paint an incorrect and cynical picture of the downward trajectory for President Trump in the face of a supposedly turbocharged Harris Campaign. In truth, Harris's hollow message of "joy" was missing badly with voters across all demographics and regions, who craved actual policy changes that only President Trump can and will deliver. *See* Herald readers, *Message of 'joy' at Democratic Convention hides Kamala Harris' poor track record*, MIAMI HERALD (Aug. 27, 2024), https://www.miamiherald.com/opinion/article291479270.html (last visited July 24, 2025).

48. Meanwhile, *every other* mainstream Iowa poll also showed President Trump comfortably ahead, and by significantly more than Selzer presented. A poll conducted September 27-28, 2024 by Cygnal showed President Trump ahead by seven points; a poll conducted

November 1-2, 2024 by Emerson College showed President Trump ahead by nine points; a poll conducted November 2-3, 2024 by InsiderAdvantage showed President Trump ahead by seven points; a poll conducted November 2-3, 2024 by SoCal Strategies showed President Trump ahead by seven points; and a second poll conducted November 2-3, 2024 by SoCal Strategies showed President Trump ahead by eight points. *Formerly available at Iowa Latest Polls*, FIVETHIRTYEIGHT, https://projects.fivethirtyeight.com/polls/iowa/ (last visited Jan. 31, 2025).

49. Moreover, as revealed after the Election, even Harris's internal polling showed that she was never leading President Trump, and could not possibly have been ahead in Iowa. Diana Glebova, *Harris camp's own polling never showed VP leading Trump, team 'surprised' by reports showing her ahead: top adviser*, NEW YORK POST (Nov. 27, 2024) https://nypost.com/2024/11/27/us-news/harris-camps-own-polling-never-showed-vp-leading-trump-team-surprised-by-reports-showing-her-ahead-sr-adviser/(last visited July 24, 2024); Sam Woodward, *Kamala Harris advisers: Internal polling never showed VP ahead,* USA TODAY (Nov. 27, 2024) https://www.usatoday.com/story/news/politics/elections/2024/11/27/kamala-harris-advisers-internal-polling/76626278007/ (last visited July 24, 2024).

50. Further demonstrating Selzer's departure from reality, in each of the highest-stakes races—President, Governor, Senator—from 2016 to 2022, the Republican won in Iowa and did so by a convincing margin. A three-point lead by a Democrat candidate for President would have been remarkably out of line compared to election results in the prior four cycles.

51. Other pollsters who frequently work in swing states, such as Quinnipiac University, did not even poll Iowa in 2024, assuming, correctly, that it was a lock for President Trump. When major news outlets reported on swing states, Iowa was never included.

52. In sharp contrast to common sense, electoral history, all other public polls, and Harris's internal polling, the Harris Poll falsely showed Harris leading President Trump in Iowa with just three days to go, which suggested major, but in reality nonexistent, momentum for Harris nationwide. In truth, the Harris Poll was just a piece of political theater concocted by an individual—Selzer—who, as a supposedly legendary pollster with the power to shape public perception of elections, should have known better than to poison the electorate with a poll that was nothing more than a work of fantasy. *See* Shelby Talcott, *Gannett probes possible leak of bombshell Iowa poll*, SEMAFOR (Nov. 10, 2024), https://www.semafor.com/article/11/10/2024/gannett-probes-possible-leak-of-bombshell-iowa-poll (last visited July 24, 2025) ("The Des Moines Register is legendarily careful with Selzer's polls, which shape perceptions of crucial early caucuses in both parties . . . .").

53. The Harris Poll wasn't irregular just because it was wrong by an appalling sixteen points. Indeed, not coincidentally, the circumstances under which the Harris Poll became public via an unprecedented leak also broke DMR's longstanding policy of secrecy with Selzer's polls, proving that the Harris Poll was intended to aid Harris and harm President Trump.

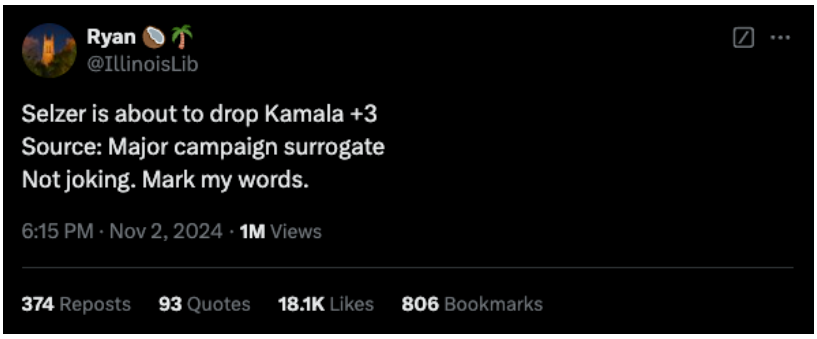
54. Defendants' misconduct should have surprised no one, given Gannett, DMR, and Selzer's increasing abandonment of objectivity in recent years. Their election interference was a long time in the making.

55. As reported by the *New York Times*, the *Register's* "liberal editorial board has become increasingly out of step with the conservative state [Iowa]." *See* Weisman, *A Famed Iowa Pollster's Career Ends With a 'Spectacular Miss' and a Trump Lawsuit*, *supra*.

56. Moreover, as the *Times* also acknowledged, Selzer "revealed a slight but consistent lean toward Democrats" in "her last *eight* final Iowa presidential polls . . . ." *Id.* In truth, Selzer has not just leaned toward Democrats, but has outright favored Democrats.

57. The Harris Poll, a bombshell "making nationwide news and giving Democrats what would turn out to be false hope," was leaked by Defendants to Democrat operatives earlier in the day on November 2, 2024, many hours before the Harris Poll Article appeared. *Id*. ("But roughly 45 minutes prior to the poll's public release, a stray tweet predicted the poll's findings. Its author said that Illinois Governor JB Pritzker, a Duke University alumnus, had mentioned the not-yet-released poll during a Duke Democrats meeting that day."). This breach resulted in Gannett, DMR's parent company, being forced to investigate "how Pritzker and possibly other political actors could have learned of the poll early, and is reviewing employees' emails . . . ." *See* Talcott, *Gannett probes possible leak of bombshell Iowa poll*, *supra*; Yael Halon, *Company behind Selzer poll launches probe into potential leak after results published on X prior to publishing*, FOX NEWS (Nov. 11, 2024), https://www.foxnews.com/media/company-behind-seltzer-poll-launches-probe-potential-leak-after-results-posted-x-prior-publishing (last visited July 24, 2025) ("The company behind the Des Moines Register, which published Ann Selzer's poorly-aged Iowa poll, has launched an investigation after the poll's findings were allegedly leaked on X prior to publishing . . . .").

58. The "stray tweet" referenced in the *Semafor* article was posted by "Ryan@IllinoisLib" at 6:15 p.m. EST on November 2, 2024, and has now been viewed over 1,100,000 times, stating:



See https://x.com/IllinoisLib/status/1852837036597948760 (last visited July 24, 2025).

59. Moreover, this leak was not the only security breach that occurred in connection with the Harris Poll.

60. On October 31, 2024, two days before the malicious leak and publication of the Harris Poll Article, Selzer became so uncontrollably excited about the Poll that, in an unfathomable breach of professional polling standards and lapse of judgment, she allowed her nephew—who was not employed by S&C or the *Des Moines Register*—to view the Poll. Admitted Selzer: "I will say that my nephew is a senior at the University of Nebraska and currently interning at Gallup, interestingly enough. And I [sic] he wanted to come and I wanted to have him here for this and he walked in Thursday night and I had a folder and I had to swear him to secrecy [sic] has to take the oath and he opened the folder and and [sic] he he [sic] couldn't believe what he was looking at. And his mouth sort of fell down to the kitchen counter and it took him a while to wrap his head around it . . . ." *See* Tim Miller, *Kamala Harris DOMINATES in Final Polls (w/J. Ann Selzer)*, THE BULWARK PODCAST (Nov. 3, 2024) (time stamp: 16:15), https://www.youtube.com/watch?si=LECNF1OBr2S2HnZU&v=P-ysKh_Gyd0&feature=youtu.be (last visited July 24, 2025).

61. Clearly, the Harris Poll, unlike Defendants' other polls, was leaked and disclosed to unauthorized third parties because the Harris Poll was created by Selzer and published by Gannett and DMR for maximum "shock and awe" political harm rather than accuracy or reliability.

It is indeed no coincidence that Defendants' most significant polling "miss" also happened to be the one that would be leaked to cause as much harm to the electoral process as possible—and one that induced the legacy media to go "all in" and treat the Harris Poll as a "canary in the coal mine" for President Trump. *See* Montage, *Media goes all in on Iowa poll showing Harris lead, sees 'canary in the coal mine' for Trump*, FOX NEWS (Nov. 4, 2024), https://www.foxnews.com/video/6364191963112 (last visited July 24, 2025) ("MSNBC, CNN and the hosts of 'The View' went all in on the results of a new *Des Moines Register* poll that found Vice President Kamala Harris leading Donald Trump by three points in Iowa.").

62. Indeed, as intended by Defendants, the Harris Poll grabbed national and international headlines. *See, e.g.,* Dan Mangan, *Shock poll shows Harris leading Trump in Iowa*, CNBC (Nov. 2, 2024), https://www.nbcbayarea.com/news/business/money-report/shock-poll-shows-harris-leading-trump-in-iowa/3697783/?os=io...&ref=app (last visited July 24, 2025);

NEWS

Shock poll shows Harris leading Trump in Iowa

The Des Moines Register/Mediacom Iowa Poll's results came as a complete surprise to political observers

By Dan Mangan,CNBC • Published November 2, 2024 • Updated on November 5, 2024 at 10:21 am

Chidanand Rajghatta, *Ayya va! Shock poll in non-battleground state shows Kamala winning*, TIMES OF INDIA (Nov. 3, 2024), https://timesofindia.indiatimes.com/world/us/ayya-va-shock-poll-in-non-battleground-state-shows-kamala-winning/articleshow/114914960.cms (last visited July 24, 2025);

Printed from
THE TIMES OF INDIA

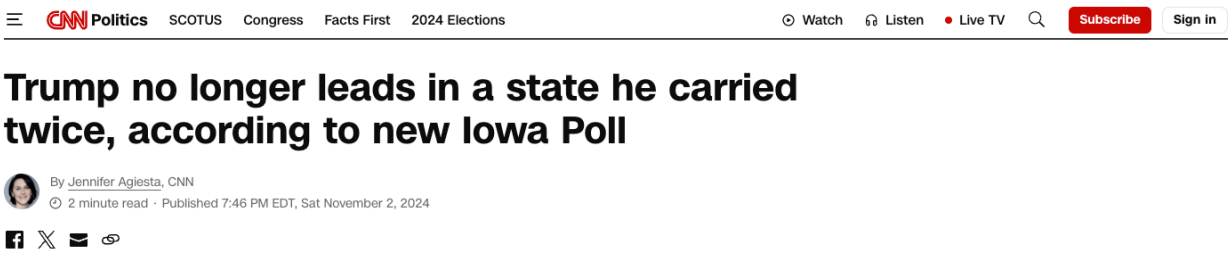
Ayya va! Shock poll in non-battleground state shows Kamala winning

TNN | Nov 3, 2024, 08.12 PM IST

Nate Silver, *What 'Shocking New Iowa Poll Means for Kamala Harris' Chances*, NEWSWEEK (Nov. 2, 2024) https://www.newsweek.com/what-shocking-new-iowa-poll-means-kamala-harris-chances-nate-silver-1979244 (last visited July 24, 2025);

Brie Stimson, *Shock Poll has Harris leading Trump in Iowa with 3-point shift toward vice president in red state,* FOX NEWS (Nov. 2, 2024) https://www.foxnews.com/politics/shock-poll-harris-leading-trump-iowa-3-point-shift-toward-vice-president-red-state.amp (last visited July 24, 2025);

Jennifer Agiesta, *Trump no longer leads in a state he carried twice, according to new Iowa Poll*, CNN POLITICS (Nov. 2, 2024), https://www.cnn.com/2024/11/02/politics/iowa-poll-harris-trump/index.html (last visited July 24, 2025);



Sara Dorn, *Why Outlier Poll Showing Harris Winning Iowa Could Spell Trouble For Trump*, FORBES (Nov. 3, 2024), https://www.forbes.com/sites/saradorn/2024/11/03/why-outlier-poll-showing-harris-winning-iowa-could-spell-trouble-for-trump/ (last visited July 24, 2025).

Forbes

FORBES > BUSINESS

BREAKING

Why Outlier Poll Showing Harris Winning Iowa Could Spell Trouble For Trump

Sara Dorn Forbes Staff

Sara Dorn is a Forbes news reporter who covers politics.

Follow

3

Nov 3, 2024, 05:13pm EST

63. After President Trump's historic victory and the triumph of other Republicans in Iowa, Selzer, aided and abetted by DMR and Gannett, attempted to sidestep her disastrous and deceitful Defendant Polls with vacuous platitudes and discussion about her next career moves. *See* J. Ann Selzer, *Pollster Ann Selzer ending election polling, moving 'to other ventures and opportunities,'* DES MOINES REGISTER (Nov. 17, 2024), available at https://www.desmoinesregister.com/story/opinion/columnists/2024/11/17/ann-selzer-conducts-iowa-poll-ending-election-polling-moving-to-other-opportunities/76334909007/ (last visited June 29, 2025).

64. In reality, Selzer quit the polling industry in disgrace after an attempt at election interference. Such action is an admission of Selzer's guilt and liability for the fake, election-interfering poll.

65. Further, lacking any sensible or innocent explanation for the Harris Poll, the *Des Moines Register* could only weakly offer that "[t]o date, no likely single culprit has emerged to explain the wide disparity." *See* Carol Hunter, *An update from the editor: What a review of the pre-election Iowa Poll has found,* DES MOINES REGISTER (Nov. 17, 2024), https://www.desmoinesregister.com/story/opinion/columnists/from-the-editor/2024/11/17/editors-update-what-a-review-of-the-pre-election-iowa-poll-has-found/76300644007/ (last visited July 24, 2025).

66. Selzer, aware that there is no innocent explanation for the Harris Poll, continues to try and talk her way out of the malignant fiction she unleashed on the public. *See* Hanna Panreck, *Former pollster Ann Selzer hits back at criticisms over Iowa poll: 'They are accusing me of a crime,'* FOX NEWS (Dec. 15, 2024), https://www.foxnews.com/media/former-pollster-ann-selzer-hits-back-criticisms-over-iowa-poll-they-accusing-me-crime (last visited July 24, 2025). Appearing on the *Iowa Press*, Selzer remarked: "Well, I'm not here to break any news. If you were hoping that I had landed one exactly why things went wrong, I have not." *See J. Ann Selzer,* IOWA PRESS (Dec. 13, 2024), https://www.iowapbs.org/shows/iowapress/iowa-press/episode/11885/j-ann-selzer (last visited July 24, 2025). Later, Selzer inadvertently revealed the root of the problem, that the Harris Poll was bought and paid for: "And the polling industry is predicated on getting people to pay money for their products." *Id*.

67. Notably, *PollFair*, an online polling analyst that reweighs polls based on historic exit poll data, took the Harris Poll and reweighted it according to historical data. Selzer weighed her sample at R+2, while *PollFair* weighted its sample at R+10. Doing so moved the results from Harris +3 (47-44) to President Trump +6 (50-44). *See* https://x.com/poll_fair/status/1852857893307158678 (last visited July 24, 2025).

68. The truth is that there is no sensible or innocent explanation for the Harris Poll since, as Manhattan Institute senior fellow James Piereson wrote, Selzer's "miss" was *beyond* extreme:

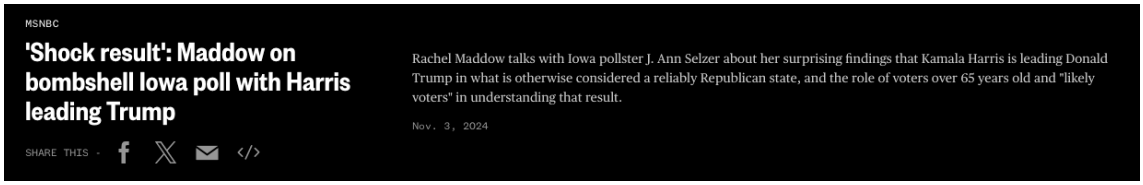
> The Selzer Poll, with a margin of error of 3.4, missed the real outcome by 16 points, or by as many as five standard deviations from the true result as revealed on election day. What are the odds of drawing such a sample by legitimate means? Answer: roughly one time in 3.5 million trials. In other words, given these odds, the results in the Iowa poll likely did not come about by "honest error."
>
> *See* James Piereson, *Statistical questions about the Iowa poll,* THE NEW CRITERION (Nov. 12, 2024), https://newcriterion.com/dispatch/statistical-questions-about-the-iowa-poll/ (last visited July 24, 2025).

69. Selzer's deceptive "miss" caused extensive harm:

> It is more likely that someone deliberately manipulated the sample so that it included too many Democrats, or simply made up the numbers as they came in for the purpose of giving confidence to Harris voters and worry for Trump supporters, or to bring national attention to a poll taken in a state not regarded as competitive. The poll did receive national attention and was widely discussed. Selzer appeared on television interviews to talk about the poll and its implications. If the goal was to promote the poll, then the gambit succeeded—at least until election day, when it was revealed to be ridiculously far off the mark.
>
> *Id*.

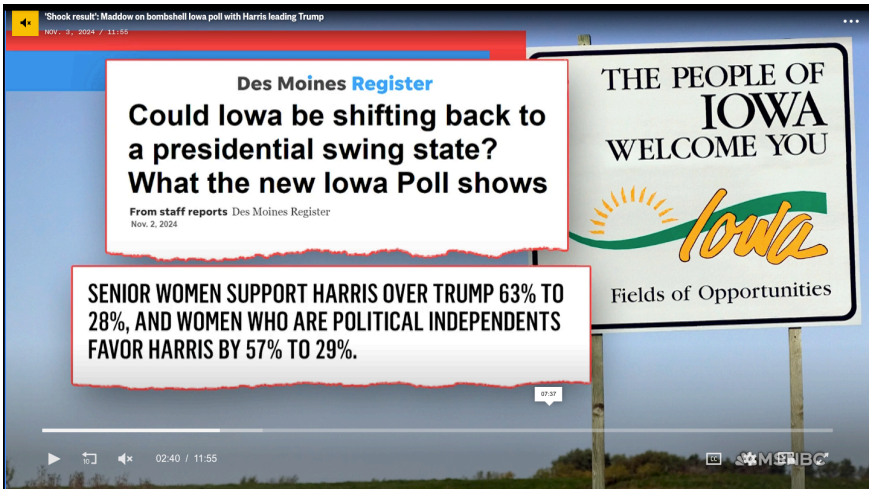
70. Indeed, Selzer *widely* appear on television interviews, where she shamelessly promoted her Harris Poll to drum up Democrat fervor while feigning shock at her own findings, most notably on MSNBC with left-wing extremist Rachel Maddow. As Selzer had intended, a giddy Maddow—like other Democrat-aligned commentators who reported on the Harris Poll—spread manufactured enthusiasm and hope to MSNBC's overwhelmingly Democrat viewers. "And the reason this is *consequential* to our psyche is that if this is accurate—and if anybody is accurate it is likely to be Ann Selzer in the Iowa poll—if this is accurate—this implies that Harris might be winning Iowa." *See* Rachel Maddow, *'Shock result': Maddow on bombshell Iowa poll with Harris leading Trump,* MSNBC (Nov. 3, 2024), https://www.msnbc.com/msnbc/watch/-shock-result-

maddow-on-bombshell-iowa-poll-with-harris-leading-trump-223450181755 (last visited July 24, 2025). (Emphasis added).



71. Maddow was perceptive about one thing: the Harris Poll *was* consequential, but for all the wrong reasons. Selzer, who Maddow breathlessly called a "living bullseye," carried more than enough weight to shift public perception about the race. *Id*.

72. Ironically, as Maddow attempted to put the magnitude of the Harris Poll in perspective for her suddenly rejuvenated audience, she only underscored why the Harris Poll was a partisan fiction. "Iowa is a State where neither campaign has spent any time or resources since the primaries. They don't have a ground game up there. They don't have ads up there. Trump won Iowa by eight points last time and nine points the time before that. Nobody thinks of it as a swing state . . . . but here she is with a lead?" *Id*.



73. Maddow then welcomed Selzer to the program, with the pollster immediately complimenting Maddow's perspective on the Harris Poll as "picture perfect." *Id*. Selzer added: "I don't see how anybody would look at those numbers and the history in Iowa in the past eight to

twelve years and think that these numbers could have been foretold." *Id*. Of course, the numbers could not have been foretold because they weren't possible or real, they were fake.

74. Nor can Selzer hide behind feeble excuses about the purported difficulty of polling in races involving President Trump—the Harris Poll wasn't Selzer's only inexplicable, flagrant "miss" in favor of a Democrat candidate in the 2024 election cycle. The Harris Poll was one of *five* massive "misses" favoring Democrats this cycle.

Defendants' Other 2024 Polling "Misses" Favoring Democrats and Demonstrating a Pattern of Deceit

75. The Harris Poll was but one of Selzer's five massive "misses" favoring Democrats this cycle, all of which harmed President Trump, as well as other Republican candidates in Iowa.

76. Indeed, Defendants' brazen 2024 election interference was not limited to the Harris Poll. Also on November 2, 2024 and November 3, 2024, DMR and Gannett published another poll in the online and print versions of the *Des Moines Register*, which purported to show that incumbent Representative Miller-Meeks trailed by sixteen points (53%-37%) against Democrat challenger Christina Bohannan in the race for Iowa's 1st Congressional District; Representative Miller-Meeks ultimately won the 1st District by two-tenths of a point (50.1%-49.9%), with 206,955 votes to 206,156 for Bohannan. *See* Stephen Gruber-Miller, *Iowa poll: Democrats are preferred over Republicans in 2 of 4 congressional districts,* DES MOINES REGISTER (Nov. 3, 2024), available at https://www.desmoinesregister.com/story/news/politics/iowa-poll/2024/11/03/iowa-poll-democrats-preferred-over-republicans-congress-nunn-baccam-miller-meeks-bohannan-hinson/75988058007/ (last visited June 29, 2025); Marissa Payne, *Recount affirms Mariannette Miller-Meeks' win over Christina Bohannan in 1st District,* DES MOINES REGISTER (Nov. 27, 2024), available at https://www.desmoinesregister.com/story/news/politics/elections/2024/11/27/iowa-election-

results-mariannette-miller-meeks-wins-congressional-1st-district-recount/76595052007/ (last visited June 29, 2025); visited June 29, 2025); Iowa First Congressional District Results, NEW YORK TIMES, available at https://www.nytimes.com/interactive/2024/11/05/us/elections/results-iowa-us-house-1.html (last visited July 24, 2025).

77. The odds of a pollster with Selzer's experience and track record innocently missing *both* President Trump's *and* Representative Miller-Meeks' races by the same margin, sixteen points, and favoring the Democrat candidates with both "misses," are outside any reasonable range of error.

78. Yet, Selzer—who had brandished and relied on her mainstream reputation for accuracy despite several other, far less publicized, egregious polling misses in favor of Democrats—discussed *infra*—would have the public believe it was merely a coincidence that two of the worst polling misses of her career came just days before the most consequential election in memory, that one was leaked, *and* both happened to go against Republican candidates. The Harris Poll and the poll of Representative Miller-Meeks' race were no "misses," but rather attempts to corruptly influence and interfere in the outcome of the 2024 Presidential Election and other key elections, including the Iowa 1st District.

79. As intended, Selzer's manipulated Harris Poll harmed President Trump and many other elections affecting voter turnout and other metrics, including for example, Representative Miller-Meeks' contest against Bohannan.

80. Regarding the poll of Representative Miller-Meeks' race, the DMR, aided by Gannett, reported:

> Now, voters prefer a Democratic candidate by a 16-point margin in the 1st District, where Democrat Christina Bohannan, a law professor and former state

> representative, is in a rematch with Republican U.S. Rep. Mariannette Miller-Meeks, who is seeking her third term. Miller-Meeks defeated Bohannan in 2022 by nearly 7 percentage points.
>
> *See* Gruber-Miller, *Iowa poll: Democrats are preferred over Republicans in 2 of 4 congressional districts, supra.*

81. Given that Representative Miller-Meeks defeated Bohannan by nearly seven points in 2022 (53.4%-46.6%), Selzer's projection that Bohannan led Miller-Meeks by sixteen points in the rematch constituted a *twenty-three-point* swing in Bohannan's favor—virtually a statistical impossibility and an absurd suggestion given the absence of any significant events or developments that might explain such a dramatic change. *See 2022 Iowa U.S. House – District 1 Election Results*, DES MOINES REGISTER, https://www.desmoinesregister.com/elections/results/race/2022-11-08-house-IA-17071 (last visited July 24, 2025). Of course, this was all part of a pattern of misses favoring Democrats, to President Trump's detriment.

82. Selzer also disregarded Representative Miller-Meeks' recent electoral history as two-time Congressional incumbent: having eked out a 6-vote victory in 2020 and defeated Bohannan handily in 2022, Miller-Meeks certainly could not have trailed Bohannan by sixteen points this cycle. *See 2020 Iowa U.S. House – District 2 Election Results*, DES MOINES REGISTER (Jan. 11, 2021), https://www.desmoinesregister.com/elections/results/race/2020-11-03-house-IA-17072/ (last visited July 24, 2025); *See 2022 Iowa U.S. House – District 1 Election Results*, *supra*.

83. Even a poll from a few weeks earlier (Sept. 30 to Oct. 1, 2024) by the Democrat Party had Bohannan up only four points (50%-46%). *Formerly available at* https://projects.fivethirtyeight.com/polls/house/2024/iowa/1/ (last visited Jan. 31, 2025).

84. Further, a poll from the end of August by Normington, Petts & Associates for the Bohannan Campaign had showed the race tied at 47% each. *See id*.

85. The poll of Representative Miller-Meeks' race was twelve points off from even the Democrats' optimistic projection. Furthermore, Iowa's 1st District is normally an R+3 seat, according to the Cook Political Report. President Trump had won it in 2020 by three points, and Kim Reynolds won it in 2018 by three points. A polling "miss" of this size, together with the other polling "misses" detailed below, are not indicator of mere error, but indicators of a pattern intended to harm President Trump and other Republican candidates in Iowa.

86. Following a bruising and costly recount in what proved to be a historically tight race, Miller-Meeks prevailed by two-tenths of a point. *See* Payne, *Recount affirms Mariannette Miller-Meeks' win over Christina Bohannan in 1st District, supra.* This outcome meant that the Poll about Miller-Meeks had been off by a whopping *sixteen* points—the same amount of the "miss" in the Harris Poll, also favoring the Democrat.

87. But that was not all. In the race for Iowa's 3rd Congressional District—rated by the Cook Political Report as R+3—between incumbent Republican Zach Nunn and Democrat challenger Lanon Baccam, Selzer projected Baccam with a seven-point lead over Nunn (48%-41%), according to another poll published by the Des Moines Register on November 3, 2024. *See* Gruber-Miller, *Iowa poll: Democrats are preferred over Republicans in 2 of 4 congressional districts, supra.*

88. Notwithstanding Selzer's poll, Nunn prevailed by four points. *See* Stephen Gruber-Miller and Courtney Crowder, *Republican Zach Nunn defeats Lanon Baccam, wins reelection bid in Iowa's 3rd District,* DES MOINES REGISTER (Nov. 6, 2024), available at https://www.desmoinesregister.com/story/news/politics/elections/2024/11/05/zach-nunn-lanon-baccam-face-off-in-iowas-3rd-congressional-district/75777485007/ (last visited July 24, 2025).

This outcome meant Selzer's poll had been off by a disastrous eleven points—again in favor of the Democrat.

89. In the race for Iowa's 2nd Congressional District between incumbent Republican Ashley Hinson and Democrat challenger Sarah Corkery, Selzer projected Hinson with a tight three-point lead over Corkery (45%-42%), according to another poll published by the Des Moines Register on November 3, 2024. *See* Gruber-Miller, *Iowa poll: Democrats are preferred over Republicans in 2 of 4 congressional districts, supra.*

90. Notwithstanding Selzer's poll, Hinson prevailed by over *fifteen* points. *See* Sabine Martin, *Republican U.S. Rep. Ashley Hinson wins third term, vows to back President Trump's agenda,* DES MOINES REGISTER (Nov. 5, 2024), available at https://www.desmoinesregister.com/story/news/politics/elections/2024/11/05/iowa-election-results-ashley-hinson-sarah-corkery-jody-puffett-2nd-congressional-district/75721251007/ (last visited June 29, 2025). This outcome meant Selzer's poll had been off by a disastrous twelve points—again in favor of the Democrat.

91. In the race for Iowa's 4th Congressional District between incumbent Republican Randy Feenstra and Democrat challenger Ryan Melton, Selzer projected Feenstra would win with the same sixteen-point lead over Melton (53%-37%) that she projected for Bohannan over Representative Miller-Meeks, according to another poll published by the *Des Moines Register* on November 3, 2024. *See* Gruber-Miller, *Iowa poll: Democrats are preferred over Republicans in 2 of 4 congressional districts, supra.*

92. Notwithstanding Selzer's poll, Feenstra prevailed by over *thirty-four* points. *See* Philip Joens, *Randy Feenstra defeats Ryan Melton in Iowa's Fourth Congressional District,* DES MOINES REGISTER (Nov. 5, 2024), available at

https://www.desmoinesregister.com/story/news/politics/elections/2024/11/05/randy-feenstra-ryan-melton-vie-for-iowas-4th-congressional-district/75721620007/ (last visited June 29, 2025). This outcome meant Selzer's poll had been off by a disastrous eighteen points—again in favor of the Democrat.

93. The odds of a pollster with the experience and track record of Selzer innocently missing the presidential race by sixteen points and all four Iowa Congressional races by sixteen points (1st District), eleven points (2nd District), twelve points (Third District), and eighteen points (Fourth District), respectively, and favoring the Democratic candidates with all five "misses," are outside any reasonable range of error. *See, e.g.,* Piereson, *Statistical questions about the Iowa poll, supra.* This is proof of intentional wrongdoing.

CLAIMS FOR RELIEF

COUNT ONE

Violation of Iowa Consumer Fraud Act
Iowa Code Chapter 714H
(Plaintiff v. All Defendants)

94. Plaintiff realleges his allegations contained in paragraphs 1 through 93 as if set fully forth herein.

95. This action is brought pursuant to Iowa Code Chapter 714H and its relevant provisions.

96. Iowa Code § 714H.3(1) provides:

> A person shall not engage in a practice or act the person knows or reasonably should know is an unfair practice, deception, fraud, false pretense, or false promise, or the misrepresentation, concealment, suppression, or omission of a material fact, with intent that others rely upon the unfair practice, deception, fraud, false pretense, false promise, misrepresentation, concealment, suppression, or omission in connection with the advertisement, sale, or lease of consumer merchandise . . . .

97. Iowa Code § 714H.2(3) defines a consumer as "a natural person or the person's legal representative."

98. Iowa Code § 714H.2(5) defines "deception" as "an act or practice that is likely to mislead a substantial number of consumers as to a material fact or facts."

99. Iowa Code § 714H.2(6) defines "merchandise" the same as the definition contained in Iowa Code § 714.16, under which the term includes "any objects, wares, goods, commodities, intangibles, securities, bonds, debentures, stocks, real estate or *services*." (Emphasis added).

100. Iowa Code § 714H.2(9) defines "unfair practice" the same as the definition contained in Iowa Code § 714.16, under which the term "means an act or practice which causes substantial, unavoidable injury to consumers that is not outweighed by any consumer or competitive benefits which the practice produces."

101. Iowa Code § 714H.5 provides for a private right of action for consumers damaged by violations of § 714H.3(1):

> 1. A consumer who suffers a sustainable loss of money or property as the result of a prohibited practice or act in violation of this chapter may bring an action at law to recover actual damages. The court may order such equitable relief as it deems necessary to protect the public from further violations, including temporary and permanent injunctive relief.
>
> 2. If the court finds that a person has violated this chapter and the consumer is awarded actual damages, the court shall award to the consumer the costs of the action and the consumer's attorney reasonable fees.

102. As to the nature of the conduct that constitutes an "unfair practice," the "Iowa Consumer Fraud Act 'is not a codification of common law fraud principles.'" *Moeller v. Samsung Electronics America, Inc*., 623 F.Supp.3d 978, 985 (2002) (quoting *State ex rel. Miller v. Pace*, 677 N.W. 2d 761, 770 (Iowa 2004). "It permits relief upon a lesser showing that the defendant made a misrepresentation or omitted a material fact 'with the intent that others rely upon the . . . omission.'" *Id*. (quoting § 714.16(2)(a)). "A course of conduct contrary to what an ordinary

consumer would anticipate contributes to a finding of an unfair practice. *State ex rel. Miller v. Vertrue, Inc*., 834 N.W.2d 12, 37 (Iowa 2023).

103. President Trump, together with all voters in Iowa and across America harmed by the Defendant Polls, is a "consumer" within the meaning of the statute, having acquired, read, and been deceived by the *Des Moines Register*, in particular the Harris Poll Article, but also all coverage about the other manipulated polls favoring Democrats.

104. Defendants furnished "merchandise" to consumers, including Plaintiff, within the broad meaning of the statute since they provided a service: physical newspapers, online newspapers, and other content that contained the Defendant Polls.

105. Defendants engaged in "deception" because the Defendant Polls were "likely to mislead a substantial number of consumers as to a material fact or facts"; in this case, consumers were misled into believing that Harris was leading President Trump in the Iowa Presidential race and were also misled into believing that Democrats were leading multiple races in Iowa. These Polls were misleading about the only material facts that matter when it comes to polling: who is winning the race in question and by how much.

106. Defendants engaged in an "unfair act or practice" because the publication and release of the Defendant Polls "cause[d] substantial, unavoidable injury to consumers that [was] not outweighed by any consumer or competitive benefits which the practice produced," to wit: consumers, including Plaintiff, were badly deceived and misled as to the actual position of the respective candidates in the Iowa Presidential race. Moreover, President Trump, the Trump 2024 Campaign, and other Republicans were forced to divert campaign and financial resources to Iowa based on the deceptive Harris Poll. Consumers within and without Iowa who paid for subscriptions to the *Des Moines Register, USA Today,* and other Gannett-owned publications, or who otherwise

purchased the publication, including Plaintiff, were also badly deceived. Additionally, Iowans who contributed to the Trump 2024 Campaign were similarly deceived.

107. Exacerbating their deception and unfair acts and practices, Defendants originally made the Harris Poll Article and all coverage about the other manipulated polls favoring Democrats publicly available, but then deceptively concealed both Articles behind a paywall after this action was commenced. This completely undermines their disingenuous claims of fairness and transparency and shows consciousness of guilt.

108. The Defendant Polls were deceptive, misleading, unfair, and the result of concealment, suppression, and omission of material facts about the true respective positions of President Trump and Harris in the Presidential race, and the candidate positions in the Iowa Congressional races, all of which were known to Defendants and should have been disclosed to the public.

109. Moreover, as demonstrated by the leak of the Harris Poll before publication in the *Des Moines Register*, Defendants created, published, and released the Harris Poll for the improper purpose of deceptively influencing the outcome of the 2024 Presidential Election.

110. Pollsters such as Selzer, polling companies such as S&C, and news organizations such as DMR and Gannett, are responsible for accurately representing the truth of events, not distorting polls to try and falsely make their preferred candidate appear to be in the lead.

111. Due to Defendants' actions, the public could not discern who was truly leading in the Iowa Presidential race and, as a result, were, or could have been, badly deceived into thinking that Harris was leading the race, and that Democrats were leading Congressional races against Republican candidates.

112. Undeniably, Defendants' manipulation of Congressional races harmed President Trump even more than it harmed the candidates in those races, in multiple respects: by negatively influencing voter turnout, by damaging and tarnishing the Republican brand, and by creating completely false portraits of Congressional races that were also germane to President Trump's race. Indeed, the race between President Trump and Harris could not be viewed in isolation.

113. Defendants' broad misconduct gives rise to liability under the Iowa Consumer Fraud Act because the Defendant Polls were deceptive, misleading, and involved concealment, suppression, and omission of material facts. Defendants engaged in this misconduct to try to improperly influence the outcome of the 2024 Presidential Election and other electoral races relevant to President Trump and the Republican brand.

114. Because of Defendants' false, misleading, and deceptive conduct, President Trump has sustained actual damages by having to expend extensive time and resources, including direct federal campaign expenditures, to mitigate and counteract the harms of the Defendants' conduct. Because the Defendants' conduct was willful and wanton, President Trump is also entitled to statutory damages three times the actual damages suffered.

115. Additionally, because the Iowa Consumer Fraud Act is equitable in nature, Plaintiff is entitled to injunctive relief, including an order enjoining Defendants and their associates, affiliates, or any related entities, from publishing or releasing any further deceptive polls designed to influence the outcome of an election, and requiring Defendants to disclose all data and information upon which they relied in creating, publishing, and releasing the false, misleading, and deceptive Defendant Polls.

COUNT TWO
Fraudulent Misrepresentation
(Plaintiff v. All Defendants)

116. Plaintiff realleges his allegations contained in paragraphs 1 through 115 as if fully set forth herein.

117. The elements of fraudulent misrepresentation are: (1) representation; (2) falsity; (3) materiality; (4) scienter; (5) intent to deceive; (6) justifiable reliance; and (7) resulting injury. *Midwest Home Distributor, Inc. v. Domco Indust. Ltd.,* 585 N.W.2d 735 (Iowa 1998).

118. The Defendant Polls were misrepresentations of the state of the respective races at the time they were taken and published. These Polls were more than outliers—they were statistically impossible.

119. The Defendant Polls were false misrepresentations of the state of the races. They were not even close to accurate.

120. The Defendant Polls were material misrepresentations. Selzer's polling was long wrongfully regarded as the gold standard nationally and in Iowa, and predictably generated enormous media attention. Numerous media outlets at the state, national, and global level reported on the Polls.

121. The Defendant Polls were knowingly false misrepresentations of the races. Any responsible pollster or journalist with experience in Iowa politics would recognize the clear inaccuracy of the Defendants' Polls, yet Defendants chose to publish the Polls anyway. Statistically, the results of the Harris Poll have a 1 in 3,500,000 chance of being the result of honest error, and the odds of the other manipulated polls being the result of honest error are similar. This was not honest error.

122. The Defendant Polls were intentionally deceptive misrepresentations. Selzer and Gannett's senior staff at the *Des Moines Register*, all of whom lean strongly toward Democrats, knew that Defendants' Polls were considered an accurate representation of the Iowa electorate and

that these Polls were inaccurate, and yet they decided to publish the Polls anyway, showing their intent to deceive Plaintiff, other candidates for elected office, their readers, and the broader electorate with false Polls.

123. Worse still, exacerbating their intentionally deceptive misrepresentations, Defendants originally made the Harris Poll Article and other manipulated election coverage publicly available, but then deceptively concealed all the coverage behind a paywall after this action was commenced, which shows consciousness of guilt.

124. Given Selzer's historic accuracy and the *Des Moines Register's* general reputation for accuracy, Plaintiff justifiably relied on the Defendant Polls at issue

125. Plaintiff was injured by the fraudulence of the Defendant Polls at issue: not only did these Polls harm Plaintiff in his race, but Plaintiff, as a reader of the *Des Moines Register* and Selzer's polls, was entitled to accurate information, not to be misled by fraudulent misrepresentations.

126. Defendants are liable for presenting false polling.

COUNT THREE
Negligent Misrepresentation
(Plaintiff v. All Defendants)

127. Plaintiff realleges his allegations contained in paragraphs 1 through 126 as if fully set forth herein.

128. If the Court finds that the misrepresentations were not intentional, as it should, then in the alternative Plaintiff pleads the tort of negligent misrepresentation.

129. Negligent misrepresentation is also sometimes described as "the tort of negligently giving misinformation." *Sain v. Cedar Rapids Cmty. Sch. Dist*., 626 N.W.2d 115, 123 (2001).

130. "[P]rofessionals such as accountants, abstractors, and attorneys owe a duty of care in supplying information to foreseeable third parties as members of a limited class of persons who would be contemplated to use and rely upon the information." *Id*.

131. The "duty [of care for negligent misrepresentation] arises only when the information is provided by persons in the business or profession of supplying information to others." *Id*.

132. "[T]he foreseeability of harm helps support the imposition of a duty of care." *Id*.

133. "[T]he pecuniary interest which a person has in a business, profession, or employment which supplies information serves as an additional basis for imposing a duty of care." *Id.*

134. Newspaper journalists and pollsters are professionals with at least a bachelor's degree and some years of experience, if not advanced degrees in journalism, political science, or statistics. Selzer, for example, has a Ph.D. in Communication Theory and Research.

135. Consumers and readers of newspapers and online media content, as well as political candidates who are covered by the media and polling, are part of the limited class of foreseeable third parties who rely on the information provided by these professionals.

136. Newspaper journalists and pollsters are supposed and expected to be in the business of supplying accurate, reliable information to others.

137. Newspaper journalists and pollsters are not supposed to provide information to their readers in an adversarial or arms-length setting.

138. Defendants could foresee that reporting obviously inaccurate polling results would harm their readers and the subjects of their polls by delivering a product other than the one that those individuals expected or were entitled to, an honest snapshot of the election being polled. The

product to which those receiving information are entitled to is accurate news and data—not wildly inaccurate polls calculated to interfere with elections.

139. Defendants have a pecuniary interest in their business of supplying information—this is how they get and keep readers, and how Selzer and S&C get and keep clients.

140. The inaccurate information supplied by Defendants harmed Plaintiff as both consumer and candidate—it gave him a false impression of the state of the world at a critical moment in his race.

141. The information supplied by the Defendants was a false portrayal of the facts, not a statement of opinion or future intentions.

142. The decision of Defendants to publish this information was not reasonable. In fact, given Defendants' knowledge of previous elections in Iowa and other polling data in Iowa at the time, it was reckless or at minimum, negligent.

143. Worse still, exacerbating their recklessness and negligence, Defendants originally made the Harris Poll Article and other manipulated election coverage publicly available, but then deceptively concealed both Articles behind a paywall after this action was commenced, which shows consciousness of guilt.

144. Defendants' recklessness or negligence created an ascertainable pecuniary loss: the value of the false content that they acquired, purchased, and consumed as well as expenditures and losses relating to their races.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a jury trial as to all issues so triable.

WHEREFORE, Plaintiff PRESIDENT DONALD J. TRUMP demands judgment against Defendants J. ANN SELZER, SELZER & COMPANY, DES MOINES REGISTER AND TRIBUNE COMPANY, and GANNETT CO., INC. as follows:

(a) On Counts One, Two, and Three, actual damages to be determined upon trial of this action;

(b) On Counts One, statutory damages three times the actual damages suffered;

(c) On Count One, an injunction enjoining Defendants' ongoing deceptive and misleading acts and practices relating to the Defendant Polls and compelling Defendants to disclose all information upon which they relied to engage in the deceptive and misleading acts relating to the Defendant Polls;

(d) The attorneys' fees and costs associated with this action; and

(e) Such other relief as the Court deems just and proper.

Date: July 25, 2025

Respectfully submitted,

/s/ Edward Andrew Paltzik
Edward Andrew Paltzik
Taylor Dykema PLLC
925 E. 25th St.
Houston, TX 77009
(516) 526-0341
edward@taylordykema.com
(admitted pro hac vice)

/s/ Alan R. Ostergren
ALAN R. OSTERGREN
Attorney at Law
Alan R. Ostergren, PC
500 East Court Avenue
Suite 420
Des Moines, Iowa 50309
(515) 297-0134
alan.ostergren@ostergrenlaw.com

Attorneys for Plaintiff,
President Donald J. Trump

EXHIBIT 13

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

PRESIDENT DONALD J. TRUMP, an individual, *Plaintiff*, v. J. ANN SELZER, SELZER & COMPANY, DES MOINES REGISTER AND TRIBUNE COMPANY, and GANNETT CO., INC., *Defendants*.	Civil Case No. 4:24-cv-449-RGE-WPK **DEFENDANTS J. ANN SELZER AND SELZER & COMPANY'S BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS THE REVISED AMENDED COMPLAINT UNDER RULE 12(b)(6)** **ORAL ARGUMENT REQUESTED**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

INTRODUCTION[1]

Plaintiff's claims are barred by the First Amendment, and the Court should dismiss them with prejudice. In the United States there is no such thing as a claim for "fraudulent news." No court in any jurisdiction has ever held such a cause of action might be valid, and few plaintiffs have ever attempted to bring such outlandish claims. Those who have were promptly dismissed. *E.g.*, *Hollander v. CBS News, Inc.*, No. 16 Civ. 6624, 2017 WL 1957485, at *3–4 (S.D.N.Y. May 10, 2017) (dismissing wire fraud claims based on allegedly false and misleading news stories about candidate Donald Trump), *aff'd but vacated on other grounds sub nom.*, *Hollander v. Garrett*, 710 Fed. Appx. 35 (2d Cir. 2018); *Wash. League for Increased Transparency & Ethics v. Fox News*, 19 Wash. App. 2d 1006, 2021 WL 3910574 (Wash. Ct. App. 2021) (unpublished) (affirming dismissal

[1] The arguments advanced in this brief are substantively identical to those set forth in the Selzer Defendants' brief in support of their motion to dismiss the Amended Complaint (ECF No. 33) because this Court ordered Plaintiff to file a "revised version of the Amended Complaint" without "new parties, allegations, or claims" (ECF No. 65).

The Revised Amended Complaint (ECF No. 88-1) includes additional allegations and revisions in excess of the parameters of the Court's Order. *See, e.g.*, Rev. Am. Compl. ¶¶ 112–13 (removing allegation that down-ballot races were impacted by Selzer's polling and adding an allegation that "Defendants' manipulation of Congressional races harmed President Trump even more than it harmed the candidates in those races," including by "damaging and tarnishing the Republican brand"); *id*. at ¶ 75 (adding allegation other polls "harmed President Trump, as well as other Republican candidates"); *id.* at ¶ 81 (adding allegation a poll was "all part of a pattern of misses favoring Democrats, to President Trump's detriment"); *id.* at ¶ 85 (adding allegation that "A polling 'miss' of this size, together with the other polling 'misses' detailed below, are not indicator of mere error, but indicators of a pattern intended to harm President Trump and other Republican candidates in Iowa"); *id.* at ¶ 103 (adding allegation that Trump read and was deceived by "all coverage about the other manipulated polls favoring Democrats"); *id.* at ¶126 (replacing the allegation that Defendants presented "false Polls" with an allegation that Defendants presented "false polling"); *id.* at ¶¶ 7, 33–34, 35, 61, 103 (adding the words "harm," "harmful," "Harmfully"); *id.* at ¶ 143 (adding an allegation the Defendants made "other manipulated election coverage" available to the public); *id.* at ¶ 125 (adding an allegation Trump was "a reader" of Selzer's polls). These revisions add nothing to materially support Mr. Trump's claims but add allegations that would require further leave to amend. The Court should strike them under its inherent authority or Fed. R. Civ. P. 12(f)(1) for violating the Court's Orders.

of claims under the Washington Consumer Protection Act against Fox News for allegedly false reporting about COVID-19); *cf. Nat'l Inst. of Fam. & Life Advocs. v. Raoul*, 685 F. Supp. 3d 688, 695 (N.D. Ill. 2023) (enjoining application of Illinois Consumer Fraud Act to anti-abortion advocacy as "both stupid and very likely unconstitutional").

There is good reason for this. History's judgment repudiated the 1798 Sedition Act which prohibited "false, scandalous and malicious … writings against the government of the United States" or its president, and that fraught episode "first crystallized a national awareness of the central meaning of the First Amendment." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964). Since then, courts at all levels have confirmed our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *id.* at 270, holding that speech is presumptively protected unless it falls within one of a few limited and narrowly defined categories, *United States v. Stevens*, 559 U.S. 460, 468–70 (2010). Those categories do not include a general exception for "false speech." *United States v. Alvarez*, 567 U.S. 709, 722 (2012) (plurality opinion). Plaintiff Trump seeks to illegitimately expand them to include "fake news," a tag line that may play well for some on the campaign trail but has no place in America's constitutional jurisprudence. In this regard, civil damages, no less than criminal sanctions, cannot lie against protected speech. *Snyder v. Phelps*, 562 U.S. 443 (2011); *Sullivan*, 376 U.S. at 277.

Even if such a cause of action existed, the Revised Amended Complaint is fatally flawed on every level: Plaintiff Trump fails at the threshold to allege any recoverable damages and does not state plausible claims, either on the law or on the facts as alleged. No court has ever accepted claims like these, and this Court should not be the first.

ALLEGATIONS IN PLAINTIFF'S REVISED AMENDED COMPLAINT

Defendant J. Ann Selzer is a resident of Des Moines, Iowa, and holds a Ph.D. in Communication Theory and Research from the University of Iowa. (Rev. Am. Compl. ¶ 16). She is the founder and president of Selzer & Company ("Selzer"), which conducts opinion research, including polls. (*Id.* at ¶ 16). Selzer has been the *Des Moines Register*'s primary pollster for four decades, overseeing all its polls—including its Iowa Poll. (*Id.*)

Selzer's polls have a reputation for consistency and accuracy. (*Id.* at ¶ 28). In 2016, "Clare Malone of *FiveThirtyEight* described Selzer as 'the best pollster in politics.'" (*Id.*) And "in a June 2024 rating of 25 pollsters, Nate Silver rated Selzer first with an A+ score." (*Id.*) Indeed, Selzer's polls were "regarded as the gold standard nationally and in Iowa." (*Id.* at ¶ 120).

Pollsters, however, are not seers. Every election has outlier polls, and the results of polls do not always conform to the final election tally. (*See id.* at ¶¶ 62 (news reports describing Selzer's November 2024 poll as an "outlier"), 118). In 2018, Selzer's final poll of the Iowa gubernatorial race between Democrat Fred Hubbell and Republican Kim Reynolds showed Hubbell up by two points, but Reynolds prevailed by three. (*Id.* at ¶ 31). In 2020, Selzer's final Senate poll showed Republican Joni Ernst ahead by four points, and Ernst prevailed by seven. (*Id.* at ¶ 32). Occasionally, polls miss by larger margins. In 2022, Selzer released a poll the October before the general election for Iowa Attorney General showing Republican Brenna Bird trailing Democratic incumbent Tom Miller by sixteen points, but Bird defeated Miller by two. (*Id.* at ¶ 30).

The *Des Moines Register* published its final Iowa Poll of the 2024 presidential race on November 2 and 3, 2024. (*Id.* at ¶ 1).[2] The poll surveyed 808 likely voters in Iowa. (*Id.* at ¶¶ 1,

[2] Brianne Pfannenstiel, *Iowa Poll: Kamala Harris Leapfrogs Donald Trump to Take Lead Near Election Day. Here's How*, Des Moines Reg. (Nov. 2, 2024, 6:01PM), https://www.desmoinesregister.com/story/news/politics/iowa-poll/2024/11/02/iowa-poll-kamala-

76). It showed Plaintiff Trump trailing Kamala Harris by three points. (*Id.* at ¶ 2). The poll results were surprising because Selzer's preceding polls showed Mr. Trump leading the race, and other contemporaneous polls showed him with a seven-to-nine-point lead. (*Id.* at ¶¶ 45, 48). The *Des Moines Register* published Selzer's methodology along with a detailed analysis of the poll which compared the latest results to previous polls. (*Id.* at ¶¶ 1, 76).

Mr. Trump and other Republicans immediately disputed the poll's results. The same day Selzer released the poll, *PollFair* "reweighted" the poll with its own metrics and calculated Mr. Trump leading Iowa by six points. (*Id.* at ¶ 67). Ultimately, Mr. Trump won Iowa by thirteen points—meaning the poll was approximately sixteen points off from the election results. (*Id.* at ¶ 2).

Winning, however, wasn't enough for Mr. Trump, and he sued Ms. Selzer, Selzer & Company, the *Des Moines Register*, and its parent, Gannett. Plaintiff alleges the final 2024 Iowa Poll was "fake" and sought to foster enthusiasm for Democrats. (*Id.* at ¶¶ 14, 73). Selzer denies these conspiracies but must treat them as true herein.

Mr. Trump alleges he "expend[ed] extensive time and resources, including direct federal campaign expenditures, to mitigate and counteract the harms" of the Iowa Poll, though he does not allege what those resources or expenditures were. (*Id.* at ¶ 114). He also alleges the poll "deceived" Iowans "who contributed to the Trump 2024 Campaign." (*Id.* at ¶ 106). The Revised Amended Complaint adds an allegation that the Iowa Poll "damag[ed] and tarnish[ed] the Republican brand." (*Id.* at ¶ 112).

---

harris-leads-donald-trump-2024-presidential-race/75354033007 (last updated Nov. 7, 2024), *archived at* https://archive.is/UqdGz. Because the article releasing the poll is central to Plaintiff's claims, the Court may consider its contents on a motion to dismiss. *See Gorog v. Best Buy Co.*, 760 F.3d 787, 791 (8th Cir. 2014).

Mr. Trump filed this action in Iowa state court on December 16, 2024, raising one claim under the Iowa Consumer Fraud Act. Gannett removed the case to this Court based on diversity jurisdiction. (*Id.* at ¶ 21). On January 31, 2025, Mr. Trump filed an Amended Complaint, which added Representative Mariannette Miller-Meeks and Bradley Zaun as well as common law claims for fraudulent and negligent misrepresentation. (ECF No. 23). Trump, Miller-Meeks, and Zaun then filed a motion to remand, which this Court denied. (ECF Nos. 30, 65). In denying the motion to remand, this Court ordered Plaintiff Trump to refile this Revised Amended Complaint omitting Miller-Meeks and Zaun as plaintiffs and deleting any allegations solely to support their claims. (ECF Nos. 65, 70, 86). On the deadline to complete that administrative task, Trump instead moved to stay the proceedings. (ECF No. 66). This Court denied his stay motion but extended his deadline to file the Revised Amended Complaint to July 18, 2025. (ECF No. 70). On that deadline, Trump again filed a motion to stay instead of filing the Revised Amended Complaint as ordered. (ECF No. 83). This Court again denied his motion to stay and ordered him to file the Revised Amended Complaint within 48 hours. (ECF No. 86). Trump filed a Revised Amended Complaint on July 25, 2025. (ECF No. 88-1). This motion followed.

LEGAL STANDARD

Plaintiff's Revised Amended Complaint fails because it does not "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). While this Court must draw reasonable inferences in Plaintiff's favor, it is "free to ignore legal conclusions, unsupported conclusions, unwarranted inferences, and sweeping legal conclusions cast in the form of factual allegations." *Monson v. DEA*, 589 F.3d 952, 961 (8th Cir. 2009) (internal quotation marks omitted).

Plaintiff's fraud claims face a heightened pleading standard under Rule 9(b). *See E-Shops Corp v. U.S. Bank Nat'l Ass'n*, 678 F.3d 659, 665 (8th Cir. 2012) ("Rule 9(b)'s heightened pleading requirement applies to statutory fraud claims.") Plaintiff "must state with particularity the circumstances constituting fraud," Fed. R. Civ. P. 9(b), including "such facts as the time, place, and content of the defendant's false representations, as well as the details of the defendant's fraudulent acts, including when the acts occurred, who engaged in them, and what was obtained as a result," *United States ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552, 556 (8th Cir. 2006).

ARGUMENT

I. The First Amendment Bars Plaintiff's Claims.

This Court need not even address the elements of Plaintiff's claims because the First Amendment bars the action. It is a transparent attempt to punish news coverage and analysis of a political campaign, speech that not only is presumptively protected but "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder*, 562 U.S. at 451–52 (internal quotation marks omitted). Given the obvious affront to basic constitutional values, Plaintiff tries to change the subject by framing his claims around a state consumer protection law applicable to misrepresentations "in connection with the advertisement, sale, or lease of consumer merchandise." Iowa Code § 714H.3(1). Undaunted by the poor fit between commercial transactions and speech on public affairs, Plaintiff tries to pound a square peg into a round hole without any attempt to reconcile the constitutional mismatch. But as the Supreme Court has made clear, "simply labeling an action one for 'fraud' … will not carry the day." *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 617 (2003).

Plaintiff is hardly the first to use artful pleading seeking to evade the First Amendment, and courts are adept at seeing through such artifice. Even at the dawn of modern First Amendment jurisprudence, the Supreme Court recognized government could not suppress a "malicious,

scandalous and defamatory newspaper" simply by labeling it a "public nuisance." *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 706–08, 720 (1931) ("Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint.") The Court similarly barred another demagogue—Governor Huey Long—from imposing a "tax on lying" on big city newspapers that criticized him. *Grosjean v. Am. Press Co.*, 297 U.S. 233, 245–50 (1936); *see Minn. Star & Trib. Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 579–80 (1983) (Long denounced "'lying newspapers' as conducting 'a vicious campaign' and the tax as 'a tax on lying.'"). In *New York Times v. Sullivan*, the Court barred segregationists from using defamation law as a tool to cripple the civil rights movement, giving no weight "to the epithet 'libel' than … to other 'mere labels' of state law." 376 U.S. at 268–69 (citation omitted). The Revised Amended Complaint fits squarely within this rogue's gallery.

A. Plaintiff Illegitimately Seeks to Create a New First Amendment Exception.

Plaintiff assumes "false news" falls outside the First Amendment's protection, but over 200 years of American free speech law and practice prove otherwise. "Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker." *Id.* at 271. As the Supreme Court recently explained, "[o]ur constitutional tradition stands against the idea that we need Oceania's Ministry of Truth." *Alvarez*, 567 U.S. at 723.

"From 1791 to the present, … the First Amendment has permitted restrictions upon the content of speech in a few limited areas, and has never included a freedom to disregard these traditional limitations." *Stevens*, 559 U.S. at 468 (cleaned up). These "historic and traditional categories long familiar to the bar" include obscenity, child pornography, defamation, fraud, incitement, fighting words, and speech integral to criminal activity. *Id.* (collecting cases). Former

Justice Souter observed that "[r]eviewing speech regulations under fairly strict categorical rules keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said." *Denv. Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 774 (1996) (Souter, J., concurring). Consequently, the Court steadfastly resists efforts to increase or expand the boundaries of these categories as "startling and dangerous" and has rejected any "freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *Stevens*, 559 U.S. at 470, 472.

Plaintiff tries to shoehorn his claim into an existing category by calling the Iowa Poll "fake" and asserting that actionable "fraud" occurred. But "in the famous words of Inigo Montoya from the movie *The Princess Bride*, 'You keep using that word. I do not think it means what you think it means.'" *Pro Com., LLC v. K & L Custom Farms, Inc.*, 870 N.W.2d 273, 2015 WL 2406782, at *5 n.3 (Iowa. Ct. App. 2015) (table). As a matter of basic law, Plaintiff's allegations about polls and news stories he dislikes have nothing to do with fraud. *See infra* Section I.B. He also sprinkles the complaint with loose talk of "election interference," (Rev. Am. Compl. ¶¶ 1, 31, 54, 64, 76), although he stops short of including a separate claim on that basis, perhaps out of awareness that "no court has held that a scheme to rig an election itself constitutes money or property fraud," *Westchester Cnty. Indep. Party v. Astorino*, 137 F. Supp. 3d 586, 604 (S.D.N.Y. 2015).

Categories of unprotected speech are defined by precise legal tests, and Plaintiff cannot stretch those boundaries to serve a political narrative. The Supreme Court routinely rejects attempts to broaden those limits based on assertions that the speech at issue is somehow "like" a recognized exception. *See, e.g., Stevens*, 559 U.S. at 470–71 (Other "descriptions are just that—descriptive. They do not set forth a test that may be applied as a general matter …."); *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 793–96 (2011) (rejecting "attempt to shoehorn speech about

violence into obscenity," citing a lack of "longstanding tradition in this country" restricting such speech); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 55–56 (1988) (rejecting bid to leave "outrageous" speech unprotected because it "does not seem to us to be governed by any exception to the … First Amendment"); *Alvarez*, 567 U.S. at 721–22 ("The Government has not demonstrated that false statements … should constitute a new category of unprotected speech" based on a "tradition of proscription.").

Because the categories are governed by history and tradition, the Plaintiff could not have chosen a *worse* candidate for inclusion than "fake news." America's first experience with prohibiting false news—the Sedition Act of 1798—expired under its own terms, and all fines assessed under that misbegotten law were remitted. President Thomas Jefferson denounced it as an unconstitutional "nullity, as absolute and palpable as if Congress had ordered us to fall down and worship a golden image." *Sullivan*, 376 U.S. at 272–76. While the Supreme Court never adjudicated the Sedition Act's attempt to punish "false" writings about public officials, "the attack upon its validity has carried the day in the court of history," *id.*, defined "the central meaning of the First Amendment," *id.*, and conditioned "the fabric of jurisprudence woven across the years," *Commonwealth v. Lucas*, 34 N.E.3d 1242, 1253 (Mass. 2015).

Plaintiff's quest to punish "fake news" not only ignores this history, it also fumbles the conceptual basis for unprotected speech categories, which the Court first described as speech "of slight social value." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). Here, Plaintiff seeks to create a new First Amendment exception for speech that has always received the *highest* level of constitutional protection—political speech and commentary. In a word, it just doesn't fit.

The Supreme Court has repeatedly reaffirmed that the First Amendment "'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Citizens*

United v. FEC, 558 U.S. 310, 339 (2010) (citation omitted). Speech about the political process is "at the core of our First Amendment freedoms," *Republican Party of Minn. v. White*, 536 U.S. 765, 774 (2002), because a "major purpose" of the First Amendment was to protect "free discussion of … candidates," *Mills v. Alabama*, 384 U.S. 214, 218 (1966). Accordingly, the "First Amendment affords the broadest protection" to "[d]iscussion of public issues and debate on" the political process. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995) (citation omitted). Political polling is "speech protected by the First Amendment" both because it "requires a discussion between pollster and voter" and the resulting poll itself "is speech." *Daily Herald Co. v. Munro*, 838 F.2d 380, 384 (9th Cir. 1988).

The First Amendment accords speech in this area wide berth because "erroneous statement[s] [are] inevitable in free debate, and [they] must be protected if the freedoms of expression are to have the breathing space that they need to survive." *Sullivan*, 376 U.S. at 271–72 (cleaned up). Efforts to regulate "truth" in political commentary are thus presumptively unconstitutional and subject to strict scrutiny. *See 281 Care Comm. v. Arneson*, 766 F.3d 774, 784-85 (8th Cir. 2014) (invalidating Minnesota law prohibiting knowingly false statements on ballot measures); *Grimmett v. Freeman*, 59 F.4th 689, 692 (4th Cir. 2023) (invalidating North Carolina statute prohibiting false statements about candidates "knowing such report to be false or in reckless disregard of its truth or falsity"); *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 476 (6th Cir. 2016) (invalidating Ohio law prohibiting knowingly false statements about candidates); *Lucas*, 34 N.E.3d at 1253 (invalidating Massachusetts law prohibiting false statements about candidates and ballot measures); *Rickert v. State Pub. Disclosure Comm'n*, 168 P.3d 826 (Wash. 2007) (en banc) (invalidating Washington law prohibiting false statements of material fact about political

candidates). Bottom line, political polls and news reports are not the stuff of which First Amendment exceptions are made.

Beyond that, Plaintiff compounds the constitutional problem by asking this Court for an injunction to prevent the publication of "any further deceptive polls." (Rev. Am. Compl. ¶ 115). Such an order is a classic prior restraint—"the most serious and the least tolerable infringement on First Amendment rights," *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976), and "the essence of censorship," *Near*, 283 U.S. at 713. As a matter of basic law, this Court cannot censor future speech because of Plaintiff's hunch it will be "deceptive." *See, e.g.*, *Cognitest Corp. v. Riverside Publ'g Co.*, No. 94 C 4741, 1995 WL 382984, at *2 (N.D. Ill. June 22, 1995) (granting Rule 12(b)(6) dismissal of request "to enjoin future, as yet unspoken and unidentified speech which the plaintiffs assert will be false if spoken"); *Murray Energy Holdings Co. v. Mergermarket USA, Inc.*, No. 2:15-cv-2844, 2016 WL 3365422, at *8 (S.D. Ohio June 17, 2016) (granting Rule 12(b)(6) dismissal of request for an order prohibiting defendants from future statements, noting "it operates as an unconstitutional prior restraint on speech"). Plaintiff does not allege any legal basis for a prior restraint.

B. Plaintiff Cannot Plead Around the First Amendment by Alleging Fraud.

Plaintiff wields the terms "election interference" and "fraud" like an alchemist's incantation, hoping to transform his political dross into legal gold. But no amount of vacuous repetition can convert his expansive concept of "fake news" to the very limited and specific *legal* concept of fraud. The Supreme Court has made clear that slapping the "fraud" label on a claim cannot satisfy the specific showing required or extinguish the First Amendment. *Madigan*, 538 U.S. at 617. Fraud has "exacting" requirements in order "to provide sufficient breathing room for protected speech," so a "[f]alse statement alone" cannot trigger liability. *Id.* at 620.

Plaintiff's lawsuit simply misunderstands fraud. Fraud is "[a] knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment." *Fraud,* Black's Law Dictionary (12th ed. 2024). Fraud requires not just a false statement, but one made by the defendant in the context of persuading the plaintiff to "part[] with money, or property of value in reliance upon the defendant's representations." William L. Prosser, *Handbook of the Law of Torts* § 105, at 684 (4th ed. 1971); *see Alvarez*, 567 U.S. at 722–23 (distinguishing false statements generally from fraud, which is designed to "secure moneys or other valuable considerations, [like] offers of employment"). The classic example of fraud is a crooked used-car salesman rolling back an odometer. *See* Restatement (Second) of Torts § 525 cmt.b, illus. 1.

Plaintiff alleges no representations by Selzer for the purpose of inducing him into a transaction. Instead, Plaintiff skips (several) steps. He alleges Selzer made false statements and tacks on conclusory allegations that Plaintiff later "relied on" and were "damaged" by the statements. Even accepting such unspecific allegations as true, *that's not fraud*. There is no transactional nexus between the parties and no purpose by Selzer to induce Plaintiff into doing anything. Being wrong (even intentionally) does not become fraud when someone listens and acts.

This Court illustrated the difference between falsity and fraud in *United States v. Kepler*, where it rejected the argument that a statute prohibiting false claims of receiving Army medals could survive First Amendment scrutiny through the "fraud" exception. 879 F. Supp. 2d 1006, 1012 (S.D. Iowa 2011). The Court explained "fraud is not mere lying" because lying, by itself, "lacks an essential element of a fraud claim: proof of detrimental reliance or actual harm to the plaintiff." *Id.* at 1009 n.1 (citing *Madigan*, 538 U.S. at 620–21).

The elements of Plaintiff's fraud claims reflect these commonsense boundaries. To state a claim under the Iowa Consumer Fraud Act ("ICFA"), Plaintiff must allege a false statement "of a

material fact, with the intent that others rely upon [it], … in connection with the advertisement, sale, or lease of consumer merchandise." Iowa Code § 714H.3(1). Similarly, fraudulent misrepresentation covers only those situations where a defendant "fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it." *Kirk v. Farm & City Ins. Co.*, 457 N.W.2d 906, 909 (Iowa 1990) (quoting Restatement (Second) of Torts § 525). Both claims require a false statement from the defendant about a critical aspect of a proposed transaction *for the purpose of* inducing the plaintiff to enter that transaction. That is what fraud is and what Plaintiff's "false news" claims against Selzer lack, both conceptually and in the pleaded facts, as described in Section II below.

C. Plaintiff's Theory of Liability Would Eviscerate the First Amendment.

No court has ever adopted Plaintiff's extraordinary theory of liability for "false news" because it has no limiting principle. Admittedly, it required casting a wide net to find litigants even proposing a similar theory, but those claims have uniformly failed. For example, the Southern District of Florida, affirmed by the Eleventh Circuit, rejected a "novel and unprecedented expansion of the scope of tort law" seeking to hold the Weather Channel liable for damage caused by an incorrect forecast. *Brandt v. Weather Channel, Inc.*, 42 F. Supp. 2d 1344, 1345–46 (S.D. Fla.), *aff'd*, 204 F.3d 1123 (11th Cir. 1999).

The court explained that the plaintiffs' theory contravened core First Amendment principles and declined, as a matter of law, to impose a "forecaster's duty." *Id.* at 1346. "If the court were to impose such a duty … [it] could extend to farmers who plant their crops based on a forecast of no rain, construction workers who pour concrete or lay foundation based on the forecast of dry weather, or families who go to the beach for a week based on a forecast of sunny weather." *Id.* Just as with the election coverage here, "[p]redicting possible future events whose outcome is uncertain is not an exact science for which a [publisher] should be held liable." *Id.*

Similarly, the Eastern District of New York rejected an attempt to contort the elements of fraud against protected speech. *Demuth Dev. Corp. v. Merck & Co.*, 432 F. Supp. 990 (E.D.N.Y. 1977). *Demuth* involved a "novel claim" against chemical encyclopedia publisher Merck for "willful misrepresentation" of the toxicity of a chemical used in Demuth's equipment that it alleged scared away purchasers. *Id.* at 991. The court explained Demuth could not "point to any relationship of the parties, arising out of contract or otherwise, which in morals or good conscience, placed Merck under any duty towards plaintiff or its business." *Id.* at 993 (internal quotation marks omitted). The court held "Merck's right to publish free of fear of liability is guaranteed by the First Amendment, and the overriding societal interest in the untrammeled dissemination of knowledge." *Id.* (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)).

"Fraud" does not exist when someone believes dishonest behavior took place and they lost money. If it did, courthouses would overflow on Monday mornings with claims against National Football League referees. Especially in debate over public affairs, "every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us." *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

America's history and tradition protects political commentary; it does not subject "false" reports to liability. Plaintiff's claims are barred by the First Amendment.

II. Plaintiff's Claims Are Facially Deficient.

A. Plaintiff Fails to Allege Recoverable Damages.

Even if the First Amendment did not bar Plaintiff's claims, each claim fails at the starting gate because he does not plead legally cognizable damages. *See Briehl v. Gen. Motors Corp.*, 172 F.3d 623, 630 (8th Cir. 1999) (damages are an "essential element" of a tort claim). First, stating the obvious: Mr. Trump won the election. Plaintiff's attempt to plead monetary damage rests on vague allegations of harm to nonparties and violates core principles of causation.

Mr. Trump alleges that, as a candidate, he "expend[ed] extensive time and resources, including direct federal campaign expenditures" to "counteract the harms" of the Iowa Poll, including unspecified harm to the "Republican brand."[3] But he filed this lawsuit in his personal capacity, and the Supreme Court has made clear that a campaign is "a legal entity distinct from the candidate." *FEC v. Cruz*, 596 U.S. 289, 294 (2022). Mr. Trump alleges no cognizable harm to him *as an individual* from the Iowa Poll, so he has not pleaded the element of damages.

Plaintiff's Revised Amended Complaint also does not support legally cognizable causation between the Iowa Poll and the alleged damages. For fraud to be the legal cause of Plaintiff's damages, his loss must "connect[] to the misrepresentation in a way to which the law attaches legal significance." *Spreitzer v. Hawkeye State Bank*, 779 N.W.2d 726, 740 (Iowa 2009) (citing Restatement (Second) of Torts § 548A cmt. a). Relying on statements by a speaker who (1) did not direct them to the complaining party and (2) made them for a purpose unrelated to the alleged damages is not a connection with a legal significance. *See, e.g., Charles Schwab Corp. v. Bank of Am. Corp.*, 883 F.3d 68, 91–92 (2d Cir. 2018) (third-party reliance on a statement being merely "foreseeable" is insufficient because it would trigger "boundless liability"). Plaintiff can no more sue a newspaper pollster for diverted resources than a farmer could sue a TV weatherman for crop damage due to unexpected frost. *Brandt*, 42 F. Supp. 2d at 1345–46.

The remaining "damages" Plaintiff asserts are not cognizable. Plaintiff alleges "millions of Americans … were lied to, deceived, and maligned by" the Iowa Poll, and that the poll "tarnish[ed]" the "Republican brand." (Rev. Am. Compl. ¶¶ 9, 112). But courts are not "a vehicle for the vindication of the value interests of concerned bystanders." *FDA v. All. for Hippocratic*

[3] Rev. Am. Compl. ¶¶ 112, 114; *see also id.* at ¶ 9 (harm to "President Trump's Campaign and its affiliated entities"); ¶ 13 (action brought to redress harm "to the Trump 2024 Campaign" and "to millions of citizens in Iowa and across America").

Med., 602 U.S. 367, 382 (2024) (citation omitted). Plaintiff's feeling "deceived," "lied to," and "maligned" by a poll is not a cognizable harm because, as explained above, even intentionally false statements, without more, do not provide a basis for liability. *See also* Iowa Code § 714H.2(1) ("[a]ctual damages" must be ascertainable amounts and do not include "mental distress.") A plaintiff still must adequately allege a cognizable cause of action. *Madigan*, 538 U.S. at 620. Mr. Trump has not.

B. Plaintiff Fails to State a Claim Under the ICFA.

1. Plaintiff does not have a claim under the ICFA because he alleges no actual or contemplated transaction between himself and Selzer.

Plaintiff has no claim under the ICFA against Selzer because he does not allege that he purchased or leased anything from Selzer. The ICFA is a consumer fraud statute designed to protect Iowa consumers deceived into buying or leasing a product. It provides a cause of action for victims of "deception" and "fraud" "in connection with the advertisement, sale, or lease of consumer merchandise." Iowa Code § 714H.3. And it allows consumers to recover damages if they suffer an "ascertainable loss of money or property as the result" of that deception or fraud. *Id.* § 714H.5(1). Plaintiff alleges no "fraud" or "deception" to induce him into a transaction with Selzer, nor does he allege any "ascertainable loss of money or property." And Plaintiff's Revised Amended Complaint identifies no instance of the ICFA ever being applied to a context other than actual or attempted contractual privity between a seller/lessor and a consumer.

2. Plaintiff cannot invoke the ICFA, which covers only "consumer merchandise" bought or leased for "personal purposes."

The Court should also dismiss Plaintiff's ICFA claim based on the statute's unambiguous text. When interpreting state statues, federal courts "appl[y] that state's rules of statutory construction." *Behlmann v. Century Sur. Co.*, 794 F.3d 960, 963 (8th Cir. 2015). "The first step in ascertaining the true intent of the legislature is to look at the statute's language." *Mulhern v. Cath.*

Health Initiatives, 799 N.W.2d 104, 113 (Iowa 2011) (citation omitted). When that "language is plain and unambiguous, [courts] will look no further." *Id.* The ICFA's plain text forecloses Plaintiff's ICFA claim against Selzer.[4]

First, Plaintiff does not allege that Selzer sold or leased anything to him. And the ICFA defines "advertisement" as "the attempt by publication, dissemination, solicitation, or circulation to induce directly or indirectly any person to enter into any obligation or acquire any title or interest in any merchandise." Iowa Code § 714H.2(2) (citing and incorporating *id*. § 714.16(1)(a)). The Iowa Poll offered and induced no obligation or transaction; *it's an opinion poll.* It did nothing more than explain its view on which candidates were leading and set out its methodology for how it arrived at that opinion. (Rev. Am. Compl. ¶¶ 1, 76). The Iowa Poll is textually outside the ICFA's scope.

Second, a political opinion poll of the Iowa electorate is not "consumer merchandise." Under Iowa law, "courts generally presume words contained in a statute or rule are used in their ordinary and usual sense with the meaning commonly attributed to them." *Off. of Consumer Advoc. v. Iowa Utils. Bd.*, 744 N.W.2d 640, 643 (Iowa 2008). And in the ICFA, "consumer merchandise" is "merchandise offered for sale or lease, or sold or leased, *primarily for personal, family, or household purposes*." Iowa Code § 714H.2(4) (emphasis added). Merriam-Webster defines the possessory form of "personal" as "intended for private use or use by one person." It defines "family" as "the basic unit in society traditionally consisting of two parents rearing their children."

[4] By its plain terms, the ICFA applies to commercial transactions, not political commentary. Plaintiff's attempt to extend the law outside its traditional context renders it unconstitutional as applied here because it would reach political speech and news coverage the speaker "reasonably should know" are false. *Sullivan*, 376 U.S. at 288 (evidence of negligently false speech is constitutionally insufficient); *Bertrand v. Mullin*, 846 N.W.2d 884, 894 (Iowa 2014) (same).

And "household" means "those who dwell under the same roof and compose a family."[5] Bars of soap and minivans—purchases everyday Iowans make while taking care of themselves and their families—are "consumer merchandise." Any logical and plain reading of the ICFA shows a comprehensive opinion poll of the Iowa electorate intended for general publication is not "merchandise" "primarily for personal, family, or household purposes." *See Butts v. Iowa Health Sys.*, 863 N.W.2d 36, 2015 WL 1046119, at *8 (Iowa Ct. App. 2015) (table) (ICFA does not apply when defendant "does not offer or sell consumer merchandise.").

Finally, the Iowa Poll did not "relate[] to a material fact or facts" in an advertisement, sale, or lease. Iowa Code § 714H.3(1). Under the ICFA, it is not enough to allege a "deceptive" or "fraudulent" representation generally. Instead, a plaintiff "must prove that the prohibited practice related to a material fact" conveyed "in connection with the advertisement, sale, or lease of merchandise." *Id.* The representation Plaintiff relies upon is the polling results. But those results are not, and do not relate to, "a material fact or facts" in an advertisement, sale, or lease. Material facts in consumer transactions are representations about facts like price, use restrictions, a car's gas mileage, or bedding thread count. Not only is the poll not a representation in connection with an advertisement or sale/lease, but it plays no role as a material fact in a representation. Plaintiff's ICFA claim is misplaced: it is not a consumer fraud claim, and this Court should dismiss it.

C. Plaintiff Fails to State a Claim for Fraudulent Misrepresentation.

Plaintiff's allegations likewise cannot support a common law claim for fraudulent misrepresentation. For such a claim, "a plaintiff must prove (1) defendant made a representation

[5] *Personal*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/personal (updated Feb. 20, 2025); *Family*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/family (updated Feb. 20, 2025); *Household*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/household (updated Feb. 20, 2025).

to the plaintiff, (2) the representation was false, (3) the representation was material, (4) the defendant knew the representation was false, (5) the defendant intended to deceive the plaintiff, (6) the plaintiff acted in reliance on the truth of the representation and was justified in relying on the representation, (7) the representation was a proximate cause of plaintiff's damages, and (8) the amount of damages." *Gibson v. ITT Hartford Ins. Co.*, 621 N.W.2d 388, 400 (Iowa 2001). Even crediting Plaintiff's allegations and conspiracies as true, he doesn't even satisfy half the elements.

First, as explained in Section I.B, Plaintiff butchers the concept of fraud. Representations, falsity, reliance, scienter, and damages are components of a claim arising in a situation where a defendant lies to induce a plaintiff into a transaction to the plaintiff's detriment. Here, Selzer made no actionable representation "to the Plaintiff." And Plaintiff has not alleged the Iowa Poll was "material" to an inducement directed to Plaintiff by Selzer. Plaintiff similarly does not allege Selzer intended to induce him into a transaction. Nor, as explained in Section II.A, does he allege cognizable damages. Plaintiff thus fails to even plead elements (1), (3), (5), (7), or (8).

Plaintiff also fails to plead element (6), justifiable reliance. In Iowa, the "justifiable-reliance standard does not mean a plaintiff can blindly rely on a representation." *Spreitzer*, 779 N.W.2d at 737. Rather, "[a] person may not justifiably rely on a professional representation if 'red flags' signal such reliance is unwarranted." *Young ex rel. Young v. Rally Appraisal, L.L.C.*, 928 N.W.2d 660, 2019 WL 1486608, at *4 (Iowa Ct. App. 2019) (table). Here, according to Plaintiff, the Iowa Poll defied "common sense, electoral history, [and] all other public polls." (Rev. Am. Compl. ¶ 52). He alleges media coverage identified the poll as an "outlier." (*Id.* at ¶ 62). Plaintiff also alleges Selzer had a history of undercounting Republican support. (*Id.* at ¶¶ 28–32). And Plaintiff alleges that "[a]ny responsible pollster or journalist with experience in Iowa politics would recognize the clear inaccuracy of" the poll. (*Id.* at ¶ 121). In short, so desperate to spike the

football regarding Selzer's polling inaccuracies, Plaintiff aggressively concedes the element of reliance.

Moreover, in contrast to his repetitive allegations that everyone with experience in Iowa politics recognized the poll as an unreliable outlier, Plaintiff asserts (remarkably) that he "justifiably relied on" the polls. (*Id.* at ¶ 124). That allegation is both conclusory and contradicted by Plaintiff's *actual* allegations. "Parties alleging fraud must plead reliance with 'sufficient particularity to state a plausible claim of justifiable reliance,'" and "[c]onclusory allegations that a plaintiff detrimentally relied on" representations do not provide "sufficient factual matter to state a claim of relief plausible on its face." *Ambassador Press, Inc. v. Durst Image Techn. U.S., LLC*, 949 F.3d 417, 423 (8th Cir. 2020) (citation omitted). As Plaintiff fails to adequately allege six out of the eight elements of fraudulent misrepresentation, the Court should dismiss the claim.

D. Plaintiff Fails to State a Claim for Negligent Misrepresentation.

The same infirmities infecting Plaintiff's fraudulent misrepresentation claim undermine his negligent misrepresentation claim. In Iowa, a plaintiff asserting negligent misrepresentation must establish "(1) the defendant was in the business or profession of supplying information to others; (2) the defendant intended to supply information to the plaintiff or knew that the recipient intended to supply it to the plaintiff; (3) the information was false; (4) the defendant knew or reasonably should have known that the information was false; (5) the plaintiff reasonably relied on the information in the transaction that the defendant intended the information to influence; (6) and the false information was the proximate cause of damage to the plaintiff." *Doe v. Grinnell Coll.*, 473 F. Supp. 3d 909, 937 (S.D. Iowa. 2019) (citation omitted).

When, as here, a plaintiff's claim involves only "intangible economic interests," it is subject to "more restrictive rules of recovery." *Id.* (quoting *Pitts v. Farm Bureau Life Ins. Co.*, 818 N.W.2d 91, 111 (Iowa. 2012)). That is due to "the extent to which misinformation may be, and

may be expected to be, circulated, and the magnitude of losses which may follow from reliance on it." *Van Sickle Const. Co. v. Wachovia Comm. Mortg., Inc.*, 783 N.W.2d 684, 690 (Iowa 1990) (quoting Restatement (Second) of Torts § 522 cmt. a). It is not enough to allege Selzer's awareness that the poll might reach Plaintiff and influence him. Instead, recovery is limited to "the person or one of a limited group of persons whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it." *Id.* at 691. In short, Plaintiff must allege a cognizable legal duty by Selzer to supply *him* with accurate information. *Id.*

But Selzer owed Plaintiff no legal duty. As the Fifth Circuit explained, "If a newspaper prints incorrect information, if a scientist publishes careless statements in a treatise, or if an oil company prints an inaccurate road map, they cannot be 'liable' to those of the general public who read their works absent some special relationship between [the] writer and reader." *De Bardeleben Marine Corp. v. United States*, 451 F.2d 140, 148 (5th Cir. 1971); *see also Stancik v. CNBC*, 420 F. Supp. 2d 800, 808 (N.D. Ohio 2006) ("News broadcasters do not owe the general public a heightened duty of care."); *Brandt*, 42 F. Supp. 2d at 1345–46 (refusing to "impose on a television broadcaster of weather forecasts a general duty to viewers"). As another federal court explained, "accuracy in news reporting is certainly a desideratum, but the chilling effect of imposing a high duty of care on those in the business of news dissemination and making that duty run to a wide range of readers or TV viewers would have a chilling effect which is unacceptable under our Constitution." *Tumminello v. Bergen Evening Rec., Inc.*, 454 F. Supp. 1156, 1159–60 (D.N.J. 1978). Without duty, there is no negligence. And the First Amendment bars states from imposing a common law duty on news suppliers to "get it right." *See Sullivan*, 376 U.S. at 288; *Bertrand v. Mullin*, 846 N.W.2d 884, 894 (Iowa 2014).

Plus, Plaintiff does not allege Selzer "intended to supply information" *to* him or knew any recipients intended to supply it to him (element (2)). Similarly, Plaintiff does not allege Selzer intended to influence his decision-making, nor does he allege adequate facts supporting justifiable reliance (element (5)). The claim is facially and constitutionally deficient.

III. The Court Should Dismiss Claims Against Ms. Selzer as an Individual.

The Court should dismiss Plaintiff's claims against Ms. Selzer as an individual because he does not allege sufficient facts to pierce the corporate veil between Selzer & Company and Ms. Selzer. *HOK Sport, Inc. v. FC Des Moines, L.C.*, 495 F.3d 927, 935 (8th Cir. 2007) ("[T]ypically, a corporate entity and its owners are separate and distinct.") A plaintiff "bear[s] the burden of proving that exceptional circumstances exist which warrant piercing the corporate veil." *C. Mac. Chambers Co. v. Iowa Tae Kwon Do Acad., Inc.*, 412 N.W.2d 593, 598 (Iowa 1987). Such circumstances may exist "where the corporation is a mere shell, serving no legitimate business purpose, and used primarily as an intermediary to perpetuate fraud or promote injustice." *Id.* at 597 (citation omitted). Here, Plaintiff does not allege any of the exceptions apply, much less facts supporting an exception. The Court should dismiss the claims against Ms. Selzer individually.

CONCLUSION

Defendants J. Ann Selzer and Selzer & Company respectfully request this Court grant their motion to dismiss Plaintiff's claims with prejudice and request oral argument on the motion.

Dated: July 26, 2025

Respectfully Submitted,

/s/ *Robert Corn-Revere* .

Robert Corn-Revere*†
(DC Bar No. 375415)
Conor T. Fitzpatrick*
(Mich. Bar No. P78981)
FOUNDATION FOR INDIVIDUAL
RIGHTS AND EXPRESSION (FIRE)

700 Pennsylvania Ave. SE, Suite 340
Washington, DC 20003
(215) 717-3473
bob.corn-revere@thefire.org
conor.fitzpatrick@thefire.org

Greg Greubel
(Iowa Bar No. AT0015474)
Adam Steinbaugh*
(Cal. Bar No. 304829)
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION (FIRE)
510 Walnut St., Suite 900
Philadelphia, PA 19106
(215) 717-3473
greg.greubel@thefire.org
adam@thefire.org

Matthew A. McGuire
(Iowa Bar No. AT0011932)
NYEMASTER GOODE, P.C.
700 Walnut St., Suite 1300
Des Moines, IA 50309
(515) 283-8014
mmcguire@nyemaster.com

Attorneys for Defendants J. Ann Selzer and Selzer & Company

* *Admitted pro hac vice.*
† *Lead counsel*

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing document was served upon all parties of record through the Court's CM/ECF electronic filing system, with copies sent to the below-named individuals by electronic mail on July 26, 2025.

/s/ *Robert Corn-Revere*

Copy to:

EDWARD ANDREW PALTZIK
TAYLOR DYKEMA PLLC
914 E. 25th Street
Houston, TX 77009
edward@taylordykema.com

ALAN R. OSTERGREN
Attorney at Law
Alan R. Ostergren, PC
500 East Court Avenue Suite 420
Des Moines, Iowa 50309
(515) 297-0134
alan.ostergren@ostergrenlaw.com

Attorneys for Plaintiff

EXHIBIT 14

IN THE IOWA DISTRICT COURT FOR JONES COUNTY

BENNETT MACHINE & FABRICATION INC
CHARLES OWEN MARTIN
CURTIS D MARTIN

Plaintiff(s),

vs.

DEERE & COMPANY
JOSE G ESPINOZA

Defendant(s).

CASE NO. 06531 LACV006963

ORDER

Dated: 06/28/2022

On this date, Defendants' Motion to Dismiss or Stay on Grounds of Comity came before the undersigned for review. Plaintiffs filed their resistance and Defendants filed a reply.

The Court notes that a separate legal action between Plaintiffs and Defendant Deere & Company has commenced in United States District Court for the Northern District of Illinois (hereinafter "Federal Court Action"). The subject matter of the counterclaims asserted by Plaintiffs against Defendant Deere & Company in the Federal Court Action are the same claims Plaintiffs allege against Defendant Deere & Company in this district court case. The parties stated within their respective filings that pending before the court in the Federal Court Action are Defendant Deere & Company's Motion to Dismiss Counterclaims, and Plaintiffs' Motion to Stay, with an expected ruling date of July 6, 2022. Upon review of the parties' written arguments and supporting documents, given the nature of the Federal Court Action and this district court case and that there are related pending motions in the Federal Court Action, the Court finds that this matter should be stayed, until after Federal Court issues its ruling on the pending motion to dismiss and the motion to stay.

The Court FINDS AND ORDERS that this matter is stayed for thirty (30) days from the date of this Order. Upon the filing of the ruling in the Federal Court Action on the pending motion to dismiss and motion to stay, each of the parties is directed to file a status report to the Court stating how the parties propose to proceed with this matter.

Clerk to notify.

State of Iowa Courts

Case Number	**Case Title**
LACV006963	CHARLES MARTIN ET AL VS JOSE ESPINOZA ET AL
Type:	ORDER TO STAY

So Ordered

Sean McPartland, District Court Judge,
Sixth Judicial District of Iowa

Electronically signed on 2022-06-28 11:29:21

EXHIBIT 15

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

UNITED ATLANTIC VENTURES, LLC,	:	
Plaintiff,	:	
v.	:	C.A. No. 2024-0184-MTZ
TMTG SUB INC. f/k/a TRUMP MEDIA & TECHNOLOGY GROUP CORP., **TRUMP MEDIA & TECHNOLOGY GROUP CORP** f/k/a DIGITAL WORLD ACQUISITION CORP., **DONALD J. TRUMP**, **DEVIN G. NUNES**, **DONALD J. TRUMP, JR.**, **KASHYAP "KASH" PATEL**, **DANIEL SCAVINO, JR.**, **ERIC SWIDER**, **FRANK J. ANDREWS**, **EDWARD J. PREBLE**, and **JEFFREY A. SMITH**,	:	
Defendants.	:	

OPENING BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS, OR ALTERNATIVELY, TO STAY ON THE BASIS OF TEMPORARY PRESIDENTIAL IMMUNITY

DATED: January 24, 2025

OF COUNSEL:

Caryn G. Schechtman
DLA PIPER LLP (US)
1251 Avenue of the Americas
New York, NY 100020-1104
(212) 335-4593
(212) 335-4501 (Fax)
caryn.schechtman@us.dlapiper.com

Josh Halpern
M. David Josefovits
DLA PIPER LLP (US)
500 Eighth Street, NW
Washington, DC 20004
(202) 799-4000
(202) 799-5000 (Fax)
josh.halpern@us.dlapiper.com
david.josefovits@us.dlapiper.com

DLA PIPER LLP (US)
John L. Reed (I.D. No. 3023)
Ronald N. Brown, III (I.D. No. 4831)
1201 N. Market Street, Suite 2100
Wilmington, DE 19801
(302) 468-5700
(302) 394-2341 (Fax)
john.reed@us.dlapiper.com
ronald.brown@us.dlapiper.com

Attorneys for Defendants President Donald J. Trump, Trump Media & Technology Group Corp. f/k/a Digital World Acquisition Corp., Devin G. Nunes, Donald J. Trump, Jr., Kashyap "Kash" Patel, Eric Swider, Frank J. Andrews, Edward J. Preble, and Jeffrey A. Smith

-and-

HALLORAN FARKAS + KITTILA LLP
Theodore A. Kittila (No. 3963)
M. Jane Brady (No. 1)
William E. Green, Jr. (No. 4864)
John G. Harris (No. 4017)
5722 Kennett Pike
Wilmington, DE 19807
(302) 257-2025
(302) 257-2019 (Fax)
tk@hfk.law / mjb@hfk.law /
wg@hfk.law / jgh@hfk.law

Attorneys for TMTG Sub Inc. f/k/a Trump Media & Technology Group Corp., President Donald J. Trump, and Daniel Scavino, Jr.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE(S)**

CONSTITUTIONS, STATUTES, AND RULES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Defendants President Donald J. Trump, Devin G. Nunes, Donald J. Trump, Jr., Kashyap "Kash" Patel, Daniel Scavino, Jr., Eric Swider, Frank J. Andrews, Edward J. Preble, Jeffrey A. Smith, TMTG Sub Inc. f/k/a Trump Media & Technology Group Corp., and Trump Media & Technology Group Corp. f/k/a Digital World Acquisition Corp. (collectively, "Defendants") submit this Opening Brief in Support of their previously-filed Motion to Dismiss, or Alternatively, to Stay on the Basis of Temporary Presidential Immunity.

Thomas Jefferson once warned that a President could be "withdraw[n] entirely from his constitutional duties" if the courts "could bandy [him] from pillar to post [and] keep him constantly trudging from north to south & east to west." Letter from Thomas Jefferson, U.S. President, to George Hay, U.S. Dist. Att'y for Va. (June 20, 1807), *reprinted in* 10 *The Works of Thomas Jefferson* 404 (Paul Leicester Ford ed., 1905). President Trump defended more personal lawsuits during his first term in office than any other sitting President in U.S. history—indeed, more than all other Presidents combined. Without a rule of temporary immunity, President Jefferson's nightmare could easily become America's reality.

During the President's first term, his political rivals explained that they would leverage "every area of the law to investigate President Trump and his business transactions."[1] Private citizens contributed too, with civil lawsuits funded by the President's detractors,[2] calculated to "embarrass[]" or even "impeach" him.[3] The ACLU's post-election promise to "see you in court" sparked a record $38 million surge in donations.[4] The volume of litigation against the President was unprecedented, and it threatened the "effective functioning of government." *Nixon v. Fitzgerald*, 457 U.S. 731, 751 (1982). The rule of law, commentators announced, had been replaced by "the rule of the circus."[5]

---

[1] Jeffery C. Mays, *N.Y.'s New Attorney General Is Targeting Trump. Will Judges See a 'Political Vendetta?*,' N.Y. Times (Dec. 31, 2018), https://www.nytimes.com/2018/12/31/nyregion/tish-james-attorney-general-trump.html.

[2] Erin Doherty, *LinkedIn Founder Bankrolled E. Jean Carroll's Lawsuit*, Axios (Apr. 14, 2023), https://www.axios.com/2023/04/13/linkedin-founder-funding-e-jean-carroll-trump-suit.

[3] Jeremy Stahl, *The New Trump Defamation Lawsuit is Daring Trump to Incriminate Himself in Court*, Slate (Jan. 17, 2017), https://slate.com/news-and-politics/2017/01/the-new-trump-defamation-lawsuit-is-daring-trump-to-incriminate-himself-in-court.html.

[4] Karl Vick, *Perhaps the Largest Protest in U.S. History Was Brought to You by Trump*, Time Magazine (Jan. 26, 2017), https://time.com/magazine/us/4649884/february-6th-2017-vol-189-no-4-u-s/.

[5] Jed Handelsman Shugerman, *The Trump Indictment is a Legal Embarrassment*, N.Y. Times (April 5, 2023), https://www.nytimes.com/2023/04/05/opinion/trump-bragg-indictment.html.

As President Trump begins his second term, the burden of litigation against him will only grow heavier. Shortly after the President's victory, New York's Attorney General announced that her "office has been preparing for several months" for the President's reelection, and that her office was "prepared to fight back" by burying the President in litigation.[6] The President has already been sued more than all his predecessors combined, yet his rivals promise that there is still more to come. That swell of litigation will pose an even greater threat to the operations of the Executive Branch and the standing of state courts that purport to sit in judgment of his conduct.

The Framers of our Constitution never dreamed that the Presidency would be consumed by so much defensive, private litigation. Vice President John Adams believed that "the President, personally, was not the subject to any process whatever," for it could not be that trial judges could "stop the whole machine of Government." Journal of William Maclay 167 (Edgar S. Maclay ed., 1890). Justice Joseph Story wrote that the President, "while he is in the discharge of the duties of his office, . . . must be deemed, in civil cases at least, to possess an official inviolability." 3 J. Story, Commentaries on the Constitution of the United States

[6] New York Attorney General News Conference, CSPAN (Nov. 6, 2024), https://www.c-span.org/program/public-affairs-event/new-york-attorney-general-news-conference/651857.

§ 1563, pp. 418-19 (1st ed. 1833). As the Founders saw it, the American Presidency was not to be trifled with.

For more than two centuries, that view largely prevailed. In 1997, in *Clinton v. Jones*, the U.S. Supreme Court recognized that, "in the more than 200-year history of the Republic," only one sitting President had ever faced a live lawsuit during his term. 520 U.S. 681, 702 (1997). "If past is any indicator," the *Clinton* Court predicted, it is most "unlikely that a deluge of [private] litigation will ever engulf the Presidency." *Id.* But "predicting the future is difficult," as Justice Breyer warned. *Id.* at 723 (Breyer, J., concurring). And with the benefits of hindsight, the Supreme Court's "optimism turn[ed] out to be misplaced" *id.*, including with respect to President Clinton—who was impeached as a direct result of the civil case at issue.

But what the *Clinton* Court lacked in predictive prowess, it more than made up for in judicial humility. As it often does, the Supreme Court was careful to decide only the question before it, which was whether there exists a categorical rule of immunity for sitting Presidents from civil litigation in *federal court*. The Supreme Court recognized that litigation against a sitting President in *state court* would raise "quite different" questions under the Constitution's Supremacy Clause and raises unique concerns about "local prejudice." *Id.* at 691. Accordingly, *Clinton* carefully reserved the question whether a sitting President could be a civil defendant "in state tribunal." *Id.* at 691 & n.13. That restrained approach was consistent with the

Court's general recognition that "[o]ne case in more than two centuries does not afford enough experience to definitively and comprehensively determine the President's scope of immunity." *Trump v. United States*, 603 U.S. 593, 615 (2024) (quotations omitted). With the benefits of experience, and for at least three independent reasons, the Court should hold that a sitting President cannot be sued civilly in state court.

First, as the Supreme Court recognized in *Clinton*, the Supremacy Clause and Article II of the Constitution prohibit any measure of direct control by a state over the sitting President. 520 U.S. at 691 & n.13. The Supremacy Clause prevents states from interfering with the operation of the federal government. And "[u]nder our Constitution, the executive Power—all of it—is vested in a President." *Seila Law LLC v. CFPB*, 591 U.S. 197, 203 (2020) (quotation omitted). Accordingly, any exercise of compulsory civil jurisdiction by a state court over a sitting President risks interference with the operations of the federal government. Indeed, experience has shown that private civil litigation against a sitting President causes real and substantial damage to the Executive Branch.

Second, regardless of what the federal Constitution might require, this Court should recognize a state common law rule requiring the deferral of litigation against a sitting President until the end of his term. As Justice Ginsburg once observed, most immunities are creatures of the common law, and state courts are thus free to

"recognize [temporary Presidential] immunity as a matter of their common law." Transcript of Oral Argument at 8, *Clinton v. Jones*, 520 U.S. 681 (1997) (No. 95-1853) ("Argument Tr., *Clinton*").[7] That common law deferral rule is necessary to protect Delaware's courts from politicized entanglements with the Presidency that arise whenever the President is named as a defendant in cases that are often intended to maximize disruption and embarrassment to the Presidency. And it finds support in Delaware's original Constitution, which expressly codified protections for the sitting "president," D.E. Const. of 1776, art. XXIII, as well as in other judge-made doctrines that require a deferral of litigation to prevent "interference from the courts," *Levinson v. Delaware Compensation Rating Bureau, Inc*., 616 A.2d 1182, 1190 (Del. 1992).

Third, even absent a categorical bar on state civil litigation against a sitting President, this Court should exercise its discretion to extend the existing stay of discovery until the end of the President's term. That stay extension is a necessary component of the overall protections afforded to the Presidency against the deluge of personal litigation filed against the sitting President. It respects the President's decision to extricate himself from his business and place his shares in trust, so that he may focus on governance. And it insulates the Court against further efforts by Plaintiff to second-guess the President's priorities.

[7] Available at https://apps.oyez.org/player/#/rehnquist10/oral_argument_audio/20325.

In sum, this motion has nothing to do with the underlying merits of this action. The Third Amended Complaint fails to state a claim and should be dismissed with prejudice, but the U.S. Constitution takes precedence. In that regard, this motion is about President Trump's unwavering commitment to the rule of law and his vigilance in enforcing the Constitution to protect the Office of the President, the Executive Branch, and the American people from any form of lawfare that may interfere with his constitutional obligations.

Respectfully, for the reasons summarized above, and for those set forth below, the motion to dismiss or stay should be granted.

RELEVANT BACKGROUND

A. Plaintiff Places the President at the Center of Its Complaint, Including the President's Official Acts

Plaintiff United Atlantic Ventures, LLC's ("UAV") Third Amended Complaint (D.I. 142, "TAC") focuses primarily on President Trump's purported efforts to alter corporate arrangements at Trump Media Technology Group ("TMTG").[8] The TAC—which mentions President Trump more than 150 times across 45 of its 65 pages—scrutinizes the President's relationships with close family members and advisers in connection with Truth Social, a social media platform owned and operated by TMTG. (*See generally* TAC.)

The TAC alleges that President Trump orchestrated a six-month "lock-up" period to restrict Plaintiff's ability to transfer its shares in TMTG, and that he repudiated a previously signed Services Agreement granting Plaintiff certain rights. (*See*, *e.g.*, TAC ¶¶ 2-3, 48-50.) According to Plaintiff, this lock-up was part of a broader scheme by the President and several of his close advisers to retaliate against Plaintiff for opposing the authorization of new stock, and against one of UAV's principals for refusing to transfer shares to First Lady Melania Trump. (TAC ¶¶ 2-3, 15, 94-100.)

---

[8] This Relevant Background is based on the allegations in the TAC and documents incorporated therein. *See In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 169-70 (Del. 2006); *Genworth Fin., Inc. Consol. Deriv. Litig.*, 2021 WL 4452338, at *1 & n.3 (Del. Ch. Sept. 29, 2021). Defendants do not concede the accuracy of any of the allegations and recite them solely for purposes of the legal analysis herein.

The TAC names several others as Defendants to this alleged conspiracy, but it portrays all of them as "lack[ing] independence from" President Trump and acting solely at his direction. (TAC ¶¶ 124-49.) For example, Plaintiff claims that President Trump "controls and dominates" the other Defendants—including his son, the future FBI Director, and a White House Deputy Chief of Staff. (TAC ¶¶ 84, 124-49.) It alleges that all Defendants are "completely loyal" to President Trump. (TAC ¶¶ 124.) It purports to demonstrate that loyalty by reference to official Presidential acts (TAC ¶¶ 127, 136-37, 146), and it claims that the President leveraged this loyalty to force the company into making "knowingly false" public disclosures (TAC ¶ 96).

B. Plaintiff Prosecutes A Hyper-Aggressive Litigation Strategy

Plaintiff has taken a maximally aggressive approach in prosecuting this litigation. Even before this Court granted Plaintiff's motion to amend the complaint and add President Trump as a defendant, opposing counsel sought to depose the President on just twelve days' notice—scheduling the deposition for the same day as his highly publicized New York trial. (D.I. 57; D.I. 65; D.I. 100, at 6-7.) Opposing counsel filed two motions to hold Defendants in contempt, both of which this Court rejected. (D.I. 123; D.I. 145; D.I. 166; D.I. 165.) And opposing counsel demanded expedition, even after the merger had already closed and despite the fact that the shares were already deposited in escrow and any potential claim would be

for money damages only. (D.I. 129 at 69). By all accounts, this approach appeared to have been calculated to maximize the pressures and burdens on the President and his co-Defendants.

C. President Trump Wins Re-Election, Disengages from TMTG, and Asserts Temporary Presidential Immunity

President Trump has not been a director of either Defendant since March 2024. Following his victory in the 2024 election, he took significant steps to further separate himself from TMTG. On December 17, 2024, the President transferred his entire TMTG ownership—114,750,000 shares—to a trust.[9] Soon thereafter, and well in advance of Inauguration Day, Defendants notified this Court that they intend to seek either a stay or dismissal of the case based on temporary Presidential immunity. (D.I. 181.) Consistent with binding precedent from the U.S. Supreme Court and the Delaware Supreme Court, Defendants requested that this Court defer consideration of the merits until the immunity question was resolved. (*Id.*) Defendants also sought consent from Plaintiff for a two-week extension of the motion-to-dismiss briefing schedule to allow this Court adequate time to consider the motion to stay. (D.I. 183.)

[9] Schedule 13D, (Dec. 17, 2024), https://www.sec.gov/Archives/edgar/data/1849635/000114036124023398/ef20027965_sc13da.htm.

Opposing counsel responded by immediately questioning the President's good faith; they characterized the motion to stay as a "transparent" and "strategic" ploy, and refused to acquiesce to the two-week extension that was designed to give this Court sufficient time to consider the stay motion. (D.I. 184 ¶¶ 1, 18; D.I. 187.) After this Court granted that two-week extension, opposing counsel doubled down, declaring their intent to take the President's "deposition at the White House" and accusing the President of undue delay (even though immunity was raised weeks before Inauguration Day). (D.I. 187 ¶¶ 1, 18.)

This Court granted Defendants' motion to stay the claims pending consideration and resolution of the immunity issues. (D.I. 190.) In its ruling, the Court acknowledged "the inevitability and priority of the defendants' immunity motion," it emphasized that discovery was already stayed, and it stressed that the case no longer warranted expedited treatment. (D.I. 190; D.I. 127; D.I. 118.)

This briefing followed.

ARGUMENT

I. THE U.S. CONSTITUTION REQUIRES DEFERRAL OF STATE CIVIL LITIGATION AGAINST A SITTING PRESIDENT

The U.S. Supreme Court has long recognized that "the special nature of the President's constitutional office and functions" mandates certain immunities from litigation, even though the Constitution nowhere expressly provides for those immunities. *Fitzgerald*, 457 U.S. at 756; *see, e.g.*, *Trump v. United States*, 603 U.S. at 637-39. The question in this case is therefore whether the Constitution's "text, structure, and traditions" together support a sitting President's temporary immunity from defending against civil litigation in state court based on his unofficial acts. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995). The answer is "yes."

The Supremacy Clause of the U.S. Constitution preempts even the *risk* of interference by the States in the operations of the Executive Branch. Under Article II of the Constitution, the President embodies the Executive Branch. Accordingly, any compulsory process by the States directly against the sitting President *risks interference* with the Executive Branch in violation of federal supremacy. And as a practical matter, experience has already proven that the deluge of civil litigation against the President taxes his time and attention in a manner that *actually interferes* with operations of the Executive Branch.

A. The Supremacy Clause Prohibits Even The Risk Of State Interference With The Independence And Operations Of The Executive Branch

In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), the Supreme Court announced the "great principle" that "the States have no power" to "retard, impede, burden, or in any manner control" the operations of the federal government. *Id.* at 426, 436. That principle derives from the Supremacy Clause, U.S. Const. Art. VI, Cl. 2; "[i]t is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence." *McCulloch*, 17 U.S. (4 Wheat.) at 427. The founders enshrined this principle of federal supremacy in our Constitution on the understanding that "the powers of the National government could not be exercised with energy and efficiency at all times, if its acts could be interfered with and controlled for any period by officers or tribunals of another sovereignty." *In re Tarble*, 80 U.S. (13 Wall) 397, 409 (1871).

For centuries, the Supreme Court has explained that this supremacy principle prohibits the states from impeding *in any way* the federal government's exercise of its constitutionally assigned responsibilities. The principle extends beyond any formal conflicts between state and federal law. *See Clinton*, 520 U.S. at 691 n.13. Instead, "the sphere of action appropriated to the United States" under the Supremacy Clause "is as far beyond the reach of judicial process issued by a State

judge or a State court as if the line of division was traced by *landmarks and monuments* visible to the eye." *Covell v. Heyman*, 111 U.S. 176, 183 (1884) (quoting *Ableman v. Booth*, 62 U.S. 506, 516 (1858)) (emphasis added).

This landmarks-and-monuments principle prohibits state courts from "control[ling] the conduct" of federal officers in any way. *Johnson v. Maryland*, 254 U.S. 51, 56-57 (1920). This "principle has governed a series of decisions" from the U.S. Supreme Court. *Feldman v. United States*, 322 U.S. 487, 491 (1944).[10] For example, state courts cannot try a federal officer "for an alleged offense against the law of the State," if that offense arises from the execution of his duties. *Tennessee v. Davis*, 100 U.S. 257, 263 (1879). They cannot issue writs of habeas against federal officials, directing them to release "persons in federal custody." *Trump v. Anderson*, 601 U.S. 100, 111 (2024) (*per curiam*) (citing *In re Tarble*, 80 U.S. (13 Wall) at 409). And they lack "even the lesser power[] to issue writes of mandamus against federal officials." *Id.* (citing *MClung v. Silliman*, 19 U.S. (6 Wheat.) 598, 603-05 (1821)); *see also United States v. Mead Corp.*, 533 U.S. 218, 242 (2001) (Scalia, J., dissenting) (explaining that, until 1875, "[j]udicial control of federal executive officers was principally exercised through the prerogative writ of mandamus"). This

[10] *See*, *e.g.*, *Central Nat. Bank v. Stevens*, 169 U.S. 432, 460 (1898) (expressly invoking the "landmarks and monuments" principle); *Moran v. Sturges*, 154 U.S. 256, 268 (1894) (same); *Covell v. Heyman*, 111 U.S. 176, 183 (1884) (same); *In re Tarble*, 80 U.S. 397, 406 (1871) (same).

is because, as the Supreme Court has explained, a federal official's "conduct can only be controlled by the [federal] power that created him." *MClung*, 19 U.S. (6 Wheat.) at 605. Many courts today have thus concluded that state judges are also powerless to issue injunctions against federal officers; and the U.S. Supreme Court has never held otherwise. *Brooks v. Dewar*, 313 U.S. 354, 360 (1941) (describing this as a "grave" and unsettled question).

In short, the landmarks-and-monuments principle completely disables the state courts from exercising any control over federal officials that risks interference with the operations of the Executive Branch.

B. Any Exercise Of Civil Jurisdiction Over The President's Person Risks Interference With The Executive Branch

The U.S. Supreme Court has never addressed whether state courts may exercise civil jurisdiction directly over a sitting President. But under a straightforward application of the landmarks-and-monuments principle, the answer must be "no." Jurisdiction "goes to the court's power to exercise *control*" over the defendant. *Leroy v. Great Western United Corp.*, 443 U.S. 173, 180 (1979) (emphasis added). Because the President is vested with *all* the executive power, "any direct control by a state court over the President" necessarily risks interference with the operations of the federal government. *Clinton*, 530 U.S. at 691 n.13.

1. The President Alone Embodies The Executive Branch

"The President occupies a unique position in the constitutional scheme" in three respects, such that any exercise of civil jurisdiction over his person necessarily threatens interference with the operations of the executive branch. *Fitzgerald*, 457 at 749.

First, the President quite literally embodies the entire Executive Branch. Unlike the plural Congress or the plural Supreme Court, "[t]he President is the executive department." *Mississippi v. Johnson*, 71 U.S. 475, 500 (1867). Article II vests "the entire 'executive Power' in a single individual," *Clinton*, 520 U.S. at 710 (Breyer, J., concurring), making the President "the only person who is also a branch of government." Jay S. Bybee, Who Executes the Executioner? Impeachment, Indictment and Other Alternatives to Assassination, 2 Nexus J. Op. 53, 60 (1997); *see also Seila Law*, 591 U.S. at 203. For that reason, the President—but not lower federal officials—has constitutional immunity from any judicial process that threatens to undermine his independence or interfere with his functions. *Fitzgerald*, 457 U.S. at 750 n.31.

Second, the President's "unique status under the Constitution" also gives him unrivaled power over foreign and domestic affairs. *Id.* at 750. The President alone is Commander in Chief, and he alone is charged with the duty to "take Care that the Laws be faithfully executed." Article II, §§ 2 & 3. "In times of peace or war,

prosperity or economic crisis, and tranquility or unrest, the President plays an unparalleled role in the execution of the laws, the conduct of foreign relations, and the defense of the Nation." 24 Op. O.L.C. 222, 246-47 (Oct. 16, 2000). The President "cannot delegate ultimate responsibility" for these powers "because Article II makes a single President responsible for the actions of the Executive Branch." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 496-97 (2010) (citation and quotation marks omitted).

Third, the President's immense responsibilities are completely unremitting. While Congress need only assemble "once in every Year," Art. I, § 4, Cl. 2, and it may "adjourn from day to day," Art. I, § 5, Cl. 1, "constitutionally speaking, the President never sleeps." Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 Harv. L. Rev. 701, 713 (1995). The "executive branch," President Jefferson explained, "is the sole branch which the constitution requires to be always in function." 3 Phillip B. Kurland & Ralph Lerner, The Founders' Constitution 530 (3d ed. 2000). Indeed, the President's responsibilities are so all-encompassing that the Constitution affords a mechanism for his succession, even in the event of temporary incapacity. U.S. Constitution, Amend. XXV, §§ 3-4. The sponsors of the Twenty-Fifth Amendment stressed that there must "at all times" be a President "who has complete control and will be able to perform all the powers and duties of his office,"111 Cong. Rec. 15,595

(1965) (statement of Sen. Bayh), and that the country "cannot permit the Office of the President to be vacant even for a moment." Presidential Inability: Hearings before the House Comm. on the Judiciary, 89th Cong. 2 (1965) (statement of Rep. Celler). The President is the "sole indispensable man in government." Philip B. Kurland, *Watergate and the Constitution* 135 (1978).

For all of these reasons, a state court's exercise of compulsory jurisdiction and control over the President "even for a moment" necessarily risks interference with the operations of the Executive Branch. While other lower-ranking members of the Executive Branch may be subjected to civil damages actions in state court, *Teal v. Felton*, 53 U.S. 284, 292-93 (1851), the President is different. He alone is vested with all the executive power, he alone embodies a full branch of government, and he alone carries with him the unremitting constitutional obligation to take care that the laws of the United States are faithfully executed. That is why he must enjoy the "unrestricted power . . . to remove [even] the most important of his subordinates." *Fitzgerald*, 457 U.S. at 750. And it is why, at the Constitutional Convention, James Wilson insisted that the President be made "as independent as possible . . . of the States." 1 The Records of the Federal Convention of 1787, at 66 (Max Farrand ed., 1911).

Any exercise of compulsory jurisdiction over the sitting President by a state court risks interference with his unremitting responsibilities. Under the landmark-and-monuments principle, the Court should recognize a rule of temporary immunity that protects the Presidency from the diversions, distractions, and harassment of state civil litigation.

2. Unlike The Federal Courts, State Courts Cannot Exercise Their Jurisdiction Over The President In A Manner That Risks Interference With The Executive Branch

In *Clinton v. Jones*, the Supreme Court held that a sitting President may be subjected to the civil jurisdiction of the federal courts. 520 U.S. at 705-06. That conclusion followed from separation-of-powers principles, under which the federal courts—as a coordinate and coequal branch of the federal government—may sometimes burden the operations of the Executive Branch. *Id.* at 699-703. But state courts are not "coequal" branches of government and therefore cannot subject the President, as a defendant, to any civil jurisdiction that risks interference with his official duties.

Clinton recognized that the President "occupies a unique office with powers and responsibilities so vast and important that the public interest demands that he devote his undivided time and attention to his public duties." 520 U.S. at 697. It thus accepted the "initial premise" of President Clinton's argument that defending against civil litigation "may impose an unacceptable burden on the President's time

and energy, and thereby impair the effective performance of his office." *Id.* at 697, 701-702. The Court nonetheless rejected the President's conclusion that the risk of "interactions between the Judicial Branch and the Executive, even quite burdensome interactions, necessarily rise to the level of constitutionally forbidden impairment." *Id.* at 702. The "separation of powers," the Court explained, "does not mean that the branches 'ought to have no partial agency in, or no controul over the acts of each other.'" *Id*. at 703 (citing The Federalist No. 47, 325-26 (James Madison) (Jacob E. Cooke ed.,1961) (emphasis omitted)). To the contrary, the Constitution "imposes upon the Branches a degree of overlapping responsibility" and "a duty of interdependence." *Id.* at 702.[11]

As evidence of this "interdependence," *Clinton* cited the long-settled tradition, tracing back to *Marbury v. Madison*, in which federal courts have reviewed the legality of a President's "official action[s]" and have issued injunctions against lower federal officials to block their implementation. *Clinton*, 520 U.S. at 703. A paradigmatic example of that authority, *Clinton* explained, was the famous case of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), in which the Supreme Court enjoined the Secretary of Commerce from following President

[11] *Accord* Federalist No. 48, at 146 (J. Madison) (R. Fairfield ed. 1981) (the three branches are "connected and *blended* as to give each a constitutional control over the others"); *Mistretta v. United States*, 488 U.S. 361, 381 (1989) (no "hermetic division among the Branches").

Truman's unlawful directive to "take possession of and operate most of the Nation's steel mills." *Clinton*, 520 U.S. at 703. Beginning with *Marbury* and culminating in *Youngstown*, the Court explained, the "separation of powers" has always contemplated "quite burdensome interactions" between the President and the co-equal federal judiciary. *Id.* at 702. The Court therefore concluded that, even though defending against federal civil litigation could place a "burden on the President's time and energy," *id.*, "the doctrine of separation of powers does not require federal courts to stay all private actions against the President until he leaves office," *id.* at 705-06.

None of *Clinton*'s reasoning, however, applies to the state courts. The state courts are not a coordinate or coequal branch, and unlike the federal courts, they have no authority to sit in judgment of the President's official acts. It is unthinkable that a state court would seek to enjoin the President's national security policies, as the federal court did in *Youngstown*. For state courts "lack even the [far] lesser powers to issue writs of mandamus against federal officials or to grant habeas corpus relief to persons in federal custody." *Anderson*, 601 U.S. at 111. And to this very day, the Supreme Court still has *never* authorized the state courts to issue injunctions against *any* federal officials acting in their official capacity, let alone when they act at the direct charge of the President. *Brooks*, 313 U.S. at 360. Unlike the federal courts, the state courts cannot exercise any measure of "controul" over the sitting

President—because, under the Supremacy Clause, any burdensome "interactions between the [state judiciary] and the Executive . . . necessarily rise to the level of constitutionally forbidden impairment." *Clinton*, 520 U.S. at 702.

Clinton itself recognized the dispositive distinctions between state and federal courts. There, the Supreme Court took the unusual step of devoting nearly an entire page of the U.S. Reports to not only *reserving* the "important constitutional issue[]" of whether a sitting President may be sued in state court, but also *explaining* why that question was so "different" from a President's amenability to suit in federal court: "Because the Supremacy Clause makes federal law 'the supreme Law of the Land,'" the Court explained, "any direct control by a state court over the President, who has principal responsibility to ensure that those laws are 'faithfully executed,' Art. II, §3, may implicate concerns that are quite different from the interbranch separation-of-powers questions addressed here." 520 U.S. at 690-91 & n.13.

Clinton thus underscores that state courts cannot exercise compulsory civil jurisdiction and control over the sitting President. Because state courts are not "co-equal" branches, and because they can have neither "agency in" nor "controul" over the Presidency, *Clinton*, 520 U.S. at 699, 703, the line separating the state courts from the President must be "traced by landmarks and monuments visible to the eye," *Covell*, 111 U.S. at 183. That clear line must be drawn at jurisdiction, because jurisdiction "goes to the court's power to exercise control" over the defendant.

Leroy, 443 U.S. at 180. Under Article II and the Supremacy Clause, state courts are categorically disabled from exercising compulsory civil jurisdiction against a sitting President.

C. State Civil Litigation Interferes Substantially With The Independence And Operations Of The Executive Branch

While the landmarks-and-monuments principle prohibits even the *risk of interference* with the federal government, experience has proven that state civil litigation against a President *actually interferes* in a meaningful way with the President's ability to do his job. In 1982, the Supreme Court warned that the President is "an easily identifiable target" for harassing litigation, and that any "diversion of his energies" caused by litigation "would raise unique risks to the effective functioning of government." *Fitzgerald*, 457 U.S. at 751-753. With the benefits of hindsight and lived experience, it now is clear that state civil litigation against the President causes real "diversion" and "harassment" of the Presidency, sufficient to interfere substantially with the operations of the Executive Branch.

1. Civil Lawsuits Divert The President From His Official Duties

As already explained, the President's duties are unrelenting. "No daily schedule of appointments can give a full timetable—or even a faint indication—of the President's responsibilities." Arthur B. Tourtellot, The Presidents on the Presidency 372 (1964). President George Washington wrote that "[t]he duties of my Office . . . at all times . . . require an unremitting attention." *Id.* at 348. President

Benjamin Harrison called it "a rare piece of good fortune . . . if the President gets one wholly interrupted hour at his desk." *Id.* at 360. And President Wilson described "the amount of work a President is supposed to do" as "preposterous." *Id.* at 365.

Those responsibilities have only increased with time. President Eisenhower explained that "the duties of the President are essentially endless."[12] President Lyndon Johnson recounted that "[o]f all the 1,886 nights I was President, there were not many when I got to sleep before 1 or 2 a.m., and there were few mornings when I didn't wake up by 6 or 6:30." Lyndon B. Johnson, The Vantage Point 425 (1971). During his first term, President Trump too slept just four to five hours per night—because the burdens of Presidency dwarfed even his responsibilities as a global business leader.[13]

---

[12] *Radio and Television Address to the American People Following Decision on a Second Term*, The American Presidency Project (Feb. 29, 1956), https://www.presidency.ucsb.edu/documents/radio-and-television-address-the-american-people-following-decision-second-term.

[13] Lydia Ramsey, *Donald Trump's Doctor Says He Only Sleeps Four to Five Hours Each Night*, The Independent (Jan. 17, 2018), https://www.the-independent.com/news/world/americas/donald-trump-sleep-four-five-hours-night-health-examination-doctor-ronny-jackson-a8163516.html; *see also* @readDonald Trump, Truth Social (Jan. 21, 2025 12:28 A.M.), https://truthsocial.com/@realDonaldTrump/posts/113864692804149616 (President Trump conducting official business at 12:28 AM the night following his inauguration); @readDonald Trump, Truth Social (Jan. 21, 2025 2:54 A.M.), https://truthsocial.com/@realDonaldTrump/posts/113865267313503356 (same at 2:54 AM).

Civil litigation against the President necessarily intrudes upon those unremitting responsibilities. *See Marek v. Chesney*, 473 U.S. 1, 10 (1985) (describing the "burdens, stress, and time [associated with civil] litigation"). As a practical matter, any case against the President that centers on his conduct (whether official or private) will require his substantial participation at almost every stage. The President will need to review the complaint and the answer; engage with discovery demands by highlighting relevant documents; review all pleadings and motions; and consult with his counsel throughout about pretrial and trial strategy. In addition, the President would be required to prepare for and participate in his own deposition. And he would have a right and an obligation to attend trial—possibly in any state court throughout the United States. The President cannot adequately protect his interests in that process without compromising, in at least some respects, on the time and attention devoted to his official duties.

Experience has shown that civil litigation against the sitting President necessarily occupies his energies and attention. While the Court in *Clinton* "predict[ed]" that the case was "unlikely to occupy any substantial amount of [the President's] time" while in office, 520 U.S. at 702, "hindsight" has falsified that rosy prediction. *See* 1 Laurence Tribe, *American Constitutional Law* 765-66 (3d ed. 2000). According to then-Commerce Secretary Mickey Kantor, the *Jones* case "created chaos" that "took away from the ability of the U.S. government to

function." Michael (Mickey) Kantor Interview, William J. Clinton Presidential History Project 72 (June 28, 2002). "[I]t is not even arguable," he reported, that the case had a "huge effect" on "the ability of the presidency and the White House to function" and "get things done." *Id.* For example, President Clinton was required to consult with his personal attorney "*three times*" on the same day that he was deliberating with advisers about whether to commence war with Iraq. Peter Baker, *Clinton Settles Paula Jones Lawsuit for $850,000*, Washington Post, (Nov. 14, 1998), at A1 (emphasis added).[14] Even for the President, the burdens of personal litigation are unavoidable. And, only for the President, those burdens interfere necessarily with the operations of the federal government.

Those burdens have only grown heavier with time. During his first term, President Trump was sued at least ten times—more than any other President in U.S. history, and more than all of them combined.[15] The President was forced to defend

---

[14] Litigation against a President also comes with heavy financial costs. As Hillary Clinton explained, after President Clinton's term, they left the White House "not only dead broke but in debt" "due to enormous legal fees." Dan Merica, *Hillary Clinton in 2001: We Were 'Dead Broke'*, CNN (June 9, 2014), https://www.cnn.com/2014/06/09/politics/clinton-speeches/index.html.

[15] Prior to President Trump taking office, we are aware of only one case in which a President was subjected to process in state court during their presidency. Suits arising out of a car accident were filed against Senator John F. Kennedy during his 1960 campaign and settled after he took office. *Clinton*, 520 U.S. at 692 (citing Complaint, *Bailey v. Kennedy*, No. 757200 (Cal. Super. Ct. Oct. 27, 1960); and Complaint, *Hills v. Kennedy*, No. 757201 (Cal. Super. Ct. Oct. 27, 1960)). The court did not permit the plaintiffs to take the President's deposition, permitting the President to respond by way of written

against multiple defamation actions,[16] the grievances of a disgruntled niece,[17] and a variety of other lawsuits—from copyright infringement to incitement-to-riot claims—all of which occupied his time and attention.[18] Indeed, President Trump was compelled to settle several of these lawsuits because they were becoming a "very significant distraction" to the Presidency.[19] And as President Trump himself explained, these litigations would have impeded his ability to "focus on our country."[20]

---

interrogatories. Order Denying Motion for Deposition, Bailey, No. 757200 (Los Angeles Cnty. Super. Ct. Aug. 27, 1962). The case was settled before further discovery against the President.

[16] Jeremy Stahl, *The New Trump Defamation Lawsuit is Daring Trump to Incriminate Himself in Court*, Slate (Jan. 17, 2017), https://slate.com/news-and-politics/2017/01/the-new-trump-defamation-lawsuit-is-daring-trump-to-incriminate-himself-in-court.html.

[17] Kara Scannell, *Judge Throws Out Mary Trump's Lawsuit Against Donald Trump, Saying Her Claim Was Barred By Prior Agreements*, CNN (Nov. 15, 2022), https://www.cnn.com/2022/11/15/politics/mary-trump-lawsuit-dismissed/index.html.

[18] Aaron Katersky, *Donald Trump versus 'Electric Avenue''s Eddy Grant*, ABC News (Oct. 19, 2021), https://abcnews.go.com/Politics/donald-trump-versus-electric-avenues-eddy-grant/story?id=80664068.

[19] Brent Schrotenboer, T*rump Lawyer: Lawsuits Would Have Been 'Significant Distraction' To President*, USA Today (Nov. 18, 2016), https://www.usatoday.com/story/news/2016/11/18/trump-lawyer-lawsuits-were-significant-distraction/94100186/.

[20] @realDonaldTrump, X (Nov. 19, 2016, 8:34 AM), https://x.com/realDonaldTrump/status/799969130237542400.

Today, as the President begins his second term, he is a defendant in at least fourteen lawsuits, with claims ranging from simple defamation to more complex business disputes. Without the protections of temporary Presidential immunity, the President will be forced to defend against these cases—and the many more that are sure to arise during his second term—all to the detriment of his office and the American people he serves.[21]

Each of these many cases brings with it the acute risk of harassment to the President. As Justice Breyer presciently observed, "a sitting President, given the 'the visibility of his office,' could well become 'an easily identifiable target for suits for civil damages.'" *Clinton*, 520 U.S., at 722 (Breyer J., concurring) (citation omitted). In *Clinton* itself, political lawyers like George Conway "offer[ed] secret

[21] While the "predictions" in *Clinton* about the increased likelihood and impact of personal litigation on the Presidency must be reexamined in light of subsequent experience, *Clinton*'s separation-of-powers holding remains binding law and can only be revisited by the U.S. Supreme Court. That, however, does not preclude this Court from taking subsequent history into account when evaluating President Trump's supremacy arguments or when fashioning a remedy based on the record and specific context of this case. Chancellor Seitz faced an analogous situation in *Belton v. Gebhart*, 87 A.2d 862, 865-66 (Del. Ch. 1952), *aff'd*, 91 A.2d 137 (Del. 1952), the only case to be affirmed in connection with the landmark *Brown v. Board of Education of Topeka* line of cases. 347 U.S. 483 (1954). Chancellor Seitz first noted that, "I believe the 'separate but equal' doctrine in education should be rejected, but I also believe its rejection must come from [the U.S. Supreme Court]." 87 A.2d at 865. Nonetheless, he then concluded, based on the "evidence" in the record and the particular facts of the case, that "separate but equal" was not in fact "equal" in Delaware, despite the Supreme Court's decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896). 87 A.2d at 866-871. To be sure, the historical record has proven that civil litigation against the President interferes substantially with the operations of the Executive Branch.

legal aid to [President Clinton's] accusers"[22] because they "didn't like the Clintons."[23] Indeed, when a settlement between President Clinton and the plaintiff seemed imminent, Conway and others tried to prevent it, admitting "[i]t was contrary to our purpose of bringing down the president."[24]

With President Trump's ascent, the problem of politicized private litigation against the sitting President has only grown worse. Not only has President Trump been targeted by *lawyers* oppositional to his views and politics; he has also been targeted in an even more egregious way by billionaire adversaries, who seek actively to fund litigation against him.[25] Because there is no limit to monies such adversaries will spend in their efforts to destroy the President, there is no limit on the number of politicized and fully-financed cases that may be marshalled against a President during his term.

---

[22] Ben Terris, *George Conway Is The Man At The Center Of Everything*, Wash. Post (May 14, 2017), https://www.washingtonpost.com/lifestyle/style/george-conway-is-the-man-at-the-center-of-everything/2017/05/13/e0720ad6-366b-11e7-b412-62beef8121f7_story.html.

[23] Dylan Stableford, George Conway Tells How He Helped Bring Clinton-Lewinsky Scandal to Light, Yahoo! News (Nov. 19, 2018), https://www.yahoo.com/news/george-conway-tells-helped-bring-clinton-lewinsky-scandal-light-223318772.html.

[24] Ben Terris, *George Conway is the Man at the Center of Everything*, Wash. Post (May 14, 2017).

[25] Erin Doherty, *Trump Lawyer Says Bankrolled E. Jean Carroll's Lawsuit*, Axios (Apr. 14, 2023), https://www.axios.com/2023/04/13/linkedin-founder-funding-e-jean-carroll-trump-suit.

2. State Civil Litigation In Particular Makes The President Especially Vulnerable To Harassment

While all civil litigation threatens to harass and divert the President away from his official responsibilities, civil litigation against the President in the *state courts* exposes him to unique and heightened risks of harassment and "local prejudice" that further interfere with his ability to do his job. *See Clinton*, 520 U.S. at 691. That is so for at least four reasons.

First, the President is more likely to be ensnared in state court than federal court, because state courts have "nearly unlimited trial jurisdiction." *Court of General Jurisdiction*, Black's Law Dictionary (12th ed. 2024). State law covers a far larger expanse of conduct than federal law. *See United States v. Lopez*, 514 U.S. 549, 566 (1995). "[E]very state" in the country has passed long-arm statutes designed to maximize their courts' jurisdiction over out-of-state defendants. *Sternberg v. O'Neil*, 550 A.2d 1105, 1109 (Del. 1988). And many state courts—unbound by Article III or the federal pleading standards—have relaxed the threshold requirements that otherwise protect a President from litigation in federal court. *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989) ("[T]he constraints of Article III do not apply to state courts[.]"); E. Farish Percy, *The Fraudulent Joinder Prevention Act of 2016*, 62 Vil. L. Rev. 213, 237 (2017) ("Many states have not adopted the *Iqbal* heightened pleading standard.").

Second, the breadth and volume of state court litigation further increases the likelihood that the President will face vexatious litigation in those courts. While roughly 300,000 cases are filed in federal trial courts each year, *see* Chief Justice John G. Roberts, Jr., *2023 Year-End Report on the Federal Judiciary* 10 (2023), more than *30 million* are filed in the state trial courts, Morgan Moffett, et. al, *2022 Caseload Highlights*, Court Statistics Project (2024). And the more than 27,000 state trial judges outnumber their 677 federal district court colleagues forty to one. *See* U.S. Dep't of Just., *Special Report, State Court Organizations, 2011* 4 (2011); U.S. Cts., *U.S. District Courts—Judicial Business* 2023.[26] Allowing each of the 27,000 state trial judges across this country to issue compulsory process against the President in any of those 30 million pending cases would pose a grave threat to the functioning of the Executive Branch.

Third, the Supreme Court has expressed "confidence in the ability of our federal judges" to protect the interests of the Presidency, *Clinton*, 520 U.S. at 707, because the Constitution insulates those judges from political pressure through life tenure and salary protection, *see* U.S. Const. Art. III, §1. Many state judicial systems do not afford those same protections. While Delaware's judges are appointed, many

[26] Available at https://www.uscourts.gov/data-news/reports/statistical-reports/judicial-business-united-states/judicial-business-2023/us-district-courts-judicial-business-2023.

state judges must "face election to keep their jobs,"[27] and none enjoys the lifetime tenure that safeguards the unflagging independence of the federal judiciary. A blanket deferral rule is required because these structural differences lead to the perception (rightly or wrongly) that certain of these judges are "nothing more than politicians in robes." Justice Sandra Day O'Connor, *Judicial Independence and Civic Education*, Utah Bar Journal, Sept./Oct. 2009, at 13.

Indeed, the Founders were deeply concerned about the prospect of state judicial interference with the Presidency. Justice Story famously warned that "state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice" in state courts. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816). The framers rejected proposals to empower state judges to try presidential impeachments for precisely that reason: They feared these "state functionaries" might pursue "local policy" and become "deeply interested in the . . . ruin of rivals" at the helm of the federal government. 2 Joseph Story, Commentaries on the Constitution of the United States § 769, at 242 (1833).

[27] *See* U.S. Dep't of State, Election *Briefing Series: American Judicial Elections* (June 27, 2024), at https://www.state.gov/briefings-foreign-press-centers/2024-elections-fpc/judicial-elections.

Those concerns have proven prescient, as sitting Presidents from both parties have fallen victim to the "local prejudice" of state judges. During President Obama's term, for example, activists in Georgia obtained a subpoena ordering him to appear at an administrative hearing regarding his American citizenship and eligibility for the ballot. Order on Mot. to Quash Subpoenas, *Farrar v. Obama*, No. 1215136-60 (Ga. Off. of State Admin. Hr'gs, Jan. 20, 2012). President Obama moved to quash the subpoena on the ground that it "'require[d] him to interrupt duties as President of the United States' to attend a hearing in Atlanta, Georgia." *Id.* But a state administrative law judge denied the motion, stating that President Obama had "fail[ed] to provide any legal authority" showing that a President could not "be compelled to attend a Court hearing." *Id.* The President disregarded the subpoena, prompting a (failed) attempt to hold him in contempt. Tr. of Hr'g at 44, *Farrar*, No. 1215136-60 (Ga. Off. Of State Admin. Hr'gs Jan. 26, 2012).

While "local prejudice" certainly afflicts both parties, President Trump has been subjected to more state-court harassment than any of his predecessors—indeed, more than all of them combined. During the President's first term, a New York state court refused to quash a subpoena for the President's testimony in a state civil trial. *See Galicia v. Trump*, 109 N.Y.S.3d 857, 861 (Sup. Ct. 2019). The Court ordered the President to "appear for a videotaped deposition prior to the trial." *Id.* at 861.

And the President was forced to obtain a stay from an appellate court. 24973/2015 Docket cmt. No. 9 (N.Y. Sup. Ct. Sept. 26, 2019).

That was just the beginning. In another civil matter, a state trial court rejected President Trump's requests for a stay and compelled the President to endure the burdens of discovery during his term in office, only to have the appellate court stay the case mere weeks before the deadline for the President's deposition. *Zervos v. Trump,* 2020 WL 63397, (N.Y. App. Div. Jan. 7, 2020). After all that, the plaintiff ultimately dismissed her claim against the President *with prejudice* after he left office—presumably because the case had no merit and the opportunity to embarrass the President in the Oval Office had expired.[28]

The situation has only further deteriorated since then. In the lead up to his second term, President Trump was subjected to a criminal trial in New York before a judge with close ties to his political rivals. Legal experts from across the spectrum have expressed shock and alarm at the irregularities that have pervaded those proceedings.[29] Yet, the judge has consistently declined to recuse himself. And even

---

[28] *See* Jonathan Stempel, *Former 'Apprentice' contestant Zervos abruptly ends lawsuit against Donald Trump*, Reuters (Nov. 12, 2021), https://www.reuters.com/world/us/former-apprentice-contestant-zervos-ends-lawsuit-against-donald-trump-2021-11-12/.

[29] Adam Klasfeld, *'Half-Crimes': Critics Far Outside MAGA-World Pick Apart 34-Count Felony Indictment Against Donald Trump*, Law & Crime (Apr. 5, 2023),

as the federal criminal cases against President Trump have all been dismissed, that zombie state prosecution persisted until this month.

Fourth, and finally, elected law enforcement officers are incentivized to weaponize their state justice systems against the sitting President, including in civil cases. For example, in the 2018 election for Attorney General of New York, candidates "practically tripped over one another promising to take [President] Trump to court."[30] The winning candidate promised to use "every area of the law to investigate President Trump and his business transactions and that of his family as well."[31] She described a "country at war with itself" and promised to "join with other law enforcement and attorneys general across this nation in removing" President Trump from office.[32] After failing to deliver on that promise, the Attorney General chose instead to weaponize a civil enforcement statute in a crusade to

---

https://lawandcrime.com/trump/half-crimes-critics-far-outside-maga-world-pick-apart-34-count-felony-indictment-against-donald-trump/.

[30] Emma Platoff, *America's Weaponized Attorneys General*, The Atlantic (Oct. 28, 2018), www.theatlantic.com/politics/archive/2018/10/both-republicans-and-democrats-have-weaponized-their-ags/574093/

[31] Allan Smith, *Incoming New York Attorney General Plans Wide-Ranging Investigation of Trump and Family*, NBC News, (Dec. 12, 2018), https://www.nbcnews.com/politics/donald-trump/incoming-new-york-attorney-general-plans-wide-ranging-investigations-trump-n946706.

[32] NowThisImpact, *Why Letitia James Wants to Take on Trump as NY's Attorney General*, YouTube (Sep. 28, 2018), www.youtube.com/watch?v=D1yj0NKSsuU.

bankrupt the President.[33] The resulting $350 million civil penalty assessed against him was so shocking and irregular that the Governor of New York felt compelled to reassure "New Yorkers who are business people" that they "have nothing to worry about, because they're very different than Donald Trump."[34]

New York is not alone in this respect. When the Fulton County District Attorney took office in 2021, she knew "almost immediately" that she would target President Trump, ultimately suing him.[35] Throughout the litigation, she did all she could to harass President Trump, appearing almost nightly on television to discuss the case, and even publishing derogatory cartoons of the President.[36] The "local prejudice" was so egregious that the Court of Appeals of Georgia disqualified the District Attorney from the case for failing to "exercis[e] her independent professional judgment totally free of any compromising influences." *Roman v.*

---

[33] Jeffery C. Mays, *N.Y.'s New Attorney General Is Targeting Trump. Will Judges See a 'Political Vendetta?*,' N.Y. Times (Dec. 31, 2018), https://www.nytimes.com/2018/12/31/nyregion/tish-james-attorney-general-trump.html.

[34] Lauren Irwin, *Hochul Tells NY Businesses Not to Fear About Trump Verdict: 'Nothing to Worry About'*, The Hill (Feb. 18, 2024), https://thehill.com/homenews/state-watch/4474774-hochul-tells-ny-businesses-not-to-fear-about-trump-verdict-nothing-to-worry-about/.

[35] Danny Hakim & Richard Fausset, *Inside a Georgia Prosecutor's Investigation of a Former President*, N.Y. TIMES (Aug. 24, 2023), https://www.nytimes.com/2023/08/15/us/fani-willis-donaldtrump-georgia-investigation.html.

[36] *See*, *e.g.*, @FaniforDa, X (Jul. 18, 2022), https://x.com/FaniforDA/status/1549163274897350657.

State, 2024 WL 5164724, at *4 (Ga. Ct. App. Dec. 19, 2024). But justice delayed is justice denied—and President Trump was forced to endure nearly four years of politicized investigation and litigation.

As the President begins his second term, he faces unprecedented dangers of bias in the state courts across the country—and it is foreseeable that the time and energy previously invested into state-court criminal proceedings against the President will be channeled into civil proceedings. What began in New York and Georgia will not stop there. "If one State can do this, so can every other State." *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 46 (1867). And in the case of private civil litigation against a sitting President, so can every citizen across the country. Without a rule of temporary immunity, the President's many adversaries will continue to deploy state-court litigation as a weapon to "commandeer the President's time, drag him from the White House, and haul him before" hostile judges across America. Amar & Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, at 713. Under the landmarks-and-monuments principle, state courts must not exercise their civil jurisdiction over an unwilling sitting President.

D. *Trump v. Vance* Supports a Sitting President's Temporary Immunity From State Civil Litigation

In *Trump v. Vance*, 591 U.S. 786 (2020), the Supreme Court upheld a state criminal subpoena issued to a third-party custodian of the President's personal records. Though the case is not directly on point, it shows why a prophylactic

immunity rule is necessary to protect the President from the threats of state civil litigation.

In *Vance*, the New York District Attorney had issued a criminal grand jury subpoena to an accounting firm—Mazars USA, LLP—seeking "financial records relating to the President." 591 U.S. at 791. The President sought to enjoin issuance of the subpoena in federal district court. *Id.* at 792. But the lower courts refused the injunction, reasoning that "presidential immunity does not bar the enforcement of a state grand jury subpoena directing a third party to produce non-privileged material, even when the subject matter under investigation pertains to the President." *Id.* at 793 (citation omitted). The U.S. Supreme Court affirmed and rejected the sitting President's position that even his personal records, then residing with a third party, were immune from the state criminal subpoena power. *Id.* at 810-11.

Vance did not settle the question presented here for at least two reasons. First, the case did not involve any "direct control" by a state court over the sitting President. *Clinton*, 520 U.S. at 691 n.13. The subpoena was directed to a third party, Mazars, and it was Mazars—not the President—who risked contempt for its noncompliance. *See Zervos v. Trump*, 171 A.D.3d 110, 137 (N.Y. App. Div. 2019) (Mazzarelli, J., dissenting in part) (describing the ever-present threat of contempt as a "sword of Damocles" that hangs "over the President's head" throughout the litigation). At no point in the case did the President ever appear before, or otherwise

subject himself to the jurisdiction of, the state court. Accordingly, *Vance* did not implicate—and could not resolve—the question left open in *Clinton* whether a state court may exercise civil jurisdiction and thus "direct control" over the sitting President.

In addition, *Vance* was a criminal case. And so the Court relied heavily on the bedrock criminal-law rule that "the public has a right to every man's evidence," as well as the "two centuries of" precedent in which Presidents have "uniformly" complied with "properly tailored criminal subpoena[s]." 591 U.S. at 791, 802. But the right to "every man's evidence" has no application in civil cases, where there is a "lesser public interest" in prompt resolution, *Fitzgerald*, 457 U.S. at 754 n.37, and where there exists no comparable "tradition" of Presidential participation, *see Anderson*, 601 U.S. at 113-14 ("[A] lack of historical precedent is generally a 'telling indication' of a 'severe constitutional problem' with the asserted power.").

Nevertheless, *Vance* is still relevant to the question presented here because it shows clearly why a prophylactic rule is necessary for state civil litigation. The Court in *Vance* recognized that the "Supremacy Clause prohibits state judges and prosecutors from interfering with a President's official duties." 591 U.S. at 806. And it further recognized that "harassing subpoenas could, under certain circumstances, threaten the independence or effectiveness of the Executive." *Id.* at 805. But the Court concluded that a prophylactic rule of immunity was unnecessary

to protect the Presidency for two reasons. Neither one applies to civil litigation against a sitting President.

First, the Court stressed that "the law [of criminal subpoenas] already seeks to protect against the[ir] predicated abuse." *Id.* For example, "grand juries are prohibited from engaging in arbitrary fishing expeditions and initiating investigations out of malice or an intent to harass" in ways that might unduly burden the President. *Id.* (quotation marks omitted). But there are no comparable protections in state civil ligation, where plaintiffs frequently file lawsuits to achieve strategic objectives and to open the floodgates of discovery. That is why Judge Learned Hand famously said that he "dread[ed] a lawsuit beyond anything else short of sickness and death." 3 Lectures on Legal Topics, Assn. of the Bar of the City of New York 105 (1926), quoted in *Fitzgerald*, 457 U.S. at 763 n. 6 (Burger, C.J., concurring). The risks to the Presidency of diversion and harassment are present at every step in the ongoing—and often interminable—process of defending against civil litigation.

Second, and more importantly, the *Vance* Court stressed that, if a state prosecutor were ever to abuse the subpoena power, the President could always vindicate his Article II interests swiftly by challenging the individual subpoena "in a federal forum, as the President has done here." *Vance*, 591 U.S. at 806; *see also id.* at 814 (Kavanaugh J., concurring in judgment) (stressing, as an important point

of agreement among "[a]ll nine Members of the Court," that "a President may raise objections to a state criminal subpoena not just in state court but also in federal court"). In other words, subpoenas involve discrete and self-contained directives that may be fully scrutinized by a federal court *before* a President ever sets foot in the state forum.

That is not possible for civil litigation against a sitting President. As a defendant in a civil case, the President may face not one, but any number of adverse rulings that risk distracting from his official responsibilities. *Ad hoc* federal review could not plausibly provide adequate protection from that steady stream of possible interference. At every juncture in the case—from briefing deadlines, to the scope of discovery, to the timing and contours of trial—the state court is forced to decide which specific litigation demands comport with the President's schedule and responsibilities. Each of those interlocutory determinations risks interference with the Executive Branch, yet there is no straightforward way for the federal courts to assess them. In theory, the President would be required to initiate a sort of shadow trial—or a series of mini-trials—in which the federal court could superintend the state court's judgments at every step. But that "ongoing federal audit of state . . . proceedings" would make a mockery of the state court, *O'Shea v. Littleton*, 414 U.S. 488, 500 (1974); it would further tax the President's time with satellite litigation; and it is patently unrealistic and unworkable—a point Justice Scalia recognized more

than thirty years ago. *See* Argument Tr., *Clinton* at 2:05 (Justice Scalia: "[S]uppose the suit were in State court, and the State court decided that the testimony of someone who was not the President is important to be preserved. Does that become a Federal question?"). The only plausible way to vindicate a sitting President's right to a federal forum is to insulate him, temporarily, from the burdens of defending against state civil litigation.

Today, thirty years on from *Clinton*, the idea of ad hoc federal supervision has become even less practicable. President Trump has already faced more state-court lawsuits than all prior Presidents combined. As a result, in the various cases against him, the state trial courts will need to take account not only of the President's unremitting duties, but also of the various litigation demands imposed by *other courts*. And when the President inevitably seeks federal court review of any adverse interlocutory rulings, the federal judges too will be forced to undertake the impossible task of determining whether the simultaneous demands of the various courts threaten interference with the President's official duties. Rather than continue down this dystopian path, this Court should take the only workable approach and recognize, consistent with centuries of historical practice, that the sitting President must not be subjected to the burdens of state civil litigation.

II. DELAWARE COMMON LAW REQUIRES DEFERRAL OF CIVIL LITIGATION AGAINST A SITTING PRESIDENT

It is the "settled policy" of Delaware courts to avoid difficult constitutional questions "unless [their] determination is essential to the disposition of the case." *Downs v. Jacobs*, 272 A.2d 706, 708 (Del. 1970). This Court need not resolve the federal constitutional question here because Delaware's common law can protect the sitting President against burdensome civil litigation in the State's courts.

As Justice Ginsburg rightly observed during oral argument in *Clinton v. Jones*, state courts may "recognize [temporary Presidential] immunity as a matter of their common law." *See* Argument Tr., *Clinton* at 8. The "genius of the [Delaware] common law lies in its ability to adapt" to new situations, *Beattie v. Beattie*, 630 A.2d 1096, 1098 n.3 (Del. 1993), with "court made" rules grounded in "reason" and "right sense," *Williams v. Williams*, 369 A.2d 669, 673 (1976). Defendants respectfully submit that this Court heed Justice Ginsburg's suggestion and recognize a "right sense" rule of deferral. *Id.* That common law rule is consistent with Delaware's foundational principles of "judicial restraint," with the state's historic respect for the federal government, and with the many other deferral rules that have been crafted by the state courts. *See* Justice Karen Lynn Valihura, *Creating Common Law in the Corporate Context, Delaware Style*, 25 U. Pa. Bus. L. Rev. 1, 36-37 (2023).

A. Delaware's Guiding Principles, As Well As The Practices of Its Sister State Courts, Favor A Common-Law Deferral Rule

The deferral rule follows directly from principles of "judicial restraint" that have long guided the development of the Delaware common law and "cabin[ed] a court's use of the judicial power." *Id.* at 36. No Delaware court has ever exercised jurisdiction against an unwilling sitting President. Under guiding principles of judicial restraint, this Court should not be the first. Any exercise of jurisdiction over the sitting President would not only risk interference with the federal government, but also would draw the Delaware courts into inherently politicized disputes that compromise their public standing.

Litigation against the sitting President diminishes the dignity of the state courts in two principal ways. *First*, as already explained, any state process against the President risks interfering with the execution of his duties. If the President asserts that a specific deposition, trial, or even discovery deadline disrupts the function of the Executive Branch—as he has every right to do so—the state court would then be compelled to evaluate the validity of the President's concerns and to sit in judgment of his priorities. Such determinations as to how the President spends his time—in addition to violating the Supremacy Clause—are inherently political and will be perceived as such by the public. *See* Justice O'Connor, *Judicial Independence and Civic Education* at 13. The deferral rule thus protects the state

court from the political taint that arises from a local court's entanglement with the affairs of the national government.

Second, if the President disagrees with any of the state court's assessments, he would be entitled to raise those objections immediately in federal court. *See Vance*, 591 U.S. at 814 & n.1 (Kavanaugh, J., concurring). That satellite federal litigation—while constitutionally required—would further distract the sitting President from his official duties. And it would further dishonor the state courts that purport to sit in judgment of the President's actions. A rule of deferral is thus essential to protect the "public regard" for the state courts by avoiding entanglements with the federal executive and superintendence by the federal Judiciary. *See McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.,* 263 A.2d 281, 283 (Del. 1970).

Litigation against the sitting President is also inconsistent with Delaware's twin traditions of respect for the sitting chief executive and deference to the federal government. At its founding, Delaware recognized the dangers of litigation against a sitting chief executive. In September 1776, Delaware's original state constitution codified *express protections* for the state's sitting "president"—the term then used for Governor. D.E. Const. of 1776, art. XXIII. Article 23 provided that all "officers" of the state shall be "removed on conviction of misbehavior at common law, or on impeachment, or upon the address of the general assembly." *Id.* But the "president"

was treated differently: He could not be subjected to impeachment processes while in office, but instead could only be impeached and punished once "*he is out office*." *Id.* (emphasis added). When Delaware ratified the federal Constitution in December 1787, it did so on the understanding that judicial process against a sitting chief executive may interfere with the entire machinery of the Executive Branch.

In that same spirit, the Delaware courts have been especially "vigilant about not stepping on the toes of . . . the federal government." *Salzberg v. Sciabacucchi*, 227 A.3d 102, 134 (Del. 2020). Delaware courts have avoided lawsuits that "in any way interfere with or limit the jurisdiction of" federal authorities. *Nottingham Partners v. Dana*, 564 A.2d 1089, 1105 (Del. 1989). They have avoided "stand[ing] as an obstacle to the accomplishment and execution of the full purposes and objectives" of federal law. *O'Malley v. Boris*, 742 A.2d 845, 848 (Del. 1999). And they have recognized repeatedly that federal interests "should outrank the preference which is given to the State." *W. Coast Power Co. v. S. KS Gas Co.*, 172 A. 414, 415 (Del. Ch. 1934).

Consistent with these guiding principles, the courts of this state have refrained from exercising undue jurisdiction and control over any officers of the federal government, no matter their rank. "The President's unique status under the Constitution distinguishes him from other executive officials," and requires even stronger protections from state court process. *Fitzgerald*, 457 U.S. at 750; *see also*

Franklin v. Massachusetts, 505 U.S. 788, 827 (1992) (Scalia J., concurring) (citing the "apparently unbroken historical tradition" of federal courts refusing injunctive relief against the President himself). Any compulsory assertion of civil jurisdiction directly over the sitting President would amount to a striking deviation from the tradition of judicial restraint that has long characterized the relationship between the Delaware courts and the federal government.

Lastly, the deferral rule also finds support in the common law traditions of Delaware's sister states. When asked to exercise undue control over federal officials, many state courts across the country have gone beyond the Supremacy Clause and crafted their own prophylactic common-law rules to fortify the landmarks and monuments that separate the state courts from the machinery of the National Government. For example, although the Supreme Court has never squarely addressed whether state courts may review the legality of federal administrative action, state courts have held, under "*the law of th[e] State*, . . . that [their] State courts have no jurisdiction to review Federal administrati[ve] orders." *Wasservogel v. Meyerowitz*, 300 N.Y. 125, 134 (N.Y. 1949) (emphasis added). Similarly, the highest courts of Michigan, Massachusetts, and New York have all refused their courts the authority to enjoin federal officers, despite the fact that the U.S. Supreme Court has never squarely settled the question. *See*, *e.g.*, *Armand Schmoll, Inc., v. Fed. Rsrv. Bank of New York*, 37 N.E.2d 225, 226 (N.Y. 1941); *Parry v. Delaney*,

37 N.E.2d 249, 250 (Mass. 1941); *People ex rel. Brewer v. Kidd*, 23 Mich. 440, 448 (Mich. 1871). Whatever the federal constitution might require, these state courts have crafted common-law rules that are designed to prevent even the "*the possibility* of interference with substantive federal policy." *Thompson v. Federal Deposit Ins. Corp.*, 241 Kan. 328, 331 (Kan. 1987) (emphasis added).

These prophylactic protections are particularly important when the President himself is involved. Until President Trump's first term, and with just one exception in U.S. history, the state courts never even attempted to exercise civil jurisdiction over and against the sitting President. Today, however, state courts across the country are being called upon to sit in judgment of the sitting President, to tax his time, and to second-guess his priorities. That state of affairs—President Jefferson's nightmare—dishonors the Presidency and debases the state courts that purport to control his actions. A brightline deferral rule would reverse those worrisome trends. It would restore the "utmost respect" that is due to the "office of the Presidency." *National Treasury Emps. Union v. Nixon*, 492 F.2d 587, 616 (D.C. Cir. 1974). And it would honor the longstanding imperative for courts "to avoid, if at all possible, direct involvement . . . in the President's constitutional dut[ies]." *Id.*

B. Deferral Rules, Like The One Requested By The President, Are Common In Delaware And Far Less Prejudicial To Plaintiffs Than Other Forms Of Immunity

A rule deferring litigation against a sitting President is also consistent with a variety of judge-made abstention doctrines crafted to protect the integrity of the state judiciary. These doctrines—like all deferral rules—frequently require civil plaintiffs to accept the temporary postponement of litigation to protect the public interest.

Administrative Exhaustion. This "judicially created rule" bars Delaware courts from exercising jurisdiction until the plaintiff has exhausted all available remedies before a state agency. *Levinson*, 616 A.2d at 1187. Exhaustion serves "to allow administrative bodies to perform their statutory functions in an orderly manner without preliminary interference from the courts." *Id.* at 1190. Though "nothing in the Delaware Constitution []or the Delaware Code" requires the rule, Delaware's courts have embraced exhaustion principles to honor the "proper relationship between the courts and administrative agencies." *Id.* at 1187, 1190. So too here.

Primary jurisdiction. Like exhaustion, the judge-made doctrine of primary jurisdiction allows courts to stay an otherwise cognizable action and refer any embedded issue to an administrative body. *In re Marta*, 672 A.2d 984, 988 (Del. 1996). This doctrine too honors the "special competence" of the state executive branch "in the matter at hand." *E. Shore Nat. Gas Co. v. Stauffer Chem. Co.*, 298 A.2d 322, 325 (Del. 1972). As courts have stressed, the doctrine is not an

"abdication" of the judicial power, but rather an exercise in "temporary abstention" flowing from the state judiciary's respect for the coordinate executive branch. *Id.*

The case for deferral in this context is far stronger than in the contexts of exhaustion or primary jurisdiction. In those cases, the state administrative defendant seeks deferral so that he may "perform [his] statutory functions in an orderly manner without . . . interference from the courts." *Levinson*, 616 A.2d at 1190. Here, the President of the whole United States seeks a deferral, so that he may properly focus on constitutional "functions" of singular importance to the country and the world. If the Delaware courts temporarily defer litigation in deference to their state administrative agencies, there is no reason not to extend that same common-law courtesy to the Nation's Commander in Chief.[37]

Deferral is especially apt here because it is far less protective of the defendant—and far less prejudicial to the plaintiff—than other absolute immunities embraced by Delaware's common-law courts. *See, e.g.*, *Klein v. Sunbeam*, 94 A.2d 385, 539 (Del. 1952) ("absolute[] privilege" from libel for state legislatures and judges); *Short v. News-Journal Co.*, 212 A.2d 718, 721 (Del. 1965) (recognizing that

[37] Deferral rules are common in the federal system too. For example, the Servicemembers Civil Relief Act permits civil claims by or against military personnel to be tolled and stayed while they are on active duty. 50 U.S.C. Ch. 50. Likewise, the automatic stay provision of the Bankruptcy Code provides that litigation against a debtor must be stayed as soon as a party files a bankruptcy petition; that stay ordinarily remains in effect until the bankruptcy proceeding is completed or the bankruptcy court lifts the stay. 11 U.S.C. § 362.

"members of the executive branch of our State government" might have similar privileges). Those immunities do not merely delay litigation, but leave innocent victims completely without redress. Temporarily excusing the President from the burdens of defending against state civil litigation is a far more modest accommodation, and it serves even more "compelling public ends." *Fitzgerald*, 457 U.S. at 758. Accordingly, Defendants respectfully submit that this Court recognize a common-law rule deferring litigation against the sitting President until the completion of his term.

III. THIS LITIGATION SHOULD BE STAYED UNTIL THE PRESIDENT LEAVES OFFICE

Even if the Court declines to recognize a general constitutional or common-law rule deferring litigation against all sitting Presidents, there remains the question whether this case should go forward against this President. Defendants respectfully submit that it should not.

This Court has the "inherent power" to stay a case as a means of "control[ling the] proceedings before it." *Abbot v. Vavala*, 2022 WL 453609, at *8 (Del. Ch. Feb. 15, 2022). "[E]xperience, intuition, and commonsense" dictate whether and for how long a stay should issue. *Unbound P'rs Ltd. P'ship v. Invoy Hldgs. Inc.*, 251 A.3d 1016, 1030 (Del. Super. Ct. 2021). "[U]nder the law of this State[,] the granting or denial of a stay by a trial court lies within the discretion of the trial court." *Gen. Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681, 682-683 (Del. 1964).

Commonsense favors a stay of this case until the end of the President's term. As an initial matter, Defendants are not seeking to meaningfully alter the status quo because discovery has already been stayed pending disposition of Defendants' motions to dismiss. Defendants seek only an *extension* of that existing stay through the end of the President's term, so that he may lead the country without distraction from these proceedings. That requested extension is an especially modest one here, because no matter how the Court resolves the immunity issue, discovery and trial will necessarily remain on hold. Either Defendants will prevail on their immunity arguments, in which case the case must be stayed (or dismissed). Or this Court will reject Defendants' immunity arguments, in which case Defendants will initiate an appellate process that "automatically stays any further proceedings." *United States v. Trump*, 706 F. Supp. 3d 91, 93 (D.D.C. 2023).

Under settled immunity principles, "questions of immunity are reviewable *before trial* because the essence of immunity is the entitlement not to be subject to suit." *United States* v. *Trump*, 603 U.S. 593, 635 (2024) (emphasis added). The stay must remain in place throughout that appellate process, because "[o]therwise, the benefits of such immunity [would be] lost" before the higher courts even have an opportunity to decide whether the immunity exists in the first place. *See McCaffrey v. City of Wilm.*, 133 A.3d 536, 546 n.43 (Del. 2016); *accord Coinbase v. Bielski*, 599 U.S. 736, 741-43 (2023). Accordingly, the existing stay must remain in effect

regardless of how the Court resolves the immunity question, and Defendants' modest request for a stay extension would only marginally alter that status quo.

For at least four independent reasons, this Court should grant that modest request. *First*, the President has already made the deliberative decision to disengage from TMTG. In March 2024, after taking the company public, President Trump stepped down from the board so that he could focus his energies on the forthcoming Presidential campaign. And, after prevailing in the general election, the President took the additional step of placing all of his shares in trust, so that he may focus singularly on his constitutional obligations. The President has thus made clear repeatedly—through word and deed—that disengagement from TMTG is necessary to his ability to govern the country effectively and without distraction. In demanding that this case proceed, Plaintiff is essentially asking this Court to second-guess that considered judgment and drag the President back, unwillingly, into the web of private business interests from which he has specifically sought to extricate himself. For that reason alone, and to honor the President's considered decision to set TMTG aside, a stay must issue for the duration of President Trump's term.

Second, this litigation will prove particularly distracting and disruptive to the President. The case is complex and high stakes, with Plaintiffs potentially seeking hundreds of millions of dollars in damages, yet also deeply personal. The allegations span four years and 215 paragraphs, they arise from a series of unique business

transactions, and they involve one of the President's most valued business assets.[38] In addition, the TAC references the President more than 150 times, and it takes aim at his relationships with immediate family members and close advisers. Among other things, Plaintiff claims that President Trump conspired with Devin Nunes to remove a UAV director for refusing a transfer his shares to the President's wife (TAC ¶¶ 2, 59, 99); that the President "controls and dominates" the other defendants—including his son, the future FBI Director, and a White House Deputy Chief of Staff—all of whom are "completely loyal" to the President (*Id.* ¶¶ 124, 129, 133, 141); and that the President abused this control to force the company to make "knowingly false" public disclosures (*Id.* ¶¶ 94, 96). It is inconceivable that anyone could remain wholly disengaged from litigation that—in addition to seeking significant civil damages—attacks their reputation, takes aim at their family relationships, and insinuates potential violations of the criminal law. Because litigation of this nature will necessarily require a substantial amount of the President's personal time and attention, a stay should issue.

[38] Molly Bohannon, Trump Media Stock Jumps 17%—Adding Almost $400 Million To Trump's Net Worth, Forbes, Oct. 8, 2024, https://www.forbes.com/sites/mollybohannon/2024/10/08/trump-media-stock-jumps-17-adding-almost-400-million-to-trumps-net-worth/.

Third, it has already become clear that opposing counsel will force this Court repeatedly to sit in judgment of the President's priorities. From the moment Defendants gave notice of their intention to raise immunity issues, opposing counsel has marshalled the kinds of objections that call into question the President's good faith. They have accused the President of undue delay, they have characterized his efforts to raise immunity as a "transparent" and "strategic" attempt at gamesmanship, and they have trumpeted their desire to take his deposition "at the White House." (D.I. 187, ¶ 18.) Indeed, before this Court stayed discovery, Plaintiff attempted to depose the President on just twelve days' notice and the very same day that his criminal trial in New York was scheduled to begin. (D.I. 65; D.I. 75.) And Plaintiff has twice asked this court to hold Defendants in contempt, which if repeated could invite a constitutional clash. *See Zervos v. Trump*, 171 A.D.3d 110, 127 (N.Y. App. Div. 2019) (conceding that "holding the President in contempt would be . . . violative of the Supremacy Clause"). That course of conduct makes clear that, if this case is permitted to proceed to discovery, the Court will be left with no choice but to superintend the President's priorities, second-guess his good faith, and repeatedly adjudicate constitutional claims. A stay is necessary to prevent that slippery slope of potential confrontations between the Court's scheduling orders and the President's prerogatives.

Fourth, and finally, this is not a case in which there is any need to rush to trial. This Court has already vacated expedition, Plaintiff has already received and sold hundreds of millions of dollars in TMTG shares, and they are prosecuting this lawsuit to grow those riches. Accordingly, in the unlikely event that Plaintiff prevails, they could be made whole through prejudgment interest regardless of the delay. While it is conceivable that Plaintiff might suffer some modicum of prejudice from delay, those risks are minimal—and they pale in comparison to the burdens this litigation will impose on the Presidency of the United States of America. As noted, the President has already faced—and will continue to face—a torrent of litigation that threatens to interfere with his duties. A temporary stay is both necessary and justified to ensure that President Trump can devote his time and energies to America's problems, rather than the grievances of private plaintiffs that can easily be resolved in four years' time.

A stay on these facts is consistent with—if not required by—the Supreme Court's guidance in *Clinton v. Jones*. In that case, the Supreme Court explained that "a stay of either the trial or discovery" against a sitting President "might be justified by considerations that do not require the recognition of any constitutional immunity." 520 U.S. at 706. Relevant to that determination, the Court explained, is the overall volume of "civil actions" against the President, as well as any

"particular factual findings" that suggest discovery and trial would risk interference with the President's official responsibility. *Id.* at 707-708 & n.41.

Unlike in *Clinton*, the record in this case amply demonstrates why this litigation will impose undue burdens on the Presidency. *First*, President Clinton faced just a single lawsuit, while President Trump faces a flood. *Second*, the *Clinton* case and its aftermath show that litigation against the President personally is far more taxing on the President's time than the Supreme Court foresaw. *Third*, the President has already demonstrated through his conduct that further entanglements with TMTG will distract from his official responsibilities. And *fourth*, Plaintiff has signaled that they will ask this Court repeatedly to second-guess the President's priorities. For all of those reasons, the Court has ample basis to conclude that there is "potential harm [to the Presidency] that may ensue from" further proceedings. *Clinton*, 520 U.S. at 708. At the very least, a stay should issue.

IV. A STAY OR DISMISSAL AS TO PRESIDENT TRUMP MUST EXTEND TO ALL DEFENDANTS

Any stay or dismissal of the claims against President Trump requires corresponding relief as to the remaining Defendants. That is so for three reasons.

First, a stay of the whole case is necessary to protect the interests underlying the President's temporary immunity. Like the *Clinton* case, this one "revolves around the alleged actions of [the President]." *Jones v. Clinton*, 879 F. Supp. 86, 88 (E.D. Ark. 1995). The TAC references the President more than 150 times, it centers

on his conduct, and it claims that all other remaining Defendants acted at his direction. (TAC ¶¶ 124-49.) As a result, it is difficult to envision "how proceedings [could] go forward against [all Defendants] without the heavy involvement of the President through his attorneys." *Jones*, 879 F. Supp. at 88. The President will be compelled to engage with litigation strategy and discovery demands precisely because *his* actions, *his* decisions, and *his* thought processes are central to the allegations. Allowing discovery and trial to proceed against the remaining Defendants would thus undermine the very interests served by the President's temporary immunity.

At the same time, the difficulties of consulting freely and frequently with the President during his term would clearly prejudice the remaining defendants. As an initial matter, proceeding without the President would put the remaining Defendants to an impossible choice: They could attempt to consult with the President in order to adequately prepare their own defenses. But in so doing, they would risk diverting the President's time and attention away from the constitutional responsibilities of his office. It would be grossly unfair to force the remaining Defendants—who include the President's son and his closest advisers—to choose between prioritizing their own defense and the prerogatives of the Presidency.

But suppose *arguendo* that the remaining Defendants were willing to tax the President's time in service of their own personal defenses. Even then, it is hardly clear that the remaining Defendants, as a matter of self-interest, could or should consult freely with the President. Unlike most ordinary citizens, the President faces relentless scrutiny, with every meeting and every moment monitored by the media and public. In addition, under the Presidential Records Act, the President is required to document all of his official "activities, deliberations, decisions, and policies." 44 U.S.C. § 2203(a). Between the record-keeping and public scrutiny, the remaining Defendants could plausibly conclude that any communications with the President would risk compromising the confidentiality that is required for an effective "common interest" defense. *See* Restatement (Third) of the L. Governing Laws. § 76 (Am. L. Inst. 2000). Given the President's centrality to the allegations, the remaining Defendants cannot be expected to proceed with this case in his absence.

Second, a stay of the entire case is warranted as a matter of judicial economy. A court may stay duplicative litigation "to promote judicial efficiency and to avoid conflicting opinions which can occur if multiple cases are allowed to go forward separately where there are common controlling issues." *Joseph v. Shell Oil Co.*, 498 A.2d 1117, 1122-23 (Del. Ch. 1985). If this Court declines to stay the case against the remaining Defendants, there could be two successive discovery periods, two

rounds of dispositive motions, and two trials with the same witnesses (save one) and evidence on the same issues (but absent evidence developed with respect to the President), as well as the possibility of inconsistent judgments. Rather than duplicate efforts and waste resources, the Court should grant a stay or dismissal that ensures the Defendants may litigate together.

Third, because the President is a necessary party, Court of Chancery Rule 19 bars the case from proceeding in his absence. A party is "necessary" if he "claims an interest relating to the subject of the action." Ch. Ct. R. 19(a)(1)(B). President Trump is a necessary party for several reasons: The TAC focuses singularly on his conduct; all of the remaining Defendants are alleged to have acted at his direction; the President is the only Defendant who is also a party to the Services Agreement; and he was the majority owner of TMTG. For all of those reasons, he has a "legally protected interest" in the case that will be "practically—not theoretically—impaired" by a ruling in his absence. *Mehra v. Teller*, 2023 WL 2260640, at *4 (Del. Ch. Feb 28, 2023). In "equity and good conscience," Ch. Ct. R. 19(b), this case cannot proceed without the President because of the "prejudice" that he and all of the Defendants will suffer in his absence. *Lone Pine Res., LP v. Dickey*, 2021 WL 2311954, at *16 (Del. Ch. June 7, 2021).

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' Motion to Stay or Dismiss on the Basis of Temporary Presidential Immunity.

DATED: January 24, 2025

DLA PIPER LLP (US)

/s/ John L. Reed
John L. Reed (I.D. No. 3023)
Ronald N. Brown, III (I.D. No. 4831)
1201 N. Market Street, Suite 2100
Wilmington, DE 19801
(302) 468-5700
(302) 394-2341 (Fax)
john.reed@us.dlapiper.com
ronald.brown@us.dlapiper.com

Attorneys for Defendants President Donald J. Trump, Trump Media & Technology Group Corp., Devin G. Nunes, Donald J. Trump, Jr., Kashyap "Kash" Patel, Eric Swider, Frank J. Andrews, Edward J. Preble, and Jeffrey A. Smith

OF COUNSEL:

Caryn G. Schechtman
DLA PIPER LLP (US)
1251 Avenue of the Americas
New York, NY 100020-1104
(212) 335-4593
(212) 335-4501 (Fax)
caryn.schechtman@us.dlapiper.com

Josh Halpern
M. David Josefovits
DLA PIPER LLP (US)
500 Eighth Street, NW
Washington, DC 20004
(202) 799-4000
(202) 799-5000 (Fax)
josh.halpern@us.dlapiper.com
david.josefovits@us.dlapiper.com

-and-

HALLORAN FARKAS + KITTILA LLP

/s/ Theodore A. Kittila
Theodore A. Kittila (No. 3963)
M. Jane Brady (No. 1)
William E. Green, Jr. (No. 4864)
John G. Harris (No. 4017)
5722 Kennett Pike
Wilmington, DE 19807
(302) 257-2025
(302) 257-2019 (Fax)
tk@hfk.law / mjb@hfk.law /
wg@hfk.law / jgh@hfk.law

Attorneys for TMTG Sub Inc. f/k/a Trump Media & Technology Group Corp., President Donald J. Trump, and Daniel Scavino, Jr.

Words: 13,950 of 14,000

EXHIBIT 16

PUBLIC MATTER—DESIGNATED FOR PUBLICATION

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	SBC-23-O-30029
	)	
JOHN CHARLES EASTMAN,	)	
	)	OPINION
State Bar No. 193726.	)	
	)	

In a democracy nothing can be more fundamental than the orderly transfer of power that occurs after a fair and unimpeded electoral process as established by law. In this disciplinary matter, we consider the appropriate discipline to recommend to the California Supreme Court when an attorney, who has sworn to uphold the laws and constitutions of the State of California and the United States, attempts to actively undermine the results of an election to the most powerful office in the United States with the goal of delaying or invalidating the lawful installation of his client's electoral opponent and thereby keep his client in office.

The Office of Chief Trial Counsel of the State Bar (OCTC) charged respondent John Charles Eastman with 11 counts of misconduct arising from his actions surrounding the representation of President Donald J. Trump (President Trump) and his campaign during the 2020 presidential election. Following 34 days of trial, the hearing judge found Eastman culpable on 10 of the 11 counts. While finding that Eastman's actions were mitigated by "his many years of discipline-free practice, cooperation, and prior good character," the judge found his wrongdoing was "substantially aggravated by his multiple offenses, lack of candor[,] and

indifference." She concluded Eastman's actions constituted "a fundamental breach of an attorney's core ethical duties," and that "his unwillingness to acknowledge any ethical lapses regarding his actions [demonstrated] . . . a significant risk that Eastman may engage in further unethical conduct, compounding the threat to the public." Based on the record established at trial, the judge recommended disbarment.

Eastman appeals the hearing judge's recommendation. He disputes all of the judge's culpability findings: that he failed to uphold the United States Constitution and laws of the United States by conspiring with others, including President Trump, to obstruct the electoral count on January 6, 2021, in violation of title 18 United States Code (U.S.C.) section 371 (count one); seeking to mislead the Supreme Court of the United States (U.S. Supreme Court) by filing a motion to intervene in a case brought by the State of Texas (count two); seeking to mislead a United States district court by the filing of a verified complaint (count four); and making multiple misrepresentations to former Vice-President Michael Pence (former Vice-President Pence), his counsel, and to the general public who watched, heard, or read Eastman's statements on a January 2, 2021 "Bannon's War Room" podcast, at the "Stop the Steal" rally on January 6, and in an article he wrote that was published on January 18, "Setting the Record Straight," (counts three and five through ten). Eastman also asserts free speech protections under the First Amendment to the United States Constitution (First Amendment) and claims due process violations premised on a combination of adverse pretrial rulings and the way in which the judge conducted the trial. Finally, Eastman disputes one aggravation finding made by the judge and argues the judge did not properly balance the aggravating and mitigating circumstances. Hence, if culpability is affirmed, he argues less discipline is warranted.

OCTC appeals the hearing judge's decision on three grounds but supports the discipline recommendation of disbarment. First, for counts five and seven, OCTC seeks a clarification that

Eastman's misrepresentations were intentional, stating the judge described Eastman's misrepresentations in various places of both counts as intentional, grossly negligent, and reckless. Second, OCTC seeks culpability for count eleven, which the judge dismissed based on the finding that no evidence existed in the record showing Eastman's statements contributed to the assault and breach of the United States Capitol as alleged by OCTC. Finally, OCTC asserts that the judge should have assigned aggravation for significant harm.

Upon our independent review (Cal. Rules of Court, rule 9.12), we reject Eastman's First Amendment defenses and his various due process claims. We find Eastman is culpable on all counts of misconduct, except count eleven. We further find Eastman's conduct in counts five and seven was intentional. We affirm the hearing judge's mitigation and aggravation findings, except we find less weight for Eastman's absence of a prior record of discipline. The record does not support aggravation for significant harm as argued by OCTC. Due to the serious nature and extent of Eastman's misconduct and the weight of aggravating circumstances in relation to mitigation, we recommend that Eastman be disbarred. Disbarment is necessary to protect the public, the courts, and the legal profession.[1]

I. PROCEDURAL BACKGROUND

OCTC filed the Notice of Disciplinary Charges (NDC) on January 26, 2023. The NDC alleged 11 counts of misconduct relating to Eastman's representation of President Trump during and after the 2020 presidential election. Eastman was charged with one count of failing to support the Constitution and laws of the United States (Bus. & Prof. Code, § 6068, subd. (a));[2]

[1] Any arguments raised on review, but not specifically addressed in this opinion, have been considered and rejected. Additionally, any factual error not raised on review is waived by the parties. (Rules Proc. of State Bar, rule 5.152(C).) All further references to rules are to the Rules of Procedure of the State Bar of California unless otherwise noted.

[2] All further references to sections are to the Business and Professions Code unless otherwise noted.

two counts of seeking to mislead a court (§ 6068, subd. (d)); and eight counts of moral turpitude through misrepresentations or other acts of dishonesty or corruption (§ 6106). Eastman filed his response on February 15. The parties filed their joint pretrial statement on June 5 followed by a stipulation to undisputed facts on June 12. Additional stipulations regarding exhibits were filed on October 27 and December 1.

A 34-day trial commenced on June 20, 2023.[3] Approximately seven motions in limine were filed by the parties. Although the hearing judge issued numerous and significant pretrial and trial rulings, neither party sought interlocutory review of those rulings. The parties thereafter submitted closing briefs, and the judge issued a decision on March 27, 2024. OCTC and Eastman timely filed requests for review. Oral argument was held on March 19, 2025.

II. EASTMAN'S DUE PROCESS RIGHTS WERE NOT VIOLATED

Eastman raises three issues on review, claiming his due process rights were violated.[4] We begin our discussion of his arguments by noting that, "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' [Citations.]" (*Mathews v. Eldridge* (1976) 424 U.S. 319, 333.) "Due process" includes the right to be adequately notified of charges or proceedings, the right for an opportunity to be heard at those proceedings, and the right to have an impartial person or panel make the final decision in the proceedings. (*Goldberg v. Kelly* (1970) 397 U.S. 254, 267-268, 271.) In sum, Eastman's due process entitlement in this disciplinary proceeding was to a "fair hearing." (*In the Matter of Acuna* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 495, 501, citing *Rosenthal v. State Bar*

[3] Trial occurred June 20-23 and 29-30; August 24-25; September 5-8, 12-15, and 26-29; October 3-4, 6, 17-20, 23-24, and 30; and November 2-3, 8, and 13.

[4] While Eastman makes repeated references to "due process," we presume he is specifically invoking language from the Fourteenth Amendment to the United States Constitution, which prohibits any state from depriving "any person of life, liberty, or property, without due process of law . . . ."

(1987) 43 Cal.3d 612, 634.) Here, Eastman specifically contends that the trial proceeding lacked an impartial adjudicator; he was unable to compel testimony of out-of-state witnesses and refused an opportunity to substitute witnesses; and bias occurred in the conduct of the trial. After our review of the record and as detailed below, we conclude that Eastman indeed received a fair hearing and thus his due process violation claims lack merit.

A. Eastman's Trial Did Not Lack an Impartial Adjudicator

Eastman contends that his discipline matter involves "an intensely[ ]partisan dispute over a presidential election," and "several indicia" demonstrate a "lack of impartiality." Eastman claims OCTC's decision to file charges against him was triggered by "an activist organization" and OCTC's Chief Trial Counsel and prosecutors assigned to his case are all registered Democrats who should have been recused. He argues that, because his case is political and not "the run-of-the-mill disciplinary [case]," it should have been adjudicated by an electoral commission or similar committee with bipartisan membership. He further asserts that three of the five Hearing Department judges, including the hearing judge who presided over his case, are appointed by partisan elected officials and made political donations in support of former President Joseph R. Biden, Jr. (former President Biden) or the Democratic Congressional Campaign Committee. These concerns, according to his briefs, raise an unconstitutional potential for bias.

In essence, Eastman, who challenges how State Bar Court judges are appointed, seeks a different adjudication system for his matter.[5] In his pursuit to make his disciplinary case political, Eastman ignores the salient fact that he was a licensed California attorney at the time of

[5] Several points raised by Eastman about the appointment process are based on facts outside of the record and Eastman failed to request judicial notice or file a request to augment the record. (Rule 5.156(B), (C).)

his misconduct. His license to practice is subject to the jurisdiction of the California Supreme Court, which Eastman does not dispute. Section 6079.1 provides that, of the five judges of the State Bar Court Hearing Department, two shall be appointed by the Supreme Court of California (California Supreme Court), one by the Governor, one by the Senate Committee on Rules, and one by the Speaker of the Assembly. The statute's constitutionality was upheld by the California Supreme Court a quarter of a century ago:

> "[A]lthough this court's inherent authority over attorney admission and discipline includes the power of this court to appoint the judges of the State Bar Court and to specify their qualifications, other appointment mechanisms specified by the Legislature are permissible so long as they are subject to sufficient judicially controlled protective measures to ensure that such appointments do not impair the court's primary and ultimate authority over the attorney admission and discipline process. . . . [B]ecause of our continuing primary authority over the operations of the State Bar Court—including the appointment of that court's judges—and the numerous structural and procedural safeguards, described herein, that exist both within the attorney discipline system and within the State Bar Court appointment process established by this court, we conclude that the legislation here at issue, providing that some of the hearing judges shall be appointed by the executive and legislative branches . . . does not defeat or materially impair our authority over the practice of law, and thus does not violate the separation of powers provision."

(*Obrien v. Jones* (2000) 23 Cal.4th 40, 44.) Thus, in this disciplinary matter, we find no due process violation has occurred from the appointment process of State Bar Court judges.[6]

Eastman next contends that the assigned hearing judge made political donations to Democratic candidates or causes, which Eastman states are his political opponents. As Eastman's contention is premised on facts outside the trial record, and no request for judicial

[6] Eastman argues that the current process for appointing hearing judges is "anathema to due process." The State Bar Court is without jurisdiction to declare the appointment process unconstitutional. (Cal. Const., art. III, § 3.5.) However, in recommending a suspension or disbarment to the California Supreme Court, we may recommend that a rule or statute be declared unconstitutional if "applicable legal principles and precedents" call for such action. (*In the Matter of Respondent B* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 424, 433, fn. 11.) We decline to make such a recommendation.

notice or to augment the record was sought, his contention fails and is rejected. Even if the facts as asserted were in the record, his claim would fail. Canon 5 of the California Code of Judicial Ethics states, "Judges . . . are entitled to entertain their personal views on political questions. They are not required to surrender their rights or opinions as citizens. They shall, however, not engage in political activity that may create the appearance of political bias or impropriety." Eastman infers that the judge's campaign donations to a candidate must equate to the political activity of an organization who subsequently receives funds from the candidate, thus creating an appearance of bias or impropriety, but he offers no authority for this unreasonable interpretation of the canon. Eastman even recognizes canon 5(A)(3), which provides, in relevant part, that judges may make monetary contributions to a political party, organization, or candidate that do not exceed certain limits. Eastman makes no allegation that the judge failed to comply with the limits in canon 5(A)(3), only that the judge's donations here "may create the appearance of political bias or impropriety," but he states he does not argue that "judges should be required to relinquish their political party affiliations and not donate to campaigns."

In the end, Eastman states his case is unique, calling it "the most politicized disbarment proceeding in California's history," but his belief is not evidence nor does it create an appearance of impropriety regarding the hearing judge. Because he identifies no evidence other than his subjective belief, we reject his claims of bias as speculative and conclusory. (*In the Matter of Wright* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 219, 226.)

Beyond his claims of judicial bias, Eastman also asserts that the Chief Trial Counsel and OCTC prosecutors involved in his disciplinary matter are biased because they are registered Democrats, including one who donated to former President Biden's 2020 campaign. Based on this information, Eastman contends that rule 2201(a)(2) requires the recusal of OCTC because OCTC's participation "creates an appearance" of partiality and likely unfair treatment. Once

again, Eastman's arguments are based on facts outside of the record. Further, under the plain language of rule 2201(a)(2), the State Bar of California's Board of Trustees has delegated to the Chief Trial Counsel the discretion to determine if OCTC can function "in an evenhanded manner" and otherwise provide "that an attorney will receive fair treatment." No evidence exists in the record that the Chief Trial Counsel failed to properly exercise his discretion.

B. Eastman's Due Process Violation Claims Regarding His Witnesses Fail

Eastman makes two contentions regarding his proposed witnesses that he claims affected his due process rights. First, he was unable to compel testimony from out-of-state witnesses due to rule 5.62[7] and section 1989 of the Code of Civil Procedure.[8] Second, the hearing judge refused to allow him to substitute new witnesses on behalf of designated witnesses in the pretrial conference statement who had withdrawn after learning they were potentially implicated in ongoing investigations by the United States Department of Justice (DOJ) and other investigative agencies.

A judge has broad discretion to admit or exclude evidence. (*In the Matter of Farrell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 490, 499.) The standard of review we apply to procedural rulings is abuse of discretion or error of law. (*In the Matter of Respondent L* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 454, 461.) An abuse of discretion occurs when a judge has "exceeded the bounds of reason, all of the circumstances before it being considered." (*H. D.*

---

[7] Rule 5.62 provides, "Any party may issue trial subpoenas under Business and Professions Code §§ 6049(c) and 6085 and Code of Civil Procedure § 1985. And any party may compel another party to testify or produce documents at trial by serving a notice to appear under Code of Civil Procedure § 1987."

[8] California Code of Civil Procedure section 1989 provides, "A witness, including a witness specified in subdivision (b) of Section 1987, is not obliged to attend as a witness before any court, judge, justice or any other officer, unless the witness is a resident within the state at the time of service." California Code of Civil Procedure section 1987 details the process for service of the subpoena, including required fees and time to prepare for travel and attendance.

Arnaiz, Ltd. v. County of San Joaquin (2002) 96 Cal.App.4th 1357, 1368.) Of particular importance here, Eastman must also show actual prejudice resulting from the ruling. (*In the Matter of Aulakh* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 690, 695 [to prevail on claim of error for procedural ruling, abuse of discretion and actual prejudice resulting from ruling must be established]; *In the Matter of Johnson* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 233, 241 [party must establish actual prejudice when asserting violation of due process].)

Eastman has failed to demonstrate any actual prejudice regarding either generalized contention. His arguments on appeal are brief and conclusory. Eastman did not explain how any witness that was beyond the reach of a subpoena or the late-disclosed replacement witnesses would have provided admissible and relevant evidence at his trial. On this basis, we reject his arguments as presented on appeal. (*Wells v. State Bar* (1978) 20 Cal.3d 708, 715 ["casual claims of prejudice are insufficient to warrant relief"]; cf. *Jones v. State Bar* (1989) 49 Cal.3d 273, 288-289 [no due process violation when failure to call witnesses was based on attorney's lack of due diligence].)

C. Eastman's Generalized Claims of Bias in the Conduct of the Trial Also Fail

Eastman claims on review that the hearing judge exhibited bias during these proceedings in the following circumstances: (1) hostility towards Eastman or his witnesses resulting in prejudgment of the issues; (2) a clear pattern of arbitrary and selective admission or exclusion of evidence favoring OCTC or prejudicing Eastman, including the unjustified exclusion of U.S. Supreme Court briefs from state attorneys general and legislators and the disparate treatment in admission of post-January 2021 evidence; and (3) political partisanship as evidenced by the judge's disparate treatment of witnesses based on political affiliation. In support of Eastman's alleged claims, he cites to numerous examples in the record. Upon our review of the record, we find no support for his allegations of bias, which we detail, *post*.

Eastman's general theme here is his belief that "blatant partisan bias" and "double standards" influenced the hearing judge's rulings. As the U.S. Supreme Court has stated,

> "[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion. [Citation.] . . . [T]hey . . . can only in the rarest circumstances evidence the degree of favoritism or antagonism required . . . when no extrajudicial source is involved. . . . Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge."

(*Liteky v. U.S.* (1994) 510 U.S. 540, 555.) Our rules state that "[t]he hearing judge has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time." (Rule 5.104(F); accord, *In the Matter of Farrell*, *supra*, 1 Cal. State Bar Ct. Rptr. 490, 499.) Further, a judge has the discretion to preclude irrelevant lines of questioning. (*In the Matter of Lucero* (Review Dept., Aug. 13, 2024, SBC-21-O-30658) 6 Cal. State Bar Ct. Rptr __.) Eastman's complaints of bias due to the judge's active participation in the proceeding ignores the principle that, while a judge's "questioning must be temperate, nonargumentative, and scrupulously fair," a judge "has both the discretion and the duty to ask questions of witnesses, provided this is done in an effort to elicit material facts or to clarify confusing or unclear testimony. [Citations.]" (*People v. Cook* (2006) 39 Cal.4th 566, 597.)

We have reviewed the multiple citations Eastman has referenced from the record in his opening brief and his arguments to support his claims. Contrary to Eastman's assertions that the hearing judge "routinely badgered and harassed" him, or otherwise mischaracterized or ignored his or the other witnesses' testimonies, our review reveals the record is replete with instances of the judge requiring compliance with trial rules and procedures. For example, the record shows Eastman's counsel required continuous reminders to ask non-leading questions of Eastman's

own witnesses.[9] Additionally, counsel tried on numerous occasions over the course of the trial to elicit expert testimony from his percipient witnesses, notwithstanding the fact that his attempts were well past the expert witness disclosure date. These witnesses included retired Wisconsin Supreme Court Justice Michael J. Gableman, Garland Favorito,[10] John Droz, and Raymond M. Blehar.[11] Finally, Eastman's counsel repeatedly attempted to admit exhibits that had previously been excluded without stating that a reconsideration of a prior ruling was sought or continued to question witnesses about an exhibit even when the judge had denied admission of the exhibit. That the judge may have at times expressed frustration with Eastman's and his counsel's actions and statements is understandable upon review of the complete record.

Further, Eastman's assertions that the hearing judge "prohibited [him] from presenting any evidence postdating January 2021," and "not a single one of the dozens of [his] post-January . . . 2021 exhibits" was admitted, while OCTC was permitted to admit such evidence, are not supported by the record. We note that in his reply brief, Eastman conceded the judge did admit some but not "much" of his 2021 evidence. Based upon our review of the record, we find Eastman's allegations of bias in the exclusion and admission of post-January 2021 evidence lack

[9] OCTC's summary of approximately 90 instances of sustained objections or the judge's directives to ask non-leading questions is consistent with our review of the record.

[10] Favorito, discussed *post*, is a retired Georgia information technology professional whose educational background includes a certification in computer programming. Favorito testified that just prior to retirement he was a systems development methodology consultant and had worked with "Big Eight" accounting firms. Favorito volunteered for about two decades in Georgia elections as a poll worker and audit and recount monitor. He had never been a paid expert for election-related issues. He was a cofounder of VoterGA, a volunteer organization that proposes legislative changes to address what it perceives as "verifiability" and "auditability" issues, and he pursues election-related litigation.

[11] To work around State Bar Court procedure rules, Eastman argued the witnesses were "nonretained experts" and therefore allowed pursuant to Code of Civil Procedure section 2034.310, subdivision (b). In March 2023, Eastman identified roughly 600 witnesses in this category, which led the hearing judge to conclude the designation was not made in good faith.

support in the record and, therefore, he has not established an abuse of discretion and resulting prejudice. (*In the Matter of Aulakh*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 695.)

Eastman also argues the hearing judge exhibited bias when she denied admission of U.S. Supreme Court amicus briefs and motions filed by state attorneys general and legislators in *State of Texas v. Commonwealth of Pennsylvania, et al.* (2020) 141 S.Ct. 1230 (*Texas v. Pennsylvania*), detailed *post*, but admitted OCTC exhibits consisting of opposition briefs filed by the defendant states in that action. First, Eastman does not specifically identify on review the briefs that should have been admitted or the relevance of each denied exhibit, and he has not sought in his appeal to admit any denied exhibit. Whether others adopted or repeated inaccurate and untrue information in their own court filings in *Texas v. Pennsylvania* is not probative of whether Eastman committed the charged misconduct. As for the judge admitting the briefs filed by the defendant states, at a minimum, we see no actual prejudice to Eastman by the judge's admission of those briefs. On this issue and after review of the record, Eastman has not established an abuse of discretion or any resulting prejudice, let alone bias. (*In the Matter of Johnson*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 241.)

Eastman additionally claims that the judge showed political partisanship and bias because he was not allowed to ask an OCTC witness if he was a Democrat. In contrast, Eastman argues that OCTC was allowed to ask a witness if Georgia Secretary of State Brad Raffensperger was a Republican. We see this difference not due to bias but due to the relevance of the issue at trial. Specifically, Raffensperger's political affiliation was relevant to count six, detailed *post*, and its allegations of Eastman's misrepresentation in his January 3, 2021 memorandum that the election was stolen by a "strategic Democrat[ic] plan." The fact that Raffensperger, an elected *Republican* party official, upheld the election outcome in Georgia was contrary to Eastman's claim and, therefore, that official's political affiliation was relevant.

After a thorough review of the record, we see no legally cognizable bias as Eastman has argued. The hearing judge exercised appropriate trial and courtroom management. We reject his arguments on this issue entirely.

III. FACTS AND ANALYSES ESTABLISHING EASTMAN'S CULPABILITY[12]

A. Introduction

Eastman's actions between October 2020 and January 2021 regarding the 2020 presidential election were multifaceted; thus, conduct charged in various counts frequently overlaps. Hence, we have organized our discussion based on factually related charges. We, however, do not compartmentalize Eastman's conduct into isolated events when examining the record for evidence of his knowledge and intent. (See *U.S. v. Brown* (1978) 578 F.2d 1280, 1286 [trier of fact entitled to regard evidence as a whole and to consider all surrounding relevant circumstances in evaluating presence or absence of specific intent].)

The facts are based on the trial testimony, documentary evidence, stipulated facts, and the hearing judge's factual and credibility findings, which are entitled to great weight. (Rule 5.155(A); *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 638 [deference given to credibility findings absent specific showing that such findings were erroneous].) After independently examining the record and the weight of the evidence, we affirm the judge's factual and credibility findings as supported by the record. (See *Coppock v. State Bar* (1988) 44 Cal.3d 665, 676-677 [sufficiency of evidence].) Given the voluminous record, we have summarized the facts, but, where necessary for our analyses, we provide

[12] All affirmed culpability findings have been established by clear and convincing evidence. Clear and convincing evidence demonstrates a high probability that a fact is true. (*In re White* (2020) 9 Cal.5th 455, 467, citing *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1090; *Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552 [clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command unhesitating assent of every reasonable mind].)

additional details. Therefore, we do not repeat the judge's description of the general electoral process, including the Electoral College, and the application of the Twelfth Amendment to the United States Constitution (Twelfth Amendment), and the Electoral Count Act (ECA),[13] including the required January 6, 2021 joint session of the United States Congress (Joint Session).[14]

As a matter of initial background to our discussion of the individual counts, Eastman's attorney-client relationship with President Trump and the Trump campaign (Campaign) began approximately in September 2020, following President Trump's request for the formation of an "Election Integrity Working Group" to prepare for any post-election litigation. For the first few months that he worked with the Campaign, Eastman acted informally with no written agreement between him and President Trump or the Campaign. His early contributions included research into state election codes in anticipation of an election challenge.

Following the November 2020 election, Eastman's representation of President Trump and the Campaign was formalized in a December 5, 2020 engagement letter, received by Eastman the next day (engagement agreement). The scope of Eastman's representation included "federal litigation matters in relation to the 2020 presidential general election, including election matters related to the Electoral College."[15] Eastman was paid for a portion of his work even

---

[13] Title 3, United States Code, chapter 1. The ECA was first enacted in 1887 and was most recently amended following the events of January 6, 2021.

[14] To the extent either party referred to or relied on materials outside the trial record in making their arguments, we have not considered those materials as no request for judicial notice (rule 5.156(B)) or to augment the record (rule 5.156(C)) was made. Similarly, we have not considered any cited exhibit that was excluded at trial where review of a particular exhibit's exclusion had not been sought, nor have we considered withdrawn exhibits. (Rules 5.151.2, 5.156.)

[15] Eastman testified that in the first week of December he was asked by President Trump in a phone call to consider representing him in a potential original action to be filed in the U.S. Supreme Court.

though the engagement agreement stated Eastman volunteered his services. Nevertheless, Eastman testified that he did not recall keeping records regarding his time and did not remember whether he kept notes of the work he completed pursuant to the engagement agreement. Eastman did not recall taking notes about the consultation work he did on other election-related litigation in various states. As discussed *post*, Eastman maintained a spreadsheet to track election-related claims and litigation across the country, not just the matters in which he was personally involved. However, regarding the scope of vice-presidential power in the Joint Session electoral vote tally when acting as the President of the United States Senate, Eastman did not take notes or catalogue his research. He was unable to provide an estimate of how much time he spent on such research.

B. Eastman Attempted to Mislead Two Courts in December 2020 (§ 6068, subd. (d))

1. Eastman Files Intervention Motion in U.S. Supreme Court Case

On December 7, 2020, the State of Texas filed in the U.S. Supreme Court a motion for leave to file a bill of complaint against its sister states Georgia, Michigan, Pennsylvania, and Wisconsin (collectively "defendant states") in *Texas v. Pennsylvania*. The bill of complaint (Texas complaint) was included in the motion for leave. Eastman testified that he had some involvement in drafting the Texas complaint and read at least one draft before it was filed.

The Texas complaint, with attachments, exceeded 100 pages and requested, inter alia, that the U.S. Supreme Court declare the defendant states had unconstitutionally administered the 2020 presidential election and that any electoral college votes cast by the defendant states not be counted. Texas also requested injunctive relief to prevent the use of the 2020 election results to appoint presidential electors to the Electoral College or to certify those presidential electors. To support its prayer for relief, the Texas complaint alleged that "rampant lawlessness [arose] out of

[the] Defendant States' unconstitutional acts," and described in detail the acts that occurred. It also alleged the "unconstitutional modification of statutory protections designed to ensure ballot integrity, [which] created a massive opportunity for fraud" in the defendant states. Texas also claimed, inter alia, that the defendant states violated the "Electors Clause" of the United States Constitution[16] when the defendant states implemented non-legislative changes that nullified or ignored state election statues governing the appointment of presidential electors in those states. More specifically, according to Texas, the defendant states used the pandemic as a "justification . . . [to usurp] their legislatures' authority and unconstitutionally [revise] their state's election statutes," and changes were made by "executive fiat or friendly lawsuits thereby weakening ballot integrity."[17] Hence, the defendant states were inundated "with millions of ballots to be sent through the mails, or placed in drop boxes, with little or no chain of custody and, at the same time, [the defendant states] weakened the strongest security measures protecting the integrity of the vote—signature verification and witness requirements." In sum, Texas asserted that significant grounds existed to question whether the presidential election outcomes in the defendant states were legitimate. Thus, Texas sought to extend the December 14, 2020

[16] Article II, section 1, clause 2 of the United States Constitution provides, "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."

[17] As one example of the problems that existed in the Texas complaint, Texas alleged that Pennsylvania officials adopted "differential standards" in heavily Democratic counties to maximize a Democratic party advantage in order to benefit former President Biden. Texas cited to a November 18, 2020 case filed by the Campaign in the United States District Court for the Middle District of Pennsylvania to support this particular allegation. However, Texas failed to disclose that the action was dismissed without leave to amend days after it was filed. The United States Court of Appeals for the Third Circuit upheld the dismissal in short order, which was also not disclosed.

deadline for certification of presidential electors so investigations could take place in those states.

The U.S. Supreme Court quickly dismissed the Texas complaint for lack of standing on December 11, 2020. In the few days between the filing and dismissal of the motion for leave, Eastman filed a motion to intervene to file a bill of complaint on behalf of President Trump (intervention motion).[18] Eastman's December 9 filing expressly adopted the Texas complaint's allegations as its own.[19] The intervention motion became moot with the U.S. Supreme Court's dismissal of the motion for leave.

2. Eastman Files Action in Federal District Court

On December 31, 2020, Eastman and cocounsel Kurt Hilbert filed a verified complaint by President Trump in the United States District Court for the Northern District of Georgia (*Trump v. Kemp*, No. 1:20-CV-5310 (N.D. Ga.) (*Kemp* action)). The *Kemp* action expressly incorporated a previously filed action in Fulton County, Georgia, entitled *Trump v. Raffensperger* (*Raffensperger* action),[20] and its supporting documents, including the expert declarations of Bryan Geels, Matthew Braynard, and Mark Davis. The *Kemp* action included allegations that Georgia election officials permitted numerous categories of unqualified individuals to vote, and that ballots "hidden" in "suitcases" at the State Farm Arena tabulation

[18] The pleading was entitled, in relevant part, "Motion of Donald J. Trump, President of the United States, to Intervene in his Personal Capacity as Candidate for Re-Election, Proposed Bill of Complaint in Intervention."

[19] Specifically, paragraph 8 of Eastman's bill of complaint in the intervention motion states, "Plaintiff in Intervention . . . incorporates by [reference] the allegations of paragraphs 1-134 set out in the Bill of Complaint filed by the State of Texas."

[20] The *Raffensperger* action, No. 2020CV343255, filed on December 4, 2020, was premised, in part, on an assertion that substantial doubt existed regarding the Georgia election results due to systemic misconduct, fraud, and other election irregularities. Eastman provided "a little bit" of legal advice on the *Raffensperger* action.

center in Atlanta, Georgia were counted outside the presence of observers in violation of state law. Eastman saw his role in the litigation as limited to constitutional issues. Eastman testified that he believed the responsibility for factual accuracy fell to his cocounsel, and Eastman deferred to Hilbert's factual assessments.

Weeks before Eastman filed the *Kemp* action, the *Raffensperger* action expert declarations[21] had been challenged by Georgia's experts, including a submission by the Elections Director for the Georgia Secretary of State's Office and a Massachusetts Institute of Technology professor with elections and research methodology expertise. Eastman believes he read all the defense expert declarations submitted in the *Raffensperger* action prior to filing the *Kemp* action, but Eastman saw these as falling within a "typical" scenario of disputing experts—part and parcel of the adversarial process. Eastman further rationalized that enough "caveats" existed in the *Kemp* pleading and declarations to "make the statements all true." In addition, Eastman testified that he had some questions about the Davis declaration and its omission of when Davis obtained database information, but Eastman went ahead and submitted it in support of the *Kemp* action thinking it could be cured or even withdrawn later.

Prior to Eastman filing the *Kemp* action, investigative personnel within the Georgia Secretary of State's Office concluded their investigation regarding the allegation of ballots

[21] In general terms, Geels's December 1, 2020 declaration asserted that over 66,000 voters were underage when they registered to vote. Geels was a certified public accountant, and his declaration did not disclose any experience in political science, statistics, or election administration. In Braynard's declaration, he asserted that almost 5,000 absentee voters were no longer Georgia residents, another 15,700 voters "may have" left their residences as evidenced by a national change of address registry, and in excess of 1,000 absentee voters used a post office box as a registration address. Braynard held a bachelor's degree in business administration and a Master of Fine Arts in writing. He had experience as a political consultant and with nonprofit voter registration organizations. In 2016, Braynard was a director of the Campaign's data division. Davis purported to do an analysis of Georgia voter records and the National Change of Address Registry.

hidden in suitcases at the State Farm Arena. Following witness interviews and review of videotape footage, investigators concluded no suitcases of ballots had been hidden and ballots were not improperly counted. The investigation's results were detailed in a declaration filed December 6, 2020, in a different federal case challenging the election. Eastman admitted to having seen the declaration but could not recall when. The State Farm Arena video covered a 24-hour period; however, Eastman watched only a 15- to 20-minute excerpt at the time he filed the *Kemp* action. Prior to his filing the *Kemp* action, Eastman knew Georgia officials had issued statements, and he read information provided by the Georgia Secretary of State's Office regarding the State Farm Arena video.

Days before the *Kemp* action was filed, Eric Herschmann, an attorney in the Office of White House Counsel, told Eastman there were inaccuracies in the complaint filed in the *Raffensperger* action, including "evidence proffered by the experts."[22] Subsequently, Eastman and Hilbert agreed to insert a footnote that, in essence, rendered President Trump's required verification meaningless as it was a broad disclaimer of President Trump having any personal knowledge of the facts and figures contained in the complaint. The footnote concluded with "Plaintiff has not sworn to any facts under oath for which he does not have personal knowledge or belief," notwithstanding his disclaimer that he had no personal knowledge. The *Kemp* action

[22] Eastman testified at trial that Herschmann "raised a concern . . . that some of the numbers *may* have been inaccurate." (Italics added.) In fact, Eastman was very clear in an exchange with the hearing judge that Herschmann told him that inaccuracies "may" have existed in the *Raffensperger* action allegations. However, a review of the email that Eastman wrote to his cocounsel Hilbert and another person on December 31, 2020, just before the *Kemp* action was filed, does not state "may" but makes clear that Eastman believed that inaccuracies existed, including "evidence proffered by the experts," to the point that Eastman was concerned about possible criminal liability, and he and Hilbert drafted a verification footnote that President Trump signed to address those concerns, discussed *post*. Contrary to Eastman's assertion that he did not share Herschmann's view that the expert declarations contained inaccuracies, we conclude that Eastman's trial testimony on this point is not credible given Eastman's December email and his action in drafting President Trump's verification footnote.

was voluntarily dismissed on January 7, 2021, following the settlement of the *Raffensperger* action.

3. Eastman's Two Court Filings Violate Section 6068, subdivision (d) (Counts Two and Four)

The NDC charged violations of section 6068, subdivision (d), based on Eastman's actions in his intervention motion (count two) and the *Kemp* action (count four). Section 6068, subdivision (d), imposes a duty upon attorneys to not seek to mislead a judge "by an artifice or false statement of fact or law." (See *Bach v. State Bar* (1987) 43 Cal.3d 848, 855-856 [representations made in motion that attorney knew were false violated §§ 6068, subd. (d), 6106].) Section 6068, subdivision (d), can be violated by either making knowingly false statements or material omissions, and OCTC need not show that an attorney's attempt at deception was successful in order to establish a willful violation. (*Davis v. State Bar* (1983) 33 Cal.3d 231, 239-240, citing *Pickering v. State Bar* (1944) 24 Cal.2d 141, 144-145 [presenting facts to a court "known to be false presumes an intent to secure a determination based upon" those facts and "is a clear violation of [§ 6068]"]; *Di Sabatino v. State Bar* (1980) 27 Cal.3d 159, 162-163 [attorney's contention that failure to disclose material information is irrelevant when court should have known undisclosed information is "untenable" and supports violation of § 6068, subd. (d)].) Whether Eastman violated section 6068, subdivision (d), is dependent upon clear and convincing evidence of his intent to deceive. (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174-175.) A defense to a section 6068, subdivision (d), charge is an attorney's good faith in making the charged false statement. (*Vickers v. State Bar* (1948) 32 Cal.2d 247, 253-254; *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 280.)

In our review of counts two and four, front of mind is the longstanding principle that "Honesty in dealing with the courts is of paramount importance, and misleading a judge is, regardless of motives, a serious offense." (*Paine v. State Bar* (1939) 14 Cal.2d 150, 154.) "Counsel should not forget that they are officers of the court, and while it is their duty to protect and defend the interests of their clients, the obligation is equally imperative to aid the court in avoiding error and in determining the cause in accordance with justice and the established rules of practice." (*Furlong v. White* (1921) 51 Cal.App.265, 271.) Eastman conceded at trial he had an obligation to verify the substance contained in his filings. Yet, his testimony attempted to minimize the scope of his duty when pressured by time constraints or when he deemed something in his pleadings to be "preliminary" or "setting the stage."

a. Culpability Established in Count Two

In count two of the NDC, Eastman was charged with violating section 6068, subdivision (d), when his intervention motion filed with the U.S. Supreme Court adopted certain false and misleading statements contained in the Texas complaint, knowing the charged assertions were false. The hearing judge found no culpability for two of the four charged statements.[23] Hence, we turn to the two remaining allegations set forth in count two (paragraphs 36(a) and (b)) and find sufficient evidence of culpability in the record. Regarding the NDC's paragraph 36(a), Eastman was charged with knowing the assertions in the Texas complaint, that there was "'rampant lawlessness arising out of Defendant States' unconstitutional acts,'" and that "'[t]aken together, these flaws affect[ed] an outcome-determinative numbers of popular votes in a group of States that cast outcome-determinative numbers of electoral votes,'" were false and misleading. OCTC alleged Eastman was aware "[t]here was no evidence upon which a

[23] The hearing judge found Eastman was not culpable for the allegations set forth in count two, paragraphs 36(c) and (d). OCTC did not appeal and we affirm.

reasonable attorney would rely of [*sic*] fraud in any state election in sufficient numbers that could have affected the outcome of the election." Regarding paragraph 36(b), OCTC charged Eastman knew the Texas complaint's assertions that statewide and local election officials in two Pennsylvania counties "'violated Pennsylvania's election code and adopted . . . differential standards favoring [Democratic] voters in [those two counties] with the intent to favor former Vice[-]President Biden,'" were also false and misleading. Here too, OCTC alleged that Eastman knew no evidence existed in those counties upon which a reasonable attorney would rely to support such a claim.

As detailed by the hearing judge, Eastman knew the claims of "rampant lawlessness" in at least Georgia, Michigan, and Pennsylvania were false. Moreover, Eastman's intervention motion repeatedly concealed material information. We highlight here a few examples of the evidence that most clearly support a culpability finding related to paragraph 36(a) of count two.

As a starting point, Eastman maintained a spreadsheet of election-related litigation, which he testified was utilized to track litigation across the country. Eastman ignored various statements regarding the election, such as former United States Attorney General William Barr's December 1, 2020 conclusion that insufficient evidence existed of widespread outcome-determinative fraud. Eastman also believed that statements from the Cybersecurity and Infrastructure Security Agency (CISA) about the integrity of the 2020 election were "laughable."[24]

[24] CISA is part of the United States Department of Homeland Security and is one of the entities tasked with protecting election infrastructure. Jonathan Marks, the Deputy Secretary for the Department of State for the Commonwealth of Pennsylvania testified that he considered CISA to be "credible" and one of the state's "'federal partners' in ensuring that elections are secure and safe."

Next, Eastman's knowledge that no "rampant lawlessness" existed, which changed the outcome of the 2020 election, is illustrated by an email exchange about Georgia with Cleta Mitchell.[25] In their late November 2020 exchange, Eastman stated, in order to "trigger" post-election legislative action in Georgia, "a failure to conduct the election . . . in accord with the statutory requirements" would have to be shown. To make the "extraordinary" request palatable to the legislature, Eastman opined that "compelling evidence of fraud" would be needed. Eastman implicitly acknowledged that such evidence did not exist, because he concluded, "[I]t would be nice to have actually hard documented evidence of the fraud in the areas to which the analyses pointed."[26] Thus, Eastman knew his intervention motion's adoption from the Texas complaint about "rampant lawlessness" in Georgia was without evidentiary support.

Further, Eastman also knew that Georgia's statutory election provisions had been followed lawfully. Before his email exchange with Mitchell, *Wood v. Raffensperger, et al*., No. 1:20-CV-04651 (N.D. GA) (*Wood* case) was filed, which was a motion for a temporary restraining order (TRO) that included a challenge to a settlement agreement, into which the Georgia Secretary of State had entered months earlier in order to resolve litigation and set forth procedures to review absentee ballot signatures. Those procedures had been used in at least three elections prior to the November 2020 election with no challenges. The TRO had been denied by a federal district court judge[27] and the denial was affirmed on December 5, 2020, by the United

[25] According to Eastman, Mitchell was an attorney tasked by President Trump in September 2020 to recruit people to handle potential election challenges and was also one of the people tasked to coordinate the Georgia litigation.

[26] Quoted material from the record may include spelling and grammatical errors from the original source.

[27] The federal district court judge denied Wood's injunction request on multiple grounds. Relevant to our count two discussion, the judge found that the settlement agreement met constitutional requirements and that his evidentiary claims related to the settlement agreement were "not supported by evidence at this stage."

States Court of Appeals for the Eleventh Circuit. In his December 9 intervention motion, Eastman challenged the same settlement agreement at issue in the *Wood* case and alleged the Georgia Secretary of State had "destructively revis[ed] signature and identity verification procedures," and that the settlement agreement was an impermissible change to election law designed to benefit former President Biden. However, Eastman failed to disclose the dismissal of the *Wood* case and its reasoning, along with the denial of the appeal, to the U.S. Supreme Court in his intervention motion. Eastman's assertion was baseless. We find his failure to disclose pertinent information presumes an intent to mislead the court. (*Vickers v. State Bar*, *supra*, 32 Cal.2d at pp. 252-253, citing *Pickering v. State Bar*, *supra*, 24 Cal.2d at pp. 144-145.)

Turning to Michigan, Eastman stated at trial he was "vaguely aware" of election illegality claims in Michigan and two other states at the time, but "didn't have the particulars." Months before Eastman's intervention motion was filed, a lower Michigan state court rejected claims that the Michigan Secretary of State did not have the authority to send absentee ballot applications to all registered voters. Eastman knew the ruling was affirmed by an appellate court on September 16, 2020.[28] Yet, his intervention motion claimed the Secretary of State "illegally flooded the state with absentee ballot applications mailed to every registered voter" in spite of strict state law limits. Weeks after the dismissal of the Texas complaint by the U.S. Supreme Court, Eastman was still looking for evidence of election law violations in Michigan. On January 2, 2021, Eastman emailed an attorney for information about election law violations to use at an upcoming presentation to legislators. Eastman asked if anything "went on in Michigan that fits the bill?" Given his evasive testimony, along with his January 2 email, we conclude that Eastman never possessed at any time reliable information about Michigan election law

[28] Eastman also knew the Michigan Supreme Court ultimately denied review.

violations, and his adoption of the Texas complaint's allegations regarding Michigan was also baseless.

Regarding events in the two Pennsylvania counties as alleged in paragraph 36(b), the Texas complaint referred to a second amended federal court complaint filed in *Donald J. Trump for President, Inc., et al. v. Kathy Boockvar, et al.*, No. 4:20-CV-02078 (M.D. Pa., Nov. 18, 2020) (*Boockvar* case).[29] However, Eastman's intervention motion failed to mention that the *Boockvar* case was dismissed on November 21, 2020, and the United States Court of Appeals for the Third Circuit affirmed the dismissal the next week.[30] Eastman's omission is consistent with his earlier failure to disclose in the *Wood* case as discussed, *ante*. Eastman knew about the *Boockvar* case as it was listed on the first page of his election-related litigation spreadsheet. Again, we find his failure to disclose pertinent information presumes an intent to mislead the court. (*Vickers v. State Bar*, *supra*, 32 Cal.2d at pp. 252-253, citing *Pickering v. State Bar*, *supra*, 24 Cal.2d at pp. 144-145.)

Eastman also adopted the Texas complaint's allegations that Pennsylvania "unilaterally abrogated" several signature verification statutes without its legislature's ratification of these changes. This allegation was based on a settlement in another legal case,[31] resulting in Boockvar's September 11, 2020 revised guidance regarding the handling of certain absentee

---

[29] At all relevant times, Kathy Boockvar was the Secretary of State of the Commonwealth of Pennsylvania.

[30] *Donald J. Trump for President, Inc. v. Boockvar* (M.D. Pa. 2020) 502 F.Supp.3d 899, affd. *sub nom*. *Donald J. Trump for President, Inc. v. Secretary Commonwealth of Pennsylvania, et al.* (3d Cir. 2020) 830 Fed.Appx. 377. This case involved the Campaign's challenge to, inter alia, the counting of certain absentee ballots and claims that poll watchers were blocked. The Campaign only appealed the district court's dismissal of the second amended complaint without leave to amend.

[31] *League of Women Voters of Pennsylvania v. Boockvar*, No. 2:20-cv-03850-PBT, (E.D. Pa. Aug. 7, 2020).

ballots. Both Eastman's intervention motion and the Texas complaint failed to advise the U.S. Supreme Court that the Pennsylvania Supreme Court had ruled in October 2020 that the challenged guidance was consistent with that state's election laws.[32] Eastman knew that the dismissal occurred as he had worked on the unsuccessful U.S. Supreme Court certiorari petition and the case was referenced on the first page of his litigation spreadsheet.[33] Eastman's failure to include adverse rulings demonstrates a violation of section 6068, subdivision (d). (*In the Matter of Chesnut*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 174 [concealment of material fact is just as effective as false statement in misleading judge and violates § 6068, subd. (d)].)

Eastman argues that the dismissal of the *Boockvar* case for lack of standing and jurisdictional issues means no fact-based adverse ruling exists that can support a disciplinary charge. That argument misses the mark. A jurisdictional ruling does not abrogate an attorney's duty to refrain from misleading a court. To find to the contrary would undermine the purpose of section 6068, subdivision (d).[34] Additionally, the Michigan and Pennsylvania supreme courts are the final authority on state law in their respective states. The U.S. Supreme Court generally does not review state law determinations unless federal issues are implicated. (*Kansas v. Marsh*

---

[32] *In re November 3, 2020 General Election* (2020) 662 Pa. 718, cert. den. *sub nom. Donald J. Trump for President, Inc. v. Degraffenreid* (2021) __ U.S. __ [141 S.Ct. 1451, 209 L.Ed.2d 172].

[33] Eastman offered his spreadsheet at trial as an exhibit and testified about the steps he took to track litigation across the country when he was working for the Campaign. On review, he asserts that because OCTC did not establish when he compiled the spreadsheet, the hearing judge was wrong to conclude that he knew the federal courts had rejected claims of irregularities when he filed his intervention motion. We do not find Eastman's argument persuasive here, given the record and Eastman's testimony that he tracked cases before creating the spreadsheet.

[34] Similarly, we reject Eastman's related argument that, because the U.S. Supreme Court made no ruling on the merits and it did not find the allegations were untrue, no culpability finding can be established here. Eastman did not have to be successful in deceiving the U.S. Supreme Court to be culpable for a willful violation of section 6068, subdivision (d). (*Davis v. State Bar*, *supra*, 33 Cal.3d at pp. 239-240.) The operative fact is what Eastman placed before the court, not the result.

(2006) 548 U.S. 163; *Huddleston v. Dwyer* (1944) 322 U.S. 232.) While the intervention motion raised federal constitutional issues, it challenged the same provisions that the Michigan and Pennsylvania supreme courts had already determined were not misapplied.

Eastman argues the NDC's failure to specifically allege that he omitted the *Boockvar* case's Pennsylvania Supreme Court decision precludes it from being used as a basis for culpability. This contention is without merit.[35] The NDC must provide an attorney fair notice of the nature of the charges. (*In re Ruffalo* (1968) 390 U.S. 544, 551; *Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 929; see also § 6085 [attorneys "shall be given fair, adequate and reasonable notice" of disciplinary charges against them].) The salient issue is whether the attorney has a reasonable opportunity to prepare a defense. (Compare *Sullins v. State Bar* (1975) 15 Cal.3d 609, 618 [no "miscarriage of justice" where respondent had "sufficient notice to eliminate prejudicial surprise in the preparation of his defense"] with *In the Matter of Lazarus* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 387, 397 [failure to charge violation of rule against conflicts of interest precluded argument that fee agreement provision created conflict of interest and thus violated rule].) Count two specifically identified that a violation of section 6068, subdivision (d), was charged for adopting certain Texas complaint allegations in Eastman's intervention motion. The NDC, at paragraph 38(b), further alleged Eastman knew the Texas complaint's claim, that Pennsylvania election officials violated their state's election codes in order to leverage a historical Democratic party advantage with the intent to benefit former

[35] Eastman's related point that he included an internet address in his intervention motion, which identified "all of the election cases that had been brought addressing various challenges to the 2020 election," does not absolve him of responsibility to inform a court about the relevant subsequent history of any case that he cites to support his or the Texas complaint's allegations. We also reject Eastman's argument that he is not culpable because his failure to correct the Texas complaint's allegations only "'left the impression' that no court had resolved" the *Boockvar* case and such an impression is analogous to an inference that must be resolved in his favor. Such an argument is contrary to well-established precedents cited above.

President Biden, was false and misleading as there "was no evidence upon which a reasonable attorney would rely" to support the claim.

Eastman had sufficient notice of the charge and his failure to disclose the Pennsylvania Supreme Court's determination, that the challenged guidance was consistent with Pennsylvania state law, is simply evidence used to prove the allegation. Overall, we find the record establishes culpability for the allegation made in paragraph 38(b) of count two.

b. Culpability Established in Count Four

In count four, the NDC charged that Eastman sought to mislead a court by willfully making multiple knowingly false allegations in the *Kemp* action filed in federal district court in violation of section 6068, subdivision (d). These allegations included the incorporation of the *Raffensperger* action's accusations that Georgia engaged in fraudulent or unlawful actions involving several categories of unqualified persons who were allowed to vote and accepting votes cast by deceased voters. In addition, count four also quoted Eastman's allegation that Fulton County election officials "'remove[d] suitcases of ballots from under a table where they had been hidden, and processed those ballots without open viewing in violation of [state law].'" The hearing judge found the allegations to be false and made with actual knowledge that Eastman intended to deceive the federal district court. Upon our review of the record, sufficient evidence exists of Eastman's attempt to mislead the federal district court to support culpability for count four.

First, we find an attempt to mislead regarding the false allegations that Georgia engaged in fraudulent or unlawful actions involving several categories of unqualified persons who were allowed to vote and accepted votes cast by deceased voters. The *Kemp* action incorporated the

Raffensperger complaint and its supporting expert declarations,[36] and the record shows Eastman knew there were serious factual errors by the experts, and this issue was made known to him before the *Kemp* action was filed. Once Herschmann made Eastman aware of inaccuracies, the record shows that Eastman did nothing to rectify the problem, except to create a footnote that would render Georgia's complaint verification requirement useless in an attempt to avoid potential criminal responsibility. The December 31, 2020 email and the resulting footnote show that Eastman had actual knowledge that the *Kemp* action contained false information,[37] or, at the very least, he was willfully blind to the inaccuracies after Herschmann raised them.[38]

Next, we consider the *Kemp* action's allegations regarding the hidden suitcases of ballots that were improperly counted. Like the hearing judge, we also find this allegation to be false,

---

[36] We reject Eastman's argument that the hearing judge erred in her assessment of the expert declarations. Eastman argues at length that it was improper for the judge to perform a "gatekeeping" analysis pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579 as to those experts. The judge, as the trier of fact, was required to examine the evidence and decide whether the charged statements in the *Kemp* action violated section 6068, subdivision (d). Because the *Kemp* action incorporated the complaint and supporting documents filed in the *Raffensperger* action, the judge was required to examine it all. Hence, the judge had to resolve whether the allegations in count four were based on information upon which a reasonable attorney could rely. This is a factual finding and not *Daubert* "gatekeeping." We also reject Eastman's arguments that the judge failed to give "serious consideration" to Favorito's opinions, whose testimony was allowed only as a percipient witness.

[37] Given our finding, we reject Eastman's argument that "the allegations of outcome-determinative illegality/irregularity woven into the fabric of the complaint were, at the very least, tenable."

[38] Willful blindness is the legal equivalent to actual knowledge. (See *In the Matter of Carver* (Review Dept. 2016) 5 Cal. State Bar Ct. Rptr. 427, 432-433 [willfully ignoring evidence of ineligibility in committing unauthorized practice of law supported culpability finding of intentional moral turpitude].) The doctrine of willful blindness requires two elements: (1) the defendant must subjectively believe that there is a high probability that a fact exists; and (2) the defendant must take deliberate actions to avoid learning of that fact. (*Global-Tech Appliances, Inc. v. SEB S.A.* (2011) 563 U.S. 754 769.) Here, both elements are satisfied as noted, *ante*. Although Eastman argues we have not previously applied willful blindness to a section 6068, subdivision (d), charge, we find our prior application of the concept in establishing moral turpitude for intentional acts sufficiently analogous under the facts presented here.

and we note that, at trial, Eastman agreed with OCTC that "the ballots under the table" at the State Farm Arena "were not a surreptitiously hidden suitcase of ballots, but were actually regular absentee ballots in a regular processing container." Prior to the filing of the *Kemp* action, Eastman had seen a 15- to 20-minute portion of the full video at the State Farm Arena, and he was aware of the Georgia Secretary of State's statements regarding the video that did not support the allegation. Based on the video excerpt he did see and knowing the statements from the Georgia Secretary of State, we can only conclude that, at the very least, Eastman was willfully blind to the falsity in his assertion in the *Kemp* action that hidden suitcases of ballots were improperly counted at the State Farm Arena. Eastman attempts to dissuade us from finding culpability by arguing that the "gravamen" of the allegation was the "illegal counting of the ballots outside the presence of poll watchers." This point is a red herring. While the *Kemp* action did allege that ballots were counted without poll watchers present, the fact remains that the allegation was also comprised of false information about ballots.

Eastman raises multiple general defenses to count four, which we have reviewed, but none persuade us to reverse the hearing judge's culpability finding. We find Eastman's challenges are not supported by the record, and we focus our discussion on his two primary arguments. First, Eastman presents a "division of labor" defense. He claims his role was to address the constitutional issues and that he reasonably relied on his cocounsel Hilbert, who was responsible for the factual allegations. We find this defense unpersuasive under the facts of this case. (Cf. *Cole v. Patricia A. Meyer & Associates, APC* (2012) 206 Cal.App.4th 1095, 1100, 1117 [division of labor between counsel is no defense to malicious prosecution and defamation claims].) Next, Eastman asserts a "press of business" excuse—that the time constraints and numerous other legal tasks rendered him unable to verify the information in the *Kemp* action. Throughout the trial, Eastman consistently explained away his lack of due diligence because he

was busy and at times "drinking from a fire hose," which is not an appropriate defense to a charge of misleading a court by knowingly presenting a false statement or concealing material information. (Cf. *Blair v. State Bar* (1989) 49 Cal.3d 762, 780 [press of business not a mitigating factor]; *Carter v. State Bar* (1988) 44 Cal.3d 1091, 1101.) In fact, Eastman's admissions made in support of his "press of business" and "division of labor" defenses actually support our findings of willful blindness.

We find the totality of the record contains clear and convincing evidence of Eastman's attempt to deceive the federal district court. The record supports culpability for count four.

C. Moral Turpitude Established for Seven of Eight Counts Due to Eastman's Multiple False and Misleading Assertions Related to the 2020 Presidential Election (§ 6106)

Counts three and five through eleven allege Eastman made various false and misleading assertions amounting to moral turpitude under section 6106. Like the hearing judge, we find Eastman culpable for all the alleged moral turpitude counts, except count eleven.

1. Applicable Law

Misconduct reflecting dishonesty, particularly when committed in the practice of law, is conduct involving moral turpitude. (*Read v. State Bar* (1991) 53 Cal.3d 394, 412.) A fundamental rule of attorney ethics is common honesty. (*Baker v. State Bar* (1989) 49 Cal.3d 804, 815.) Moral turpitude "includes creating a false impression by concealment as well as affirmative misrepresentations. [Citations.]" (*In the Matter of Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896, 910.) Moral turpitude also includes knowingly making dishonest statements to clients. (*Fitzpatrick v. State Bar* (1970) 20 Cal.3d 73, 87-88.)

Section 6106 is violated by an attorney's material omissions or misrepresentations of material facts. (Cf. *Grove v. State Bar* (1965) 63 Cal.2d 312, 315 [§ 6068, subd. (d), violation involving concealment as well as affirmative misrepresentations with "no distinction . . . drawn

among concealment, half-truth, and false statement of fact"].) A moral turpitude violation can be either intentional or grossly negligent. To discern between intentional or grossly negligent moral turpitude, we may examine intent, which can be established by direct or circumstantial evidence. (*Zitny v. State Bar* (1966) 64 Cal.2d 787, 792.) Willful blindness can also provide evidence of specific intent. (*In the Matter of Carver*, *supra*, 5 Cal. State Bar Ct. Rptr. at pp. 432-433.) We apply these principles to the counts detailed below.

2. Eastman's December 23, 2020 and January 3, 2021 Memoranda (Counts Three and Six)

a. Facts

Eastman had a longstanding belief that Congress counts the electoral votes and is the sole entity to resolve any disputes, as illustrated by his testimony before the Florida Legislature in late November 2000.[39] This belief lasted at least until mid-October 2020, as reflected in an October 16, 2020 email exchange with Bruce Colbert, who had emailed Eastman a draft letter for both of their signatures and intended for President Trump. Colbert's draft letter stated the United States Senate President decided "authoritatively what 'certificates' from the states to 'open' and what electoral votes are 'counted,' under the [Twelfth] Amendment and the Electoral Count Act of 1887, 3 U.S.C. [section] 15."[40] On October 16, 2020, Eastman wrote the following in-line comment on the draft:

> "I don't agree with this. The [Twelfth] Amendment only says that the President of the Senate opens the ballots in the joint session and then, in the passive voice, that the votes shall then be counted. 3 [U.S.C. section] 12 says merely that he is the presiding officer, and then it spells out specific procedures, presumptions, and default rules for which slates will be counted. Nowhere does it suggest that the

[39] Eastman was introduced at that Florida legislative hearing as an expert in the Electoral College.

[40] The Twelfth Amendment, ratified in 1804, provides, in pertinent part: "The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted . . . ."

> President of the Senate gets to make the determination on his own. [Section] 15 doesn't, either."

Moreover, Eastman also opined in his contemporaneous email reply that the draft letter relied too heavily on "getting injunctions from the Supreme Court, with requests that are not supported by statutory or constitutional text or on matters for which the Constitution gives the last word elsewhere."[41]

Eastman's position markedly changed following President Trump's election loss and his formal retention by President Trump and the Campaign. Eastman began to press the theory that the ECA was unconstitutional and former Vice-President Pence had the unilateral authority to resolve disputed electoral votes. Eastman testified he started his "extensive research" into the Twelfth Amendment and the ECA in October 2020. According to Eastman, his research into the ECA and vice-presidential authority included review of historical congressional records, constitutional convention materials, several law review articles, and some non-scholarly articles. However, at trial, Eastman could not recall the election years he reviewed during this October through December 2020 time frame. Eastman conceded he may have simply relied on references made in law review articles about the historical records.[42] Notably, Eastman kept no

[41] Eastman testified at trial that, until mid-October 2020, he assumed that the ECA was constitutional.

[42] Eastman testified he relied upon multiple articles published prior to December 23, 2020: Vasan Kesavan, *Is the Electoral Count Act Unconstitutional* (2002) 80 N.C. L.Rev. 1653; Bruce Ackerman and David Fontana (2004) *Thomas Jefferson Counts Himself Into the Presidency* 90 Va. L.Rev. 551 (Ackerman article); Nathan Colvin and Edward B. Foley (2010) *The Twelfth Amendment: A Constitutional Ticking Time Bomb* 64 U. Miami L.Rev. 475; Edward B. Foley, *Preparing for A Disputed Presidential Election: An Exercise in Election Risk Assessment and Management* (2019) 51 Loyola Chi. L.J. 309; and a October 19, 2020 non-academic article written by University of California, Berkeley Professor John Yoo (who also testified as an expert on behalf of Eastman) and University of St. Thomas Professor Robert Delahunty, which was published in the online magazine "The American Mind," entitled *What Happens If No One Wins* (Yoo/Delahunty article).

contemporaneous records of his research and he did not take research notes. Eastman was unable to recall the name of one of the two former students that assisted him in the research, and he could not provide any estimate of the amount of time he spent on his research. Eastman had no recollection of cataloging the information he reviewed, unlike his approach to tracking election litigation and election-related issues. Eastman testified, "I just don't recall the timetable of when I looked at all that information."[43]

At trial, Eastman used his 2023 NDC answer, responses to OCTC investigative inquiries, and his trial testimony in an attempt to fill the void left by the absence of any contemporaneous notes about the materials he claims he reviewed in October through December 2020. This included Eastman's review of the pre-Twelfth Amendment elections and their related counts. However, according to Yoo's testimony, neither the 1796 nor the 1800 election and their related electoral counts provided historical precedent. Eastman also claimed he reviewed post-Twelfth Amendment and pre-ECA election counts of 1817, 1821, 1837, and 1857. Neither Yoo nor OCTC's expert Matthew Seligman[44] found those first three elections probative as to whether a

---

[43] In an attempt to explain the absence of any notes, Eastman asserts in his responsive brief that his October and November research was mere "scholarly curiosity" in the months prior to his December 2020 retention by President Trump and the Campaign. This is a direct contradiction of his trial testimony that he undertook—in his own words—"extensive research" starting in October 2020. It also conflicts with his argument that the October 2020 emails between Colbert and him and the Yoo/Delahunty article caused him to shift his position regarding vice-presidential authority and the ECA. The hearing judge did not find Eastman's claim credible that his opinion about the ECA or the Twelfth Amendment changed because of his email exchanges with Colbert and his review of the Yoo/Delahunty article. The judge determined Eastman's new position seemed to correlate more closely with the time frame of his representation of President Trump and the Campaign. We give deference to the judge and affirm her credibility finding given Eastman's failure to provide any documentation of his research into this issue and his changed argument that his research was because of curiosity. (*In the Matter of Bach*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 638 [deference given to credibility findings absent a specific showing that such findings were erroneous].)

[44] Seligman holds a doctorate in philosophy from New York University and a law degree from Stanford University. He clerked for a federal appeals court judge and has taught at Harvard

vice-president has unilateral authority in the electoral count process, and the 1857 count dispute was resolved by the Congress. Eastman also examined the 1960 election where Hawaii issued three slates of electors, two official and one unofficial. The first official slate was for then Vice-President Richard M. Nixon and signed by the outgoing governor. Following a court-ordered recount resulting in then Senator John F. Kennedy's victory, a second official slate was signed by the new governor and sent to the United States Congress in advance of the January 6, 1961 joint session. Nixon, with no objections raised, sought and received unanimous consent to accept the second official slate. At trial, Yoo noted no legitimate, alternate slate of electors existed to proffer for the January 6, 2021 electoral count. Yoo believed former Vice-President Pence was on "unassailable grounds" in his determination he had no right to overturn the election. Finally, although Eastman mentioned he reviewed the 1787 constitutional convention records in a submission to OCTC, Eastman claimed for the first time at trial that those convention records contained the most important, supportive evidence of his positions and that he reviewed the materials in late 2020.

Eastman testified that he created two documents based on his research, which he prepared in furtherance of his representation of President Trump and the Campaign. Eastman claims he did not share either document with President Trump. The two documents are the only written record of Eastman's research. Neither document names a recipient, client, or author, but each had "privileged and confidential" at the top and were in an outline format. Both documents were undated but had the same title: "January 6 scenario."

University and Cardozo School of Law, including a class entitled "War Gaming 2020" that focused on disputed elections. At the time of the trial in this matter, Seligman was a Fellow with the Constitutional Law Center at Stanford. Since 2016, Seligman has done extensive research into the history of United States elections.

The first document is two pages long. Eastman sent it to attorneys Boris Epshteyn and Kenneth Chesebro on December 23, 2020 (December 23 memo). Epshteyn worked with the Campaign. Eastman did not know whether Chesebro had a formal attorney-client relationship with President Trump or the Campaign, but he knew Chesebro volunteered on a President Trump-related Wisconsin legal team. Chesebro made initial edits to the December 23 memo.[45] Eastman also gave a copy of the December 23 memo to a person who was not part of the Campaign but asked Eastman for advice.[46]

In its first line, Eastman's December 23 memo stated that seven states "have transmitted dual slates of electors to the President of the Senate." However, the governors of those seven states only submitted official elector slates for former President Biden as established by their respective "Certificates of Ascertainment." Following that opening statement, Eastman quoted a provision of the ECA and opined, "This is the piece that we believe is unconstitutional." He also stated, with a quick reference to John Adams's and Thomas Jefferson's actions in their respective elections of 1796 and 1800, there was "very solid legal authority, and historical precedent, for the view that the [Vice-President] does the counting, including the resolution of disputed electoral votes . . . and all the Members of Congress can do is watch." Then, he set forth six numbered paragraphs as to how former Vice-President Pence should proceed. Eastman concluded that the United States Constitution made the Vice-President the "ultimate arbiter," and stated, "We should take all of our actions with that in mind." Besides the ECA, the only source

[45] Chesebro is also a licensed California attorney and has been suspended since February 2024 due to his Georgia felony conviction for violating Official Code of Georgia Annotated sections 16-4-8 and 16-10-20.1(b)(1) (conspiracy to commit filing false documents).

[46] Eastman also recalled that he also shared his thinking with several unnamed members of Congress around the same time. The December 23 memo eventually became public in October 2021, when it was in a book published by Bob Woodward and thereafter detailed in media outlets such as CNN and *The Washington Post*.

cited in Eastman's December 23 memo was a link to a law review article by Laurence Tribe, a retired constitutional law professor from Harvard University.

Eastman's January 3, 2021 memorandum (January 3 memo) is six pages long, single-spaced, and, according to Eastman, an evolution of the December 23 memo. Eastman shared the January 3 memo with Epshteyn, perhaps Chesebro, but not President Trump.[47] The memo had four sections: (1) examples of various election officials' "misconduct" in Arizona, Georgia, Michigan, Nevada, New Mexico, Pennsylvania, and Wisconsin; (2) a quick analysis of the constitutional and statutory process of opening and counting electoral votes pursuant to the Twelfth Amendment and the ECA; (3) "War Gaming the Alternatives" with proposed strategy and courses of action for former Vice-President Pence to ultimately declare President Trump reelected; and (4) justification for taking Eastman's recommended "bold" action. Eastman's statements regarding the historical record were simply based upon his recollection of his research as he had no notes or other materials on which to rely.

Eastman characterized both memos as being internal brainstorming ideas without any recommendations. However, the ultimate beneficiary was Eastman's and Epshteyn's client: President Trump.

Underpinning the January 3 memo's demand for "bold" action was Eastman's assertion that election results were tainted in states where Biden had won by a relatively narrow margin. However, Eastman's push for action ignored information that belied his assertions of tainted elections, and he relied on individuals that had no background, training, or experience in election administration. For example, Eastman relied on Droz and his "Election Integrity Group," an ad

[47] Once the December 23 memo became public in October 2021, Eastman publicly released his January 3 memo as well.

hoc collection of individuals culled from subscribers to his online newsletter.[48] While several of Droz's volunteers had impressive careers, they were not election professionals.[49] Eastman did not ask if members of Droz's group had election-related experience, and he knew the group had not provided evidence that fraud occurred in the 2020 election.

In the January 3 memo, Eastman's references to "illegal conduct by election officials" in seven states, including Arizona, Nevada, and New Mexico, were not based on any personal knowledge. Approximately one week after the December 23 memo and two days before the January 3 memo, Eastman asked Epshteyn in an email whether any information about election law violations existed in these three states. Eastman conceded at trial that, as of January 2, 2021, he was only "vaguely aware, from news accounts and otherwise, that there were allegations of illegality" in Michigan, Arizona, and Nevada. In fact, Mitchell wrote to Eastman on January 2 requesting data to get to members of Congress "who are now clamoring for facts and data re[garding] illegal votes." Mitchell stated they had "plenty of data" from Georgia but knew "nothing" regarding other states. Other than responding to her that "serious forensic investigations have been blocked at almost every turn," Eastman provided her nothing because he had nothing to offer.

For example, Eastman did not reach out to state election officials in either New Mexico or Nevada for information or utilize publicly available information from various states. He did not consider statements from Pennsylvania and Michigan state election officials that confirmed election results and debunked disinformation circulating about the election because they were

[48] Droz created "Media Balance Newsletter" and highlighted stories not in "mainstream media."

[49] In fact, Droz did not think specialized knowledge was needed to analyze election statistics because "numbers are numbers." Three members of Droz's group who testified at trial were Droz, Blehar, and Stanley Young. Only Young, with a background in statistics, qualified as an expert witness at trial.

elected "partisan" Democratic officials, even though Republican election officials in Georgia who had similar conclusions were also deemed by Eastman to be untruthful. Multiple detailed state court findings in Nevada, Arizona, Wisconsin, and Michigan regarding claims of election malfeasance were issued that predated both the December 23 and the January 3 memos, in which those courts concluded that election irregularity allegations were meritless.

Beyond events and litigation occurring at the state level, Eastman ignored as "implausible" and "laughable" the November 12, 2020 statement from CISA that there was "no evidence that any voting system deleted or lost votes, changed votes, or was in any way compromised." Similarly, Eastman gave no accord to a November 16, 2020 open letter signed by approximately 60 top election security and computer scientists that opined, "To our collective knowledge, no credible evidence has been put forth that supports a conclusion that the 2020 election outcome in any state has been altered through technical compromise." Moreover, the open letter noted there were "alarming assertions being made that the 2020 election was 'rigged' by exploiting technical vulnerabilities. However, in every case of which we are aware, these claims either have been unsubstantiated or are technically incoherent." Barr, the United States Attorney General at that time by appointment of President Trump, issued a December 1, 2020 statement proclaiming that "we have not seen fraud on a scale that could have effected a different outcome in the election." However, this did not persuade Eastman as he believed the DOJ, headed by Barr at the time, did not conduct a sufficient investigation.

Throughout the trial, Eastman attempted to rationalize why the universe of conclusions from numerous election and law enforcement officials in both political parties were of no import. We do not find his attempts persuasive upon review of the detailed record submitted to us.

b. False and Misleading Statements in the December 23 Memo (Count Three)

Count three alleged Eastman's opening sentence in his December 23 memo, that seven states "have transmitted dual slates of electors to the President of the Senate," was intentionally false and misleading, and made with the intent to provide legal advice to President Trump and former Vice-President Pence. The hearing judge found Eastman culpable as charged. More specifically, the judge determined "Eastman used the false assertion concerning dual slates of electors to provide an alternative strategy for Vice[-]President Pence to declare President Trump as the winner of the 2020 presidential election. The two-page memo was designed to provide legal support and convince Vice[-]President Pence to carry out that strategy."

On review, Eastman argues (1) OCTC does not have the authority to seek discipline for statements made in an internal "brainstorming" memo that was not shared with President Trump, (2) the December 23 memo was only a rough draft, and (3) no case law exists with analogous facts to support a culpability finding. Eastman further contends the charged statement was not false.[50]

The record demonstrates sufficient evidence that the charged statement in the December 23 memo was indeed false. First, Eastman understood the "alternate electors" he and others worked to gather for President Trump were not authorized by any state government. Eastman stated as much in an editorial comment to Colbert's draft letter to President Trump with direct references to the Twelfth Amendment and the ECA, and he held that view on

[50] In his September 2022 response to an OCTC investigative letter, Eastman described the advice he gave former Vice-President Pence, which he testified at trial that he used that word "loosely" and may have been technically inaccurate in his response because he had to provide OCTC "a lot of information."

December 19, 2020.[51] Second, Eastman knew the governors of the seven states (Arizona, Georgia, Michigan, Pennsylvania, Nevada, New Mexico, and Wisconsin) had each sent only one slate of duly appointed electors. No other branch of a state's government, such as a state legislature, sent an opposing slate. As Eastman's own expert Yoo testified, "[A] court has to find something, or the legislature and the governor have to send in two electoral votes." The implication of Yoo's statement is clear: a dispute cannot be fabricated, which Eastman and others attempted to do.

Eastman's assertion on review that the December 23 memo was an internal memo or rough draft is not consistent with the facts. Eastman provided the December 23 memo to at least one other person outside the Campaign. To the extent Eastman argues the December 23 memo was not providing legal advice, the text of the document reveals otherwise: "this is the piece that *we* believe is unconstitutional"; "here's the scenario *we* propose"; and "*we* should not allow the Electoral Count Act constraint on debate to control." (Italics added.) These statements show (1) the memo gave legal advice about potential next steps in President Trump's pursuit of an electoral victory and (2) the memo was within the scope of the engagement agreement.

Based on the facts of this case and the broad expanse of section 6106, we find OCTC within its authority to charge any dishonesty relating to the December 23 memo. Section 6106 plainly covers "*any act* involving moral turpitude, dishonesty or corruption," (italics added) and the conduct need not occur while acting as an attorney. A basic principle of statutory construction is to give every word meaning (*Klein v. United States of America* (2010) 50 Cal.4th 68, 80), and we give the words "any act" their ordinary meaning. Eastman's engagement letter

[51] Eastman's opinion on this point did not change. In an email to Valerie Moon, on January 10, 2021, Eastman told her that the alternate electors "had no authority."

included "election matters related to the Electoral College." We also find Eastman's arguments unpersuasive that the hearing judge used case law that was not factually similar, and no case law exists with analogous facts to support a section 6106 culpability finding. A section 6106 violation is not limited to fact patterns detailed in prior decisions. Our culpability determination is based upon the plain language of section 6106 and case law guidance on how to analyze whether particular conduct falls within the broad scope of section 6106. Section 6106 violations include misconduct that reflects dishonesty. (*Read v. State Bar*, *supra*, 53 Cal.3d at p. 412; *In the Matter of Wells*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 910.) That is precisely the approach the hearing judge took when she analyzed whether the charged conduct amounted to moral turpitude and cited to cases such as *In the Matter of Chesnut*, *supra*, 4 Cal. State Bar Ct. Rptr. 166; *Grove v. State* Bar, *supra*, 63 Cal.2d 312; and *Zitny v. State* Bar, *supra*, 64 Cal.2d 787. The record supports culpability for this count.

c. False and Misleading Statements in the January 3 Memo (Count Six)

Count six charged that the following four assertions in Eastman's January 3 memo were false and misleading: (1) "outright fraud" occurred through "electronic manipulation of voting tabulation machines"; (2) seven states had submitted dual slates of electors because the President Trump electors in seven states met, "cast their electoral votes for [President] Trump, and transmitted those votes to [former Vice-President] Pence"; (3) Michigan mailed absentee ballots to all registered voters without the statutorily required absentee ballot application; and (4) the 2020 presidential election "was [s]tolen by a strategic Democrat[ic] plan to systematically flout existing election laws for partisan advantage." The hearing judge found Eastman culpable on the first three statements.[52] The judge did not consider "Eastman's beliefs to be sincere, honest, or

[52] OCTC does not challenge the hearing judge's finding of no culpability for the fourth charged misrepresentation that the election was "stolen." We affirm.

credible," regarding the three statements. The judge stated that Eastman "knowingly ignored any evidence contradicting the notion of voting machine manipulation; was aware that the Michigan Secretary of State had not distributed [absentee] ballots to all registered voters; and, as a constitutional scholar, understood that no conflicting dual slates of electors had been transmitted."[53] She also rejected the argument that Eastman was simply providing President Trump with vigorous representation as he crossed the line into unethical deception.

As with count three, we reject Eastman's arguments on review that the charged statements in the January 3 memo were not material because it was an internal document and was not distributed directly to President Trump. It was a document prepared pursuant to the terms of Eastman's engagement agreement with President Trump and the Campaign. It outlined a course of action to be taken. Consistent with our holding regarding the December 23 memo, we find the misrepresentations made in the January 3 memo are also subject to discipline as acts of moral turpitude. We agree with the hearing judge that sufficient evidence exists to support culpability.

Turning to the individual allegations, we reject Eastman's argument that the selected quotes used in paragraph 54(a) of the NDC's count six altered the context of his full sentence.[54] The allegation removed the parenthetical in the charged statement. Under the header "Illegal conduct of election officials," Eastman's January 3 memo stated, "Quite apart from outright

[53] We find it difficult to accept that Eastman, as a constitutional scholar, did not keep records and was unorganized in documenting his research on this important matter. We are further troubled that at trial, Eastman frequently had only vague recollections about important points that cut against his theory of the case, yet he clearly remembered other facts helpful to him. This strains Eastman's credibility and leads to the conclusion Eastman is intellectually disingenuous when it suits his purposes. We discuss the issue of candor in our aggravation discussion, *post*. (*In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269, 282) [analytical differences regarding believability (credibility) and falsity (candor)].)

[54] Paragraph 54(a) alleged the memo asserted, "[t]here had been 'outright fraud' through 'electronic manipulation of voting tabulation machines.'"

fraud (both traditional ballot stuffing, and electronic manipulation of voting tabulation machines), important state election laws were altered or dispensed with altogether in key swing states and/or cities and counties." Eastman argues the first portion of the sentence plus the parenthetical is an "aside" and not the main point of the sentence. Eastman asserts the primary point was that state election laws were violated. The NDC did not mischaracterize the charged statement in the January 3 memo. Eastman's single sentence makes two independent claims. The first clause claimed outright fraud, including fraud by electronic manipulation of votes. The second clause of the sentence focused on violations of election laws in certain states.[55]

We also reject Eastman's arguments that items such as the December 2020 report authored by Peter Navarro[56] and unnamed "statistical experts" provide support for the charged statement about electronic vote manipulation specifically and voter fraud generally. Initially, Eastman was not able to recall whether Navarro's report was published before January 2, 2021. The report was later eventually admitted for the limited purpose of establishing Eastman possessed or reviewed it prior to January 18, 2021. As to reliance on "statistical experts,"

---

[55] In addition, Eastman further argues that there can be no culpability finding for this count because his claim of fraud through vote tabulation manipulation by machines "was not provably false at the time," citing *Standing Committee v. Yagman* (9th Cir. 1995) 55 F.3d 1430, 1438-1440. To the extent Eastman argues the charged sentence was "rhetorical hyperbole" and therefore entitled to First Amendment protection, the argument is not well founded. We consider Eastman's First Amendment defenses, *post*. Rhetorical hyperbole provides protection for statements that cannot "reasonably [be] interpreted as stating actual facts . . . . [Citation.]" (*Milkovich v. Lorain Journal Co*. (1990) 497 U.S. 1, 20.) Here, Eastman's assertion of "quite apart from outright fraud (both traditional ballot stuffing, and electronic manipulation of voting tabulation machines)" is reasonably interpretated as a factual statement and is not afforded constitutional protection. Moreover, false statements that are either intentionally false or made with reckless disregard for the truth are not protected speech and may be the basis of attorney discipline. (*Ramirez v. State Bar* (1980) 28 Cal.3d 402, 411.)

[56] We have reviewed the report by Navarro that Eastman had admitted into the record. Unlike Eastman's memo, Navarro's report describes "claim[s] that the election may well have been stolen from President . . . Trump," and uses other similar language, as opposed to Eastman's assertion that "outright fraud" was an established fact.

Eastman only called one such expert at trial: Stanley Young. However, Young was only qualified as a general expert in statistics, not in statistics relating to elections. Moreover, Young's trial conclusions regarding his statistical views were effectively rebutted by OCTC's expert witness, Justin Grimmer, Ph.D.[57] To the extent Eastman relied on an Antrim County, Michigan report authored by Russell Ramsland, Eastman himself thought some of Ramsland's analysis regarding electronic vote flipping to be "over the top." As detailed in our discussion of count seven, *post*, Eastman had no real information about Ramsland's background, training, or experience, and only learned at some point later that Ramsland had once given advice to a Texas governmental entity regarding the purchase of voting machines years before.[58] Eastman failed to consider the public information released by the Michigan Secretary of State on the very issue of false claims regarding the election in Antrim County. As was consistently displayed at trial and as we have discussed *ante*, Eastman simply dismissed other credible sources of information when it conflicted with his view. This purposeful lack of intellectual rigor by a constitutional scholar and former law school dean is circumstantial evidence of intentional conduct through willful blindness. (*Zitny v. State Bar*, *supra*, 64 Cal.2d at p. 792.)

Next, as alleged in paragraph 54(b) of count six, Eastman's January 3 memo concluded "there are thus dual slates of electors from [seven] states." Eastman prefaced that conclusion by stating, "Because of these illegal actions by state and local election officials (and, in some cases,

---

[57] Grimmer is a tenured political science professor at Stanford University and a Senior Fellow at The Hoover Institution, a public policy thinktank. Grimmer's background, training, and experience included statistics and political methodology. He authored and/or peer reviewed scholarly works in the areas of statistical theory and methods, election administration, congressional elections, and voter fraud claims.

[58] Eastman further agreed with Alex Halderman, an election security expert who critiqued Ramsland's work in the Antrim County, Michigan litigation in that some of Ramsland's claims were unsubstantiated. Eastman was not aware that in 2023, a federal appellate court upheld sanctions imposed in 2021 on attorneys for using Ramsland's assertions that Dominion machines manipulated votes.

judicial officials), the Trump electors in the above 6 states (plus in New Mexico) met on December 14, cast their electoral votes, and transmitted those votes to the President of the Senate (Vice-President Pence)." First, as stated previously, seven states did not submit official dual slates of electors. As Eastman well knew, each of the seven states submitted one official slate. While groups supporting President Trump formed in those seven states and "voted," they were not "electors" as the term is used in the ECA. Sufficient evidence clearly exists that Eastman knew before he wrote the January 3 memo that these groups were of no import without the imprimatur of a state's governor or legislature.

Finally, as to the charge in paragraph 54(c) of count six, the record supports a finding that Eastman committed intentional moral turpitude. We reject Eastman's assertion that he made a simple mistake when claiming Michigan mailed absentee ballots to all registered voters in violation of Michigan law. Michigan, in accordance with applicable law, mailed absentee ballot applications. Even though Eastman conceded early that he erred using the word "ballot" instead of "applications," the mailing of absentee applications was not a violation of Michigan law either. Yet, Eastman still persisted in his answer to the NDC that Michigan election law did not permit the widespread mailing of absentee ballot applications. Eastman also challenges the hearing judge's materiality finding as to the Michigan statement.[59] Eastman argues it was not material because only Epshteyn received the January 3 memo.[60] This ignores the fact that the January 3 memo (like the December 23 memo) was prepared in furtherance of Eastman's

[59] The hearing judge's decision states, "The misrepresentations about the manipulation of voting machines and Michigan absentee ballots were significant and material. Eastman used them to bolster the argument for Vice-President Pence to reject electoral votes and/or delay or adjourn the Joint Session of Congress."

[60] However, at trial, Eastman could not recall whether Chesebro also received the January 3 memo. He had given the December 23 memo to Chesebro. Hence, it is possible Epshteyn was not the only recipient.

representation of President Trump and for the purpose of helping forge a path to persuade former Vice-President Pence to delay the count or reject electors on January 6. The false Michigan statement was one of Eastman's points that supported his recommended action.

3. Eastman's Meetings and Communications with Former Vice-President Pence and Staff Prior to the January 6, 2021 Joint Session

On January 4, 2021, President Trump called an Oval Office meeting attended by Eastman and former Vice-President Pence, along with Pence's Chief of Staff Marc Short and counsel Greg Jacob. The purpose of the meeting was to talk about former Vice-President Pence's role on January 6.

Eastman's attendance at this meeting was within the scope of his representation of President Trump. Eastman stated his legal opinions to the group over the course of the meeting. Eastman recounted that, during the Oval Office meeting, President Trump asked him if former Vice-President Pence could "simply reject electors if [the former Vice-President] had information that they were not legally certified."[61] Eastman testified that he responded to the President's question, saying "It's more nuanced than that," and explained, with only one set of certified electors, it was, in his opinion, an open question whether the former Vice-President had such power. Eastman ultimately opined that the former Vice-President "had unilateral authority to determine the validity of the electoral vote certificates." However, Eastman stated that even if the former Vice-President had that power, it would be "foolish" to go that route as no state legislature had provided an alternative certified slate of electors. Eastman believed that the more prudent option was for the former Vice-President to delay the electoral count for 10 days, rather than to reject certain electoral votes, and he advocated for a delay.[62] According to Jacob, the

[61] We refer to this as the "reject electors theory."

[62] Also referred to at trial as a "delay option," we refer to this as the "delay theory."

former Vice-President always viewed his role in the electoral count as a ministerial one. The meeting ended with President Trump requesting, and the former Vice-President agreeing, that the former Vice-President's staff would meet with Eastman the next day to discuss the issue further. Following the Oval Office meeting, Jacob drafted a memorandum for the former Vice-President summarizing the meeting's points, including that Eastman "acknowledges that his proposal violates several provisions of statutory law," and sent it the following day.

Eastman met with Jacob and Short around 11:00 a.m. on January 5, 2021. A few hours before that meeting, President Trump tweeted: "The Vice-President has the power to reject fraudulently chosen electors." Upon his arrival at Short's office, and much to Jacob's surprise, Eastman again pressed the reject electors theory.[63] Jacob understood from Eastman that at least five states (Arizona, Georgia, Wisconsin, Michigan, and Pennsylvania) were involved in the pursuit of this theory. In the two-hour meeting, Eastman and Jacob discussed former Vice-President Pence's unilateral authority to reject electoral votes, the texts of the Twelfth Amendment and the ECA, along with the electoral counts of 1797, 1801, and 1961. Jacob testified that, during the course of their "robust" exchange, he understood Eastman conceded the discussed elections were not "examples of vice presidents rejecting electoral vote certificates, or claiming that they had any authority to do so, or claiming that they had any authority to make any kind of substantive decision about electoral vote certificates." Eastman opined that if the former Vice-President rejected the electors, the U.S. Supreme Court would likely not take the case pursuant to the political question doctrine, but if it did, the vote would be nine to zero against a rejection of the official electors. Eventually, the conversation turned to Eastman's

[63] The record supports the hearing judge's determination that Jacob's testimony was more credible than Eastman's as to whether Eastman again pressed the reject electors theory during their January 5, 2021 meeting. (*In the Matter of Bach*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 638.) Eastman does not directly challenge this finding on review.

delay theory. However, no state legislatures had requested a delay; only a few individual legislators had done so.

After their January 5, 2021 meeting ended, Eastman and Jacob spoke on the telephone twice that day. One of those calls included President Trump and another attorney. In the call with President Trump, Jacob recalled the President's team acknowledged the reject electors theory that Eastman pushed in the meeting earlier in the day was a nonstarter. The group circled back to the delay theory. According to Jacob, former Vice-President Pence was not swayed. Moreover, the delay theory was pragmatically flawed. As noted in Jacob's post-January 4 meeting memorandum, Eastman acknowledged that "no Republican-controlled legislative majority in any disputed state has expressed an intention to designate an alternate slate of electors." Then, late in the evening of January 5, Eastman sent an email with an attached letter to Jacob proclaiming a "major new development." According to Eastman, the Pennsylvania Legislature would "vote to recertify its electors if former Vice[-]President Pence implements the plan we discussed." However, Eastman eventually conceded at trial that no majority of state legislators in any Republican-controlled legislature communicated a desire to send an alternate slate of electors.

About half an hour after Eastman sent this email to Jacob, Eastman had a four-minute call with President Trump.[64] Minutes after this call concluded, President Trump tweeted, "If Vice President @Mike_Pence comes through for us, we will win the Presidency. Many States want to decertify the mistake they made in certifying incorrect & even fraudulent numbers in a process NOT approved by their State Legislatures (which it must be). Mike can send it back!" Eastman testified President Trump's tweet was consistent with his advice.

[64] Eastman has no recollection of the call reflected on the White House call log.

4. Eastman's January 6, 2021 Email to Jacob Contained False and Misleading Statements (Count Eight)

a. Facts

Eastman and Jacob exchanged emails throughout the day on January 6, 2021. Close to 11:00 a.m., Jacob sent a short reply to Eastman's "major new development" email from the night before. Jacob challenged the constitutionality of Eastman's plan in light of the ECA's provisions.[65] By 1:00 p.m., the Joint Session had started in the House of Representatives, but the Senate had withdrawn, as required by the ECA, for each house to consider objections raised regarding Arizona's electoral votes. Eastman emailed Jacob at approximately 1:30 p.m., following his remarks at the "Stop the Steal" rally and less than an hour before the Capitol was breached.[66] At this point in time, President Trump had concluded his remarks at the Ellipse, a park near the White House, and crowds had begun their march from the rally to the Capitol. From the safety of a nearby hotel, Eastman emailed Jacob, called Jacob's earlier reply "small-minded" in light of the United States Constitution "being shredded," and implied that any "statutory requirement" impeding former Vice-President Pence from acting as Eastman advocated should be "ignored."

Jacob crafted a detailed, three-paragraph response to Eastman's email before the sounds of the Capitol attack reverberated near him as rioters began to make their way into the building. Jacob, while hiding from the rioters, sent his response to Eastman at 2:14 p.m., adding a final

---

[65] Several emails note Mountain Standard Time, MST, and are adjusted here to reflect Eastern Standard Time.

[66] By this time, former Vice-President Pence had issued what became known as his "Dear Colleague" letter. In the letter, he explained his position regarding the scope of his authority before he gaveled the Joint Session into order. The former Vice-President stated, "It is my considered judgment that my oath to support and defend the Constitution constrains me from claiming unilateral authority to determine which electoral votes should be counted and which should not."

statement, "we are now under siege." Jacob blamed Eastman's actions as the cause of the attack. He reminded Eastman that the ECA provisions, followed for more than a century, were not irrelevant and "cannot be set aside except when in direct conflict with the Constitution," and that "there is no reasonable argument that the Constitution directs or empowers the Vice[-]President to set [aside] a procedure followed for 130 years before it has even been resorted to." Jacob then remarked that Eastman's scheme was "a results[-]oriented position that you would never support if attempted by the opposition, and essentially entirely made up." Immediately thereafter, Jacob was escorted to different building locations for safety.

Seemingly unmoved by the violence happening at and around the Capitol, Eastman responded to Jacob at 2:25 p.m.:

> "You think you can't adjourn the session because the ECA says no adjournment, while the *compelling evidence that the election was stolen continues to build and is already overwhelming*. The 'siege' is because YOU and your boss did not do what was necessary to allow this to be aired in a public way so the American people can see for themselves what happened."

(Italics added.) Minutes before Eastman's email, President Trump tweeted:

> "Mike Pence didn't have the courage to do what should have been done to protect our Country and our Constitution, giving States a chance to certify a corrected set of facts, not the fraudulent or inaccurate ones which they were asked to previously certify. USA demands the truth!"

The email communication between Eastman and Jacob resumed in the early evening hours of January 6. Eastman complained to Jacob that former Vice-President Pence only mentioned the reject electors theory in his "Dear Colleague" letter when the delay theory was also presented to the former Vice-President. Eastman stated he remained firm that the delay option was "the most prudent course as it would have allowed for the opportunity for this thing to be heard out, but also had a fair chance of being approved (or at least not enjoined) by the Courts." About 30 minutes later, Jacob responded and acknowledged that the delay approach

was more "modest . . . [b]ut the legal theory is not." Jacob also asked Eastman if he had told President Trump that "in your professional judgment, the Vice President DOES NOT have the power to decide things unilaterally?" Eastman quickly replied, "He's been so advised, as you know because you were on the phone when I did it. [. . .] But you know him – once he gets something in his head, it is hard to get him to change course."

Eastman then emailed Jacob again at 11:44 p.m., after the electoral count had resumed. Eastman pointedly remarked that the ECA had been violated, with former Vice-President Pence's approval, when objections to counting Arizona's electoral votes exceeded the allotted time under title 3 U.S.C. section 17.[67] Eastman concluded:

> "So now that the precedent has been set that the Electoral Count Act is not quite so sacrosanct as was previously claimed. *I implore you to consider* one more relatively *minor violation* and adjourn for 10 days to allow the legislatures to finish their investigations, as well as to allow a full forensic audit of the *massive amount of illegal activity that has occurred here*. If none of that moves the needle, at least a good portion of the 75 million people who supported President Trump will have seen a process that allowed the illegality to be aired."

(Italics added.)

b. Culpability

Count eight charged, as false and misleading, Eastman's January 6, 2021 email statement to Jacob made at 2:25 p.m., discussed *ante*. The NDC further alleged the statement was made with the intent to pressure former Vice-President Pence to adjourn the Joint Session and Eastman knew his claim of "compelling evidence that the election was stolen continues to build and is already overwhelming" was false.

[67] According to title 3 U.S.C. section 17, when both houses of Congress separate to decide upon an objection to the counting of any electoral vote or votes from any state, any senator or representative may speak to such objection for five minutes, and not more than once. After such debate has lasted two hours, the presiding officer of each house shall put the objection up for a vote without further debate.

The hearing judge found Eastman culpable for this count as there was no outcome-determinative fraud in the 2020 presidential election and Eastman was aware or should have known that no affirmative proof of outcome-determinative fraud existed. The judge also noted this conduct, to influence former Vice-President Pence, was not duplicative of count two (misleading a judge in the intervention motion in violation of section 6068, subdivision (d), discussed *ante*) and count five (misstatements on Bannon's War Room in violation of section 6106, discussed *post*) as those two counts addressed misrepresentations to different individuals, in different situations, and at different times.[68]

Eastman argues on review that the claims made in his email to Jacob had sufficient evidence to support his statement to Jacob. As with several other counts, Eastman asserts the record shows evidence of "outcome-determinative illegalities," which we have rejected previously and reject here as well. Eastman clearly made a misrepresentation to Jacob in his email when he stated, "compelling evidence that the election was stolen continues to build and is already overwhelming." While, in a few local instances, issues arose in the counting of ballots, no evidence existed that outcome-determinative illegalities occurred in a manner that would have had an effect in any state. We also reject, again, Eastman's assertion that historical authority supported his theory that a vice-president has the "authority to recess, delay, or adjourn the electoral count." Nor were there sufficient scholarly works to support Eastman's vice-presidential authority claim.[69] Eastman also knew that, without another certified slate of

[68] The hearing judge also found Eastman had no First Amendment protection for charged statements, which we affirm in Section IV, *post*.

[69] We note Eastman was unable to recall the articles he read in the months of October through December 2020. He could not remember, at the time of the January 3 memo, any historical records he reviewed or if he took the Ackerman article's discussion of historical records at face value. When pressed at trial, Eastman could not articulate several salient points in one of the articles on which he relied.

electoral votes from a state, former Vice-President Pence did not have the authority to refuse to count a state's electoral votes. We reject his arguments in their entirety.

The record supports the conclusion that Eastman's charged communication with Jacob was not true and made with the intent to have Jacob convince former Vice-President Pence to adjourn or delay the Joint Session. (*In the Matter of Wells*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 910 [moral turpitude for creating false impressions due to affirmative misrepresentations or concealment].) Eastman is culpable as charged in count eight.

5. Eastman's Statements at the Ellipse's "Stop the Steal" Rally (Counts Seven and Eleven)

a. Facts

Eastman spent the night of January 5, 2021, before the Joint Session, mingling with Rudolph Giuliani and others at a Washington, D.C., hotel reception where organizers of the "Stop the Steal" rally had congregated. That evening was also when Georgia held runoff elections for its two United States Senate seats. That evening, Eastman met Russell Ramsland and Joe Oltmann for the first time. Eastman's conversation with Ramsland and Oltmann worked its way into his Ellipse remarks the following day, on which count seven is based.

Eastman had no recollection of Oltmann's educational or professional background or experience. Eastman believed Oltmann ran a "data company" but had no recollection how or when he learned that piece of information. Eastman had slightly more information about Ramsland before their first encounter at the hotel reception. Eastman had a generalized understanding that Ramsland, years before, had once advised a Texas governmental entity on the type of voting machines to purchase or avoid. Eastman testified in broad terms that he knew that Ramsland played a role in challenging the Antrim County, Michigan vote returns and that Ramsland had submitted "expert declarations in other cases." Eastman did not research either

Oltmann's or Ramsland's backgrounds, training, or experience before he spoke at the Ellipse the following day. During Eastman's conversation with them, he discussed their belief that vulnerabilities existed in Dominion voting machines. Oltmann shared with Eastman a one-page chart that purported to show the vulnerabilities. Oltmann primarily provided Eastman with the details of their theory that "phantom ballots" (i.e., copied or replicated ballot images) and "fake ballots" (i.e., pre-loaded ballots not cast by an actual voter) were held in suspense folders stored within the machines' operating system, and that these fake and phantom ballots could be accessed via the internet by someone attempting to interfere in the election.

Following Oltmann's and Ramsland's claims about fake and phantom ballots in Dominion tabulators along with the one-page chart, they made two predictions about the Georgia runoff elections that evening. At trial, Eastman explained the first prediction was "the percentage of ballots would remain constant while additional ballots kept getting reported." The second predication was that the reporting of the counting would stop because bad actors were "drawing ballots in from the suspense folders," and needed time to "tag voters in the voter rolls who had not voted, so that if there was an audit after the fact, the number of ballots would match."

Georgia used Dominion machines for the 2020 presidential election cycle and the 2021 run-off election. Eastman believed he saw the two predictions play out in both of the Georgia Senate runoff elections that night because media reports stopped reporting once the total ballots cast had reached about 95 percent, and that number did not change as additional ballots were reported as being received. However, Eastman did not calculate the total votes cast and did not

know the reports of total votes cast that evening were only estimates.[70] Eastman was quick to embrace the pair's predictions, yet Grimmer in his expert testimony stated these predictions were not "logically coherent." Furthermore, Grimmer testified that once the media's reporting of votes enters into the 90th percentile, not a lot of change occurs in the percentage figure itself even though ballot counting continues. Moreover, he stated election night reporting typically does not broadcast vote returns in precise and incremental terms and are instead only estimates.

On the morning of January 6, 2021, Eastman and Guiliani traveled together from their hotel to the televised "Stop the Steal" rally at the Ellipse. Eastman had little recall of the earlier part of the day, but did remember he was asked that morning to speak, and he pulled his thoughts together while en route to the rally. Eastman decided he wanted to speak about the predictions that Ramsland and Oltmann said to him. Eastman, introduced by Giuliani, spoke at around 10:45 a.m. to a crowd he estimated to be between a quarter to a half a million people.

In his remarks, Eastman told the crowd about matters pending before the U.S. Supreme Court that detail "chapter and verse, the number of times state election officials ignored or violated the state law" in order to elect former President Biden. Eastman declared that "traditional fraud" happened and that "we know that dead people voted."[71] He then went on to tell the crowd that voting machines were an actor in his fraud claims:

> "And, let me, as simply as I can, explain it. You know the old way was to have a bunch of ballots sitting in a box under the floor, and when you needed more, you pulled them out in the dark of night. They put those ballots *in a secret folder* in the machines. Sitting there waiting until they know how many they need. And then, the machine, after the close of polls, we now know [who's] voted and we

[70] Blehar, one of Eastman's witnesses and part of the Droz group, had noticed the election night vote total change and believed that change was likely attributed to underestimating voter turnout. He did not believe, nor did he tell Eastman he believed, election results were manipulated by matching registered voters, who did not vote in the election, to ballots in a suspense folder.

[71] Eastman believed there were ballots cast on behalf of deceased voters in Georgia, Nevada, and perhaps Michigan.

> know who hasn't. And, I can now, in that machine, *match those unvoted ballots with an unvoted voter and put them together in the machine*.
>
> And, how do we know that happened last night in real time? You saw when it got to 99% of the vote total, and then it stopped. The percentage stopped, but the votes didn't stop. What happened, and you don't see this on Fox or any of the other stations, but the data shows that the denominator, how many ballots remain to be counted. How else do you figure out the percentage that you have? How many remain to be counted? That number started moving up. *That means they were unloading the ballots from that secret folder, matching them to the unvoted voter*, and voila. We have enough votes to barely get over the finish line."

(Italics added.) Eastman then turned his focus to former Vice-President Pence and said to the crowd, "all we are demanding of Vice President Pence is this afternoon at 1:00 [p.m.], he let the legislators of the state look into this so we get to the bottom of it, and the American people know whether we have control of the direction of our government or not." Eastman concluded that anyone not willing to "stand up" did not "deserve to be in office."

b. Culpability Established for Count Seven

Count seven charged Eastman with making false and misleading statements at the Ellipse's "Stop the Steal" rally about Dominion electronic voting machines fraudulently manipulating the election results for both the 2020 presidential election and the January 5, 2021 Georgia runoff elections. The NDC quoted from Eastman's remarks to the large crowd where he repeated the claim:

> "'They' put ballots 'in a secret folder in the machines, sitting there waiting until they know how many they need,' and that after the polls closed, 'unvoted ballots' were matched with 'an unvoted voter' to fraudulently change the election totals in favor of [former President Joseph] Biden and the Democratic candidates in the Georgia runoff election. [Eastman] further stated that [an] analysis of the vote percentages showed that 'they were unloading the ballots from that secret folder, [and] matching them to the unvoted voter and voila we have enough votes to barely get over the finish line.'"

Eastman testified that these concepts came from his hotel conversations with Ramsland and Oltmann the night before.

The hearing judge determined Eastman was grossly negligent in his violation of section 6106 because he made reckless statements of voting machine manipulation, and he ignored information that would show his statements were false. On review, OCTC seeks a clear culpability finding that Eastman's misconduct was intentional. Eastman seeks reversal of the hearing judge's culpability finding, arguing insufficient evidence was produced at trial and challenges the hearing judge's factual determinations.[72]

We affirm the culpability finding for this count and further find Eastman's comments at the Ellipse were intentional. Even accepting Eastman's claim that his presence at the "Stop the Steal" rally was not planned, he had sufficient time to consider his actions, including sufficient time to decide he would assert to the assembled crowd a wholly unvetted theory about secret folders or phantom or fake ballots he heard at a hotel gathering the night before as established facts. He had absolutely no evidence of such items, just an uncorroborated theory passed along at a hotel reception, and he did not condition his statements that he had been given this theory the night before or that he had not investigated that theory—he asserted the theory as a fact.[73] Hence, based on this conduct the record supports finding his statements were purposeful, and thus intentional. (*Zitny v. State Bar*, *supra*, 64 Cal.2d at p. 792 [intent may be proved by direct or circumstantial evidence].) Eastman's discussions with a few others at the same hotel reception where he listened to Oltmann and Ramsland's theories of electronic vote manipulation were not a substitute for a reasonable vetting of their claims.

---

[72] Eastman raised a First Amendment defense to this count, which we resolve in Section IV, *post.*

[73] In response to OCTC's question whether Eastman was encouraging listeners not to trust the outcome of the election, Eastman said, "The statements I made were encouraging the listeners to focus on the illegality that had occurred in the election and to get to the bottom of what that illegality was and whether it affected the outcome. My view is that that's encouraging us to get to the bottom of it, to get to the truth." Eastman's statement here misses the point: one cannot "get to the truth" by first asserting mere speculation as truth.

Eastman failed to establish his assertion on review that he had "conflicting credible evidence" to support the charged false statements or that he vetted Oltmann and Ramsland's claims.[74] As detailed in the hearing judge's decision and our discussions of the preceding counts, Eastman consistently rejected information from true experts and relied on unverified assumptions and theories. Contrary to Eastman's arguments, we do not require that he "blindly accept" claims from the government that the election was not conducted fraudulently. However, he is not allowed to assert a theory that he heard the night before as established fact. The record supports a culpability finding of intentional moral turpitude for count seven.

c. Culpability Not Established for Count Eleven

Count eleven alleged Eastman told the crowd of protesters at the Ellipse on January 6, 2021, that election fraud existed, that dead people had voted, that Dominion's electronic voting machines had been used to fraudulently manipulate the election results, that former Vice-President Pence had the legal authority to delay the counting of electoral votes, and that the former Vice-President did not deserve to be in office if he did not delay the counting of votes. OCTC charged that these statements by Eastman were false and misleading and "contributed to provoking the crowd to assault and breach the Capitol in an effort to intimidate [former Vice-President] Pence and prevent the electoral count from proceeding, when such harm was foreseeable," and thus Eastman violated section 6106.

[74] Eastman makes several general references to the record to support his contention that he was familiar with Ramsland's report on Antrim County, Michigan, and that he was aware of "investigations" that identified serious flaws with Dominion voting systems. One basis for Eastman's belief was the documentary "Kill Chain." We have reviewed Eastman's references and do not find them persuasive. Even if others concluded that, in their opinion, security flaws existed, that does not allow Eastman to specifically assert falsely that Dominion voting systems had "secret folders" that allowed election officials to match "unvoted ballots with an unvoted voter and put them together in the machine." Eastman testified he did not recall seeing claims regarding pre-loaded ballots before meeting Oltman and Ramsland.

The hearing judge found that the first four of the five statements made by Eastman at the Ellipse were false and deceptive as charged in other counts: (1) that fraud occurred in the 2020 presidential election (count two); (2) that dead people voted (counts two and four); (3) that electronic voting machines were used fraudulently to alter the election results (count seven); and (4) that former Vice-President Pence had the authority to delay the vote counting (count ten).[75] However, the judge determined OCTC failed to provide any evidence that Eastman's statements "contributed to provoking the crowd to assault and breach the Capitol," and therefore dismissed count eleven with prejudice.

On review, OCTC seeks a culpability finding on count eleven, contending Eastman made false statements to convince the crowd that former Vice-President Pence could stop the electoral count and that he was well aware of the potential for violence. OCTC further contends culpability is established by President Trump, Giuliani, and Eastman acting as coconspirators who made statements that contributed to provoking the violence at the Capitol, which was foreseeable. Eastman's statements followed Giuliani's comments—"let's have trial by combat"—and preceded President Trump's comments—"fight like hell" to save the country—but OCTC presented no evidence to show that Eastman's statements contributed to the assault on the Capitol. Accordingly, the hearing judge did not find Eastman culpable of the misconduct alleged in this count. We agree with the judge's dismissal of count eleven with prejudice, but we

[75] Regarding the fifth statement in count eleven that claimed Eastman said former Vice-President Pence did not deserve to be in office if he did not delay the counting of votes, the hearing judge concluded, "Eastman did not expressly declare that [former] Vice[-]President Pence did not merit holding office if he refrained from delaying the vote counting but stated that 'anybody' unwilling to postpone the vote tallying was unworthy of office." We agree with the judge's understanding of the record and her finding that, while one could conclude Eastman was "alluding" to the vice-president, one could not reasonably conclude Eastman's statement was an assertion of an objective fact. OCTC did not appeal this finding, and we affirm.

elaborate with our discussion of the record, which provides additional support for the judge's conclusion.

We note OCTC argued, that to establish culpability for moral turpitude under section 6106, Eastman's statements would have to be intentional, willfully blind, reckless, or done with gross negligence.[76] Our review of the record does not support a finding in any of these categories as OCTC urges in its brief. First, we see no evidence in the record of intent as alleged in count eleven. (*In the Matter of Yee* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 330, 334 [intentional misrepresentation not found where no evidence or witnesses presented to rebut contrary testimony].) At trial, in direct response to the question as to whether Eastman's statements on January 6, 2021, were intended to incite the crowd at the "Stop the Steal" rally to take violent action, Eastman answered, "Absolutely not." We disagree with OCTC's description in its brief that Eastman "told the crowd . . . that they had to act quickly to stop the count that afternoon," or that "it was essential for them to act." His words at the rally establish that he made false and misleading statements, but in no way does he tell the crowd "to assault and breach the Capitol" as alleged in the NDC. Second, we do not see that he engaged in willful blindness at the rally. While OCTC claims his statements were willfully blind, it does not provide a factual basis to support its assertion. We cannot discern the evidence that existed, but

[76] OCTC, in a footnote, states "the hearing judge suggested . . . that count [eleven] charged Eastman with inciting lawlessness," but disputed that suggestion and emphasized count eleven charged "a violation of section 6106, not criminal incitement." OCTC makes its discussion in count eleven with the clear goal of finding culpability under section 6106 and not as a permissible restriction on speech within the meaning of *Brandenburg v. Ohio* (1969) 395 U.S. 444, which allows limitation on speech where "advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." (*Id.* at p. 447.) Upon review, we do see that count eleven alleges Eastman's statements, as described in this count, "contributed to *provoking* the crowd to assault and breach the Capitol . . . ." (Italics added.) We see little difference between the verbs "provoke" and "incite." We act on OCTC's stated legal position and analyze count eleven using section 6106 and applicable case law.

Eastman otherwise ignored, when he made his statements that would foretell the crowd's later assault and breach of the Capitol. (See *In the Matter of Carver*, *supra*, 5 Cal. State Bar Ct. Rptr. at pp. 432-433 [willfully ignoring evidence supports moral turpitude finding].) Likewise, OCTC claims Eastman's statements were reckless or grossly negligent, and while it discusses the law on these points generally, it does not explain how the statements he made would consciously disregard "a substantial and unjustifiable risk" that his statement would result in the assault and breach of the Capitol. (*In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 935, fn. 12; see *Sanchez v. State Bar* (1976) 18 Cal.3d 280, 285 [breach of fiduciary relationship that binds attorney by conscientious fidelity to interests of his client is gross negligence].)

Finally, citing *Pinkerton v. United States* (1946) 328 U.S. 640, OCTC contends in its reply brief that, because Eastman acted as a coconspirator, he was therefore responsible for the natural and foreseeable consequences of all other coconspirator actions in furtherance of the conspiracy. Regardless of President Trump's and Guiliani's comments at the "Stop the Steal" rally, we do not see Eastman's statements supporting a conclusion that the assault and breach of the Capitol was a foreseeable result of his statements, and we decline to extend *Pinkerton* vicarious conspiracy liability as a means to establish culpability in a disciplinary matter for the reasons set forth in our discussion of aggravation for significant harm, *post.* We affirm the hearing judge's dismissal of count eleven with prejudice. (*In the Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838, 843 [dismissal of charge for want of proof after trial on merits is with prejudice].)

6. Eastman Knowingly Used Misinformation in His Attempt to Persuade Former Vice-President Pence (Count Ten)

Count ten is premised on four instances where Eastman "repeatedly proposed and sought to encourage that [former Vice-President] Pence exercise unilateral authority to disregard the electoral votes of certain states or delay the counting of electoral votes." Those charged instances were contained in the December 23 memo, the January 3 memo, and two emails to Jacob during the evening of January 6, 2021. According to the NDC, each of these writings urged the former Vice-President to either disregard the electoral votes of particular states or delay the electoral vote count even though Eastman knew no basis in law or fact existed for his positions.

The hearing judge found culpability as alleged and reasoned:

> "Eastman was aware, or should have been aware, that the course of conduct he proposed in his memos was factually and legally unsupported. Eastman's dubious strategy to influence [former] Vice[-]President Pence to take unilateral action to determine the validity of [the] slate of electors in the contested states or delay the Joint Session of Congress constitutes moral turpitude in violation of section 6106 . . . ."

The judge assessed no additional disciplinary weight as the same facts supported culpability for count one. We find the charged statements in the two emails and the two memos were made with the intent to encourage the former Vice-President to take unilateral action at the upcoming Joint Session. We reject Eastman's arguments as detailed *post* and further find Eastman intentionally pushed both his reject electors and delay theories, knowing those theories were not supported by the facts, the relevant historical record, or the law.

On review, Eastman asserts he is a constitutional expert and his theories were supported by scholarly articles and his interpretations of past elections. We reject his arguments, including that his interpretation of the Twelfth Amendment and the ECA were supported by his sources. We have closely examined Eastman's testimony as well as the testimony of Yoo, Seligman, and

Jacob. We note Eastman's trial recollection was frequently poor as to what he reviewed, when he reviewed items, and the content he gleaned from his sources. Eastman was never able to precisely identify at trial the items on which he specifically relied in late 2020 as opposed to materials reviewed after the fact and in anticipation of trial. For example, Eastman did not recall if he reviewed actual historical data or relied on the Ackerman article's recitation of the historical record. Despite Eastman's statement that he is a "constitutional scholar," he made erroneous assertions, in writing, to OCTC about the historical record. For example, Eastman mischaracterized United States Senator Charles Pickney's unconstitutionality arguments relating to an 1800 bill as leading to that bill's defeat. As Seligman detailed, the bill actually passed the Senate but did not survive the congressional reconciliation process. This is but one example of the lack of rigor and discernment Eastman applied to the issue of vice-presidential authority and the analysis of the historical record.

The record established that Eastman presumed the ECA was constitutional for decades and it did not run afoul of the Twelfth Amendment. His December 23 and January 3 memos and the change in his position were part of Eastman's actions to convince former Vice-President Pence to reject properly appointed electors or delay the January 6, 2021 electoral count, and the memos themselves contained false and misleading statements as discussed, *ante*. Moreover, in a January 6 email to Jacob, Eastman conceded that the former Vice-President did not have unilateral authority to reject electors or postpone the count and then reminded Jacob he told that to President Trump, writing "as you know because you were on the phone when I did it. [. . .] But you know him - once he gets something in his head, it is hard to get him to change course." Yet, Eastman continued to press Jacob to convince the former Vice-President to delay the January 6 proceeding.

Eastman's argument on review references Jacob's December 8, 2020 memorandum to former Vice-President Pence that there was debate about his Joint Session role, but this argument misses the mark. Jacob testified that, at the time he drafted that document, he was just at the start of his research and had not yet reached a definitive conclusion. By December 14, Jacob clearly realized there would be no dual slates of electors. By the time Eastman and Jacob met on January 4 and 5, 2021, Jacob was more fully versed in the issues as established by Eastman's own trial testimony and Jacob's post-January 4 meeting memorandum. Finally, there were still unresolved factual issues in early December 2020 that were no longer at play by January 4, 2021.

Eastman claims Yoo testified that others shared Eastman's views and that Yoo also agreed a vice-president has authority to resolve disputed electoral ballots submitted for counting. This argument contorts Yoo's testimony and ignores distinctions drawn by the witness. First, even if Yoo was correct in his conclusion that a vice-president may have a role to act in a scenario that does not fall under a provision in the ECA, such as a governor or a legislative body submitting competing slates, Yoo's opinion was premised on a real dispute that existed. According to Yoo, the dispute in the 2020 presidential election was contrived rather than an actual dispute. Further, Yoo stated former Vice-President Pence was on "unassailable ground" when he determined the former Vice-President did not have the right to overturn the election.

Eastman worked to create an appearance of a legitimate dispute when in fact none existed. Eastman, through his knowing use of misinformation in his two memos and the charged emails with Jacob, repeatedly pushed for the former Vice-President to delay the electoral count or reject electors on January 6, 2021. We find Eastman engaged in misconduct that violated section 6106 as alleged in count ten; however, no weight will be given to this finding in our

culpability analysis as the misconduct is duplicative of count one, discussed *post*. (*In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 127.)[77]

7. Eastman's January 2021 Media Statements About the 2020 Election (Counts Five and Nine)

In addition to Eastman's efforts to convince former Vice-President Pence to reject electors or delay the electoral count and his involvement in election-related litigation alleging fraud and other illegalities, Eastman also had a media presence. Eastman is charged with making knowingly false and misleading statements in two of those media efforts: a podcast appearance before the January 6, 2021 Electoral College vote and an article he published in the days following the vote.

a. Eastman Made Misrepresentations During his Appearance on "Bannon's War Room" Podcast (Count Five)

Before Eastman completed his January 3 memo, attended the January 4, 2021 Oval Office meeting, and the January 5 follow-up meeting with Jacob and Short, Eastman appeared on the nationally broadcast program "Bannon's War Room." At the start of Eastman's January 2 interview by host Steve Bannon, Bannon described Eastman to his audience as "[o]ne of the great thinkers about the Constitution, and also a man of action. He's the President – He runs the overall operation over there. But John Eastman is the *constitutional lawyer* that's been putting up these lawsuits." (Italics added.) Bannon described Eastman as President Trump's lawyer to his audience two additional times. During the Bannon interview, Eastman stated action was needed in the states:

> "[W]hat we have here is *massive evidence that this election was at least conducted illegally*. In violation of the state statutes. But, lots of evidence, as well, that as a result of that illegal conduct, removing checks against fraud in the

[77] Eastman raised a First Amendment challenge as well for this count, which we resolve in Section IV, *post*.

> absentee ballot process *that we have absentee fraud more than enough to have affected the outcome of the election*."

(Italics added). Eastman further claimed Georgia, Pennsylvania, and Wisconsin were the states with the most egregious examples of state election laws being ignored or improperly altered. Prior to Eastman's January 2 appearance, Georgia, Pennsylvania, and Wisconsin election officials issued various public statements refuting claims of outcome-determinative absentee ballot fraud. Eastman testified that he did not give "much credence" to press releases issued by Democratic elected officials in Pennsylvania and Michigan, and he did not give any weight to Republican election officials in Georgia because he felt they were untruthful. He also stated he was frequently unaware (or only vaguely aware) of election officials' public statements. Eastman had no specific information about election law violations in Arizona, Michigan, or Nevada. For example, the same day he appeared on Bannon's podcast, Eastman sent an email to an attorney asking for information about Michigan "to the extent the violations are clear."

The NDC charged Eastman's statements on Bannon's War Room broadcast in count five as follows: "[Eastman] stated there was 'massive evidence' of fraud involving absentee ballots in the November 3, 2020 presidential election, 'most egregiously in Georgia, Pennsylvania, and Wisconsin.' [Eastman] further stated that there had been 'more than enough' absentee ballot fraud 'to have affected the outcome of the election.'" In finding Eastman culpable, the hearing judge determined he was grossly negligent. On review, OCTC seeks culpability based on intentional conduct. Eastman seeks a reversal of the judge's finding, arguing the NDC selectively quoted his statement and that the allegation was not proved at trial.[78]

[78] Eastman also argues his charged statements in this count are protected under the First Amendment. We address and reject that argument, *post*.

Turning first to Eastman's "selective quote" argument, Eastman said the following during the interview:

> "No, this is a power the Constitution assigns exclusively to those state legislators. And they need to act because what we have here is *massive evidence that this election was at least conducted illegally*, you know, in violation of the state statutes. But *lots of evidence*, as well, that as a result of the illegal conduct, removing checks against fraud in the absentee ballot process, that *we have absentee fraud more than enough to have affected the outcome of this election*."[79]

(Italics added.) Eastman claims that, when he said there was "massive evidence that this election was at least conducted illegally … in violation of state statutes," he did not refer to fraud. We find his argument wholly unpersuasive when considering the entirety of the interview and the charge. At the outset of the interview, Eastman asserted that election laws—specifically, those requiring a verified signature on absentee ballots designed to minimize the risk of fraud—had not been followed, "most egregiously in Georgia, Pennsylvania, and Wisconsin," and thus, those states had conducted the election illegally.[80] A couple minutes later, Eastman explicitly stated that "absentee fraud" occurred because of the illegal conduct he had described and that it was "more than enough to have affected the outcome of this election." Towards the end of the interview, he described the resulting slates of electors in those states as "illegally certified" and "fraudulently certified," which is factually untrue. The NDC provided Eastman with the nature of the charge—moral turpitude by misrepresentation, in violation of section 6106—and sufficient factual allegations in support of the charge for Eastman to prepare a reasonable defense. (§ 6085; *In re Ruffalo*, *supra*, 390 U.S. at p. 551; *Van Sloten v. State Bar*, *supra*, 48 Cal.3d at p. 929; S*ullins v. State Bar*, *supra*, 15 Cal.3d at p. 618.)

---

[79] This quotation is from the simultaneous transcription that appears in the video at minutes 2:55 to 3:09, which has some minor differences from the separate, printed transcript, both of which were admitted into the record as a single exhibit.

[80] Eastman reiterated this claim later in the interview when he said there "was a concerted effort to thwart the . . . anti-fraud provisions [the state legislators] had put in place."

Although OCTC was not technically accurate in attributing Eastman's use of the phrase "massive evidence" to "fraud," as pleaded in the charge, Eastman's own words inextricably linked "massive evidence" to illegal conduct. Therefore, he has failed to articulate how his claim that "massive evidence that the election was . . . conducted illegally" is meaningfully different from the NDC's charge. (See, e.g., *In the Matter of Field* (Review Dept. 2010) 5 Cal. State Bar Ct. Rptr. 171 [no due process violation when NDC characterized respondent's post-conviction disclosure duty as legal rather than ethical].)

Even if OCTC's allegation inaccurately conflated Eastman's concepts of state election law violations and fraud, and Eastman's statement of "massive evidence" referred to "illegalities," that misstep does not defeat the charge. OCTC accurately alleged Eastman said there was "more than enough" absentee ballot fraud "to have affected the outcome of this election." This statement strikes at the gravamen of the charge as set forth in the NDC: "[T]hese allegations regarding absentee ballot fraud were false and misleading, as [Eastman] knew at that time that there was no evidence upon which a reasonable attorney would rely of absentee ballot fraud in any state in sufficient numbers that could have affected the outcome of the election." Eastman argues that, while potentially ambiguous, the "more than enough" phrase likely modifies "illegal conduct" and not "absentee fraud." Reviewing the video of the War Room podcast with the attendant transcript shown in minute increments, we reject this argument as it is apparent that the phrase is modifying "absentee fraud."

As to culpability, OCTC met its burden of proof that Eastman's statements were not made with gross negligence but were intentionally false and misleading statements. Thus, the record supports an intentional moral turpitude finding under section 6106. The record supports the conclusion that Eastman knew no basis existed for the assertion that there was sufficient absentee ballot fraud to alter the outcome of the 2020 election. Based upon our review of the

record, as discussed *ante*, no massive evidence of either illegality or fraud existed in the states of Georgia, Pennsylvania, and Wisconsin. As was evident throughout the trial, Eastman simply rejected information and court decisions that were contrary to his views.

b. Eastman Made Misrepresentations in His "The American Mind" Article (Count Nine)

After the Capitol attack and on the eve of former President Biden's inauguration, Eastman published an article in the Claremont Institute's online publication, "The American Mind." Eastman's article, published on January 18, 2021, was entitled *Setting the Record Straight on the POTUS "Ask."* The NDC charged in count nine that Eastman made, in the course of the article, false election irregularity claims: (1) votes were electronically "flipped" from President Trump to former President Biden in Antrim County, Michigan; (2) more absentee ballots were cast than requested in parts of Wayne County, Michigan; and (3) "suitcases of ballots were pulled from under the table after election observers had been sent home for the night" at the State Farm Arena in Fulton County, Georgia. We take each charged statement in turn.

As to the article's claim that, in Antrim County, Michigan, votes were "electronically flipped" from President Trump to former President Biden, the Michigan Secretary of State issued a press release on November 6, 2020, months before Eastman published his article. It informed the public that the "erroneous reporting of unofficial results from Antrim County was a result of accidental error on the part of the Antrim County Clerk." The press release further advised the public that there had been human error in an unofficial release of results caused by failure to complete a software update, but no equipment malfunction occurred and the county's software functioned properly in counting ballots. Another press release followed on December 8 to once again address allegations about the Antrim County vote. A month before Eastman's article was

published, yet another press release was issued on December 17 that announced a hand audit of all presidential votes in Antrim County confirmed the equipment accurately counted the Antrim County votes. This is consistent with Halderman's March 2021 conclusion, who was an election security expert retained by Michigan's Secretary of State and Attorney General and who Eastman praised at trial.[81]

Eastman had a generalized aversion to information provided by state government officials and also failed to actively seek out credible experts to advise him. As was consistent throughout the trial, Eastman either claimed he was too busy to verify information or had an inability to recall what he knew and what steps he took to verify information forwarded to him. We reject Eastman's assertion that his Antrim County allegation is "demonstrably true." The testimony of Michigan officials at trial and the documentary evidence in the record show the contrary. Thus, Eastman's statement in his article was false, and he is culpable under section 6106.

Regarding Eastman's allegation in his article about Wayne County having more absentee ballots cast than requested, Eastman failed to take into account that Wayne County does not report absentee votes by precinct, but rather by separate counting boards covering multiple precincts. Wayne County precinct data would show no absentee ballots because those ballots are separately counted by an absentee voting board, a different entity from Wayne County. Eastman conceded at trial he did not recall the source of the allegation or whether it was true and repeats

[81] Halderman's March 26, 2021 report of his forensic investigation found, inter alia, "inaccurate unofficial results were a consequence of human errors" and "not caused by a security breach." Further, Halderman found, "The final results match[ed] the poll tapes . . . and there [was] no evidence that the poll tapes [were] inaccurate, except . . . in [a few] down-ballot races." Contrary to Eastman's argument, Halderman did not "confirm that votes had been electronically flipped from Trump to Biden in Antrim County, Michigan."

the concession on review.[82] We reject Eastman's arguments that his statement was a mistake, given it is an untrue allegation with his having no recollection as to its source, or that he is entitled to First Amendment protection pursuant to *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 271. First, Eastman's reliance on *New York Times Co. v. Sullivan* is not applicable here. As discussed in Section IV, *post*, this is a disciplinary proceeding. Hence, we examine Eastman's conduct pursuant to an objective standard, not a subjective one. Eastman's conduct was not objectively reasonable as he did not know the source of his information. By Eastman's own admission, he repeated unsubstantiated information. This is patently unreasonable. (Cf. *In the Matter of Parish* (Review Dept. 2015) 5 Cal. State Bar Ct. Rptr. 370, 375-376 [subjective intent did not apply and no reasonable factual basis existed for attorney's allegation that judge was involved with corporate fraud and bribery].)

Eastman's charged statement was untrue as established by the testimony of the Director of Michigan's Bureau of Elections. The number of absentee ballots counted was consistent with the number of ballots requested. Moreover, the false claim was premised on a fundamental misunderstanding of how Michigan processes absentee ballots. We also reject the contention he was simply negligent in repeating the claim. Intentionality is established by Eastman's willful blindness to the truth or falsity of his published allegation. (*In the Matter of Carver*, *supra*, 5 Cal. State Bar Ct. Rptr. at pp. 432-433.)

Regarding Georgia, Eastman included the following statement in his article:

> "A large portion of the American citizenry believes the illegal actions by partisan election officials in a few states have thrown the election. They saw it with their own eyes—in Fulton County, Georgia, where suitcases of ballots were pulled from under the table after election observers had been sent home for the night."

[82] We note that, at the end of Eastman's article, it contains an undated correction stating, "a previous version of this article incorrectly stated that there were more votes cast than registered voters in Wayne County, [Michigan]." The parties did not address this on review.

No real dispute exists that Eastman's claim regarding the "suitcases" of ballots at the State Farm Arena was untrue. (See our count four discussion, *ante.*) By December 5, 2020, investigative personnel within the Georgia Secretary of State's Office concluded no hidden suitcases of ballots existed and ballots were not improperly counted. As detailed in our discussion regarding Eastman's First Amendment defense, *post*, his false assertion about the State Farm Arena ballots being in "suitcases" is not protected as "rhetorical hyperbole" as the statement is reasonably "interpreted as stating actual facts." (*Milkovich v. Lorain Journal Co*., *supra*, 497 U.S. at p. 20, citations omitted.)

D. Eastman Failed to Support the Constitution or Laws of the United States in His Pursuit to Delay the Electoral Count (§ 6068, subd. (a)) (Count One)

Count one charged that Eastman failed to support the Constitution or laws of the United States during his drive to delay the electoral count process or cause duly appointed electors of various states to be rejected, in violation of section 6068, subdivision (a), which imposes a duty on attorneys to support the Constitution and laws of the United States and California. Failure to do so warrants discipline. (*In the Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91, 110; *In the Matter of Lilley* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 476, 487.)[83]

As the hearing judge found Eastman culpable only for his failure to support the federal criminal prohibition against conspiring to defraud the United States (title 18 U.S.C. § 371), our

[83] A defense to a section 6068, subdivision (a), charge is a good faith mistake of law. (*In the Matter of Respondent P* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 622, 631.) However, Eastman raised no such defense as he asserts, erroneously, there was "substantial historical and scholarly support" for the positions he took regarding former Vice-President Pence's authority.

focus is on the conspiracy allegation.[84] We utilize the elements of that federal offense to guide our analysis as to whether Eastman violated section 6068, subdivision (a).[85] The "defraud clause" portion of the general federal conspiracy statute prohibits conspiring "to defraud the United States, or any agency thereof in any manner or for any purpose." The elements to convict under the federal statute are that a person "(1) entered into an agreement (2) to obstruct a lawful government function (3) by deceitful or dishonest means and (4) committed at least one overt act in furtherance of the conspiracy [citations]." (*United States v. Conti* (9th Cir. 2015) 804 F.3d 977, 979-980.)[86] The means used to achieve the goal of the conspiracy need not be independently illegal. (*United States v. Caldwell* (9th Cir. 1993) 989 F.2d 1056, 1059, overruled on other grounds by *Neder v. United States* (1999) 527 U.S. 1, 8-9.) In the seminal case of *Hammerschmidt v. United States* (1924) 265 U.S. 182, the U.S. Supreme Court defined "defraud" in the context of an obstruction conspiracy case as "deceit, craft or trickery, or at least *by means that are dishonest.*" (*Id*. at p. 188, italics added.) A "defraud clause" conspiracy charge reaches to "any conspiracy for the purpose of impairing, obstructing or defeating the

[84] Count one also alleged Eastman did not support the ECA provisions in effect at the time and that he failed to support article II, section 1 of the Twelfth Amendment. The hearing judge found OCTC did not meet its burden of proof as to those allegations because it only established that Eastman intended to violate these provisions rather than proving an actual violation. OCTC did not challenge this finding on review, and we affirm the finding. Hence, we do not address OCTC's legal theory in the NDC as to the interplay between section 6068, subdivision (a), and the charged failure to support the ECA or the Twelfth Amendment. We instead focus on whether Eastman used deceitful means and conspired with others to obstruct the electoral count on January 6, 2021.

[85] State Bar Court proceedings are *sui generis*—neither criminal nor civil. (*Brotsky v. State Bar* (1962) 57 Cal.2d 287, 300.)

[86] The hearing judge relied on *United States v. Meredith* (9th Cir. 2012) 685 F.3d 814, 822 to establish the elements of 18 U.S.C. section 371, which are very similar to our discussion of the elements in the statute set out in *Conti*.

lawful function of any department of government, [citations]." (*Dennis v. United States* (1966) 384 U.S. 855, 861.)

The hearing judge found Eastman conspired with President Trump to obstruct the Joint Session through deceitful means, and Eastman committed numerous overt acts in furtherance of the conspiracy. Eastman argues on review that two of the four elements of the offense were not established: (1) the Joint Session was not a lawful government function due to underlying election illegalities in some states, and (2) the hearing judge's application of "defraud" to his conduct was overbroad.[87] In furtherance of this latter point, Eastman argues the scope of a vice-president's authority was an "open question" and, even if Eastman used a false legal premise, his actions did not amount to "deceit, craft, or trickery." Eastman's arguments are not supported by the record.

Regarding Eastman's first argument, the Joint Session was in fact a lawful government function. No credible evidence exists to the contrary that the meeting of both houses of the United States Congress pursuant to the Twelfth Amendment and the ECA is not a lawful government function. No judicial finding or affirmative legislative action occurred that made the Joint Session unlawful. Sufficient support is in the record, discussed *ante* in several of the other counts and as detailed by the hearing judge, that Eastman used multiple dishonest means to advance his goal to impair, obstruct, or defeat the lawful purpose of the Joint Session.[88] Eastman

---

[87] As Eastman only challenges whether two of the four elements were met, we find he waived the factual findings for the remaining elements. (Rules Proc. of State Bar, rule 5.152(C)). Even if challenged, the remaining elements, based upon our independent review of the record, support a finding they were met. Clear and convincing evidence exists of an agreement with Trump and others, including Eastman, to impede the January 6, 2021 Joint Session. As for the final element, the record is replete with numerous overt acts, such as making intentional false and misleading statements to former Vice-President Pence, his staff, and the public.

[88] Therefore, we reject Eastman's argument that he did not have the requisite mens rea to violate title 18 U.S.C. section 371.

made numerous false claims to help accomplish the conspiracy's shared objective: to have former Vice-President Pence run interference on the electoral vote count with the goal to have him reject or delay the counting of electoral votes on January 6, 2021. The hearing judge's detailed decision of the trial record supports the finding that Eastman used dishonest means in order to help advance the conspiracy detailed in the NDC.

As to Eastman's second argument, the hearing judge's conclusion is consistent with the U.S. Supreme Court's definition of "defraud" in *Hammerschmidt*. Accordingly, Eastman failed to support the law that prohibits defrauding of "the United States, or any agency thereof in any manner or for any purpose." (18 U.S.C.§ 371; *Hammerschmidt v. United States*, *supra*, 265 U.S. at p. 188; *Dennis v. United States*, *supra*, 384 U.S. at p. 861.) We further find this count and count ten duplicative and assign disciplinary weight only to this count. (*In the Matter of Sampson*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 127 [no additional disciplinary weight for former rule 4-100(A) violation when duplicative of moral turpitude violation].)

IV. EASTMAN'S FIRST AMENDMENT DEFENSES ARE NOT SUPPORTED BY THE FACTS OR CASE LAW

We now address Eastman's contention that his statements in counts one through ten, found as misconduct by the hearing judge and affirmed by us, are protected expressions of his rights under the First Amendment, including freedom of speech and the right to petition the government for a redress of grievances.[89] Eastman contends that his statements cannot be used as grounds for professional disciplinary action. Further, Eastman asserts that the hearing judge misinterpreted and misapplied First Amendment jurisprudence in applying an intermediate

[89] The First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

scrutiny standard for advertising and soliciting cases as opposed to the strict scrutiny standard applicable to restrictions on core political speech issues.

The First Amendment rights of attorneys are linked to the critical role they perform within the judicial system. While these rights are fundamental, they must be calibrated to align with the unique role attorneys play in the administration of justice. As we have stated, "attorneys occupy a special status and perform an essential function in the administration of justice. Because attorneys are officers of the court with a special responsibility to protect the administration of justice, courts have recognized the need for the imposition of reasonable speech restrictions upon them." (*In the Matter of Anderson* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 775, 781, citing *Goldfarb v. Virginia State Bar* (1975) 421 U.S. 773, 792 [state's interest in regulating lawyers is especially great because lawyers are essential to primary governmental function of administering justice and have historically been court officers].)

For these reasons, "speech otherwise entitled to full constitutional protection may nonetheless be sanctioned if it obstructs or prejudices the administration of justice." (*Standing Comm. on Discipline v. Yagman* (9th Cir. 1995) 55 F.3d 1430, 1442, citing *Gentile v. State Bar of Nevada* (1991) 501 U.S. 1030, 1074-1075.)[90] Because lawyers are "an intimate and trusted and essential part of the machinery of justice, an officer of the court in the most compelling sense," (*id*. at p. 1072, citations and internal quotations omitted), it is contemplated that a lawyer's right to free speech is especially limited in the courtroom. (*Id*. at p. 1071 ["It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free

[90] In *Gentile*, the court reviewed a First Amendment challenge to a Nevada bar disciplinary sanction leveled against a criminal defense attorney who had given a post-indictment press conference, in which he suggested that his client was an innocent scapegoat, that the actual perpetrator was a crooked police detective, and that others likely to testify as witnesses were drug dealers and money launderers.

speech' an attorney has is extremely circumscribed"].) Even beyond the confines of the courtroom or the pendency of a case, attorneys are not necessarily "protected by the First Amendment to the same extent as those engaged in other businesses." (*Id*. at p. 1073.) In examining the Nevada disciplinary rule at issue, the court in *Gentile* held that the "substantial likelihood of material prejudice" standard used in the Nevada rule constituted a "constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials." (*Id*. at p. 1075.)[91]

Eastman contends that the hearing judge erred in applying the commercial speech balancing test to the speech issues in this case. Citing *Gentile*, Eastman argues that strict scrutiny is the appropriate standard when examining core political speech, while OCTC argues that Eastman's speech is subject to intermediate scrutiny pursuant to *Gentile*. We agree with Eastman that strict scrutiny is the applicable standard when examining core political speech and that Eastman's charged statements involved core political speech. (See *Gentile v. State Bar of Nevada*, *supra*, 501 U.S. at pp. 1075-1076 [content neutral Nevada rule was "narrowly tailored" and regulated only limited area of attorney speech]; see also *In the Matter of Parish*, *supra*, 5 Cal. State Bar Ct. Rptr. 370, 375, citing *Republican Party of Minnesota v. White* (2002) 536 U.S. 765, 774 [content-based restriction on judicial campaign speech burdens speech at core of First Amendment freedoms].) [92]

[91] Eastman's contention that some of his statements are merely "rhetorical hyperbole" is not persuasive. Eastman's statements, such as "We know there was fraud. Traditional fraud that occurred. We know that dead people voted," would not fall within such an exception. (*Milkovich v. Lorain Journal Co*., *supra*, 497 U.S. at p. 20.)

[92] To the extent that the correct analytical standard is relevant, we believe the applicable standard is one of strict scrutiny. Regardless, our focus remains on Eastman's false statements and whether or not they violate the rules and statutes governing attorney conduct.

While attorneys have a First Amendment right to make statements in public in the course of their professional duties, this right does not extend to making knowing or reckless false statements of fact or law. We addressed this concept in *In the Matter of Parish*.[93] In that case, Parish was a candidate for judicial office and was found culpable for factual misrepresentations that he made about himself and his opponent. These campaign misrepresentations violated former rule 1-700 of the Rules of Professional Conduct, which prohibited, through the incorporation of former canon 5,[94] candidates from "knowingly, or with reckless disregard for the truth" misrepresenting their opponents "identity, qualifications, present position, or any other fact concerning the candidate or [their] opponent." (*In the Matter of Parish*, *supra*, 5 Cal. State Bar Ct. Rptr. at p. 372, fn. 1].) Parish argued, consistent with a First Amendment defense, that he unknowingly made one false statement about his opponent and further contended he was not culpable because the prosecution failed to prove he made the statements with a reckless disregard of the truth. *Parish* is also consistent with cases where, in balancing an attorney's First Amendment rights outside of the courtroom with the public protection components of the attorney disciplinary process, the attorney's conduct is assessed under an objective,

[93] Regarding the point of law that false statements do not enjoy First Amendment protection, the U.S. Supreme Court has stated, "Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration." (*Garrison v. State of Louisiana* (1964) 379 U.S. 64, 75.)

[94] Former California Code Judicial Ethics, canon 5B(2), now canon 5B(1)(b), effective January 1, 2013.

reasonableness standard. (*U.S. Dist. Court for Eastern Dist. of Washington v. Sandlin* (9th Cir. 1993) 12 F.3d 861.)[95]

The evidence and testimony at trial established that Eastman made multiple false and misleading statements in his professional capacity as an attorney for President Trump in court filings and other written statements, as well as in conversations with others and in public remarks. Both this opinion and the hearing judge's decision detail, in the discussion of the individual counts where culpability was found, that Eastman knowingly made these false statements or had no reasonable factual or legal basis for making them. Accordingly, while we have applied the strict scrutiny standard to the facts of this case, we find Eastman's First Amendment defenses regarding his rights to free speech and to petition the government for the redress of grievances do not bar a finding of culpability and discipline in this matter.

Furthermore, the First Amendment does not protect speech that is employed as a tool in the commission of a crime. (See *United States v. Hansen* (2023) 599 U.S. 762, 783 [First Amendment does not protect "speech integral to unlawful conduct"]; *United States v. Williams* (2008) 553 U.S. 285, 298 ["Many long established criminal proscriptions—such as laws against conspiracy, incitement, and solicitation—criminalize speech (commercial or not) that is intended to induce or commence illegal activities"].) Count one of the NDC charges Eastman with conduct and statements made in furtherance of a criminal scheme, i.e., conspiring to promote and assist President Trump in executing a strategy to overturn the legitimate results of the 2020 presidential election by obstructing the count of electoral votes of certain states, in violation of title 18 U.S.C. section 371. Attorneys do not have a constitutional right to collaborate with

[95] In contrast, Eastman's reliance on *New York Times Co. v. Sullivan, supra*, 376 U.S. 254, 269-271, is misplaced as that case involved a claim of defamation by a public official and was analyzed under a subjective standard.

clients for purposes that are unlawful, criminal, or fraudulent. (Cf. Rules Prof. Conduct, rule 1.2.1 [prohibiting attorney from advising or assisting violation of law].)

Eastman, in the scope of his representation of President Trump, wrote in his January 3 memo that former Vice-President Pence had the power to "gavel" in President Trump as reelected on January 6, 2021. Eastman's January 3 memo also contained additional deceptive, untrue, and fraudulent statements, such as the claim that there were dual slates of electors for certain states, that former Vice-President Pence was the ultimate arbiter under the Constitution to determine the result and could even declare President Trump the winner, and that such "bold" action was justified because "this Election was Stolen by a strategic Democrat[ic] plan to systemically flout existing election laws." Eastman knew that his advice lacked a reasonable basis in law because he conceded to Jacob that his argument was contrary to consistent historical practice and would likely be unanimously rejected by the U.S. Supreme Court. In light of the evidence, the First Amendment does not bar disciplinary action against Eastman for his speech in assisting and advising President Trump in illegal, criminal, or fraudulent activities.

Eastman further asserts that he has a separate right to petition for redress of grievances, and we acknowledge Eastman's First Amendment right. However, restrictions on the right to petition generally are subject to the same analysis as restrictions on the right of free speech. (*Wayte v. United States* (1985) 470 U.S. 598, 610, fn. 11.) Specifically, he asserts that, in his own right, he petitioned legislators to investigate and the President of the Senate to accede to his requests to investigate the impact of illegality in the conduct of the election. Eastman claims he was acting as a private citizen, exercising his right to petition at the January 4, 2021 Oval Office meeting and in his January 6 emails with Jacob. We agree with the hearing judge that Eastman did not attend the January 4 meeting in his capacity as a private citizen. We reach this same conclusion as to Eastman's charged January 6 emails. As such, because we have already

determined that Eastman's First Amendment defense to several counts does not preclude disciplinary action against him, we similarly find that Eastman's right to petition for redress does not bar finding culpability and the imposition of discipline. Accordingly, we reject Eastman's First Amendment defenses.

V. AGGRAVATION AND MITIGATION

Aggravating circumstances under the Standards for Attorney Sanctions for Professional Misconduct are "factors surrounding a lawyer's misconduct that demonstrate that the primary purposes of discipline warrant a greater sanction than what is otherwise specified in a given Standard."[96] (Std. 1.2(h).) Mitigating circumstances are "factors surrounding a lawyer's misconduct that demonstrate that the primary purposes of discipline warrant a more lenient sanction than what is otherwise specified in a given Standard." (Std. 1.2(i).) OCTC is required to establish aggravating circumstances by clear and convincing evidence (std. 1.5), and Eastman must meet the same burden to prove mitigation (std 1.6).

The hearing judge found aggravation for multiple acts of wrongdoing, lack of candor, and indifference.[97] The judge also found mitigation for no record of prior discipline, cooperation, and extraordinary good character. On review, Eastman only disputes the lack of candor finding and asserts that the aggravation and mitigation, when "appropriately balanced," should result in a lesser degree of discipline if culpability is affirmed. OCTC argues on review that aggravation should be assigned for significant harm.

---

[96] All further references to standards are to the Rules of Procedure of the State Bar, Title IV, Standards for Attorney Sanctions for Professional Misconduct.

[97] The hearing judge declined to find aggravation under standard 1.5(d) for intentional misconduct, bad faith, or dishonesty as there were not separate and distinct facts supporting aggravation apart from the facts supporting culpability. Neither party challenges these findings on review, and we agree.

A. Aggravation

1. Multiple Acts of Wrongdoing (Std. 1.5(b))

The hearing judge assigned substantial weight in aggravation for Eastman's multiple acts of wrongdoing, including (1) seeking to mislead the U.S. Supreme Court in *Texas v. Pennsylvania*, (2) seeking to mislead the United States District Court for the Northern District of Georgia in *Trump v. Kemp*, (3) making multiple false and misleading statements amounting to moral turpitude (six counts), (4) encouraging former Vice-President Pence to disregard properly certified electoral votes and delay certification of the votes, amounting to moral turpitude, and (5) conspiring to commit an offense against the United States in violation of title 18 U.S.C. section 371.[98] We agree with the judge that substantial weight in aggravation is appropriate for Eastman's multiple acts of wrongdoing. (Std. 1.5(b).) (See *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 555 [repeated similar acts of misconduct considered serious aggravation].)

2. Lack of Candor (Std. 1.5(l))

Standard 1.5(l) provides that aggravation may include "lack of candor and cooperation to the victims of the misconduct or to the State Bar during disciplinary investigations or proceedings." The hearing judge found a portion of Eastman's testimony lacked candor: when Eastman falsely testified that he did not exert pressure on Jacob to reject the certified former President Biden electors in the January 5, 2021 meeting.[99] Such a finding is supported by Jacob's records from that meeting, his testimony about the January 5 meeting, Jacob's testimony

---

[98] Multiple acts of misconduct as aggravation are not limited to the counts pleaded. (*In the Matter of Song* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 273, 279.)

[99] Eastman testified that he had no recollection of advocating for the option of rejecting electors in his meeting with Jacob and further stated he found it "implausible" that he would have made such a statement. As discussed *ante*, we agreed with the hearing judge's determination that Jacob's testimony was more credible than Eastman's on this point.

regarding Eastman's participation in a call later the same day that included President Trump, and Jacob's January 6 email response to Eastman recounting that rejecting electors had been discussed in their January 5 meeting and withdrawn that same night. As the lack of candor finding is supported by the record, we give it great weight. (See *Franklin v. State Bar* (1986) 41 Cal.3d 700, 708 [hearing panel findings on witness credibility entitled to great weight because panel saw and heard witness]; *In the Matter of Dahlz*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 282 [great weight given to hearing judge's finding on candor].)

We reject Eastman's broad claim on review that his testimony was "honest, candid, and fulsome," and the hearing judge erred by assigning aggravation for lack of candor. Eastman's testimony on this subject was not merely based on his "different memory" of the events. (*In the Matter of Kaplan* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 509, 523.) Based on the record, it is clear that Eastman was not candid about whether he pressured Jacob to reject electors on January 5. No other evidence corroborates Eastman's testimony. (See *In the Matter of Maloney and Virsik* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 791-792 [attorneys lacked candor where record at complete odds with hearing testimony]; *In the Matter of Jimenez* (Review Dept. 2022) 5 Cal. State Bar Ct. Rptr. 965, 981 [lack of candor finding where record contradicted with respondent's uncorroborated testimony].) The judge assigned aggravation to only this portion of the testimony and therefore assigned only limited aggravating weight. We adopt the finding and weight assigned by the judge.

3. Indifference (Std. 1.5(k))

Aggravation may also be found for "indifference toward rectification or atonement for the consequences of the misconduct." (Std. 1.5(k).) While the law does not require false penitence, it does require that an attorney accept responsibility for wrongful acts and show some understanding of his culpability. (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct.

Rptr. 502, 511.) The hearing judge assigned substantial weight in aggravation for Eastman's indifference, finding that he failed to understand the wrongfulness of his actions surrounding his efforts to obstruct the 2020 presidential election results. The judge noted that Eastman gave no consideration in his testimony to the effect of his January 6, 2021 televised statements to the crowd at the Ellipse, where he misrepresented to thousands that electoral fraud from electronic voting had occurred. The judge also specified that Eastman characterized these disciplinary proceedings as a political persecution, claimed that the charges contained false and misleading statements, and called for the disbarment of the attorneys who brought the charges.

Eastman does not make specific arguments on review regarding the judge's aggravation finding for indifference. Rather, he maintains that his actions were factually and legally justified and continues to focus on his belief that these proceedings are political in nature. He describes these proceedings as "an extraordinary, unprecedented, and abjectly misguided foray by the California Bar . . . into the 2020 presidential election . . . ." His assertions also focus on a claim that the judge was biased against him, which resulted in a "stupefying" decision "ravaging" his rights. The breadth of his attacks on the judge and the labeling of this disciplinary proceeding as a punitive political exercise causes us the greatest of concerns about his ethical abilities as an attorney and officer of the court and demonstrates a fundamental lack of understanding concerning his professional ethical obligations.

When charged with disciplinary misconduct related to positions taken and dismissed by the courts, an attorney's unwillingness to even consider the appropriateness of his actions or acknowledge that at some point his position may have been meritless or wrong shows that the attorney "went beyond tenacity to truculence." (*In re Morse* (1995) 11 Cal.4th 184, 209.) This is the case here as Eastman has shown nothing but defiance and pugnacity and a refusal to consider the propriety of his actions as an attorney, and he persisted in this stance during oral

argument.[100] "It is well settled that an attorney's contemptuous attitude toward the disciplinary proceedings is relevant to the determination of an appropriate sanction. [Citations.]" (*Weber v. State Bar* (1988) 47 Cal.3d 492, 507.) We affirm the hearing judge's finding of substantial weight in aggravation under standard 1.5(k) based on Eastman's continued attacks on these disciplinary proceedings and his inability to show an understanding of his misconduct.

4. Significant Harm (Std. 1.5(j)) Not Established

"[S]ignificant harm to the client, the public, or the administration of justice," may be an aggravating circumstance. (Std. 1.5(j).) OCTC appeals the hearing judge's decision to not assess aggravation under this circumstance. We find OCTC did not present any additional facts beyond those we have already considered in determining culpability that would warrant a separate aggravation finding for significant harm. (*In the Matter of Sampson*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 133 [no separate aggravation where culpability conclusions directly addressed misconduct].)

Eastman's actions resulted in culpability that involved (1) conspiring to obstruct the legitimate counting of electoral votes in his campaign to persuade former Vice-President Pence to reject electors or delay the count; (2) misleading courts in two separate cases; and (3) making false and misleading statements to the former Vice-President, other government officials, and the general public. Naturally, Eastman's actions that we have described harmed the public, the courts, and the legal profession, and resulted in culpability for violating section 6068, subdivisions (a) and (d), and section 6106. The harm that was intertwined with the various culpability findings is considered in our determination of appropriate discipline.

[100] Although represented by counsel on review, we granted Eastman's request for an opportunity to address us directly at oral argument.

OCTC additionally argues that Eastman caused significant harm to the general public by "sowing doubt" about the electoral process, which harmed those who administer elections with his unsubstantiated claims of illegality and fraud. We do not disagree with OCTC that misinformation about the 2020 election was rampant and consequentially resulted in a loss of confidence in the election process, but Eastman was just one of many who amplified this misinformation. Eastman's lies were only a part of the reason for the public's increased distrust of our electoral process. As to election administration workers and officials, we acknowledge OCTC presented evidence that, due to misinformation regarding the election in the media, election workers were harassed and states had to work to combat the misinformation. However, OCTC did not provide evidence to directly connect these examples of harm to Eastman's statements.

OCTC also seeks aggravation for the January 6, 2021 assault on the Capitol. Like the loss of public confidence in elections and our system of democracy, the January 6 assault cannot be directly attributed to Eastman in order to support an aggravation finding under standard 1.5(j). Further, OCTC did not show additional facts to justify significant harm to the administration of justice. (See *In the Matter of Sampson*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 133 [where respondent's misconduct—failure to perform with competence—caused unnecessary sanction motions and hearings, this alone did not establish significant harm to administration of justice].) The record does not reveal specific evidence that considerable court time or resources were expended due to Eastman's misrepresentations. (Cf. *In the Matter of Hunter* (Review Dept.

1994) 3 Cal. State Bar Ct. Rptr. 63, 75, 79-80 [harm to administration of justice where attorney committed multiple acts of misconduct resulting in considerable court resources wasted].)[101]

We agree with the hearing judge that OCTC's evidence offered in support of aggravation for significant harm was speculative, and thus OCTC did not prove Eastman was the cause of the harm.[102] Because OCTC has not presented sufficient evidence of additional harm that can be directly attributed to Eastman—beyond what was considered to find culpability—we decline to assign aggravation under standard 1.5(j). (Std. 1.2(h) [aggravation based on "factors surrounding a *lawyer's* misconduct"] (italics added); *In the Matter of Respondent BB* (Review Dept. 2021) 5 Cal. State Bar Ct. Rptr. 835, 845 [no aggravation where OCTC failed to establish "specific, cognizable, and significant harm" that could be "directly attributed" to respondent's actions].)[103]

B. Mitigation

1. Extraordinary Good Character (Std. 1.6(f)

A lawyer may receive mitigation for "extraordinary good character" under standard 1.6(f) if it is "attested to by a wide range of references in the legal and general communities, who are aware of the full extent of the misconduct." The hearing judge credited Eastman's good character evidence and assigned substantial weight in mitigation. Neither party challenges this

---

[101] Counts two and four (the intervention motion and the *Kemp* action) involve harm to the administration of justice, but additional facts beyond those used to determine culpability were not established.

[102] OCTC went so far as to argue aggravation for significant harm based on *Pinkerton* vicarious criminal liability for the natural and foreseeable consequences of Trump's actions in furtherance of the conspiracy to obstruct the January 6, 2021 Joint Session. (See *Pinkerton v. United States*, *supra*, 328 U.S. 640; *United States v. Fonseca-Caro* (9th Cir. 1997) 114 F.3d 906.) We decline to extend aggravation of Eastman's misconduct based on the actions of President Trump.

[103] We have considered the factual record as highlighted in our colleague's concurring opinion that Eastman's actions caused significant harm within the meaning of standard 1.5(j). Nonetheless, we remain convinced that Eastman's actions identified by our colleague either falls within the ten misconduct findings we have affirmed or that the evidentiary record does not demonstrate Eastman's actions, in and of themselves, caused significant harm.

finding on review. Eastman presented several references attesting to his good character who had known him for a considerable amount of time and understood the disciplinary charges. Eastman's character witnesses included three former judicial officers, including a retired United States circuit court judge. We give serious consideration to their testimony and declarations. (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319 [attorneys have strong interest in maintaining honest administration of justice].) Several references expressed that if Eastman were culpable of the alleged misconduct, then it was anomalous behavior that would not recur. We affirm substantial mitigation under standard 1.6(f).

2. Cooperation (Std. 1.6(e))

Mitigation may include "spontaneous candor and cooperation displayed to the victims of the misconduct or to the State Bar." (Std. 1.6(e).) The hearing judge credited the stipulation as to facts and assigned limited weight for cooperation under standard 1.6(e) because Eastman did not admit culpability, the stipulated facts were easy to prove, and the stipulation "obviated very little in terms of OCTC's preparation for trial." We affirm limited mitigating weight for Eastman's cooperation. (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [more extensive weight in mitigation for those who admit culpability and facts]; *In the Matter of Guzman* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 308, 318 [limited mitigation where stipulation was not extensive, involved easily provable facts, and no admission of culpability].)

3. No Prior Record of Discipline (Std. 1.6(a))

Mitigation for absence of a prior record of discipline may be assigned when there are many years of discipline-free practice coupled with present misconduct that is not likely to recur. (Std. 1.6(a).) Eastman practiced law for approximately 23 years prior to his misconduct. The hearing judge found Eastman has not shown insight into his misconduct and, therefore, the

misconduct was not aberrational. The hearing judge assigned moderate weight under standard 1.6(a).

While we agree with the hearing judge that Eastman has failed to accept responsibility for his wrongdoing, we cannot agree with the weight she assigned here. Given his complete inability to accept responsibility as described in our indifference finding, we have great concern that future misconduct will occur. (*Cooper v. State Bar* (1987) 43 Cal. 3d 1016, 1029 [for protection of the public, court must consider fitness of attorney to continue to practice when determining mitigation for absence of prior discipline].) Eastman continues to fully deny his many unethical actions: he denies he misled the courts; he denies that he made multiple false and misleading statements in various contexts; and he denies that he conspired to subvert the law in order to benefit his client's desire to remain in office after his client lost a fair and lawfully conducted election. Because he fails to recognize his ethical obligations and views any scrutiny of them as an attack on him, we assign only nominal mitigation for Eastman's absence of a prior record of discipline despite his 28 years of being an attorney.[104] (*In the Matter of Jones* (Review Dept. 2022) 5 Cal State Bar Ct. Rptr. 873, 895 [nominal mitigation for nine years of discipline-free practice where respondent failed to acknowledge any wrongdoing and demonstrate understanding of ethical duties]; but see *In the Matter of Reiss* (Review Dept. 2012) 5 Cal. State Bar Ct. Rptr. 206, 218 [no mitigation for 13-year discipline-free record when attorney failed to accept responsibility for wrongdoing].)

[104] OCTC did not challenge the hearing judge's assignment of moderate mitigating weight, but based on the record, we find that less mitigation is warranted. (Rule 5.155(A) [Review Department independently reviews record and may make findings, conclusions, or a decision or recommendation different from those of hearing judge].)

VI. DISBARMENT IS THE APPROPRIATE DISCIPLINE

The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts, and the legal profession; to preserve public confidence in the profession; and to maintain high professional standards for attorneys. (Std. 1.1.) Our disciplinary analysis begins with the standards. While they are guidelines for discipline and are not mandatory, we give them great weight to promote consistency. (*In re Silverton* (2005) 36 Cal.4th 81, 91-92.) The Supreme Court has instructed us to follow the standards "whenever possible." (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.) We also look to comparable case law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.)

In considering the applicable standards, we first determine which standard specifies the most severe sanction for the at-issue misconduct. (Std. 1.7(a) [most severe sanction shall be imposed where multiple sanctions apply].) Under standard 2.11, disbarment or actual suspension is the presumed sanction for an act of moral turpitude, dishonesty, or intentional or grossly negligent misrepresentation.[105] Standard 2.12(a) similarly provides for disbarment or actual suspension for violations of section 6068, subdivisions (a) and (d).

Eastman does not have a prior record of discipline, but that fact alone does not preclude disbarment. In certain circumstances, we have disbarred attorneys who have had no prior record of misconduct. (Cf. *Lebbos v. State Bar* (1991) 53 Cal.3d 37, 41, 45 [disbarment with no prior record for committing multiple acts of moral turpitude and dishonesty, including pattern of abuse of judicial officers and court system combined with failure to appreciate nature of unethical conduct]; *In the Matter of Gordon* (Review Dept. 2018) 5 Cal. State Bar Ct. Rptr. 610, 630

[105] "The degree of sanction depends on the magnitude of the misconduct; the extent to which the misconduct harmed or misled the victim, which may include the adjudicator; the impact on the administration of justice, if any; and the extent to which the misconduct related to the practice of law." (Std. 2.11.)

[respondent disbarred pursuant to standard 2.11 with no prior record of discipline due to extent of home loan modification scheme and "egregious aggravation"]; *In the Matter of Lucero*, *supra*, 6 Cal. State Bar Ct. Rptr. __ [attorney disbarred with no prior record of discipline due to multiple misrepresentations to clients and OCTC, misappropriation of less than $3,000, failure to repay funds, and lack of candor at trial].) While each of these cases are factually unique, their underlying themes of dishonesty and indifference resonate here.

We also examined the pre-standards case of *Segretti v. State Bar* (1976) 15 Cal.3d 878, where a two-year actual suspension was imposed following a determination that underlying federal criminal convictions amounted to moral turpitude due to Segretti's repeated acts of "deceit designed to subvert the free electoral process" during his time working on former President Richard Nixon's 1972 reelection campaign. (*Id*. at p. 887.) We agree with the hearing judge that *Segretti* provides guidance and, given the circumstances, guides us to a recommendation greater than two years' actual suspension. As discussed by the judge, while both Eastman's and Segretti's conduct involves dishonesty, Segretti recognized the wrongfulness of his misconduct. Eastman here clearly does not. Moreover, although the *Segretti* matter is a pre-standards case, Segretti's case did not involve the amount of aggravation present here, and we note that the overall weight of Eastman's aggravation is greater than his mitigation. Based upon the totality of the evidence and guided by the cases discussed, the unique facts of this case lead to the conclusion that disbarment is appropriate and necessary.

Eastman always had a ready excuse for his failure to verify the work of others. He frequently testified he was "busy" or "drinking from a fire hose." We do not find this a reason for a lesser sanction. An attorney's workload does not mitigate against a culpability finding. (*Blair v. State Bar* (1989) 49 Cal.3d 762, 780 [press of business not a mitigating factor]; *Carter v. State Bar* (1988) 44 Cal.3d 1091, 1101.) In addition, Eastman applied little intellectual rigor

to the task of understanding election administration and did not seek out true experts to guide his analysis. The trial record has numerous examples of Eastman simply accepting information and material relevant to his election analysis as it was handed to him, but he turned a blind eye to information that did not support his goal of assisting President Trump. Eastman, and many of those providing him with inaccurate information, had a generalized and pervasive lack of understanding of how each state runs its elections and how to access and interpret relevant data. In fact, he ignored or otherwise denigrated election officials in both political parties who, from the record, managed their elections in accordance with the law and under the most difficult of circumstances—he paid their work no mind.

After reviewing all the testimony and relevant exhibits, the record shows Eastman vainly searched for evidence that would support his predetermined conclusion—whether it was the scope of vice-presidential authority under the Twelfth Amendment or whether the election resulted in former President Biden's victory because of outcome-determinative illegality or fraud. As for one example, Eastman gave no thought to the import of the Ellipse speech he made before hundreds of thousands of spectators. At trial Eastman asserted, "I never said anything about trusting or not trusting the outcome of the election. I said we had seen evidence of illegality and fraud that warranted further investigation because the election had been certified in the face of illegality." This assertion is simply untrue—he had no evidence of illegality and he offered his unsupported allegations as established fact. He fails to accept his role in making wholly unsubstantiated and untrue statements to the crowd about the illegality of the election. In defense of his false statements at the Ellipse, Eastman asserts on review that "just because governmental agencies made statements does not mean that [he] had to blindly accept them." This illustrates the upside-down nature of Eastman's approach not only to his Ellipse speech but to all the counts where misconduct was found.

Eastman rejected actual experts while he consistently and blindly accepted the ideas of non-experts. Eastman was willing to accept and repeat any theory presented to him, so long as it was consistent with his desire to see President Trump declared the winner of the 2020 presidential election. For example, Eastman was not able to cogently explain Ramsland and Oltmans's phantom ballot theory at trial. Further, Eastman showed a startling lack of intellectual discernment when faced with opposing fact or opinion, especially given his legal career. On review, there was at least one instance where Eastman mischaracterized his own trial testimony in order to avoid a culpability determination. This conduct is even more troubling when compared to his background as a former U.S. Supreme Court law clerk, a professor of law, a law school dean, and a constitutional scholar.

Attorneys must remember they are "officers of the court, and, while it is their duty to protect and defend the interests of their clients, the obligation is equally imperative to aid the court in avoiding error and in determining the cause in accordance with justice and the established rules of practice." (*Furlong v. White* (1921) 51 Cal.App.265, 271.) Eastman lost sight of this fundamental requirement. Eastman misled two courts, including our nation's highest court. This conduct alone warrants serious discipline. (*In the Matter of Downey* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 151, 157 [misleading statements are troubling and oppose fundamental rules of ethics—common honesty—without which profession is "worse than valueless" in administration of justice].)

As we noted in counts two and four, "Honesty in dealing with the courts is of paramount importance, and misleading a judge is, regardless of motives, a serious offense." (*Paine v. State Bar*, *supra*, 14 Cal.2d at p. 154.) In essence, the way Eastman conducted himself during the course of his representation of President Trump had a negative impact on the judicial system and the administration of justice, which we have noted *ante*. The waste of precious judicial resources

on cases premised on false narratives, especially when an attorney knew the allegations were false, is a harm that must be considered even if it does not equate to aggravation. (Cf. *In the Matter of Reiss*, *supra*, 5 Cal. State Bar Ct. Rptr. at p. 220 [wasting judicial time and resources is harmful to administration of justice].) There is a distinction with a difference between hard-fought cases premised on actual facts and cutting-edge legal theories and those cases pushed forward based on, at best, mere speculation and a disingenuous take on the law. Eastman unfortunately took the latter path instead of the former. We also are unable to ignore Eastman's generalized failure to be truthful. Whether in the courts, to former Vice-President Pence and his staff, or to the public, Eastman consistently failed to be honest.

We next examine the wide-ranging impact of Eastman's conduct. Although there was no clear and convincing evidence that Eastman's January 6, 2021 statements had a causal connection to the resulting riots, Eastman's misconduct did cause harm. He used his skills to push a false narrative in the courtroom, in the White House, and in the media. That false narrative resulted in the undermining of our country's electoral process, reduced faith in election professionals, and lessened respect for the courts of this land. To this day, Eastman claims nefarious forces behind former President Biden's 2020 electoral win. Eastman even stands apart from his own expert, Professor Yoo, about former Vice-President Pence's authority under the facts of the 2020 election. Further, Eastman is unable to accept post-election court decisions in favor of the company behind Dominion voting machines.

Eastman argues that disbarment is not warranted if we determine he was culpable of the charged offenses. At oral argument, Eastman requested that if he was found culpable, any suspension should be no longer than the time period between his April 2024 transfer to involuntary inactive status and the issuance of this opinion. We find a 15-month suspension inadequate considering the record we have reviewed. Moreover, when an attorney fails to

understand or appreciate present misconduct, it causes concern that the attorney will commit other ethical violations in the future. (See *In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366, 380-381 [failure to understand culpability causes concern regarding handling of future cases].) Eastman's considerable indifference weighs heavily in our disbarment recommendation as we are concerned about future misconduct. In sum, Eastman's misconduct from November 2020 to the present as reflected in the record warrants a recommendation of disbarment.

VII. RECOMMENDATIONS

We recommend that John Charles Eastman, State Bar Number 193726, be disbarred from the practice of law in California and that Eastman's name be stricken from the roll of attorneys.

A. CALIFORNIA RULES OF COURT, RULE 9.20

We further recommend that Eastman be ordered to comply with California Rules of Court, rule 9.20 and to perform the acts specified in (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the date the Supreme Court order imposing discipline in this matter is filed.[106] (*Athearn v. State Bar* (1982) 32 Cal.3d 38, 45 [operative date for identification of clients being represented in pending matters and others to be notified is filing date of Supreme Court order imposing discipline].)

[106] Eastman is required to file a rule 9.20(c) affidavit even if Eastman has no clients to notify on the date the Supreme Court files its order in this proceeding. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.) In addition to being punished as a crime or contempt, an attorney's failure to comply with rule 9.20 is, inter alia, cause for denial of an application for reinstatement after disbarment. (Cal. Rules of Court, rule 9.20(d).) The court-approved Rule 9.20 Compliance Declaration form is available on the State Bar Court website at <https://www.statebarcourt.ca.gov/Forms>.

B. MONETARY SANCTIONS

We further recommend that Eastman be ordered to pay monetary sanctions to the State Bar of California Client Security Fund in the amount of $5,000 in accordance with Business and Professions Code section 6086.13 and rule 5.137 of the Rules of Procedure of the State Bar.[107] Monetary sanctions are enforceable as a money judgment and may be collected by the State Bar through any means permitted by law. Monetary sanctions must be paid in full as a condition of reinstatement, unless time for payment is extended pursuant to rule 5.137 of the Rules of Procedure of the State Bar.

C. COSTS

We further recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment, and may be collected by the State Bar through any means permitted by law. Unless the time for payment of discipline costs is extended pursuant to subdivision (c) of section 6086.10, costs assessed against an attorney who is disbarred must be paid as a condition of applying for reinstatement.

D. MONETARY REQUIREMENTS

Any monetary requirements imposed in this matter shall be considered satisfied or waived when authorized by applicable law or orders of any court.

---

[107] The hearing judge recommended $10,000 in monetary sanctions based on the "gravity of Eastman's misconduct" that involved multiple acts of moral turpitude, misleading courts, his efforts to interfere with the 2021 electoral count, and the substantial aggravation involved. Eastman does not challenge the sanctions amount on review. Although rule 5.137(E)(2)(a) permits imposition of sanctions for each count of culpability and we agree that Eastman both misled the courts and endeavored to impede the counting of electoral votes, we do not find that there is a need to deviate from the maximum $5,000 sanction for disbarment. (See rule 5.137(E)(3).) Considering the totality of the facts and circumstances of this matter, we find that monetary sanctions of $5,000 is appropriate. (Rule 5.137.)

VIII. INVOLUNTARY INACTIVE ENROLLMENT

The hearing judge's order that Eastman be transferred to involuntary inactive status pursuant to Business and Professions Code section 6007, subdivision (c)(4), effective March 30, 2024, will remain in effect pending the consideration and decision of the Supreme Court on this recommendation.

McGILL, J.

I CONCUR:

HONN, P. J.

RIBAS, J.

Concurring Opinion of RIBAS, J.

I agree with the conclusions of culpability and the recommended discipline for John Eastman's misconduct. I write separately to explain that I find the record contains clear and convincing evidence of significant harm as a factor in aggravation, under standard 1.5(j), for Eastman's conspiracy with the President and others to coerce the Vice-President to reject electoral votes or delay the electoral count and for his acts of moral turpitude based on the numerous false statements and unsupported legal theories he presented.

The hearing judge found there was significant harm to the public evidenced by distrust of democratic institutions and the electoral process, but concluded there was no evidence that Eastman caused this harm. We have not disturbed the judge's finding that the harm identified occurred, and the record contains abundant evidence of such harm and other harm identified by the State Bar. That witnesses did not identify Eastman by name to attribute the cause of its distrust is beside the point when Eastman was operating as a primary architect of a strategy to change an election outcome by, in part, exerting public pressure on government officials. To accomplish this, Eastman became a high-profile disseminator of misinformation. The purpose

was to sow doubt in the public's mind about the integrity of the election and distrust in democratic institutions. That public doubt and distrust, in fact, occurred is distinct from Eastman's culpability and is a significant harm that aggravates his misconduct.

As a member of the President's legal team and, specifically, as the President's "constitutional lawyer," Eastman offered credibility to the unsupported claims he presented in various court filings.[108] The public was aware of these as demonstrated by a December 28, 2020 complaint to Kathy Boockvar, Secretary of the Commonwealth of Pennsylvania: "The *Trump legal team* has produced mountains of evidence that indicates election fraud and voter fraud existed on a massive scale. . . . Unfortunately, nobody has refuted any of the actual evidence in court under oath, as the *Trump legal team* has been unable to get to the evidentiary phase of the lawsuits."[109] This individual pointedly told Boockvar: "'We the People' are comprised of 70-80 million patriots. . . . [W]e will be closely watching all of our elected officials, holding every corrupt official accountable. You still have time to get on the right side of the situation: you have the choice to either be a hero or a traitor." There were many more complaints directed to Boockvar that repeated the false assertions put forth by Eastman in his court submissions. As Pennsylvania's Deputy Secretary for Elections and Commissions testified, the misinformation expressed in the messages was concerning, partially because voters were losing confidence in the electoral process.

Other evidence in the record that identifies Eastman collectively as a cause of the public distrust in the integrity of the election is a press conference by Gabriel Sterling, who worked with Georgia's Office of the Secretary of State and was involved with the election in Georgia. In

[108] As early as November 9, 2020, Eastman was informing people he was a "member of the [President's] legal team."

[109] Italics contained in this and other quotes in the concurrence were added.

addressing voter discontent on the eve of the January 5, 2021 Georgia runoff elections for the U.S. Senate, Sterling first noted that "there are *people in positions of authority and respect* who have said [people's] votes didn't count, and it's not true[.]" Sterling then described in detail a video documenting election workers' activity in the State Farm Arena during the 2020 presidential election showing nothing illegal occurred and said, "The *President's legal team* had the entire tape. They watched the entire tape, and then from our point of view intentionally misled the State Senate, voters, and the people of The United States about this. It was intentional. It was obvious." Specifically addressing potential changes in voter turnout, Sterling said this was "[i]n large part driven by the continuing misinformation and disinformation concerning the value of people's votes in this state," as he sought to restore the public's confidence that every vote would be counted.

And Georgia Secretary of State Brad Raffensperger was compelled to write a ten-page letter, dated January 6, 2021, to members of Congress who publicly stated they would object to counting the electors presented by Georgia. As with Sterling, Raffensperger did this to refute the "false claims" raised by "the President *and his allies*," which were causing doubt about the validity of the presidential election in Georgia.

The public knew that Eastman was an important ally of the President, a member of the President's legal team, and a person of authority and respect, because on January 2, 2021, Eastman was presented by Steve Bannon on the broadcast of Bannon's War Room as "[o]ne of the *great thinkers about the Constitution*," "the *President's constitutional lawyer*," and "the *lead sled dog*." There, Eastman's intent to exert public pressure as part of his strategy was made plain when, after reasserting lies about massive fraud occurring in the election, he told listeners that they should put "rolling thunder pressure" on state legislators to "either decertify the existing slate of electors . . . or certify the correct slate of electors . . . ." If this was not sufficient

amplification of falsehoods made to the public while his stature was promoted, Eastman's Ellipse speech made four days later would be.

At the January 6 rally at the Ellipse, before hundreds of thousands of attendees, Rudy Giuliani introduced "Professor Eastman" as "*one of the preeminent constitutional scholars* in the country" to explain how it was "perfectly legal" for the Vice-President to determine "the validity of these crooked ballots or he can send them back to the legislatures[,]" and to explain how cheating occurred in the election. Following Eastman's remarks—in which Eastman reasserted lies about fraud occurring during the election and reiterated a baseless unilateral authority of the Vice-President—the President spoke, calling Eastman "*one of the most brilliant lawyers in the country*" before repeating and elaborating on the falsehoods, as he encouraged the crowd to take action.[110] These references to Eastman's prestige clearly portrayed to the public an academic heft and credibility to the fabrications asserted by Eastman, Giuliani, and the President and a legitimacy to the crowd's breach of the Capitol. By this point, Eastman had near celebrity status, as evidenced by people approaching him after his speech to introduce themselves and take selfies with him. This status has persisted, as Eastman stated in a 2023 interview with Board Chair of the Claremont Institute Tom Klingenstein: "I'll go into places where people recognize me and give me a standing ovation."

We know that the harm to the public and threat to the democratic process was partially caused by Eastman's actions, because the Vice-President's attorney and Deputy Assistant to the

[110] While we found Eastman's misrepresentations were not proven to be made with the *intent* to provoke the crowd to assault and breach the Capitol, resulting in Eastman escaping culpability under count eleven, the fact remains that significant harm did occur—at a minimum, the public distrusting the legitimacy of the election and government institutions, and at most, the public trying to thwart the democratic process through violence. Additionally, Eastman's remarks at the Ellipse were part of the factual allegations supporting counts one and seven of the Notice of Disciplinary Charges for which we found him culpable and for which we can consider any resulting significant harm.

President, Greg Jacob, who was very familiar with Eastman's activities and influence on the President, was a witness to it and directly attributed the harm to Eastman. He did so first in an email sent to Eastman while the Capitol was under siege on January 6, and then again an hour later, stating, in part, that it was "gravely irresponsible for you to entice the President with an academic theory that had no legal viability . . . . The knowing amplification of that theory through numerous surrogates, whipping large numbers of people into a frenzy over something with no chance of ever attaining legal force through actual process of law, has led us to where we are."

That others may also be responsible for this significant harm does not diminish Eastman's contribution. (See *Spindell v. State Bar* (1975) 13 Cal.3d 253, 260 [immaterial that harm was partly attributed to attorney's secretary].) Eastman was not simply one of many voices. As a prominent figure closely associated with the President, Eastman was a leader and influencer in a collective effort that included the dissemination of falsehoods to overturn the outcome of the presidential election. This resulted in a level of distrust of the electoral process that empowered members of the public to attempt to sabotage a pillar of democracy—the peaceful transfer of power. Recognition under standard 1.5(j) of aggravation for significant harm to the public interest caused by Eastman's misconduct is warranted.

No. SBC-23-O-30029

In the Matter of
JOHN CHARLES EASTMAN

Hearing Judge
Hon. Yvette D. Roland

Counsel for the Parties

For Office of Chief Trial Counsel:	Danielle A. Lee Duncan C. Carling Rachel S. Grunberg Office of Chief Trial Counsel The State Bar of California 180 Howard St. San Francisco, CA 94105
For Respondent:	Randall A. Miller Zachary Mayer Jeanette Chu Miller Law Associates, APC 411 S. Hewitt St. Los Angeles, CA 90013

EXHIBIT 17

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

DONALD J. TRUMP, in his capacity as a Candidate for President, DONALD J. TRUMP FOR PRESIDENT, INC., and DAVID J. SHAFER, in his capacity as a Registered Voter and Presidential Elector pledged to Donald Trump for President, Petitioners, v. **BRAD RAFFENSPERGER, in his official capacity as Secretary of Georgia, et al.,** Respondents.	**CIVIL ACTION FILE NO.:** 2020CV343255

RESPONDENT ERICA HAMILTON'S MOTION FOR ATTORNEYS' FEES PURSUANT TO O.C.G.A. § 9-15-14

COMES NOW, by special appearance of counsel, Respondent Erica Hamilton in her official capacity as Director of Voter Registration and Elections for DeKalb County ("Hamilton") and files this motion for an award of attorneys' fees and expenses of court pursuant to O.C.G.A. § 9-15-14. On or around December 4, 2020, Petitioners Donald J. Trump, Donald J. Trump for President, Inc., and David J. Shafer ("Petitioners") filed suit contesting the results of the November 3, 2020 presidential election and alleging violations of the Georgia Constitution against the members of the State Election Board, the Secretary of State and 15 county election supervisors.[1] The Petition, which is one of seven lawsuits challenging Georgia's presidential election results[2]

[1] Verified Petition to Contest Georgia's Presidential Election Results for Violations, of the Constitution and Laws of the State of Georgia, and Request for Emergency Declaratory and Injunctive Relief, filed on or around December 4, 2021 (the "Petition").
[2] See Motion for Attorneys' Fees Pursuant to O.C.G.A. § 9-15-14, n. 1, filed by Respondent Janine Eveler on February 22, 2021.

and among over 40 lawsuits filed nationwide,[3] repeats unsubstantiated and frivolous claims of violations of state laws and regulations related to voter registration, absentee ballot processing, signature matching, and improper limits on the public and election monitors during the tabulation of votes and the recount. Further, Petitioners named Respondent Hamilton and 14 other county election supervisors as defendants and continued to pursue this litigation after the election contest became moot, all without legal justification. Accordingly, Respondent Hamilton petitions this Court pursuant to O.C.G.A. § 9-15-14 for an award of reasonable attorneys' fees and costs in her defense of this litigation. Specifically, Respondent Hamilton seeks a mandatory award of reasonable attorneys' fees under O.C.G.A. § 9-15-14(a) as there was a complete absence of justiciable law or fact that would allow this Court to accept Petitioners' claims against Respondent Hamilton. Further, this Court has the authority to award attorneys' fees pursuant to O.C.G.A. § 9-15-14(b) in this action, because Petitioners asserted claims without substantial justification and their conduct indicates that the litigation was brought for the purpose of harassment.

In support of her Motion for Attorneys' Fees Pursuant to O.C.G.A. § 9-15-14, Respondent Hamilton joins in and incorporates by reference the facts and arguments set forth in the Motion for Attorneys' Fees Pursuant to O.C.G.A. § 9-15-14 filed by Respondent Janine Eveler on February 22, 2021 as if fully stated herein.

Similar to Respondent Eveler, Petitioners brought this suit against Respondent Hamilton with no legal basis. Specifically, the Election Code authorizes four types of defendants in an election contest: (1) a person whose nomination or election is contested, (2) the person whose eligibility to seek nomination or office is contested, (3) the election superintendent who conducted the contested primary or election, and (4) the public officer who declared the votes for and against

[3] https://www.businessinsider.com/trump-campaign-lawsuits-election-results-2020-11

any question submitted to electors at an election. O.C.G.A. § 21-2-500(2). It is undisputed that Respondent Hamilton does not fall under any of these categories of defendants[4] as (1) she was not a candidate in any November 2020 election, (2) did not seek eligibility to run for office in any November 2020, (3) is not a member of DeKalb County's Board of Registration and Elections, who serves as the election superintendent in DeKalb County,[5] and (4) did not act as the public officer declaring the votes for a question submitted to the electors. Even when Petitioners attempted to add the members of the DeKalb County Board of Registration and Elections on December 9, 2020,[6] Petitioners failed to dismiss Respondent Hamilton from this action. See Motion for Leave to Amend Verified Petition to Contest Georgia's Presidential Election Results for Violations of the Constitution and Laws of the State of Georgia, and Request for Emergency Declaratory and Injunctive Relief and to Add Parties, filed December 9, 2020.

The DeKalb County Law Department expended significant time defending Respondent Hamilton as a direct consequence Petitioners' unsubstantiated and harassing claims in this litigation, which counsel estimates, very conservatively, to be valued at $6,104.50. In support of this motion, counsel has attached affidavits from Irene B. Vander Els and Shelley D. Momo as Exhibits 1 and 2, respectively.

In conclusion and for the reasons set forth herein, Respondent Hamilton respectfully requests that the Court find her request for attorneys' fees in her defense reasonable and necessary and attorneys' fees be granted in the amount of $6,104.50 against Petitioners.

[4] Even if Respondent Hamilton were a proper party, service was not attempted on her until January 29, 2021, almost two months after this litigation began and over three weeks after Plaintiffs voluntarily dismissed this action. See Affidavit of Service, filed on February 1, 2021.
[5] Ga. Laws 2003, p. 4200, Act #236 ("There shall be a DeKalb County Board of Registration and Elections which shall have jurisdiction over the conduct of primaries and elections and the registration of electors in such county…").
[6] None of the members of the DeKalb County Board of Registration and Elections were ever served in this action.

Respectfully submitted this 22nd day of February, 2021.

LAURA K. JOHNSON
Deputy County Attorney
Georgia Bar No. 747190

BENNETT D. BRYAN
Senior Assistant County Attorney
Georgia Bar No. 157099

IRENE B. VANDER ELS
Senior Assistant County Attorney
Georgia Bar No. 033663

/s/ Shelley D. Momo
SHELLEY D. MOMO
Senior Assistant County Attorney
Georgia Bar No. 239608

Counsel for Respondent Erica Hamilton, in her official capacity as Director of DeKalb County Voter Registration and Elections

PLEASE ADDRESS ALL
COMMUNICATIONS TO:

Shelley D. Momo
DEKALB COUNTY LAW DEPARTMENT
1300 Commerce Drive, 5th Floor
Decatur, Georgia 30030
Telephone: (404) 371-3011
Facsimile: (404) 371-302
sdmomo@dekalbcountyga.gov

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

DONALD J. TRUMP, in his capacity as a Candidate for President, DONALD J. TRUMP FOR PRESIDENT, INC., and DAVID J. SHAFER, in his capacity as a Registered Voter and Presidential Elector pledged to Donald Trump for President, Petitioners, v. **BRAD RAFFENSPERGER, in his official capacity as Secretary of Georgia, et al.,** Respondents.	**CIVIL ACTION FILE NO.:** 2020CV343255

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed in the above-styled action the foregoing **RESPONDENT ERICA HAMILTON'S MOTION FOR ATTORNEYS' FEES PURSUANT TO O.C.G.A. § 9-15-14** with the Clerk of Court using the Odyssey eFileGA system, which will automatically send e-mail notification of such filing to all parties of record.

Respectfully submitted this 22nd day of February, 2021.

/s/ Shelley D. Momo
SHELLEY D. MOMO
SENIOR ASSISTANT COUNTY ATTORNEY
Georgia Bar No. 239608

PERSONS SERVED:

Ray S. Smith, III
SMITH & LISS, LLC
Five Concourse Parkway
Suite 2600
Atlanta, GA 30328

Kurt R. Hilbert
THE HILBERT LAW FIRM, LLC
205 Norcross Street
Roswell, GA 30075

Mark C. Post
MARK POST LAW, LLC
3 Bradley Park Court
Suite F
Columbus, GA 31904

Halsey G. Knapp, Jr.
Joyce Gist Lews
Susan P. Coppedge
Adam M. Sparks
KREVOLIN AND HORST, LLC
One Atlantic Center
1201 W. Peachtree Street, NW
Suite 3250
Atlanta, GA 30309

Kevin J. Hamilton
Stephanie R. Holstein
Thomas J. Tobin
Heath L. Hyatt
PERKINS COIE LLP
1201 Third Avenue
Suite 4900
Seattle, WA 98101

Marc E. Elias
Amanda R. Callais
Jacob D. Shelly
PERKINS COIE LLP
700 Thirteenth Street, NW
Suite 800
Washington, DC 20005-3960

Jessica R. Frenkel
PERKINS COIE LLP
1900 Sixteenth Street
Suite 1400
Denver, CO 80202-5255

William V. Custer
Jennifer B. Dempsey

Christian J. Bromley
BRYAN CAVE LEIGHTON PAISNER LLP
One Atlantic Center
Fourteenth Floor
1201 W. Peachtree Street, NW
Atlanta, GA 30309

Kristen Clarke
Jon Greenbaum
Ezra Rosenberg
Julie M. Houk
John Powers
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1500 K Street, NW
Suite 900
Washington, DC 20005

Todd A. Harding
MADDOX & HARDING, LLC
113 E. Solomon Street
Griffin, GA 30223

Erick G. Kaardal
MOHRMAN, KAARDAL & ERICKSON, P.A.
150 South Fifth Street
Suite 3100
Minneapolis, MN 55402

Paul Kunst
PAUL C. KUNST PC
941 Thomaston Street
Barnesville, GA 30204

Patrick D. Jaugstetter
JARRARD & DAVIS, LLP
222 Webb Street
Cumming, GA 30040

Daniel W. White
Gregg E. Litchfield
HAYNIE, LITCHFIELD & WHITE, P.C.
222 Washington Avenue
Marietta, GA 30060

Anne S. Brumbaugh
LAW OFFICE OF ANN S. BRUMBAUGH, LLC

309 Sycamore Street
Decatur, GA 30030

Melanie F. Wilson
Tuwanda Rush Williams
GWINNETT COUNTY DEPARTMENT OF LAW
75 Langley Drive
Lawrenceville, GA 30046

John R. Hancock
A. Ali Sabzevari
FREEMAN MATHIS & GARY LLP
661 Forest Parkway
Suite E
Forest Park, GA 30297

Kaye Woodard Burwell
Cheryl Ringer
David R. Lowman
OFFICE OF THE COUNTY ATTORNEY
141 Pryor Street, S.W.
Suite 4038
Atlanta, GA 30303

J. Jayson Phillips
TALLEY, RICHARDSON, & CABLE, P.A.
367 West Memorial Drive
P.O. Box 197
Dallas, GA 30132

Andrea J. Grant
LAW OFFICE OF ANDREA GRANT, LLC
60 Bowers Street
Royston, GA 30662

Christopher M. Carr
Bryan K. Webb
Russell D. Willard
Charlene S. McGowan
OFFICE OF THE ATTORNEY GENERAL
Georgia Department of Law
40 Capitol Square SW
Atlanta, Georgia 30334

Christopher S. Anulewicz
James L. Hollis

Jonathan R. DeLuca
Jena C. Lombard
Patrick N. Silloway
BALCH & BINGHAM LLP
30 Ivan Allen Jr. Blvd. N.W.
Suite 700
Atlanta, GA 30308

EXHIBIT 1

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

DONALD J. TRUMP, in his capacity as a Candidate for President, DONALD J. TRUMP FOR PRESIDENT, INC., and DAVID J. SHAFER, in his capacity as a Registered Voter and Presidential Elector pledged to Donald Trump for President, Plaintiffs, v. **BRAD RAFFENSPERGER, in his official capacity as Secretary of Georgia, et al.,** Defendants.	**CIVIL ACTION FILE NO.:** 2020CV343255

AFFIDAVIT OF IRENE B. VANDER ELS

STATE OF GEORGIA

COUNTY OF DEKALB

Personally appeared before me, the undersigned officer duly authorized by law to administer oaths, IRENE B. VANDER ELS, who, after being duly sworn, stated on oath his personal knowledge as follows:

1.

My name is Irene B. Vander Els. I am over the age of 21 and am in all ways competent to make this affidavit. I have personal knowledge of the facts stated herein and know them to be true.

2.

I am counsel of record for the DeKalb County Board of Registration and Elections ("DeKalb BRE and Erica Hamilton in her role as Director of the DeKalb County Department of Voter Registration and Elections. I am a Senior Assistant County Attorney in the DeKalb County Law Department.

3.

I have represented the DeKalb BRE and Erica Hamilton in all matters related to the above-styled action and I have represented clients in similar actions before the other courts of this state. I am familiar with this type of case and with the level of expertise required by attorneys in such a case.

4.

I have calculated attorneys' fees in this action at $145.00 per hour, which is more than reasonable (less than market rate) for an attorney in this market with over 18 years of experience practicing law.

5.

Using the rate of $145.00 per hour, representation of Erica Hamilton since the origination of this action has cost $3,422.00. A log of time spent on this matter is attached hereto as Exhibit "A".

This 22nd day of February, 2021.

Irene B. Vander Els
Georgia Bar No. 033663

Sworn to and subscribed before
me this 22nd day of February, 2021.

Notary Public

AMANDA MINTON
NOTARY PUBLIC
My Commission Expires
10-29-2023
DEKALB COUNTY, GEORGIA

Exhibit A

Date	Time spent (in hours)	Work performed
12/7/2020	1.5	Review and analysis of petition and exhibits; conference with co-counsel regarding analysis of claims and strategy for response
12/8/2020	2.0	Communicate with clients regarding new litigation; review and analysis of motions to intervene; research regarding election contest procedure
12/9/2020	2.0	Review and analysis of pleadings; research regarding potential defenses to election contest; communicate with clients regarding factual allegations; review and analysis of client documents
12/10/2020	1.0	Review and analysis of correspondence from petitioners' counsel regarding document requests; review and analysis of pleadings
12/11/2020	.2	Exchange correspondence with petitioners' counsel regarding service copies of pleadings
12/12/2020	1.8	Review and analysis of petition for certiorari; review and analysis of correspondence from county counsel regarding petition for certiorari; communicate with clients regarding petition for certiorari
12/14/2020	2.0	Draft correspondence to petitioners' counsel regarding document requests; draft correspondence to clients regarding document requests; research regarding potential defenses to election contest
12/15/2020	1.0	Review and analysis of pleadings, including State Defendants' motions to dismiss and to exclude expert evidence
12/18/2020	.8	Review and analysis of pleadings, including proposed intervenor's motion for judgment on pleadings; research regarding potential defenses to election contest
12/22/2020	.8	Review and analysis of

		pleadings, including petitioners' objection to motion for judgment on pleadings and State Defendants' supplemental motion to dismiss
12/28/2020	1.0	Review and analysis of pleadings, including response to petitioners' second request for emergency declaratory judgment and injunctive relief and supplemental motion to dismiss for failure to perfect service
12/29/2020	1.5	Review and analysis of pleadings, including petitioners' response in opposition to motion to dismiss and various filings regarding request for appointment of judge
1/4/2021	2.5	Review and analysis of pleadings, including filings relating to motions for admission pro hac vice; communicate with clients regarding status of litigation and preparation for hearing; draft answer
1/5/2021	2.0	Strategic planning in preparation for hearing; draft answer
1/6/21	2.5	Draft answer; review and analysis of correspondence from court regarding hearing; prepare for hearing
1/7/21	2.0	Strategic planning with co-defendants' counsel in preparation for hearing; draft answer; telephone call with petitioners' counsel regarding potential dismissal; communicate with co-defendants' counsel regarding potential dismissal; review and analysis of correspondence from petitioners' counsel regarding dismissal
TOTAL	23.6 hours	

EXHIBIT 2

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

DONALD J. TRUMP, in his capacity as a Candidate for President, DONALD J. TRUMP FOR PRESIDENT, INC., and DAVID J. SHAFER, in his capacity as a Registered Voter and Presidential Elector pledged to Donald Trump for President,	
Petitioners,	**CIVIL ACTION FILE NO.:** 2020CV343255
v.	
BRAD RAFFENSPERGER, in his official capacity as Secretary of Georgia, et al.,	
Respondents.	

AFFIDAVIT OF SHELLEY D. MOMO

STATE OF GEORGIA
COUNTY OF DEKALB

Personally appeared before me, the undersigned officer duly authorized by law to administer oaths, SHELLEY D. MOMO, who, after being duly sworn, stated on oath his personal knowledge as follows:

1.

My name is Shelley D. Momo. I am over the age of 21 and am in all ways competent to make this affidavit. I have personal knowledge of the facts stated herein and know them to be true.

2.

I am counsel of record for the DeKalb County Board of Registration and Elections ("DeKalb BRE") and Erica Hamilton, in her role as Director of the DeKalb County Voter Registration and Elections Department. I am a Senior Assistant County Attorney for DeKalb County.

3.

I have represented the DeKalb BRE and Erica Hamilton in all matters related to the above-styled action and I have represented the DeKalb BRE in similar actions before this Court and before the other courts of this state. I am familiar with this type of case and with the level of expertise required by attorneys in such a case.

4.

I have calculated attorneys' fees in this action at $145.00 per hour, which is more than reasonable (less than market rate) for an attorney in this market with over 12 years of experience practicing law.

5.

Using the rate of $145.00 per hour, representation of Erica Hamilton since the origination of this action has cost $2,682.50. A log of time spent on this matter is attached hereto as Exhibit "A".

This 22nd day of February, 2021.

Shelley D. Momo

Shelley D. Momo
Senior Assistant County Attorney
Georgia Bar No. 239608

DEKALB COUNTY LAW DEPARTMENT
1300 Commerce Drive, 5th Floor
Decatur, Georgia 30030
Telephone: (404) 371-3011
Facsimile: (404) 371-302
sdmomo@dekalbcountyga.gov

Sworn to and subscribed before
me this 22nd day of February, 2021.

Notary Public

Exhibit A

Date	Time spent (in hours)	Work performed
12/7/2020	2.5	Review of petition for election challenge, including exhibits
12/8/2020	.5	Correspondence and phone call with client regarding allegations made in petition and exhibits specific to DeKalb County voter registration and election department
12/9/2020	.3	Phone call to discuss strategy with co-counsel
12/9/2020	.2	Continued correspondence with client regarding allegations made in petition and exhibits specific to DeKalb County voter registration and election department
12/9/2020	2.1	Research election contest requirements and claims in the petition
12/11/2020	1.5	Review pleadings filed in case sent from opposing counsel
12/11/2020	.2	Continued correspondence with client regarding allegations made in petition and exhibits specific to DeKalb County voter registration and election department
12/11/2020	1	Review Emergency petition for cert filed by plaintiffs in the Supreme Court of Georgia
12/14/2020	2	Review of pleadings requesting special administrative judge; continued research for defense and motion to dismiss
12/17/2020	1.2	Review pleadings filed in litigation by state defendants and intervenors
12/30/2020	2	Research in preparation for and draft motion to dismiss litigation on behalf of client
1/4/2021	2.5	Continued research in preparation for and draft motion to dismiss litigation on behalf of client

1/5/2021	2.5	Continued research in preparation for and draft motion to dismiss litigation on behalf of client
TOTAL	18.5 hours	

EXHIBIT 18

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

DONALD J. TRUMP, in his capacity as a Candidate for President, DONALD J. TRUMP FOR PRESIDENT, INC., and DAVID J. SHAFER, in his capacity as a Registered Voter and Presidential Elector pledged to Donald Trump for President, Petitioners, v. **BRAD RAFFENSPERGER, in his official capacity as Secretary of Georgia, et al.,** Respondents.	**CIVIL ACTION FILE NO.:** 2020CV343255

RESPONDENT ERICA HAMILTON'S NOTICE OF WITHDRAWAL OF HER MOTION FOR ATTORNEYS' FEES PURSUANT TO O.C.G.A. § 9-15-14

COMES NOW, counsel for Respondent Erica Hamilton in her official capacity as Director of Voter Registration and Elections for DeKalb County ("Ms. Hamilton") and gives this Court notice of withdrawal of Ms. Hamilton's Motion for Attorneys' fees. Said motion is hereby withdrawn because Plaintiffs, through counsel, have provided payment for the full amount of attorneys' fees requested in Ms. Hamilton's motion. As all relief requested in the motion has been provided, the motion is withdrawn due to mootness.

Respectfully submitted this 21st day of June, 2021.

LAURA K. JOHNSON
Deputy County Attorney
Georgia Bar No. 747190

BENNETT D. BRYAN
Senior Assistant County Attorney

Georgia Bar No. 157099

IRENE B. VANDER ELS
Senior Assistant County Attorney
Georgia Bar No. 033663

/s/ Shelley D. Momo
SHELLEY D. MOMO
Senior Assistant County Attorney
Georgia Bar No. 239608

Counsel for Respondent Erica Hamilton, in her official capacity as Director of DeKalb County Voter Registration and Elections

PLEASE ADDRESS ALL
COMMUNICATIONS TO:

Shelley D. Momo
DEKALB COUNTY LAW DEPARTMENT
1300 Commerce Drive, 5th Floor
Decatur, Georgia 30030
Telephone: (404) 371-3011
Facsimile: (404) 371-302
sdmomo@dekalbcountyga.gov

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

DONALD J. TRUMP, in his capacity as a Candidate for President, DONALD J. TRUMP FOR PRESIDENT, INC., and DAVID J. SHAFER, in his capacity as a Registered Voter and Presidential Elector pledged to Donald Trump for President, Plaintiffs, v. **BRAD RAFFENSPERGER, in his official capacity as Secretary of Georgia, et al.,** Defendants.	**CIVIL ACTION FILE NO.:** 2020CV343255

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed in the above-styled action the foregoing **RESPONDENT ERICA HAMILTON'S NOTICE OF WITHDRAWAL OF HER MOTION FOR ATTORNEYS' FEES** with the Clerk of Court using the Odyssey eFileGA system, which will automatically send e-mail notification of such filing to all parties of record.

Respectfully submitted this 21ST day of June, 2021.

/s/ Shelley D. Momo
SHELLEY D. MOMO
SENIOR ASSISTANT COUNTY ATTORNEY
Georgia Bar No. 239608

PERSONS SERVED:

Ambassador J. Randolph Evans
Squire Patton Boggs (U.S.) LLC
1230 Peachtree Street NE, Suite 1700
Atlanta, GA 30309

Chris Jackson

Lint Johnson
Virginia Harman
McRae, Smith, Peek, Harman and Monroe, LLP
111 Bridgepoint Plz Ste 300
Rome, GA 30161

Ray S. Smith, III
SMITH & LISS, LLC
Five Concourse Parkway
Suite 2600
Atlanta, GA 30328

Kurt R. Hilbert
THE HILBERT LAW FIRM, LLC
205 Norcross Street
Roswell, GA 30075

Mark C. Post
MARK POST LAW, LLC
3 Bradley Park Court
Suite F
Columbus, GA 31904

Halsey G. Knapp, Jr.
Joyce Gist Lews
Susan P. Coppedge
Adam M. Sparks
KREVOLIN AND HORST, LLC
One Atlantic Center
1201 W. Peachtree Street, NW
Suite 3250
Atlanta, GA 30309

Kevin J. Hamilton
Stephanie R. Holstein
Thomas J. Tobin
Heath L. Hyatt
PERKINS COIE LLP
1201 Third Avenue
Suite 4900
Seattle, WA 98101

Marc E. Elias
Amanda R. Callais
Jacob D. Shelly
PERKINS COIE LLP

700 Thirteenth Street, NW
Suite 800
Washington, DC 20005-3960

Jessica R. Frenkel
PERKINS COIE LLP
1900 Sixteenth Street
Suite 1400
Denver, CO 80202-5255

William V. Custer
Jennifer B. Dempsey
Christian J. Bromley
BRYAN CAVE LEIGHTON PAISNER LLP
One Atlantic Center
Fourteenth Floor
1201 W. Peachtree Street, NW
Atlanta, GA 30309

Kristen Clarke
Jon Greenbaum
Ezra Rosenberg
Julie M. Houk
John Powers
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1500 K Street, NW
Suite 900
Washington, DC 20005

Todd A. Harding
MADDOX & HARDING, LLC
113 E. Solomon Street
Griffin, GA 30223

Erick G. Kaardal
MOHRMAN, KAARDAL & ERICKSON, P.A.
150 South Fifth Street
Suite 3100
Minneapolis, MN 55402

Paul Kunst
PAUL C. KUNST PC
941 Thomaston Street
Barnesville, GA 30204

Patrick D. Jaugstetter

JARRARD & DAVIS, LLP
222 Webb Street
Cumming, GA 30040

Daniel W. White
Gregg E. Litchfield
HAYNIE, LITCHFIELD & WHITE, P.C.
222 Washington Avenue
Marietta, GA 30060

Anne S. Brumbaugh
LAW OFFICE OF ANN S. BRUMBAUGH, LLC
309 Sycamore Street
Decatur, GA 30030

Melanie F. Wilson
Tuwanda Rush Williams
GWINNETT COUNTY DEPARTMENT OF LAW
75 Langley Drive
Lawrenceville, GA 30046

John R. Hancock
A. Ali Sabzevari
FREEMAN MATHIS & GARY LLP
661 Forest Parkway
Suite E
Forest Park, GA 30297

Kaye Woodard Burwell
Cheryl Ringer
David R. Lowman
OFFICE OF THE COUNTY ATTORNEY
141 Pryor Street, S.W.
Suite 4038
Atlanta, GA 30303

J. Jayson Phillips
TALLEY, RICHARDSON, & CABLE, P.A.
367 West Memorial Drive
P.O. Box 197
Dallas, GA 30132

Andrea J. Grant
LAW OFFICE OF ANDREA GRANT, LLC
60 Bowers Street
Royston, GA 30662

Christopher M. Carr
Bryan K. Webb
Russell D. Willard
Charlene S. McGowan
OFFICE OF THE ATTORNEY GENERAL
Georgia Department of Law
40 Capitol Square SW
Atlanta, Georgia 30334

Christopher S. Anulewicz
James L. Hollis
Jonathan R. DeLuca
Jena C. Lombard
Patrick N. Silloway
BALCH & BINGHAM LLP
30 Ivan Allen Jr. Blvd. N.W.
Suite 700
Atlanta, GA 30308

EXHIBIT 19

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 43

----------X

DONALD J. TRUMP,

Plaintiff,

- v -

MARY L. TRUMP, THE NEW YORK TIMES COMPANY D/B/A THE NEW YORK TIMES, SUSANNE CRAIG, DAVID BARSTOW, RUSSELL BUETTNER, JOHN DOES 1 THROUGH 10, and ABC CORPORATIONS 1 THROUGH 10.

Defendant.

----------X

INDEX NO. 453299/2021

MOTION DATE 01/19/2023

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

HON. ROBERT R. REED:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 41, 42, 43, 44, 45, 46, 56, 57, 58, 59, 67, 75

were read on this motion to/for DISMISS.

In this lawsuit, Donald J. Trump ("plaintiff"), a former president of the United States, asserts various claims against his niece, Mary L. Trump ("Mary Trump"), The New York Times Company d/b/a The New York Times ("The Times"), the individually named journalists Susanne Craig ("Craig"), David Barstow ("Barstow") and Russell Buettner ("Buettner"), along with unnamed John Does and unnamed ABC Corporations (collectively "defendants"), for their actions related to the publishing of The Times' 2018 article, "*Trump Engaged in Suspect Tax Schemes as He Reaped Riches from His Father.*" In motion sequence number 003, The Times, Craig, Barstow and Buettner move, pursuant to CPLR 3211(a)(1), (a)(7), and (g), to dismiss each of the claims asserted against them and for an order, based on New York's amended anti-SLAPP law, directing

plaintiff to pay moving defendants' attorneys' fees and costs incurred defending against plaintiff's claims.

The crux of plaintiff's claim is that a reporter for The Times caused his niece, Mary Trump, to take 20-year-old tax and financial documents held by her lawyer and disclose them in violation of a 2001 settlement agreement. The Times, it is alleged, then used those documents to publish a lengthy article in 2018 that reported that plaintiff had allegedly participated in dubious tax and other financial schemes during the 1990s. In this action, plaintiff does not specifically dispute the truth of any statements made in the article. Rather, plaintiff alleges that The Times defendants' interaction with Mary Trump resulted in her breach of certain confidentiality provisions of the 2001 settlement agreement, rendering The Times and its journalists liable for tortious interference with contract, aiding and abetting tortious interference with contract, unjust enrichment, and/or negligent supervision. Plaintiff demands $100 million in damages.

Plaintiff's claims against The Times defendants, as an initial matter, fail as a matter of constitutional law. Courts have long recognized that reporters are entitled to engage in legal and ordinary newsgathering activities without fear of tort liability – as these actions are at the very core of protected First Amendment activity. Plaintiff's claims also fall short inasmuch as they fail to assert the necessary elements of tortious interference, unjust enrichment, and negligent supervision. More particularly, plaintiff's tortious interference claim is dismissed because The Times' purpose in reporting on a story of high public interest constitutes justification as a matter of law. Plaintiff's unjust enrichment claim fails because it is duplicative of his other claims. His claim for negligent supervision, moreover, is dismissed due to the lack of any allegations that The Times reporters committed any wrongful act falling outside of the scope of their normal work duties. Finally, the newly amended anti-SLAPP law mandates that plaintiff pay defendants'

attorneys' fees and costs because plaintiff's claims plainly constitute a strategic lawsuit against public participation, and, contrary to plaintiff's argument, New York's anti-SLAPP law is directed to more than just defamation-based lawsuits.

BACKGROUND

Factual Background

Shortly after the death of Frederick C. Trump — plaintiff's father and Mary Trump's grandfather — disputes arose among various members of the Trump family regarding the estates of Frederick and his late wife, Mary Anne Trump (NYSCEF Doc. No. 1, complaint at 15-19). Mary Trump, joined by her brother Fred Trump III (individually and on behalf of his son, William Trump), his wife, and their mother (collectively, the "objectors"), filed objections to the probate of both estates against co-executors plaintiff, Robert Trump, and Maryanne Trump Barry (collectively, the "proponents") (*id.* at 17). The objectors also commenced litigation seeking to reinstate the health insurance that the proponents cut off in alleged retaliation for their objections to the probate proceedings (*id.* at 18).

The parties to the estate proceedings engaged in voluminous discovery, which, among other things, produced certain tax and financial records concerning plaintiff. Then, in April of 2001, the parties executed a settlement agreement to "fully, finally, and globally" resolve the filed actions and proceedings (*id.* at 23; *see also* NYSCEF Doc. No. 26, Ex. 9, the settlement agreement). The agreement's stated purpose was to effect a "compromise[] and settle[ment], on a 'global basis' in order to resolve all of [the parties'] differences pertaining to two (2) probate proceedings; [an] insurance case; partnership and corporate interests; as well as their interests in two (2) inter vivos trusts" (the settlement agreement at 5). Under the agreement, the objectors also acquired Mary Trump's interests in the family business.

Paragraphs 2 and 3 of the agreement contain reciprocal confidentiality provisions. Paragraph 2 specifically provides that without the express consent of all three proponents – including plaintiff – objectors:

> "shall not disclose any of the terms of [the Settlement Agreement], and in addition shall not directly or indirectly publish or cause to be published, any diary, memoir, letter, story, photograph, interview, article, essay, account, or description or depiction of any kind whatsoever, whether fictionalized or not, concerning their litigation or relationship with the 'Proponents/Defendants' or their litigation involving the Estate of FRED C. TRUMP, and the Estate of MARY ANNE TRUMP, or assist or provide information to others in connection therewith" (*id.* at 27).

Paragraph 3, on the other hand, binds plaintiff and the other proponents to extend the same promises concerning confidentiality to the objectors, including Mary Trump (settlement agreement paragraph 3). Defendants contend that, while the confidentiality provisions state that the agreement itself is confidential and that the parties may not discuss their relationship in the context of the estate disputes, the provisions do not extend confidentiality to documents exchanged during discovery in the estate proceedings.

Years later, as the public's interest in plaintiff began to grow — eventually culminating with his entry into national politics — The Times began scrutinizing some of plaintiff's public statements regarding his personal finances and entrepreneurial endeavors (NYSCEF Doc. No. 46 at 4). While running for President, plaintiff promised to disclose his tax returns (*id.*). [1] His failure to do so—even after his election—fueled speculation that the tax returns would contradict his

[1] *See, e.g.*, Today, *Donald Trump on New Hampshire Win (Full Interview)*, YouTube, at 3:45-51 (Feb. 10, 2016), https://youtu.be/vQal9FMbkcw (Q: "Real quickly. When are you going to release your tax returns?" Trump: "Probably over the next few months. They're being worked on right now."); *Meet the Press*, NBC News (Jan. 24, 2016), https://www.nbcnews.com/meet-the- press/meet-press-january-24-2016-n503241 (Q: "Will you release any of your tax returns for the public to scrutinize?" Trump: "Well, we're working on that now. I have very big returns, as you know, and I have everything all approved and very beautiful and we'll be working that over in the next period of time, Chuck. Absolutely."); Virgin Media Television, *Colette Fitzpatrick Meets Donald Trump!*, YouTube, at 1:29-1:45 (May 20, 2014), https://www.youtube.com/watch?v=Hg- 5KEt1Abg ("If I decide to run for office, I'll produce my tax returns, absolutely. And I would love to do that.").

public statements about his finances (*id.*). Then, in 2016, The Times obtained portions of plaintiff's tax returns and published an article revealing that he may have avoided taxes for nearly two decades (complaint at 34-36). The publication of the article further sparked public debate, and since then, plaintiff's taxes have become a frequent subject of media attention (*id.*).

At The Times, Craig, Barstow, and Buettner were specifically tasked with covering plaintiff's financial affairs (*id.* at 7-9). As part of their ongoing efforts to report on the topic, in 2017, Craig approached Mary Trump at her home to seek information for "a very important story about [the Trump] family finances" (*id.* at 39). Mary Trump initially declined to speak with Crag (*id.* at 40), but Craig continued reaching out to Mary Trump, assuring her that her cooperation could help "rewrite the history of the President of the United States" (*id.* at 43).

Sometime after the visit from Craig, Mary Trump changed her mind and decided to call Craig. She and Craig discussed documents from the estate disputes that had remained in Mary Trump's client file at the offices of her attorneys, the Farrell Fritz law firm. To communicate, Mary Trump and Craig used anonymous cell phones, also known as burners (*id.* at 46-47). Mary Trump initially considered the possibility that she might have to "smuggle" these documents out of her attorney's office, but instead she received permission from her attorneys to take an extra copy from them (*id.* at 45, 48). Mary Trump then shared those documents with The Times (*id.* at 49). Mary Trump never received authorization from any of the proponents for such actions (*id.* at 50).

Plaintiff contends that these actions constitute a blatant breach of paragraph 2 of the confidentiality provision of the settlement agreement. Plaintiff also contends that The Times was aware that Mary Trump's actions would constitute a violation of the settlement agreement. In fact, the complaint alleges, Craig made such acknowledgments publicly (*id.* at 58). According to

plaintiff, Mary Trump would not have breached the confidentiality provision were it not for The Times' persistent efforts (*id.* at 59). Therefore, plaintiff contends, The Times has tortiously interfered with the contract between Mary Trump and plaintiff, without justification, to plaintiff's detriment.

Then, on October 2, 2018, The Times published an article, credited to Barstow, Craig, and Buettner, entitled "*Trump Engaged in Suspect Tax Schemes as He Reaped Riches from His Father*" (the "2018 article") (*id.* at 67). The article's subject matter was described immediately below the headline: "The president has long sold himself as a self-made billionaire, but a Times investigation found that he received at least $413 million in today's dollars from his father's real estate empire, much of it through tax dodges in the 1990s" (NYSCEF Doc. No. 45, Ex. C, at 2). The 13,000-word article explained in detail the various methods plaintiff allegedly used to "dodge taxes," including "set[ting] up a sham corporation to disguise millions of dollars in gifts"; "tak[ing] improper tax deductions worth millions more"; and "formulat[ing] a strategy to undervalue his parents' real estate holdings by hundreds of millions of dollars on tax returns" (complaint at 68-70). The stock price of The Times rose 7.4% during the week of the publication of the article (*id.* at 73).

The instant action

On September 21, 2021, plaintiff filed this lawsuit. He brings four claims against The Times and the three reporter defendants: tortious interference, aiding and abetting tortious interference, unjust enrichment, and negligent supervision. Although plaintiff does not specify an identifiable harm, he demands an award of actual, compensatory, and incidental damages in an amount to be determined at trial, but alleged to be no less than $100,000,000.

In motion sequence number 003, The New York Times and its reporters move, pursuant to CPLR 3211(a)(1), (a)(7), and (g), to dismiss each of the claims asserted against them and for an order, based on New York's amended anti-SLAPP law, directing plaintiff to pay the moving defendants the attorneys' fees and costs spent defending against plaintiff's claims.

DISCUSSION

1. *Does New York's anti-SLAPP law apply to plaintiff's claims?*

New York's amended anti-SLAPP statute applies to the claims at hand because plaintiff's causes of action, as stated in the complaint and as asserted against The Times and its reporters, constitute a strategic lawsuit against public participation. Moreover, and contrary to what plaintiff argues, the anti-SLAPP statute is not limited only to defamation claims.

SLAPP suits—or strategic lawsuits against public participation—are characterized as having little legal merit but "filed nonetheless to burden opponents with legal defense costs and the threat of liability and to discourage those who might wish to speak out in the future" (*600 W. 115th St. Corp. v. Von Gutfeld*, 80 NY2d 130, 137 [1992]). The law, as amended, applies to suits that target "action involving public petition and participation" as well as any "lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest" (NY Civ Rights Law § 76-a[1][a][2]). Once triggered, plaintiffs can avoid dismissal only if they establish that they have a "substantial basis in law" for their claims or "a substantial argument for an extension, modification or reversal of existing law" (CPLR 3211[g][1]). If a defendant prevails in securing dismissal of the case, it is entitled to seek reimbursement of its costs and attorneys' fees from the plaintiff, along with compensatory and punitive damages (NY Civ Rights Law § 70-a[1][a]).

The law was originally enacted in 1992 as a response to "rising concern about the use of civil litigation, primarily defamation suits, to intimidate or silence those who speak out at public meetings against proposed land use development and other activities requiring approval of public boards" (*600 W. 115th St. Corp.,* 80 NY2d at 137). The original anti-SLAPP statute initially limited its application to instances where speech was aimed toward a public applicant or permittee, i.e. an individual who applied for a permit, zoning change, lease, license, or other similar document from a government body. As applied, the statute was "strictly limited to cases initiated by persons or business entities embroiled in controversies over a public application or permit, usually in a real estate development situation" (Sponsor's Memorandum, Bill Jacket, L 2020, ch 250).

In 2020, however, the New York legislature amended the anti-SLAPP statute to "broaden the scope of the law and afford greater protections to citizens" beyond suits arising from applications to the government (*29 Mable Assets, LLC v. Rachmanov*, 192 AD3d 998, 1000 [2nd Dep't 2021]). Among other changes, Civil Rights Law § 76-a was amended to expand the definition of an "action involving public petition and participation" to also include claims based upon "any communication in a place open to the public or a public forum in connection with an issue of public interest" (NY Civ Rights Law § 76-a[1][a][1]). The amended law further provides that "public interest" "shall be construed broadly and shall mean any subject other than a purely private matter" (NY Civ Rights Law § 76-a[1][d]). Additionally, Civil Rights Law § 70-a was amended to mandate, rather than merely permit, the recovery of costs and attorneys' fees upon demonstration "that the action involving public petition and participation was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial

argument for extension, modification or reversal of existing law" (NY Civ Rights Law § 70-a[1][a]).

The revised anti-SLAPP law was specifically designed to apply to lawsuits like this one. In fact, among other reasons, plaintiff's history of litigation — that some observers have described as abusive and frivolous[2] — inspired the expansion of the law. After the bill was signed into law, one of its authors issued a press release stating:

> "For decades, Donald Trump, his billionaire friends, large corporations and other powerful forces have abused our legal system by attempting to harass, intimidate and impoverish their critics with strategic lawsuits against public participation, or 'SLAPP' suits. This broken system has led to journalists, consumer advocates, survivors of sexual abuse and others being dragged through the courts on retaliatory legal challenges solely intended to silence them. Today, New York 'SLAPPs back' with our new legislation (S.52A/A.5991A) that expands anti-SLAPP protections, thereby strengthening First Amendment rights in New York State, the media capital of the world"
> (Press Release, Sen Brad Hoylman, Legislature Passes Legislation to Crack Down on Frivolous "SLAPP" Lawsuits Used to Silences Critics [July 22, 2020], https://www.nysenate.gov/newsroom/press-releases/brad-hoylman/trump-attacks-free-press- legislature-passes-senator-hoylman-and).

Nonetheless, plaintiff argues that his claims do not fall within the purview of the anti-SLAPP law since the claims asserted against The Times do not relate to communication in a public forum in connection with an issue of public interest. Plaintiff argues that he is not suing The Times for its publication of the 2018 article, but for its actions in inducing its co-defendant Mary Trump to breach her confidentiality agreement and turn over the confidential records. These actions constitute a stand-alone tort that must be viewed separately and apart from the subsequent publication of The Times article.

---

[2] NYSCEF Doc. No. 46 at 8 *citing* James D. Zirin, Plaintiff in Chief: A Portrait of Donald Trump in 3,500 Lawsuits, at xi (2019) (analyzing 3,500 lawsuits involving Trump and describing how he "sued as a means of destroying or silencing those who crossed him" and "to make headlines, for the entertainment value, and to reinforce his power over others"); *Donald Trump: Three Decades, 4,095 Lawsuits*, USA Today, https://www.usatoday.com/pages/interactives/trump-lawsuits (last accessed Dec. 1, 2021)

Moreover, plaintiff argues that the anti-SLAPP law is not applicable to claims other than for defamation – a cause of action which plaintiff did not assert against The Times. To support this argument, plaintiff cites to *Lindberg v. Dow Jones & Company,* where a group of journalists were sued for defamation and tortious interference for their role in inducing a source to breach a confidentiality agreement in furtherance of publishing a news article (2021 WL 3605621 [SDNY 2021]). According to plaintiff, when the defendants in that action attempted to invoke the anti-SLAPP law, the court applied it solely in the context of plaintiff's defamation claim, while declining to apply it to the plaintiff's tortious interference claim. Plaintiff further claims that New York state courts have also declined to apply the newly amended version of the anti-SLAPP law to claims of tortious interference with contract (citing *RSR Corp. v. LEG Q LLC*, 2021 WL 4523615 [NY Sup Ct 2021]); *Aristocrat Plastic Surgery v. Silva,* No. 153200/2021 [NY Sup Ct 2021) [finding that an action involving claim for tortious interference with contract did "not fall within the ambit of New York's anti-SLAPP law"]).

Finally, plaintiff also argues that this interpretation of the anti-SLAPP law is also in line with the legislative intent. The New York legislature, when initially passing the anti-SLAPP law, identified SLAPP suits as "suits brought purposefully to restrict freedom of speech" and noted that they "ordinarily arise out of defamation suits" (*see* NY Leg Mem A09005L). True to this notion, the legislature allegedly referred to SLAPP suits and defamation suits interchangeably. Therefore, according to plaintiff, there is nothing in the legislative history suggesting that the anti-SLAPP law was ever intended to apply to claims such as tortious interference.

Plaintiff's arguments fail on all counts. First, even if the complaint, as asserted against The Times, did not target the 2018 article's publication, the claims stated therein are still subject to New York's anti-SLAPP law. The law was specifically amended to protect, not just the

communication in the public forum that an anti-SLAPP plaintiff may wish to target, but also the "lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest" (NY Civ Rights Law § 76-a[1][a][2]). And there can be no dispute that newsgathering certainly qualifies as conduct in furtherance of the exercise of one's right to free speech (*see Nicholas v. Bratton*, 376 F Supp 3d 232, 279 [SDNY 2019] ["Entrenched in Supreme Court case law is the principle that the First Amendment's protections for free speech include a constitutionally protected right to gather news"]); *Matter of Holmes v. Winter*, 22 NY3d 300, 310 [2013] ["New York public policy as embodied in the Constitution and our current statutory scheme provides a mantle of protection for those who gather and report the news—and their confidential sources— that has been recognized as the strongest in the nation"]).

Moreover, contrary to what plaintiff argues, New York's anti-SLAPP law is not limited to defamation claims. The only anti-SLAPP provision limited to defamation-type claims is Civil Rights Law §76-a (2), which requires "clear and convincing evidence" of actual malice and is expressly limited to those claims "where the truth or falsity of such communication is material to the cause of action at issue." That provision is not at issue here. Its express limitation to defamation-like claims, however, shows that the two anti-SLAPP provisions that *are* at issue and have no such limitation— the burden-shifting provision in CPLR 3211(g) and the fee-shifting provision in Civil Rights Law §70-a—are generally applicable to all actions involving "public petition and participation."

Plaintiff cites multiple cases in support of his assertion that New York courts have declined to apply the newly amended version of the anti-SLAPP law to claims of tortious interference with contract. But the cases plaintiff cites do not stand for such a proposition. In fact, the Appellate Division, First Department, in reversing one of the cases that plaintiff relies

upon, expressly held otherwise. Plaintiff cites to *Aristocrat Plastic Surgery v. Silva* to support his claim that the anti-SLAPP law is limited to defamation claims (2021 WL 3703916). In *Aristocrat*, after a plastic surgery patient posted negative online reviews of plastic surgeon and his practice, a surgeon commenced an action against patient, asserting claims for defamation, tortious interference, intentional infliction of emotional distress, and prima facie tort. The patient moved to dismiss, and also moved for attorney fees and punitive damages pursuant to §70-a and 76-a(1)(a)(1) – the same provisions that The Times invokes herein.

And although the lower court granted the patient's motion to dismiss, it denied the patient's motion for attorney fees, stating that an action involving a claim for tortious interference did "not fall within the ambit of New York's anti-SLAPP law" (*id.*). The patient appealed the lower court's decision. On appeal, which was decided after the parties in this case submitted their briefs, the First Department unanimously held that the defendant in that matter was entitled to seek damages and attorneys' fees under Civil Rights Law §§ 70-a and 76-a(1)(a)(1), as the surgeon's claims asserted against the patient "fall under the ambit of the amended anti-SLAPP law" (*Aristocrat Plastic Surgery, P.C. v. Silva*, 206 AD3d 26, 32 [1st Dep't 2022]). The Appellate Division did not make any distinction between claims for defamation and tortious interference, but, instead, overturned the lower court's holding in its entirety as it related to the court's denial of the patient's anti-SLAPP motion for attorneys' fees and damages. Therefore, in this court's assessment, the First Department's holding in *Aristocrat* forecloses plaintiff's argument that the anti-SLAPP law applies only to defamation claims.

Further, plaintiff's reliance on *Lindberg v. Dow Jones & Co.* is irrelevant because the court in that case dealt with an interpretation of Civil Rights Law §76-a (2), [3] while the

[3] Civil Rights Law §76-a (2) applies specifically to a cause of action for defamation and it states the following:

defendants herein rely only on § 70-a(1)(a). Plaintiff's reliance on *RSR Corp. v. LEG Q LLC* is similarly misplaced. In *RSR Corp.*, the court dismissed an anti-SLAPP counterclaim in a corporate board dispute, not because the anti-SLAPP law does not apply to claims for tortious interference, but because the defendant there provided no evidence that the defendant's years-old statements were connected to the legal action in question.

In addition to relying on inapposite cases, plaintiff does nothing to contradict or distinguish several of the cases that moving defendants cite in support of their argument that the anti-SLAPP law applies to claims other than defamation *(see, e.g., Goldman v. Reddington*, 2021 WL 4099462, at *4 [EDNY 2021] [applying anti-SLAPP's burden-shifting and fee-shifting provision to tortious interference claim]; *Mable Assets, LLC v. Rachmanov*, 192 AD3d 998, 1000-01 [2nd Dep't 2021] [applying pre-amendment anti-SLAPP law to plaintiff's tortious interference claim]; *Bennett v. Towers*, 982 NYS 2d 843, 848 [Sup Ct Nassau Cnty 2014] [same]).

Finally, the lack of case law support for a categorical approach endorsed by plaintiff, that the anti-SLAPP law must apply only to defamation claims, also comports with the 2020 amendment's legislative history. The anti-SLAPP law was expanded in 2020 specifically to target litigation that "attempt[ed] to chill free speech," regardless of a plaintiff's particular claims (*see* S52A/A5991A, 2019-2020 Leg Sess [NY 2020] [explaining that the pre-amendment statute "failed to accomplish [its] objective" of providing "the utmost protection for free exercise of speech" [quoting L 1992 Ch 767]). And as set forth earlier—the legislature's expansive changes

---

In an action involving public petition and participation, damages may only be recovered if the plaintiff, in addition to all other necessary elements, shall have established by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false, where the truth or falsity of such communication is material to the cause of action at issue.

to the law were, in part, specifically designed to prevent plaintiff himself from filing lawsuits like this one to retaliate against journalists for their reporting. Therefore, it would be unreasonable to conclude that plaintiff could evade the application of a law specifically designed to stop frivolous lawsuits aimed at chilling free speech simply by pleading non-defamation claims. If the legislators, in passing the amendment, intended to protect free speech by shielding from frivolous lawsuits those who may wish to speak, then it stands to reason that the legislators intended to offer protections against any lawsuit aimed at interfering with such free speech, regardless of the type of claim asserted in such lawsuit.

Accordingly, because, in this court's assessment, the anti-SLAPP law applies to the claims at hand, plaintiff can avoid dismissal of those claims only if he can establish a "substantial basis in law" for his claims or "a substantial argument for an extension, modification or reversal of existing law" (CPLR 3211[g][1]). Additionally, because the anti-SLAPP law is triggered, if, in the following paragraphs, The Times defendants prevail in securing dismissal of the case, they would be entitled to seek reimbursement of their costs and attorneys' fees from plaintiff (NY Civ Rights Law § 70-a[1][a]).

2. *Does the New York Constitution protect The Times' right to solicit information from its source, even when its strategy of obtaining information involves encouraging its source to breach her contractual confidentiality obligations?*

The Times defendants' conduct is protected by New York law, which is exceedingly protective of free speech rights (*see Immuno AG v. Moor-Jankowski*, 77 NY2d 235, 249-50 [1991]. In fact, New York courts have consistently rejected efforts to impose tort liability on the press based on allegations that a reporter induced a source to breach a non-disclosure agreement.

The New York State Constitution, as evidenced by the language in Article I, § 8, provides strong protections for free speech. "Every citizen may freely speak, write and publish his or her sentiments on all subjects" (NY Const art I, subsection 8). This principle has been reaffirmed by New York courts on numerous occasions. The New York Court of Appeals, indeed, has boasted of New York's "own exceptional history and rich tradition" of protecting the freedom of the press, whether under the State Constitution or based on New York's common law (*Immuno AG*, 77 NY2d at 249-50). To that end, New York courts are especially vigilant "in safeguarding the free press against undue interference" (*id.*). This tradition extends to "the sensitive role of gathering and disseminating news of public events," which receives "the broadest possible protection" under state law (*id.*). Thus, "[t]he protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by the First Amendment," including where a case could impact "[t]he ability of the press freely to collect and edit news" (*O'Neill v. Oakgrove Constr., Inc.*, 71 NY2d 521, 526 [1988]).

That stated, the New York tradition of protecting the freedom of the press to collect news is also consistent with how the First Amendment has been interpreted. For example, in *Smith v. Daily Mail Publishing Co.*, the Supreme Court of the United States declared that "[If] a newspaper lawfully obtains truthful information about a matter of public significance, then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order" (443 US 97, 103 [1979]). Applying this principle, the Supreme Court has routinely rejected tort lawsuits premised on the publication of information that was obtained through ordinary newsgathering activities (*see Fla Star v BJF*, 491 US 524, 541 [1989] [rejecting civil liability for newspaper that lawfully obtained and published the identity of crime victim in contravention of a statute]). In *Barnicki v. Vopper*, a radio station was

sued for broadcasting an illegally recorded phone call between a school district's union officials (532 US 519 [2001]). The Supreme Court reaffirmed the principle stated in *Smith v. Daily Mail,* by holding that, because the radio station had not itself illegally recorded the call, it had no liability, given the First Amendment's protections (*id.* at 525-28).

Plaintiff argues that The Times' conduct is not constitutionally protected because its actions were tortious in nature and it is well established that "[c]rimes and torts committed in news gathering are not protected by the First Amendment" (*Le Mistral, Inc. v. Columbia Broadcasting System*, 61 AD2d 491, 494 [1st Dep't 1978]). According to plaintiff, The Times defendants' activities, even if considered within the scope of activities covered by the New York Constitution, were nonetheless coercive, harassing, vindictive, misleading, purposeful, and in blatant disregard of the plaintiff's contractual rights, and, as such, deserve no protection.

Plaintiff is mistaken. His characterization of The Times' actions as tortious does not, on its own, remove the constitutional protections that are extended to the press during the process of ordinary newsgathering *(see, e.g., Nicholas v. Bratton*, 376 F Supp 3d 232, 279 [SDNY 2019] ["[E]ntrenched in Supreme Court case law is the principle that the First Amendment's protections for free speech include a constitutionally protected right to gather news"]; *Higginbotham v. City of N.Y.*, 105 F Supp 3d 369, 379 [SDNY 2015] "[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw" quoting *First Nat'l Bank of Bos v. Bellotti*, 435 US 765, 783 [1978]). This protection is based on the longstanding recognition that "without some protection for seeking out the news, freedom of the press could be eviscerated" (*Branzburg v. Hayes*, 408 US 665, 681 [1972]).

Plaintiff argues that these constitutional protections are irrelevant where, as here, the lawfulness of the conduct is expressly and vehemently disputed in the complaint. Indeed, the complaint does characterize defendants' conduct as "fraudulent," "willful, wanton, outrageous [and] motivated by spite, malice and vindictiveness" (complaint at 131). But these are conclusory statements that must be supported by specific factual allegations in order to have any weight in evaluating a motion to dismiss (*LoPresti v. Mass Mut Life Ins Co.,* 30 AD3d 474, 475-76 [2d Dep't 2006] [affirming dismissal of tortious interference claim where "the allegation that the respondents' actions were wrongful or unlawful were conclusory and without support"]). Thus, the question before this court is not whether the complaint characterizes The Times' conduct as tortious, but whether the conduct it alleges—persuading Mary Trump to provide documents from her client file for a story about plaintiff—constitutes an illegal act or tort under the New York law.

Plaintiff principally relies on two cases to support his argument that The Times' conduct qualifies as a tort. Plaintiff argues that The Times' conduct is not constitutionally protected under *Le Mistral, Inc. v. Columbia Broadcasting System,* a case that established that "[c]rimes and torts committed in news gathering are not protected by the First Amendment" (61 AD2d 491, 494 [1st Dep't 1978]). But other than offering one selective quote from *Le Mistral*, plaintiff does not engage further with the decision. In *Le Mistral*, the Appellate Division held that the First Amendment does not protect a defendant, who in order to report on a story, entered the plaintiff's private premises without permission, thereby committing a trespass. Despite numerous requests to leave, the reporter continued recording plaintiff's premises, and later claimed that the First Amendment protected his actions. The Appellate Division, in reviewing the lower court's order, disagreed with the defendant, holding that, considering the facts of the

case, the reporter was not allowed to commit a trespass and then rely on the First Amendment to excuse his conduct (*id.*). Plaintiff also relies on *United States v. Sanusi* for a similar proposition (813 F Supp 149, 155 [EDNY 1992] [ordering CBS to disclose a videotape made when a reporter illegally trespassed in a criminal defendant's home to film the execution of a warrant)].

Here, plaintiff has not alleged any remotely similar facts. Plaintiff attempts to make an analogy between this action and the trespass cases by arguing that Craig engaged in illegal activity because she "directed" Mary Trump to pilfer documents against the advice of her attorney. But Mary Trump's book—which plaintiff concedes is incorporated into the complaint—demonstrates that Mary Trump's attorney gave her permission to take those documents (opening br. ex. B at 187). More importantly, plaintiff does not dispute this critical point: Mary Trump owned the files she disclosed to The Times, and thus there was nothing wrongful about Craig requesting them (*Bronx Jewish Boys v. Uniglobe, Inc.*, 633 NYS 2d 711, 713 [Sup Ct NY Cnty 1995] ["[A]ttorneys have no possessory rights in the client files. In other words, the file belongs to the client"]). Given these facts, the trespass cases that plaintiff relies on are inapposite.

Plaintiff does not cite a single case where any court, whether state or federal, has held that a reporter is liable for inducing his or her source to breach a confidentiality provision. In fact, New York courts have consistently rejected efforts to impose tort liability on the press based on allegations that a reporter induced a source to breach a non-disclosure agreement. In *Highland Capital v. Dow Jones & Company, Inc.*, the First Department affirmed dismissal of an investment adviser's claim that a Wall Street Journal reporter engaged in tortious conduct by obtaining information from employees bound by non-disclosure agreements (178 AD3d 572, 574 [1st Dep't 2019]). In doing so, the court highlighted that dismissal was appropriate because

"defendants' conduct as alleged in the complaint was incidental to the lawful and constitutionally protected process of news gathering and reporting" (*Highland Cap.*, 178 AD 3d at 574 citing *Bartnicki v. Vopper* 532 US 514, 534]). Other New York decisions dismissing tortious interference claims against the press are in accord (*see, e.g., Huggins v. NBC*, 1996 WL 763337, at *4 [Sup Ct NY Cnty 1996] [dismissing tortious interference claims against NBC because "any interference that occurred was merely incidental to defendants' exercise of their constitutional right to broadcast newsworthy information"]).

Plaintiff argues that *Highland* does not support dismissal of his claims because the *Highland* court, in addition to dismissing plaintiff's tortious interference claim, further stated that "[t]he complaint also failed to cite to any specific confidentiality agreements that defendants knowingly induced their sources to violate" (*Highland Cap.*, 178 AD 3d at 574). This second part of the First Department's ruling, according to plaintiff, leaves open the question of whether that court would have ruled differently had the plaintiff actually identified the alleged confidentiality agreements breached – something that plaintiff indisputably does in his complaint.

But the fact that the *Highland* complaint failed for two reasons is irrelevant. The relevant holding in *Highland* is that dismissal was warranted because "defendants' conduct as alleged in the complaint was incidental to the lawful and constitutionally protected process of news gathering and reporting," and nothing in the decision suggests that this ruling hinges on the plaintiff's failure to adequately allege other elements of their claims (*id.*). In fact, the quote from the decision on which plaintiff relies includes the word "*also,*" indicating that plaintiff's failure to cite to any specific confidentiality agreement is only an *additional* reason why the complaint failed ("[t]he complaint **also** failed to cite to any specific confidentiality agreements that

defendants knowingly induced their sources to violate *Highland Cap.*, 178 AD 3d at 574]) [emphasis added]. Moreover, the *Highland* decision accords with the precedent established in the *Huggins* cases – a decision that plaintiff completely ignores.

Given the binding precedent of *Highland Capital* and the New York Constitution's strong protection of newsgathering, plaintiff's attempt to impose civil liability on The Times and its reporters lacks "a substantial basis in law" [CPLR 3211(g)] — and is contrary to the core principles that underlie the First Amendment and the New York State Constitution. Accordingly, the tort claims asserted against The Times and its reporters are dismissed in their entirety.

3. *Did plaintiff allege the necessary elements of his tort claims?*

Even if plaintiff's claims did not fail as a matter of constitutional law, they are subject to dismissal due to plaintiff's failure to allege the necessary elements under New York common law. Plaintiff's tortious interference claim fails because The Times' purpose in reporting on a story of high public interest constitutes justification as a matter of law. Plaintiff's unjust enrichment claim fails because it is duplicative of his other claims, while his claim for negligent supervision fails due to such claims being reserved only for situations where employees commit torts outside the scope of their normal work duties.

a. Tortious interference with a contract

To state a claim for tortious interference, a plaintiff must allege "[i] the existence of a valid contract between the plaintiff and a third party, [ii] defendant's knowledge of that contract, [iii] defendant's intentional procurement of the third-party's breach of the contract without justification, [iv] actual breach of the contract, and [v] damages resulting therefrom" (*Lama Holding Co v. Smith Barney Inc.*, 88 NY2d 413, 424 [1996]). Plaintiff's tortious interference

claim is dismissed because The Times defendants' purpose in reporting on a newsworthy story constitutes justification as a matter of law.

Justification provides an absolute defense to a tortious interference claim (*Huggins v. Povitch*, 1996 WL 515498 [Sup Ct NY Cty 1996]). New York courts have consistently held that the right to engage in newsgathering activities constitutes such justification. In *Povitch*, the court dismissed a tortious interference claim against Maury Povitch – a syndicated talk show host – for inducing plaintiff's ex-wife to speak about their divorce proceedings during his talk show, in violation of a confidentiality provision in the couple's divorce settlement. Defendant Povitch was previously put on notice as to the non-disclosure provision but decided to disregard the notice and proceed with the interview. In dismissing the claim against Povitch, the court adopted the defendant's argument that the First Amendment freedom of the press to report on newsworthy subjects is an appropriate justification that will preclude a claim of tortious interference. More specifically, the court declared that it agreed that:

> " a broadcaster whose motive and conduct is intended to foster public awareness or debate cannot be found to have engaged in the wrongful or improper conduct required to sustain a claim for interference with contractual relations. Here the broadcaster's first amendment right to broadcast an issue of public importance, its lack of any motive to harm the plaintiff, and the obvious societal interest in encouraging freedom of the press, negate essential elements of the tort" (*Povitch*, 1996 WL 515498, at *9).

Previously, and utilizing the same reasoning, the court also dismissed a tortious interference claim against NBC for purportedly inducing the same woman to breach the same confidentiality provision and discuss publicly her divorce proceedings with the same plaintiff (*Huggins v. NBC*, 1996 WL 763337, at *4 [Sup Ct NY Cty 1996]). Other jurisdictions are in accord with the New York law (*see, e.g.*, *Seminole Tribe of Fla v. Times Publ'g Co.*, 780 So2d 310, 317-18 (Fla Ct App 2001) [dismissing a tortious interference claim against reporters for

soliciting tribal employees to reveal confidential documents about the tribe's gambling operations and explaining that reporters' conduct was "routine news gathering"]; *Jenni Rivera Enters., LLC v. Latin World Ent Holdings, Inc.,* 36 Cal App 5th 766, 800 [Ct. App. 2019] [dismissing a tortious interference claim against a broadcaster for reporting confidential information obtained from the plaintiff's former manager in violation of a nondisclosure agreement, because the broadcaster's actions were "not sufficiently 'wrongful' or 'unlawful' to overcome the First Amendment newsgathering and broadcast privileges"]).

In his opposition papers, plaintiff does nothing to contradict or distinguish any of the cited cases. Instead, plaintiff cites a single case, *Lindberg v. Dow Jones*, in which a federal judge permitted the plaintiff to amend his complaint as it relates to a tortious interference claim, on the basis that factual questions may exist regarding whether the defendant publishers' conduct was justified (2021 WL 5450617). In *Lindberg,* however, the district judge applied the federal pleading standard—not CPLR 3211(g)—and expressly declined to apply the First Department's protection for conduct that is "incidental to the lawful and constitutionally protected process of news gathering and reporting," in favor of a balancing test set forth in *Jews for Jesus v. Jewish Cmty Rels Council*[4] (*Lindberg*, 2021 WL 5450617 at *8 n.92).

This court, however, must, and will apply the reasoning of the First Department's decision in *Highland,* which is also in accord with other New York decisions, holding that "the First Amendment freedom of the press to report on newsworthy subjects is an appropriate justification that will preclude a claim of tortious interference" (*Povitch*, 1996 WL 515498, at *9; *Huggins*, 1996 WL 763337, at *4)]. Accordingly, because The Times defendants were

[4] *See Jews for Jesus v. Jewish Cmty Rels Council,* 968 F2d 286, 292-93 (2d Cir 1992).

undisputedly engaged in routine newsgathering, plaintiff's tortious interference claim is dismissed.

b. *Aiding and abetting tortious interference with contract*

Plaintiff's claim for aiding and abetting is likewise dismissed. Considering that plaintiff is unable to allege the tortious interference cause of action – a primary violation necessary to sustain this claim – the cause of action for aiding and abetting is likewise dismissed.

c. *Unjust enrichment*

Plaintiff's claim for unjust enrichment is dismissed because it is impermissibly duplicative of plaintiff's tortious interference with contract claims. Plaintiff does not even contest this argument. Where he has not addressed the arguments for dismissal of a claim, a plaintiff has conceded that the claim should be dismissed (*see Chiomenti Studio Legale, LLC v Prodos Cap Mgmt LLC*, 2015 WL 1095700, at *9 [Sup Ct NY Cnty 2015] ["Since defendants have not responded to the motion regarding the grounds for the dismissal of the defenses and counterclaims, the court shall deem this as a[n] admission that they lack merit or are insufficiently pleaded"]. Thus, plaintiff has waived any opposition to The Times defendants' argument.

Plaintiff vaguely argues that The Times defendants were enriched at his expense because the 2018 Article describes his "dubious tax schemes" and mentions the estate proceedings (Opp Br at 16). But plaintiff's refusal to identify the harm he suffered prevents him from sufficiently alleging enrichment at his expense. This independently warrants dismissal of his unjust enrichment claim.

d. Negligent supervision

Plaintiff's claim for negligent supervision fails due to such claims being reserved only for situations where employees commit torts outside the scope of their normal work duties.

The necessary elements of a cause of action alleging negligent retention or negligent supervision are: "(1) that the tort-feasor and the defendant were in an employee-employer relationship; (2) that the employer knew or should have known of the employee's propensity for the conduct which caused the injury prior to the injury's occurrence; and (3) that the tort was committed on the employer's premises or with the employer's chattels" (*Ehrens v. Lutheran Church*, 385 F3d 232, 235 [2d Cir 2004]). However, the negligent supervision claim is reserved only for those situations where employees commit torts outside their normal duties (*Scollar v. New York*, 160 AD3d 140, 147-48 [1st Dep't 2018]). Here, the reporter defendants engaged in newsgathering activities that were a key part of their role as Times reporters (*Nicholson v. McClatchy* Newspapers, 177 Cal App 3d 509, 519 [1986] ["asking person questions, including those with confidential or restricted information" is a "routine reporting technique"]). Given that the reporter defendants' conduct occurred within the scope of their employment, the negligent supervision claim must be dismissed. As with the unjust enrichment claim, plaintiff admits that "all of" the reporter defendants' "actions were taken in the scope of their employment" [Opp Br at 18], thereby admitting this claim's invalidity.

4. Are The Times defendants entitled to costs and attorneys' fees?

As explained above, New York's anti-SLAPP law applies to this lawsuit because it "is an action involving public petition and participation" as defined in section 76-a(1)(a) of the New

York Civil Rights Law. Therefore, due to dismissal of the claims asserted against The Times and its reporters, The Times defendants are entitled to recover their costs and attorneys' fees.

CONCLUSION

Accordingly, it is

ORDERED that The Times defendants' motion (sequence number 003) to dismiss the complaint as against them is granted; and it is therefore

ORDERED that the complaint is hereby dismissed as to defendants The New York Times Company, Susanne Craig, David Barstow and Russell Buettner; and it is further

ORDERED that the Fourth, Fifth, Sixth and Seventh Causes of Action are hereby dismissed with prejudice; and it is further

ORDERED that plaintiff Donald Trump shall forthwith pay the accumulated attorneys' fees, legal expenses and costs of the defendants The New York Times Company, Susanne Craig, David Barstow and Russell Buettner to such defendants, pursuant to and in accordance with the provisions of NY Civil Rights Law § 70-a(1)(a).

5/3/23
DATE

ROBERT R. REED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE

EXHIBIT 20

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 43

----------X

DONALD J. TRUMP,

Plaintiff,

- v -

MARY L. TRUMP, THE NEW YORK TIMES COMPANY D/B/A THE NEW YORK TIMES, SUSANNE CRAIG, DAVID BARSTOW, RUSSELL BUETTNER, JOHN DOES, ABC CORPORATIONS 1 THROUGH 10

Defendant.

----------X

INDEX NO. 453299/2021

MOTION DATE 08/25/2023

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

HON. ROBERT R. REED:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 87, 88, 89, 90, 93, 99, 101, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116
were read on this motion for ATTORNEY - FEES.

In this action for breach of contract, breach of the implied covenant of good faith and fair dealing and unjust enrichment (NYSCEF doc. no. 1, paras. 92-118), defendants The New York Times Company, Susanne Craig, David Barstow and Russell Buettner (moving defendants) moved, pursuant to CPLR 3211 (a) (1) and (a) (7), for an order dismissing the complaint and all claims asserted against them, and for an order directing plaintiff to pay moving defendants attorneys' fees and costs associated with the defense of these claims (motion seq. no. 003).

By order dated May 3, 2023, this court granted the moving defendants' motion, dismissed plaintiff's claims as asserted against them, and directed plaintiff Donald Trump to pay the accumulated attorneys' fees, legal expenses, and costs of the moving defendants, pursuant to, and in accordance with, the provisions of NY Civil Rights Law §70-a (1) (a) (NYSCEF doc. no. 84).

In motion sequence 004, the moving defendants seek an order quantifying their accumulated fees, costs and expenses, and request entry of judgment accordingly (NYSCEF doc. nos. 87, 90).

A defendant in an action involving public petition and participation may maintain an action, claim, cross claim or counterclaim to recover damages, including costs and attorney's fees from any person who commenced or continued such action provided that the defendant makes a demonstration that "the action involving public petition and participation was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law" (NY Civ Rights Law § 70-a [1] [a]).

By affirmations of David McCraw, Deputy General Counsel at the New York Times Company, and Christopher E. Duffy, counsel of record for defendant David Barstow, the moving defendants substantiate their attorneys' fees, legal expenses and costs in the amount of $392,638.69, consisting of $229,921.00 for defendants The New York Times Company, Susanne Craig and Russell Buettner, and $162,717.69 for defendant Barstow.

Plaintiff opposes the motion, arguing that the motion should be denied in its entirety, or the requested amount reduced by a significant margin, on the basis that the invoices submitted by the moving defendants' attorneys include unjustified or duplicative work and exorbitant hourly rates.

Indeed, "the award of attorneys' fees, whether pursuant to agreement or statute, must be reasonable and not excessive" (*RMP Capital Corp. v Victory Jet, LLC*, 139 AD3d 836, 839 [2d Dept 2016]). "A reasonable attorney's fee is commonly understood to be a fee which represents the reasonable value of the services rendered" (*id.* [alterations omitted]). "In general, factors to

be considered include (1) the time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented; (2) the lawyer's experience, ability, and reputation; (3) the amount involved and benefit resulting to the client from the services; (4) the customary fee charged for similar services; (5) the contingency or certainty of compensation; (6) the results obtained; and (7) the responsibility involved" (*id.*; *see JK Two LLC v Garber*, 171 AD3d 496 [1st Dept 2019]). "The determination of a reasonable attorney's fee is left to the sound discretion of the trial court." (*RMP Capital Corp.*, 139 AD3d at 839-40).

Considering the complexity of the issues presented in this action, the number of causes of action, the experience, ability and reputation of defendants' attorneys, the considerable amount in dispute, and the attorneys' success in dismissing the complaint against their defendants (*see RMP Capital Corp.*, 139 AD3d at 839-40), the court finds that $392,638.69 is a reasonable value for the legal services rendered.

Accordingly, it is

ORDERED that the attorneys' fees, legal expenses and costs for defendants The New York Times, Susanne Craig, David Barstow and Russell Buettner are hereby quantified in the amount of $392,638.69, and that the defendants shall have execution therefor; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

1/11/24
DATE

ROBERT R. REED, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
	X	GRANTED	☐ DENIED		GRANTED IN PART	☐	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT	☐	REFERENCE