

**SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, SECOND DEPARTMENT**

-----	X
PROJECT VERITAS,	:
	:
Plaintiff-Respondent,	: Appellate Division Docket
	: No. _____
vs.	:
	:
THE NEW YORK TIMES COMPANY,	: Westchester County Index
	: No. 63921/2021
Defendant-Appellant,	:
	:
and	: ORDER TO SHOW CAUSE
	:
	:
MAGGIE ASTOR, TIFFANY HSU, and JOHN	:
DOES 1-5,	:
	:
Defendants.	:
-----	X

Upon the annexed Affirmation of Jay Ward Brown of Ballard Spahr LLP, counsel for Defendant-Appellant The New York Times Company (“The Times”), dated December 27, 2021, the exhibits attached thereto, and the accompanying memorandum of law in support of the request for emergency relief pursuant to CPLR 5518, CPLR 5519(c), this Court’s inherent authority, and CPLR 5701,

LET PLAINTIFF-RESPONDENT PROJECT VERITAS SHOW CAUSE BEFORE THIS COURT, at the courthouse thereof, located at 45 Monroe Place, Brooklyn, New York 11201, on the ____ day of _____, 20____, at ____:____.m., or as soon thereafter as counsel may be heard, why an order should not be made and entered:

1. Vacating the Decision & Order entered as corrected on December 27, 2021, by the Honorable Charles D. Wood in its entirety (except for the provision granting leave for the filing of a brief amicus curiae) (the “Decision”) or, in the alternative, staying the effect of

that Decision in its entirety pending this Court's resolution of The Times's appeal therefrom, and expediting said appeal;

2. Granting The Times leave to appeal the Decision to this Court, to the extent that the Decision is not appealable as of right pursuant to CPLR 5701(a)(2)(i); and
3. Granting such other and further relief as to the Court may seem just and equitable.

SUFFICIENT CAUSE THEREFOR APPEARING, it is

ORDERED that the provisions of the Decision requiring (1) The Times "and its agents, employees, legal counsel or other persons under its control" to "immediately turn over to the plaintiff Project Veritas' counsel all physical copies of the subject legal memoranda prepared by Project Veritas' counsel, Benjamin Barr, that are in its control or possession," (2) The Times "and its agents, employees, legal counsel or other persons under its control" to "immediately delete/destroy copies of the legal memoranda prepared by Project Veritas' counsel, Benjamin Barr, from any computer, cloud server or other data collecting or disseminating sources, including but not limited to, all attachments to emails and cloud server devices, and to remove such documents from the internet and any web site or servers over which they have control," (3) The Times's counsel and the defendants to "use best efforts to retrieve copies of the legal memoranda prepared by Project Veritas' counsel, Benjamin Barr, provided to third parties," and (4) The Times to "file with the court within ten (10) days of service with notice of entry of this order an affidavit/affirmation confirming its compliance hereto," are hereby stayed pending final resolution of this Appeal; and it is further

ORDERED that service of a copy of this order to show cause and the papers upon which it was made upon counsel for Plaintiff-Respondent by personal delivery, office delivery,

overnight delivery service, or email on or before _____, 20____, shall be deemed sufficient service thereof.

Dated: Brooklyn, New York
_____, 20____

Associate Justice
Appellate Division, Second Department

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APPELLATE DIVISION, SECOND DEPARTMENT**

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	:	Appellate Division Docket
Plaintiff-Respondent,	:	No. 2021-09551
vs.	:	
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Defendant-Appellant,	:	
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and	:	
	:	
MAGGIE ASTOR, TIFFANY HSU, and JOHN	:	
DOES 1-5,	:	
	:	
Defendants.	:	
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**DEFENDANT-APPELLANT THE NEW YORK TIMES COMPANY'S
MEMORANDUM OF LAW IN SUPPORT OF ORDER TO SHOW CAUSE
FOR STAY OF ORDER PENDING APPEAL AND INTERIM STAY
DURING BRIEFING ON ORDER TO SHOW CAUSE**

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Defendant-Appellant The New York Times Company (“The Times”) respectfully submits this memorandum of law in support of the Order to Show Cause by which it seeks, pursuant to CPLR 5518, a modification or limitation of the lower court’s Decision & Order dated December 23, 2021 (the “Decision”), or, in the alternative, pursuant to CPLR 5519(c) and the Court’s inherent authority, a stay of that Decision’s effect pending the outcome of this appeal.¹ The Decision imposes an unconstitutional prior restraint on The Times’s publication of newsworthy information. It further requires The Times to relinquish possession of certain legal memoranda unrelated to this action belonging to Plaintiff-Appellant Project Veritas (“Project Veritas”)—materials received by The Times in the course of newsgathering by its reporters—and to disclose information about its newsgathering process. The Times separately seeks an interim stay, pursuant to CPLR 5519(c) and the Court’s inherent authority, of the portions of the Decision that require it to “immediately turn over to the plaintiff Project Veritas’ counsel all physical copies of the subject legal memoranda,” to “immediately delete/destroy copies of the legal memoranda” in electronic form, to “use best efforts to retrieve copies of the legal memoranda . . . from third parties,” and to certify by January 6, 2022 that it has taken those steps on pain of non-monetary and monetary penalties, as The Times will otherwise be denied effective relief. The Times has noticed this interlocutory appeal as of right pursuant to CPLR 5701(a)(2)(i) and 5701(a)(2)(v) and, in the alternative, seeks leave to appeal pursuant to CPLR 5701(c).

¹ The Times does not seek to alter or stay the provision of the Decision granting leave for the filing of a brief amicus curiae.

INTRODUCTION

In this application, The Times seeks to modify an extraordinary Decision & Order entered by the Supreme Court, Westchester County, on December 24, 2021² in a defamation action brought by Project Veritas. In the course of its newsgathering about the current FBI investigation into Project Veritas's role in the theft of a diary belonging to President Biden's daughter, Times reporters received certain legal memoranda provided by a lawyer to Project Veritas more than three years ago (the "Memoranda"). The Memoranda were obtained by journalists entirely outside the discovery process in this or any other litigation and have nothing to do with the underlying defamation claim in this action. The Decision prevents The Times from possessing or disseminating the contents of the Memoranda based solely on unfounded speculation that The Times improperly acquired them. The Decision both imposes a patently unconstitutional prior restraint on speech and also goes well beyond the scope of the trial court's discretion to manage discovery under CPLR 3103(c), including because the Memoranda were not obtained through disclosure in this or any action.

A prior restraint is "the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 562 (1976). Indeed, the Times was last subject to a prior restraint against news reporting more than 50 years ago, in the Pentagon Papers case—in which the Supreme Court ultimately vindicated the newspaper's right to possess and publish otherwise secret national security documents.

Emergency relief is needed because the constitutional violation is ongoing. As the Supreme Court has instructed, "even a short-lived 'gag' order in a case of widespread concern to

² The Order apparently was signed on December 23, 2021, but did not appear on the docket until the afternoon of December 24. The Decision was re-entered as corrected on December 27, 2021.

the community constitutes a substantial prior restraint and causes irreparable injury to First Amendment interests as long as it remains in effect.” *Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1304 (1983). The trial court has already gagged The Times for over a month, first under an order to show cause and now under the Decision from which The Times here appeals. This unconstitutional prior restraint should be vacated or, at a minimum, stayed pending the resolution of this appeal, so that The Times can continue to report to the public on the activities of Project Veritas unencumbered by restrictions that apply to no other news organization in the world.

The need for this Court’s intervention is particularly urgent with respect to the portions of the Decision that direct The Times to “immediately” turn over all physical copies of the Memoranda to Project Veritas, to destroy all electronic copies, and to seek to recover copies from other third parties. These actions, once taken, will be impossible to undo even if this Court subsequently grants The Times’s appeal in full, and thus will in the most literal sense irreparably harm The Times’s ability to research and report to the public on Project Veritas. The Times is required to certify its compliance with these provisions of the Decision by no later than January 6, on pain of possible default in the underlying defamation litigation and/or substantial financial penalties. In order to preserve the status quo, an interim stay of those portions of the Decision should be granted during briefing on this application.

FACTUAL BACKGROUND

A. The Defamation Action

Project Veritas is a non-profit corporation that works with what it calls a “band of ‘guerilla journalists.’” Compl. (Affirmation of Jay Ward Brown, dated December 27, 2021 (“Brown Aff.”), Ex. 3) ¶¶ 24, 36. Its “signature style” is to use undercover operatives to make

audio and video recordings of people who do not know they are being taped. *Id.* ¶¶ 4, 38. Its newsgathering tactics have invited frequent press attention and public controversy.³

Project Veritas filed the underlying defamation action against The Times and two of its journalists on October 30, 2020, based on articles published by The Times about a video produced in September 2020 by Project Veritas about Congresswoman Ilhan Omar (the “Ilhan Omar Video”). The Ilhan Omar Video claimed that the congresswoman and her campaign were connected to a “ballot harvesting” scheme in Minneapolis. *Id.* ¶¶ 5-9, 42-64. Project Veritas alleges that The Times defamed it by characterizing certain of its claims in the Ilhan Omar Video as “deceptive” and by stating that the Video relied on unidentified sources and contained “no verifiable evidence that representative Ilhan Omar’s campaign had collected ballots illegally.” *Id.* ¶¶ 77-79, 150-152, 186, 216, 276. Notably, the focus of the articles is not on Project Veritas’s newsgathering tactics, and they do not address tactics that are the subject of the

³ See, e.g., Shawn Boburg, Aaron C. Davis & Alice Crites, *A woman approached The Post with dramatic—and false—tale about Roy Moore. She appears to be part of undercover sting operation*, THE WASHINGTON POST (Nov. 27, 2017), https://www.washingtonpost.com/investigations/a-woman-approached-the-post-with-dramatic--and-false--tale-about-roy-moore-she-appears-to-be-part-of-undercover-sting-operation/2017/11/27/0c2e335a-cfb6-11e7-9d3a-bcbe2af58c3a_story.html (Affirmation of Joel Kurtzberg, dated November 22, 2021 (“Kurtzberg Aff.”) (Brown Aff. Ex. 8), Ex. 2) (reporting on efforts by a likely Project Veritas operative to deceive the *Washington Post*); Rick Ungar, *James O’Keefe Pays \$100,000 To ACORN Employee He Smeared—Conservative Media Yawns*, FORBES (Mar. 8, 2013), <https://www.forbes.com/sites/rickungar/2013/03/08/james-okeefe-pays-100000-to-acorn-employee-he-smeared-conservative-media-yawns/?sh=46b4e63514bd>) (Kurtzberg Aff. (Brown Aff. Ex. 8) Ex. 7) (reporting on Project Veritas’s founder and associate posing as a pimp and prostitute and surreptitiously recording an encounter with an employee of a voter registration organization); Mark Memmott, *Details Emerge About Arrest In Senator’s Office Phone Tampering*, NPR (Jan. 27, 2010), https://www.npr.org/sections/thetwo-way/2010/01/okeefe_landrieu_acorn_telephon.html (Kurtzberg Aff. (Brown Aff. Ex. 8) Ex. 8) (reporting on Project Veritas’s founder and associates posing as telephone repairmen to infiltrate a Senator’s office).

Memoranda. Rather, the articles analyze the content of the Ilhan Omar Video and the way that information was presented to viewers.

On December 18, 2020, The Times moved to dismiss the defamation action on multiple grounds, including pursuant to New York's recently amended anti-SLAPP statute, CPLR 3211(g). Brown Aff. ¶ 6. The lower court denied the motion, and The Times filed a notice of appeal on April 8, 2021. *Id.* That appeal is fully briefed and is currently pending before this Court at Docket No. 2021-02719.

B. The Discovery Stays

No disclosure has taken place in this action. Discovery was automatically stayed pursuant to CPLR 3214(b) when The Times filed its motion to dismiss. When the motion to dismiss was denied, The Times applied to this Court for a stay of discovery pending the disposition of its appeal, which was granted on October 27, 2021. Brown Aff. ¶ 7. As a result, neither side has served or responded to any document requests, interrogatories, requests for admission, notices of deposition, third-party subpoenas, or any other disclosure device.

C. The New York Times's November 11, 2021 Article

On November 11, 2021, The Times published an article titled *Project Veritas and the Line Between Journalism and Political Spying* (the "November 11 Article"),⁴ which examines Project Veritas's newsgathering tactics in light of Memoranda prepared by an attorney for Project Veritas that were given to reporters for The Times. The November 11 Article reports that Project Veritas sought advice regarding the legality of a number of potential information-

⁴ Adam Goldman & Mark Mazetti, *Project Veritas and the Line Between Journalism and Political Spying*, THE NEW YORK TIMES (Nov. 11, 2021), <https://www.nytimes.com/2021/11/11/us/politics/project-veritas-journalism-political-spying.html> (Kurtzberg Aff. (Brown Aff. Ex. 8) Ex. 1).

gathering methods. As has already been publicly reported, one memorandum concerned whether the surreptitious recording of FBI and Justice Department employees by Project Veritas would violate the Espionage Act. Kurtzberg Aff. (Brown Aff. Ex. 8) Ex. 1 at 1. Another memorandum, from February 2018, discussed whether it would be legal for Project Veritas to use the dating app Tinder to have its operatives meet government employees with national security clearances. *Id.* at 1-2. A third memorandum addressed the potential legality of having Project Veritas operatives present false identities to Secret Service agents. *Id.* at 2.

The Memoranda described in the November 11 Article have nothing to do with the claims or defenses in this defamation action.⁵ The authors of the November 11 Article are not defendants in this action and did not write any of the articles that gave rise to Project Veritas's defamation claims. *See* Compl. (Brown Aff. Ex. 3) Exs. D-H. All of the Memoranda are dated from well before The Times published its first article on the Ilhan Omar Video, and they do not discuss Ilhan Omar, alleged voter fraud, ballot harvesting, defamation law, or the Ilhan Omar Video. The Memoranda instead concern newsgathering techniques that do not appear remotely related to those employed by Project Veritas in preparing the Ilhan Omar Video. Moreover, The Times received the Memoranda through newsgathering efforts that were completely outside of the litigation process in this action—a fact that Project Veritas does not and cannot dispute, given that no discovery has taken place in this defamation action. Indeed, Project Veritas has presented no evidence at all regarding the circumstances of The Times's acquisition of the Memoranda. Nor has The Times, for reasons of preserving the reporter's privilege applicable to its newsgathering.

⁵ In keeping with sound journalistic practice, the November 11 Article discloses the existence of this pending lawsuit by Project Veritas against The Times. Kurtzberg Aff. (Brown Aff. Ex. 8) Ex. 1 at 2.

D. The Order to Show Cause

On November 17, 2021, Project Veritas filed a request for an order to show cause in the trial court, arguing that The Times had improperly acquired the Memoranda and seeking, among other things, to prevent The Times from further reporting on them. Brown Aff. ¶ 8. The following day, The Times filed a letter requesting an opportunity to be heard before the court decided whether to impose the prior restraint sought by Project Veritas. *Id.* ¶ 10 & Ex. 5. Nevertheless, without providing The Times that opportunity, the trial court entered the order to show cause. *Id.* ¶ 11 & Ex. 6. As interim relief pending resolution of the order to show cause, the trial court directed that The Times and its counsel “immediately sequester, protect, and refrain from further disseminating or publishing any of Plaintiff Project Veritas’ privileged materials” in their possession and “cease further efforts to solicit or acquire Plaintiff Project Veritas’ attorney-client privileged materials” (the “Interim Order”). *Id.*

The Times promptly filed an application under CPLR 5704 requesting that this Court review and vacate the Interim Order as an unconstitutional prior restraint. *Id.* ¶ 12. On November 19, 2021, the application was denied by the Honorable Leonard B. Austin in a one-sentence order. *Id.* Ex. 7.

In the nearly six weeks since the Interim Order was initially entered, The Times has fully complied, despite its good-faith belief that the order violates its rights under both the First Amendment and the New York Constitution.

E. The Trial Court’s December 24 Decision & Order

On November 23, 2021, five days after entering the Interim Order, the trial court held a hearing on the order to show cause. The Times filed an opposition brief the day before the hearing, *id.* Ex. 11, Project Veritas filed a reply brief on December 1, 2021, *id.* ¶ 15, and The Times filed a sur-reply on December 3, 2021, *id.* On December 14, 2021, the trial court entered

an amended interim order that clarified the scope of the interim relief granted, but largely left in place the prior restraint against The Times. *Id.* Ex. 10.

The lower court initially entered the Decision & Order that is subject of the present application on December 24, 2021, and entered it as corrected on December 27, 2021. *Id.* Ex. 1. The Decision grants Project Veritas’s motion in part and directs, among other things, that The Times:

- “immediately turn over” to Project Veritas’s counsel “all physical copies of the subject legal memoranda”;
- “immediately delete/destroy” all electronic copies of the Memoranda;
- “use best efforts to retrieve copies” of the Memoranda “provided to third parties”;
- file within ten days of service of the notice of entry of the Decision “an affidavit/affirmation confirming its compliance” and providing detailed information about the destruction of copies of the Memoranda, “including emails and attachments thereof”; and
- not “show[], transmit[], or disseminate[]” the Memoranda “in any manner to any persons absent written order of” the court.

Id. at 27-28. The Decision also provides that if The Times fails to comply as directed, Project Veritas shall file an “affirmation/affirmation of noncompliance” and “seek any relief related thereto, including preclusion, striking of pleadings, and costs and/or sanctions.” *Id.* at 28.

The Times filed and served a notice of entry of the corrected Decision, including a copy of the Decision itself, on December 27, 2021, and filed its Notice of Appeal from the Decision on the same day. The Times now seeks emergency interim and permanent relief from the Decision in this Court.

ARGUMENT

I. THIS COURT SHOULD STAY THE PORTIONS OF THE LOWER COURT'S DECISION REQUIRING "IMMEDIATE" ACTION BY THE TIMES TO PRESERVE THE STATUS QUO ANTE

As discussed in detail below, the lower court's Decision as a whole is an unconstitutional prior restraint that should be vacated. However, several portions of the Decision impose an even more pressing and, if allowed to stand during appeal, irreparable injury on The Times, in that they require it to "immediately turn over to the plaintiff Project Veritas' counsel all physical copies of the subject legal memoranda," to "immediately delete/destroy copies of the legal memoranda" in electronic form, and to seek recovery of copies of the Memoranda from others. *See* Decision (Brown Aff. Ex. 1) at 27. A separate portion of the Decision requires The Times to file an affidavit "confirming its compliance hereto" within ten days of service of the notice of entry, *i.e.*, by January 6, 2022. *Id.* Without a stay of these provisions for the pendency of this Court's consideration of this Order to Show Cause and, if other portions of this motion are denied, this appeal as whole, the remainder of this appeal will be rendered academic.

This Court has the power pursuant to CPLR 5519(c) to stay enforcement of all or part of an "order appealed from pending an appeal or determination on a motion for permission to appeal." Such a stay is at the discretion of the Court. *See Schwartz v. NYC Hous. Auth.*, 219 A.D.2d 47, 48 (2d Dep't 1996); *Grisi v. Shainswit*, 119 A.D.2d 418, 421 (1st Dep't 1986). In addition to this statutory authority, courts retain "inherent authority to grant a discretionary stay of the proceeding pending appeal," including if the party seeking the stay would "suffer hardship if this court does not grant a stay" and the party opposing the stay "will not suffer undue prejudice because of the stay." *Tax Equity Now NY v. City of N.Y.*, 173 A.D.3d 464, 465 (1st Dep't 2019), *affirming* 2018 N.Y. Misc. LEXIS 5727, at *6-8 (Sup. Ct. N.Y. Cnty. Nov. 30,

2018). Courts may exercise their “broad discretion” to grant stays “as justice require[s].” *Case Capital Corp. v. Morgan Invest., Inc.*, 154 A.D.2d 501, 501 (2d Dep’t 1989).

A. The Times’s Appeal Has Merit and Is Not Interposed for Delay.

The first factor relevant to whether the Court should exercise its discretion and grant a stay pending appeal is whether there potentially is merit to The Times’s arguments on appeal. *See Emigrant Mission Comm. of German Evangelical Lutheran Synod v. Brooklyn Elevated R. Co.*, 40 A.D. 611, 625 (2d Dep’t 1899) (affirming stay, noting it would be “different” if “it clearly appeared that there was no merit in the appeal” or “that it was taken purely for delay”); *In re Terrence K*, 135 A.D.2d 857 (2d Dep’t 1987) (same); *Wilkinson v. Sukiennik*, 120 A.D.2d 989, 989 (4th Dep’t 1986) (finding where an appeal “may have merit,” a stay of an order pending an appeal should be granted).

As set forth more fully below, the lower court erred in several different respects in rendering its Decision. First and most fundamentally, the Decision acts as a prior restraint. The federal and New York State Constitutions impose an extremely heavy burden on litigants seeking to bar the media from publishing news, and Project Veritas did not come close to meeting this standard. Second, the lower court purported to be acting pursuant to authority granted pursuant to CPLR 3103, but Project Veritas conceded that the Memoranda at issue were not obtained in the discovery process. CPLR 3103 does not and cannot allow a party suing a newspaper over one set of articles to ask a judge to act as a sort of supervising editor and control the newspaper’s ability to investigate other, unrelated stories. Third, even if CPLR 3103 did apply, Project Veritas offered no evidence that the documents were “improperly or irregularly obtained,” as opposed to being obtained through normal newsgathering processes unrelated to the conduct of this litigation.

Accordingly, this appeal at the very least “may have merit.” *Wilkinson*, 120 A.D.2d at 989. This factor therefore weighs in favor of the Court granting the requested stay. And The Times is not in any way seeking to delay. Indeed, it wishes to have the Decision dissolved as quickly as possible, as demonstrated by its filing this appeal and motion some 72 hours after the Decision was issued, a period that included two weekend days, one of which was Christmas Day. Moreover, The Times will promptly perfect its appeal and file its opening merits brief well in advance of the applicable deadlines in order to expedite resolution of the issues presented.

B. Project Veritas Will Not Be Prejudiced by a Temporary Stay of These Provisions.

Second, in determining whether to exercise its discretion to grant the requested stay, this Court properly considers “any prejudice that a stay may cause to the party opposing it.” *Chan v. Zoullas*, 2012 N.Y. Misc. LEXIS 64, at *7 (Sup. Ct. N.Y. Cnty. Jan. 10, 2012). Here, however, it is Project Veritas’s burden to demonstrate that prejudice would result from the grant of a stay. *See De Siervi v. Liverzani*, 136 A.D.2d 527, 529 (2d Dep’t 1988) (recognizing that the party opposing the application for a stay has a burden to show it will be prejudiced if the stay is issued).

No such prejudice will befall Project Veritas here. The Times is seeking an immediate stay pending resolution of the Order to Show Cause only of the portions of the Decision that would require it to return or destroy copies of the Memoranda and certify its compliance. Such a stay would preserve the status quo ante pending resolution of the Order to Show Cause and/or appeal. While The Times believes the prior restraint on its news reporting is unconstitutional, it has not violated that bar since the lower court first imposed it in the form of a temporary restraining order on November 18, 2021. Moreover, because this Court has issued a separate order staying discovery in this case while The Times’s appeal of the denial of its anti-SLAPP

motion is pending, a brief stay of enforcement of these provisions can have no impact on the discovery process.

C. The Times Would Be Prejudiced By Denial of the Stay.

The third consideration is the prejudice The Times would suffer in the absence of a stay. Indeed, even if Project Veritas could demonstrate some prejudice from a stay (which it cannot), courts still grant stays where the opposing party's prejudice "is not as severe as [that the moving party] would suffer without a stay." *Britt v. Int'l Bus. Servs.*, 255 A.D.2d 143, 144 (1st Dep't 1998). Here, the prejudice to The Times is plain.

If The Times is required to destroy and return its copies of the Memoranda "immediately" and affirm its compliance by early January, its appeal from these provision of the order will effectively have no meaning. Specifically, even if, as The Times believes is required here, this Court subsequently lifts the prior restraint and allows The Times to continue reporting on the legal memoranda, its journalists would be unable to consult the documents themselves and therefore would effectively be barred from any meaningful reporting about them. If it failed to comply, The Times would face contempt sanctions. The Decision is ambiguous about whether The Times truly must act "immediately" to return or destroy the Memoranda, or whether it has until January 6 to do so, which further heightens the urgency of this stay application. *See* Decision (Brown. Aff. Ex. 1 at 27).

Courts repeatedly have recognized that staying a proceeding or an order therein is appropriate when, without a stay, the relief sought on appeal will be mooted. *See Suffolk Cnty. Ethics Comm'n v. Neppell*, 2003 WL 26086904, at *1 (N.Y. Sup. Ct. Suffolk Cnty. Jan. 30, 2003) (granting "stay pending appeal pursuant to CPLR 5519(c)" because "[u]nless a stay is granted, the appeal will be rendered moot by virtue of the fact that defendant will be forced to file the financial disclosure statement prior to the appeal" regarding whether disclosure of the

statement is required is determined), *aff'd*, 307 A.D.2d 961 (2d Dep't 2003); *Ctr. for Nat'l Sec. Studies v. DOJ*, 217 F. Supp. 2d 58, 58-59 (D.D.C. 2002) (finding stay appropriate where district court had "ordered the Government to produce a list of the identities of all individuals detained in connection with the investigation of the September 11, 2001 terrorist attacks, and a list of the identities of their attorneys" in part because "disclosure of the names of the detainees and their lawyers would effectively moot any appeal"); *aff'd*, 331 F.3d 918 (D.C. Cir. 2003); *Neff v. Penn. R. Co.*, 173 F.2d 931, 933 (3d Cir. 1949) (finding that once privileged material is produced after an objection has been overruled, the question of correctness of the ruling is moot on appeal).

Therefore, while this Court considers the broader merits of the lower court's Decision granting a prior restraint, it should at the very least stay those provisions of the Decision that would require The Times to act to its detriment by January 6 in ways that literally cannot thereafter be remedied if it prevails on appeal.

II. THIS COURT SHOULD VACATE THE LOWER COURT'S PRIOR RESTRAINT

Beyond The Times's need for immediate relief with respect to the provisions discussed above, the lower court's Decision imposes a prior restraint on publication by The Times that violates both the First Amendment to the United States Constitution and Article I, Section 8 of the New York State Constitution. This Court should act at once to lift the restraint, because each day The Times is prevented from publishing causes "irreparable injury." *Capital Cities Media*, 463 U.S. at 1304; *see also Nebraska Press*, 423 U.S. at 1329 (Blackmun, J., in chambers) ("Where . . . a direct prior restraint is imposed upon the reporting of news by the media, each passing day may constitute a separate and cognizable infringement of the First Amendment."); *N.Y. Times Co. v. United States*, 403 U.S. 713, 715 (1971) (Black, J., concurring) ("every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment"); *Time Sq. Books, Inc. v. City of*

Rochester, 223 A.D.2d 270, 278 (4th Dep’t 1996) (“Infringement of the constitutionally guaranteed right of free expression, for even minimal periods of time, unquestionably constitutes irreparable injury”).

This Court has the power to “grant, modify or limit a preliminary injunction or temporary restraining order pending an appeal or determination of a motion for permission to appeal” pursuant to CPLR 5518. Among other things, it is proper to vacate an injunction where its proponent failed to show a likelihood of success on the merits, *see Humane Soc’y of U.S. v. Cnty. of Monroe*, 192 A.D.2d 1139 (4th Dep’t 1993), or failed to show irreparable injury, *see State of Israel v. St. Martin's Press, Inc.*, 166 A.D.2d 251, 251 (1st Dep’t 1990), or because such an injunction was ineffective, *id.* While orders imposing prior restraints are hardly routine, courts in this state have not hesitated to vacate them pursuant to this provision. *See, e.g., Porco v. Lifetime Entm’t Servs., LLC*, 116 A.D.3d 1264, 1265 n.1 (3d Dep’t 2014) (temporary restraining order preventing televising of movie vacated pending outcome of appeal of order); *State of Israel*, 166 A.D.2d at 251 (vacating temporary restraining order preventing publication of book).

This Court should vacate the Decision at this stage, without waiting for full briefing on the merits of the appeal, because it is flawed in at least three separate ways: (1) it acts as a presumptively unconstitutional prior restraint, (2) the Memoranda were in no way connected with the discovery process, and thus CPLR 3103 had no application here, and (3) even if CPLR 3103 did apply, Project Veritas failed demonstrate that the Memoranda were improperly or irregularly acquired.

A. The Decision Imposes an Unconstitutional Prior Restraint on Speech.

The Decision, which at its core commands that “the attorney-client memoranda that are the subject of this order shall not be shown, transmitted, or disseminated in any manner to any persons absent written order of this Court,” Decision (Brown Aff. Ex. 1) at 28, is a classic prior

restraint on speech, as it forbids speech based on its content in advance of its actual expression. *Ash v. Bd. of Managers of 155 Condo.*, 44 A.D.3d 324, 325 (1st Dep’t 2007) (defining prior restraint). A prior restraint is “one of the most extraordinary remedies known to our jurisprudence.” *Neb. Press Ass’n*, 427 U.S. at 562. Indeed, “the First Amendment erects a virtually insurmountable barrier” against the issuance of just the sort of prior restraint on a media organization that the lower court has here imposed. *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring). The Supreme Court has limited the imposition of prior restraints to “exceptional cases,” such as “the publication of the sailing dates of transports or the number and location of troops” in a time of war. *Near v. Minnesota*, 283 U.S. 697, 716 (1931); *see also, e.g., N.Y. Times Co. v. United States*, 403 U.S. 713, 726 (1971) (Brennan, J., concurring) (suggesting that “suppression of information that would set in motion a nuclear holocaust” could be justified). Even the possibility that a news organization’s disclosures may lead to criminal or civil sanctions after publication does not justify a prior restraint. *Id.* at 733 (White, J., concurring); *CBS Inc. v. Davis*, 510 U.S. 1315 (1994) (Blackmun, J., in chambers). In the rare case in which a prior restraint potentially could be justified, before an order barring speech can be imposed, the court must both consider alternatives and “assess the probable efficacy of prior restraint on publication” in preventing the great harm that would otherwise result. *See Neb. Press Ass’n*, 427 U.S. at 563, 565. Other alternatives to prior restraint “must be explored and ultimately rejected as inadequate—individually and in combination,” before injunctive relief may be imposed. *In re Dow Jones & Co.*, 842 F.2d 603, 611 (2d Cir. 1988). In particular, “subsequent civil or criminal proceedings, rather than prior restraints, ordinarily are the appropriate sanction for calculated defamation or other misdeeds in the First Amendment context.” *Davis*, 510 U.S. at 1318.

New York has “its own exceptional history and rich tradition” of a free press, *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235, 250 (1991), and the scope of protection provided by Article I, Section 8 of the “New York Constitution is often broader than the minimum required by the Federal Constitution,” *id.* at 249 (internal quotation marks omitted). *See also O’Neill v. Oakgrove Constr., Inc.*, 71 N.Y.2d 521, 529 (1988) (explaining that “the consistent tradition in this State of providing the broadest possible protection to the sensitive role of gathering and disseminating news of public events . . . call[s] for particular vigilance by the courts of this State in safeguarding the free press against undue interference”). Accordingly, New York courts apply an even more demanding standard for prior restraints than the federal courts, requiring “a showing on the record that such expression will immediately and irreparably create *public* injury.” *People ex rel. Arcara v. Cloud Books, Inc.*, 68 N.Y.2d 553, 558 (1986) (emphasis added); *see also, e.g., Porco*, 116 A.D.3d at 1266 (rejecting request to enjoin broadcast because any harm it might cause “would be limited to plaintiff alone” and “would not create the type of imminent and irreversible injury to the public that would warrant the extraordinary remedy of prior restraint”); *Madole v. Barnes*, 20 N.Y.2d 169, 175 (1967) (prior restraints barred “unless it is demonstrable on a record that such expression will immediately and irreparably create injury to the public weal”).

The lower court, while acknowledging the exacting standards to which prior restraints are subjected, Decision (Brown Aff. Ex. 1) at 15-16, erred in its application of them in at least three separate ways. **First**, the court suggested that the heavy presumption against prior restraints does not apply unless the speech sought to be restricted is about a matter of public concern, *id.* at 17-25, a proposition that finds no support in the jurisprudence. While many prior restraint cases understandably arise in the context of matters of public concern, the cases are clear that “[a]ny

prior restraint on expression comes to this Court with a ‘heavy presumption’ against its constitutional validity.” *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (emphasis added).

Second, the lower court compounded the error by concluding that the Memoranda do not relate to a matter of public concern. Decision (Brown Aff. Ex. 1) at 23. Specifically, it found that “[a] client seeking advice from its counsel simply cannot be the subject of general interest and of value and concern to the public. It is not the public’s business to be privy to the legal advice that this plaintiff or any other client receives from its counsel.” *Id.* at 24.

As New York’s Court of Appeals has made clear, “[d]etermining what editorial content is of legitimate public interest and concern is a function for editors,” and generally not for courts. *Gaeta v. N.Y. News, Inc.*, 62 N.Y.2d 340, 349 (1984). “The press, acting responsibly, and not the courts must make the ad hoc decisions as to what are matters of genuine public concern, and while subject to review, editorial judgments as to news content will not be second-guessed so long as they are sustainable.” *Id.*

Courts in this state repeatedly have found that even deeply personal events are matters of public concern when they are emblematic of larger issues or trends, or involve important public figures. For example, the Court of Appeals found that articles regarding the divorce of an actress addressed matters of public concern, because they “portrayed [the actress’s] alleged victimization by her financial as well as marital partner to the point of economic and career ruination. It is this episode of human interest that reflected a matter of genuine social concern.” *Huggins v. Moore*, 94 N.Y.2d 296, 305 (1999) (noting “the deference to editorial judgment our decisions require”). Similarly, in *Cottom v. Meredith Corp.*, 65 A.D.2d 165 (4th Dep’t 1978), the court found that a report about a “private legal dispute between a landlord and his tenants,”

though a “story of one isolated family . . . was a story symptomatic of the larger problem” about the health and safety of the elderly, *id.* at 170-71.

Here, Project Veritas’s surreptitious tactics have been the subject of widespread public interest and litigation. *See, e.g., supra* n.3; Second Amended Complaint and Demand for Trial, *AFT Michigan v. Project Veritas*, 17-cv-13292 (LVP-EAS) (E.D. Mich., July 19, 2018), ECF No. 72 (asserting claims involving a Project Veritas operation against the American Federation of Teachers); Complaint, *Democracy Partners, LLC v. Project Veritas Action Fund*, 17-cv-1047 (PLF) (D.D.C. June 1, 2017), ECF No. 1 (asserting claims relating to a Project Veritas operation against a political consulting firm). Beyond this, Project Veritas is a non-profit corporation, *see* Compl. (Brown. Aff. Ex. 3) ¶ 24, and there is a “significant public interest in the management and affairs of not-for-profit corporations.” *People v. Grasso*, 54 A.D.3d 180, 191 (1st Dep’t 2008).⁶

Third, Project Veritas did not establish, and the lower court did not find, that The Times’s future publication of information related to the Memoranda would “immediately and irreparably create public injury.” *Porco*, 116 A.D.3d at 1266. The Court instead found that the “attorney-client relationship between Benjamin Barr and Project Veritas has been undermined,” Decision (Brown Aff. Ex. 1) at 7, and that The Times purportedly has “gained strategic advantage in the litigation with the knowledge it gained from the memoranda,” *id.* at 8. First,

⁶ In holding that the subjects of the Memoranda are not matters of public concern, the lower court relied heavily on cases addressing the First Amendment rights of government employees. *See* Decision at 20-22 (citing *San Diego v. Roe*, 543 U.S. 77 (2004); *Connick v. Myers*, 461 U.S. 138 (1983); *Lewis v. Cowen*, 165 F.3d 154 (2d Cir. 1999); *Rutherford v. Katonah-Lewisboro Sch. Dist.*, 670 F. Supp. 2d 230 (S.D.N.Y. 2009); *Santer v. Bd. of Educ. of E. Meadow Union Free Sch. Dist.*, 23 N.Y.3d 251 (2014)). Those cases have little relevance to the prior restraint against The Times, as the government “may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large.” *United States v. Nat’l Treasury Employees Union*, 513 U.S. 454, 465 (1995).

this is all completely speculative, and thus an improper ground for a prior restraint in any event. *See Neb. Press Ass’n*, 427 U.S. at 563 (rejecting potential impact of publicity on prospective jurors as basis for restraint, as it “was of necessity speculative, dealing as he was with factors unknown and unknowable”); *N.Y. Times Co.*, 403 U.S. at 726-27 (Brennan, J., concurring) (“[O]nly governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order. In no event may mere conclusions be sufficient . . .”).

Second, all of these purported harms would already have occurred and are not redressed by the prior restraint or the destruction of newsgathering information. *See State of Israel*, 166 A.D.2d at 251 (rejecting prior restraint where book had already been distributed to wholesalers and book reviewers and thus “any grant of injunctive relief in this case would be ineffective”); *United States v. Bolton*, 468 F. Supp. 3d 1, 6 (D.D.C. 2020) (declining to grant prior restraint where book had already been distributed around the world, even though its disclosure of classified information “may indeed have caused the country irreparable harm,” because “the damage is done”). As the lower court acknowledged, the order issued here imposes “remedies that go beyond the typical discovery process.” Decision (Brown Aff. Ex. 1) at 13. If the concern is that The Times will attempt to obtain some sort of litigation advantage through its possession of the Memoranda—The Times already has represented that it will not use the Memoranda for any purpose in this litigation—then *at most* this Court could sustain only that portion of the Decision that prohibits The Times and its counsel from using the Memoranda or information obtained from them “in this action for any purposes whatsoever.” *Id.* at 27. The First

Amendment does not allow the imposition of a prior restraint where other remedies are available to address a demonstrated injury.

For each of these reasons, the Decision is a prior restraint in violation of the United States and New York Constitutions.

B. The Memoranda Are Beyond the Reach of CPLR 3103(c) Because They Were Obtained Through The Times's Newsgathering Efforts and Not Through Discovery.

The lower court issued the Decision pursuant to CPLR 3103(c), which provides: “If any disclosure under this article has been improperly or irregularly obtained so that a substantial right of a party is prejudiced, the court, on motion, may make an appropriate order, including an order that the information be suppressed.” While this provision “confers broad discretion upon a court to fashion appropriate remedies to prevent the abuse of disclosure devices,” as this Court has held, it applies *only* to information obtained “in the course of any disclosure process under CPLR Article 31.” *People v. Saqline K.*, 164 A.D.3d 1368, 1369 (2d Dep’t 2018) (finding “no basis for the issuance of a protective order pursuant to CPLR 3103(c)” where document at issue was obtained outside of disclosure process); *see also, e.g., Int’l Ass’n of Heat & Frost Insulators Local No. 26 Welfare Fund v. Hebert Indus. Insulation, Inc.*, 234 A.D.2d 930, 930 (4th Dep’t 1996) (holding that a request to inspect books and records was not “the equivalent of discovery,” and was therefore not “subject to a protective order under CPLR 3103,” because the requesting party had “an independent unqualified right to examine the books or records”).⁷ Here, as the

⁷ Federal courts have reached the same conclusion with respect to the reach of the analogous Federal Rule of Civil Procedure 26(c). *See, e.g., Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1081 (9th Cir. 1988) (reversing protective order that required return of privileged documents obtained in a separate legal action because “a district court’s power to control discovery does not extend to material discovered in a separate action”); *Schlaifer Nance & Co. v. Estate of Warhol*, 742 F. Supp. 165, 166 (S.D.N.Y. 1990) (“Neither the Federal Rules of Civil Procedure nor courts’ inherent powers support an order prohibiting use of information innocently obtained from third parties without use of judicial process.”); *Culinary Foods v. Raychem Corp.*,

lower court acknowledged, there is no dispute that reporters for The Times received the Memoranda “outside of any discovery related to this action.” Decision (Brown Aff. Ex. 1) at 9. CPLR 3103(c) therefore did not authorize the court to order The Times to relinquish possession over the Memoranda or refrain from publishing them.

In the lower court, Project Veritas cited various cases in which courts applied CPLR 3103 to materials obtained outside of discovery, but each of those cases involved materials directly relevant to the litigation at issue. Here, the materials in question have absolutely nothing to do with the defamation claim that is the subject of this litigation. As set out above, in its Complaint, Project Veritas alleges that The Times and its reporter defamed it in several articles discussing Project Veritas’s 2020 video concerning claims of ballot harvesting connected to Congresswoman Ilhan Omar. None of the Memoranda are from 2020 or relate to the content of or the newsgathering techniques used to create the Ilhan Omar Video. The controversy over the Ilhan Omar Video involves claims that the purported evidence was misleadingly presented in the video and does not support the conclusions Project Veritas draws. It does not concern the newsgathering techniques Project Veritas used to obtain the raw footage or information. Therefore, The Times would not have reason or a basis to seek the Memoranda in discovery here.

This conclusion is consistent with *Seattle Times Co. v. Rhinehart*, in which the Supreme Court recognized the crucial distinction between information and documents obtained through discovery and those “gained through means independent of the court’s processes.” 467 U.S. 20,

153 F.R.D. 614, 615 (N.D. Ill. 1993) (“[M]aterial received by one of the parties prior to commencement of this action (and therefore before initiation of any discovery, as well as the request for protective orders under Fed. R. Civ. P. 26(c)) can not be made a legitimate part of the corpus of any protective order the court enters.”).

28, 34 (1984). Whereas a court’s interest in maintaining “the integrity of its discovery processes” justifies broad discretion to control discovery materials, protective orders that extend to materials obtained outside of discovery “implicate[] the First Amendment rights of the restricted party to” a much greater degree. *Id.* at 28, 34.⁸ In upholding the protective order at issue in that case, the Court emphasized that the order was “limited to the context of pretrial civil discovery” and did “not restrict the dissemination of the information if gained from other sources.” *Id.* at 37.⁹ Here, the Decision applies to materials The Times received wholly outside the discovery process and purports to govern its conduct outside of this case entirely. Simply put, the Memoranda have nothing to do with the Ilhan Omar Video and were written years before The Times published the articles at issue in the underlying defamation action. The Times does

⁸ Following *Seattle Times*, numerous courts have rejected restrictions on the use of materials obtained outside of discovery as prior restraints. *See, e.g., Bridge C.A.T. Scan Assocs. v. Technicare Corp.*, 710 F.2d 940, 945 (2d Cir. 1983) (holding that prohibition on disclosure of information obtained outside of discovery was a prior restraint); *P&G v. Bankers Tr. Co.*, 78 F.3d 219, 225 (6th Cir. 1996) (same); *Grove Fresh Distribs. v. John Labatt Ltd.*, 888 F. Supp. 1427, 1441 (N.D. Ill. 1995) (“Prohibiting the disclosure of information gained through means independent of the court’s processes would raise the specter of prior restraint.”).

⁹ Contrary to the lower court’s assertion, the holding of *Seattle Times* does not preclude court interference only with “information available through ‘traditional public source(s),’” Decision at 10 (quoting *Seattle Times*, 467 U.S. at 33), or gathered “through ‘routine newspaper reporting techniques,’” *id.* (quoting *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 103 (1979)). The only distinction drawn by the Court is between materials obtained through discovery and materials gained in any other way. *See, e.g., Bridge C.A.T. Scan Assocs. v. Technicare Corp.*, 710 F.2d 940, 946 (2d Cir. 1983) (a court “generally has no such power to prohibit dissemination of . . . information [that] has been gathered independently of judicial processes”); *Grove Fresh Distribs. v. John Labatt Ltd.*, 888 F. Supp. 1427, 1441 (N.D. Ill. 1995) (“Prohibiting the disclosure of information gained through means independent of the court’s processes would raise the specter of prior restraint.”); *Schlicksup v. Caterpillar, Inc.*, 2011 U.S. Dist. LEXIS 169149, at *5-6 (C.D. Ill. Jan. 19, 2011) (“*Seattle Times* implicitly recognized that the newspapers were free to publish the exact same information, harassing though it might be, provided that the newspapers obtained the information through means other than the discovery process”). Moreover, as discussed below, there is no evidence in the record about how The Times obtained the Memoranda, much less evidence that The Times obtained them through means other than “routine newspaper reporting techniques.”

not intend to use the Memoranda as evidence in defending the defamation action. Barring the possession or use of the Memoranda is thus beyond the outer limits of the lower court's "substantial latitude to fashion protective orders." *Id.* at 36.

C. There Is No Evidence That the Times Obtained the Memoranda by Improper or Irregular Means.

The lower court also abused its discretion in finding that Project Veritas had met its burden of showing that the Memoranda were "improperly or irregularly obtained" pursuant to CPLR 3103(c). Decision (Brown Aff. Ex. 1) at 7; *see also Messinger v. Yap*, 203 A.D.2d 870, 873 (3d Dep't 1994) (moving party bears burden of establishing entitlement to protective order). Project Veritas has offered only bare speculation that The Times obtained the Memoranda to gain some sort of advantage in the litigation, ignoring of the obvious truth—that reporters having nothing to do with this action received newsworthy information and published it. Indeed, as the lower court noted, "[t]here is nothing in the record to show how the Times obtained the privileged memoranda," Decision at 7, and it found no basis for Project Veritas' speculation that The Times' attorneys had violated the rules of professional conduct, *id.* at 26.

Despite these acknowledgments, the court erroneously went on to conclude that The Times somehow "admitted" to obtaining the Memoranda by irregular means by stating, while distinguishing a case in the footnote of a brief, that here "no *apparent* bribery . . . was used to obtain the memoranda." Decision at 7 (quoting Brown Aff. Ex. 11 at 12 n.9).¹⁰ It is unclear how

¹⁰ The sentence from which the court quoted followed a summary of this Court's decision in *Rose v. Levine*, 37 A.D.3d 691, 692 (2d Dep't 2007), and stated in full: "These distinctions are not present here: Project Veritas's tactics are a matter of public concern, no apparent bribery or otherwise inappropriate conduct was used to obtain the memoranda for the purpose of coercing a settlement or intimidating Project Veritas, and Project Veritas has no claim against The Times relating to its possession of or publication of the memoranda." Brown Aff. Ex. 11 at 12 n.9. The phrase "apparent bribery" is nothing more than an acknowledgement of language in the court's decision finding that the plaintiff "*apparently* paid for a copy of the forensic evaluation of Mr. Levin by paying \$10,000 to the forensic expert who prepared the report." *Rose v. Levine*, No.

the court could infer wrongdoing from a sentence that states the opposite. Moreover, The Times has consistently maintained that none of Project Veritas's accusations of impropriety are true and that there is no evidence to support them. *See, e.g.,* Brown Aff. Ex. 11 at 13.

Despite the complete absence of any evidence, the trial court apparently credited Project Veritas's allegation that The Times "knew that the individual that provided the memoranda was not authorized to disclose them." Decision (Brown Aff. Ex. 1) at 7. Even if that were true, however, the Supreme Court has made clear that "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern." *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001). Indeed, such a sanction would "implicate[] the core purposes of the First Amendment." *Id.* at 533-34.

In *Bartnicki*, a radio commentator played on his show a recording of an illegally intercepted telephone call between a union official and his negotiator. The commentator had not himself intercepted the call. It had been given to him by another man, who said he had found a recording of the call in his mailbox. *Id.* at 519; *see id.* at 528 (describing question presented as "Where the punished publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully, may the government punish the ensuing publication of that information based on the defect in a chain?"). The Court held that the civil damages provisions of state and federal wiretapping laws could not constitutionally be applied to the radio host for publishing the contents of the recording—even though the host had reason to know the recording was illegal. *Id.* at 535. The Court noted that "it would be quite remarkable to hold that speech by a law-abiding possessor of information can be

14689-05, slip op. (Sup. Ct. Westchester Cnty. Feb. 21, 2006) at 1 (emphasis added) (Kurtzberg Aff. (Brown Decl. Ex. 8) Ex. 11).

suppressed in order to deter conduct by a non-law-abiding third party,” *id.* at 529-30; *see also In re King World Prods., Inc.*, 898 F.2d 56, 59 (6th Cir. 1990) (“No matter how inappropriate the acquisition, or its correctness, the right to disseminate that information is what the Constitution intended to protect.”); *Trump v. Trump*, 69 Misc. 3d 285, 295 (Sup. Ct. Dutchess Cnty. 2020) (“It is well settled that if a newspaper lawfully obtains truthful information of great public concern, even when stolen from a third party, the Courts will uphold the right of the press to publish such information, and restraint of such may be deemed unconstitutional.”).

The *Bartnicki* Court was elaborating on the long line of cases that establish that “state action to punish the publication of truthful information seldom can satisfy constitutional standards.” *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 102 (1979); *see also Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 490-91 (1975); *Fla. Star v. B.J.F.*, 491 U.S. 524, 541 (1989). “[I]f 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.” *Smith*, 443 U.S. at 103. As discussed above, *supra* at 17-18, there is ample evidence that the Memoranda relate to a matter of public concern here.

Nor does the privileged nature of the Memoranda diminish The Times’s constitutional right to publish them. The attorney-client privilege, though undeniably important, does not justify imposing a prior restraint on a news organization. *See, e.g., Republic of Kazakhstan v. Does 1-100*, 2015 U.S. Dist. LEXIS 145848, at *6-7 (S.D.N.Y. Oct. 27, 2015) (refusing to enjoin media organization from publishing privileged information); *Nicholson v. Keyspan Corp.*, 836 N.Y.S.2d 501 (Table), 2007 N.Y. Misc. LEXIS 499, at *18 (Sup. Ct. Suffolk Cnty. Feb. 28,

2007) (same).¹¹ This principle holds true even when the news organization is a party to the litigation. *See Rodgers v. U.S. Steel Corp.*, 536 F.2d 101, 1006-07 (3d Cir. 1976) (vacating protective order prohibiting disclosure by party's counsel of allegedly privileged information, as "neither the parties nor their counsel implicitly waive their First Amendment rights to disclose or disseminate information or matters obtained independent of the court's processes").¹²

III. IN THE ALTERNATIVE, THIS COURT SHOULD STAY THE DECISION PENDING AN OPPORTUNITY FOR FULL BRIEFING ON THE MERITS

For the reasons discussed above, this Court should act pursuant to its powers under CPLR 5518 to vacate the Decision in its entirety as an unconstitutional prior restraint. However, to the extent the Court believes full briefing is required, this Court should grant a stay of enforcement of the Decision under CPLR 5519 and/or its inherent powers so The Times does not suffer under

¹¹ The lower court cited *United States v. Noriega*, 917 F.2d 1543 (11th Cir. 1990), in support of its view that a claim of attorney-client privilege can overcome the heavy presumption against prior restraints. Decision (Brown Aff. Ex. 1) at 19-20. In that case, however, the key issue was the effect that broadcasting a criminal defendant's telephone conversations with his counsel would have on the defendant's Sixth Amendment right to a fair trial. *Noriega*, 917 F.2d at 1545. The defendant's claim of privilege was not, on its own, necessary or sufficient to justify a prior restraint. *See id.* at 1549-50 ("Even if the attorney-client communications in this case were determined not to be privileged, the District Court may decide that the disclosure of these communications would constitute an impediment to Noriega's fair trial."); *id.* at 1551 (determination of whether communications were privileged was "not necessarily dispositive of whether such communications should be publicly broadcast"). And, unlike in *Noriega*, this case does not involve competing constitutional rights.

¹² A case discussed by the lower court, *Smith v. Armour Pharm. Co.*, 838 F. Supp. 1573 (S.D. Fla. 1993), Decision (Brown Aff. Ex. 1) at 23, further illustrates this point. In *Smith*, the court determined that a litigant had not waived privilege when its counsel inadvertently produced a memorandum in another case, even though the contents of the memorandum were widely reported in the media after the disclosure. 838 F. Supp. at 1575-77. The court exercised its authority under Rule 26(c) to prohibit the use of the document in the pending proceeding, but noted that "[a] court has much greater discretion to control the proceedings before it than it has to control the conduct of parties outside the courtroom." *Id.* at 1578. The Times does not dispute that the lower court has discretion to control the use of the Memoranda within the proceedings before it, but the Decision impermissibly controls the conduct of The Times outside the courtroom.

the continuing effects of the restraint on its speech and the impact of the other provisions of the Decision on its possession of the Memoranda while this appeal is pending.

As discussed more fully above, a stay under CPLR 5519(c) is discretionary. *See Schwartz*, 219 A.D.2d at 48. Among other factors, courts consider the merits of the underlying appeal, the prejudice that will befall the party seeking the stay in its absence, and the prejudice that the party opposing the stay will experience. The merits of the appeal, the irreversible harm to The Times if it is required “immediately” to surrender or destroy copies of the Memoranda, and the daily prejudice to The Times in having its free speech rights restricted have been discussed extensively above.

There will be no prejudice to Project Veritas if a limited stay is issued while this appeal is resolved. The only harms identified by Project Veritas and the lower court—the impact on the relationship between Project Veritas and its counsel and a litigation advantage to The Times—are both purely speculative and, to the extent they exist, have already occurred. Even if some possibility of future prejudice existed, it would surely not be sufficient to overcome the heavy burden imposed on The Times by the contravention of the guarantees of free speech free press of the First Amendment and Article I, Section 8 of New York Constitution.

As noted, The Times urges the adoption of an expedited schedule for this appeal, to minimize the impact of such a stay as much as possible.

IV. TO THE EXTENT NECESSARY, THIS COURT SHOULD GRANT LEAVE TO APPEAL

The Decision is appealable as of right pursuant to CPLR 5701(a)(2)(i) because the motion it decided was made upon notice and it grants a provisional remedy. Specifically, the application for an order to show cause was electronically filed by Project Veritas, thus giving notice to The Times, and The Times was able to file a letter with the trial court requesting an

opportunity to be heard prior to a ruling. *See* CPLR 2211 (“A motion on notice is made when . . . an order to show cause is served.”); *Porco*, 116 A.D.3d at 1265 n.2 (trial court order granting temporary restraining order was appealable as of right, “as it decided a motion made on notice”).

In the alternative, to the extent the Decision is construed as ex parte and not appealable as of right, The Times respectfully seeks permission to appeal pursuant to CPLR 5701(c).

CONCLUSION

For the foregoing reasons, The Times respectfully requests that this Court (1) order an interim stay of the provisions of the lower court’s Decision & Order requiring The Times to return, destroy and/or seek to recover the Memoranda immediately, and to certify it has taken those steps by January 6, 2022, until this appeal is decided, (2) vacate the Court’s Decision in its entirety (except for the provision granting leave for the filing of a brief *amicus curiae*) pursuant to CPLR 5518 or, in the alternative, stay the Decision pending the outcome of this appeal, and (3) to the extent necessary, grant leave to appeal the Decision in its entirety, along with any other relief this Court may deem just and proper. Given the ongoing harm to its constitutional rights, the Times also respectfully requests that the Court set the earliest return date that is practicable for the Order to Show Cause.

Dated: December 27, 2021

Respectfully submitted,

BALLARD SPAHR LLP

/s/ Jay Ward Brown

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The New York Times Company*

**SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, SECOND DEPARTMENT**

-----	X
PROJECT VERITAS,	:
	:
Plaintiff-Respondent,	: Appellate Division Docket
	: No. 2021-09551
vs.	:
	:
THE NEW YORK TIMES COMPANY,	: Westchester County Index
	: No. 63921/2021
Defendant-Appellant,	:
	:
and	: AFFIRMATION OF
	: JAY WARD BROWN
	:
MAGGIE ASTOR, TIFFANY HSU, and JOHN	:
DOES 1-5,	:
	:
Defendants.	:
-----	X

Jay Ward Brown, an attorney duly admitted to the practice of law before the courts of the State of New York, and not a party to the above-titled action, hereby affirms under penalties of perjury:

1. I am a partner in Ballard Spahr LLP, counsel to Defendant-Appellant The New York Times Company (“The Times”) in the above-captioned appeal.

2. I submit this affirmation in support of The Times’s application to (a) vacate or stay pending appeal a Decision & Order dated December 23, 2021, originally entered on December 24, 2021, and re-entered as corrected on December 27, 2021 (the “Decision”) by the New York State Supreme Court, Westchester County (Wood, J.), which imposes a prior restraint on speech; (b) obtain an administrative stay, pending resolution of the Order to Show Cause, of those portions of the Decision that purport to require The Times and persons associated with it to “immediately” (i) turn over to Plaintiff-Respondent Project Veritas (“Project Veritas”),

(ii) delete/destroy, and/or (iii) seek to retrieve from others copies of the legal memoranda in question, and the provision requiring The Times to affirm compliance with such provisions; and (c) for leave to appeal the Decision to this Court, to the extent that the Decision is not appealable as of right. I make this affirmation based on my personal knowledge and to place before the Court documents relevant to The Times's application.

3. Annexed hereto as **Exhibit 1** is a true and correct copy of the Decision.

4. The Times has today filed its Notice of Appeal and served it and a copy of the accompanying Order to Show Cause and related papers on Project Veritas by e-mail to its counsel of record pursuant to the prior agreement of the parties regarding service by e-mail. A copy of the Notice of Appeal, as filed with the Supreme Court, Westchester County, is annexed hereto as **Exhibit 2**.

5. On October 30, 2020, Project Veritas filed this defamation action in the Supreme Court, Westchester County, based on articles published in The Times that characterized certain claims made in a video produced by Project Veritas as deceptive. Annexed hereto as **Exhibit 3** is a true and correct copy of the Complaint in this action.

6. On December 18, 2020, The Times moved to dismiss the defamation action on multiple grounds, including pursuant to New York's recently amended anti-SLAPP statute, CPLR 3211(g). The lower court denied the motion, and The Times filed a notice of appeal on April 8, 2021.

7. When the motion to dismiss was denied, The Times applied to the Appellate Division, Second Department, for a stay of discovery pending the disposition of its appeal, which was granted on October 27, 2021.

8. On November 17, 2021, Project Veritas moved the Supreme Court, Westchester County, for an order to show cause pursuant to CPLR 3103, arguing that The Times had improperly acquired and published attorney-client privileged legal memoranda and seeking, among other things, to prevent The Times from further reporting on the memoranda.

9. Annexed hereto as **Exhibit 4** is a true and correct copy of the affidavit of Project Veritas's counsel Elizabeth M. Locke, P.C. in support of the order to show cause, dated November 17, 2021, and its accompanying exhibits.

10. The following day, November 18, The Times filed a letter requesting an opportunity to be heard before the court decided whether to impose the prior restraint sought by Project Veritas. Annexed hereto as **Exhibit 5** is a true and correct copy of that letter.

11. Also on November 18, 2021, without affording The Times an opportunity to be heard, the Supreme Court, Westchester County, entered an order to show cause directing The Times or its attorneys to appear on November 23, 2021 and show cause as to why Project Veritas was not entitled to the relief requested in its motion, and ordering that "until such time as this Court resolves the Order to Show Cause, Defendant The New York Times shall immediately sequester, protect, and refrain from further disseminating or publishing any of Plaintiff Project Veritas' privileged materials in the possession of The New York Times, or its counsel, and that The New York Times and its counsel shall cease further efforts to solicit or acquire Plaintiff Project Veritas' attorney-client privileged materials" (the "Interim Order"). Annexed hereto as **Exhibit 6** is a true and correct copy of the Interim Order.

12. On November 19, 2021, The Times filed an application with this Court pursuant to CPLR 5704, seeking to modify the Interim Order. On the same day, that application was

denied by the Honorable Leonard B. Austin. Annexed hereto as **Exhibit 7** is a true and correct copy of the order denying the application.

13. Annexed hereto as **Exhibit 11** is a true and correct copy of the memorandum of law filed by The Times in opposition to the order to show cause, dated November 22, 2021.

Annexed hereto as **Exhibit 8** is a true and correct copy of the affirmation of Joel Kurtzberg in opposition to the order to show cause, dated November 22, 2021, and its accompanying exhibits.

14. On November 23, 2021, a hearing on the order to show cause was held before the Supreme Court, Westchester County. Annexed hereto as **Exhibit 9** is a true and correct copy of the transcript from that hearing.

15. Project Veritas filed a reply brief on December 1, 2021, and The Times filed a sur-reply on December 3, 2021.

16. On December 13, 2021, counsel for The Times sent a letter to the Supreme Court, Westchester County, requesting that it clarify the scope of the Interim Order.

17. Annexed hereto as **Exhibit 10** is a true and correct copy of an amended order to show cause entered by the Supreme Court, Westchester County on December 14, 2021.

18. The Times requests an administrative stay because, in the absence of such relief, it is required to act “immediately” to return to Project Veritas or destroy copies of legal memoranda it obtained through its newsgathering processes, and to undertake to retrieve copies of the memoranda from others. In the absence of relief from this Court, The Times will be required to affirm its compliance with these provisions no later than January 6. Indeed, the Decision is ambiguous as to whether The Times truly must act “immediately” to return or destroy the Memoranda, or whether it has until January 6 to do so.

19. In addition, the accompanying order to show cause is an emergency matter because it seeks to vacate or stay pursuant to CPLR 5518 and 5519(c) a Decision that bars The Times from showing, transmitting, or disseminating in any manner the legal memoranda at issue absent written permission from the lower court. The Decision is a prior restraint in violation of the First Amendment to the United States Constitution and Article I, Section 8 of the New York State Constitution. *See, e.g., Alexander v. United States*, 509 U.S. 544, 550 (1993) (“Temporary restraining orders and permanent injunctions—*i.e.*, court orders that actually forbid speech activities—are classic examples of prior restraints.”); *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976) (“[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.”). The Order was issued without any “showing on the record that such expression” by The Times would “immediately and irreparably create public injury.” *Porco v. Lifetime Entm’t Servs., LLC*, 116 A.D.3d 1264, 1266 (3d Dep’t 2014). In addition, while the lower court purported to act pursuant to CPLR 3103, the legal memoranda at issue were not obtained through the discovery process and were not subject to that provision. Furthermore, even if CPLR 3103 applied, Project Veritas has not shown that The Times “improperly or irregularly” obtained the materials, as the documents were received by reporters engaged in newsgathering activity.

20. The Times seeks the accompanying order to show case because, absent immediate relief, its significant constitutional rights will be irreparably harmed. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1976) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”); *New York Times Co. v. United States*, 403 U.S. 713, 715 (1971) (Black, J., concurring) (“[E]very moment’s continuance of the injunctions

against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment.”).

21. No prior request has been made for the relief sought herein, except as explained above.

22. I provided notice to Project Veritas of this Order to Show Cause through counsel of record via e-mail, sent at 3:43 p.m. on December 26, 2021. The notice was not accompanied by a copy of the papers in support of the Order to Show Cause because those papers were not then complete due to the emergency nature of this motion, which is being filed on the first business day after the Decision originally was entered on the afternoon of Friday, December 24. I informed counsel for Project Veritas in that e-mail of the specific relief that would be sought via the Order to Show Cause and offered to speak with them by telephone regarding the matter on Sunday evening or Monday at their convenience. On Monday morning, I spoke by telephone with Elizabeth Locke, counsel for Project Veritas, regarding possible compromise with respect to the requested administrative stay more specifically described in paragraph 2(b) above. I also communicated with Ms. Locke and certain of her co-counsel via e-mail on Monday afternoon about possible compromise on the administrative stay, and I provided to Ms. Locke and her co-counsel a copy of the Order to Show Cause to be filed herewith. To date, I have received no further response from Project Veritas’s counsel.

23. The accompanying Memorandum of Law fully sets forth the bases for the relief The Times seeks.

WHEREFORE, the undersigned respectfully requests an order granting the relief sought herein in its entirety, together with such other and further relief as this Court deems just and proper.

Dated: December 27, 2021

/s/ Jay Ward Brown
Jay Ward Brown

Exhibit 1

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

-----X
PROJECT VERITAS,

Plaintiff,

-against-

**THE NEW YORK TIMES COMPANY, MAGGIE ASTOR,
TIFFANY HSU, and JOHN DOES 1-5,**

Defendants.
-----X

WOOD, J.

**DECISION & ORDER
Index No. 63921/2020**

Seq. Nos. 8&9

New York State Courts Electronic Filing ("NYSCEF") document numbers 170-195 were read in connection with the instant motion brought by order to show cause by Project Veritas (Seq. No. 8) pursuant to CPLR 3103, against the defendants, seeking an order directing the defendant The New York Times Company ("the Times"): (1) to remove all references to or descriptions of Project Veritas' attorney-client privileged information published on the Times' website on November 11, 2021; (2) to return or immediately destroy all copies of Project Veritas' attorney-client privileged materials in the Times' possession; (3) to refrain from further publishing Veritas' attorney-client privileged materials; (4) to order the Times to cease further efforts to solicit and acquire Veritas' attorney-client privileged materials; and (5) for an interim order directing the Times to sequester and refrain from further publishing any of Project Veritas' attorney-client privileged materials.

As an initial matter, the court grants the separate motion brought by Reporters Committee

for Freedom of the Press (Seq. No. 9) seeking leave to file an amici curiae brief in support of the Times, and in response to the Court's Order to Show Cause.

NOW, based upon the foregoing, the motions are decided as follows:

The background of this case is set forth more fully in this court's decision and order entered on March 18, 2021. The Times filed a Notice of Appeal of that decision on April 8, 2021. The appeal is pending.

This court (Lefkowitz, J.) also denied the Times' application to stay discovery until a disposition of the pending appeal. The Times then sought a stay of discovery from the Appellate Division, Second Department, which was granted on October 27, 2021.

Project Veritas brought an order to show cause for the instant motion on November 18, 2021, which this court signed and entered, granting a temporary restraining order that directed the Times and its counsel to: (i) immediately refrain from further disseminating or publishing any of Project Veritas' privileged materials in the possession of the Times; (ii) cease further efforts to solicit or acquire Project Veritas' attorney-client privileged materials; and (iii) schedule argument on an expedited basis for November 23, 2021. On November 19, 2021, the Second Department denied a motion by the Times pursuant to CPLR 5704 that sought to vacate the Temporary Restraining Order issued by this court.

On November 23, 2021, after argument by all counsel on the relief requested by Project Veritas, this court set a briefing schedule, with Project Veritas to submit reply papers by December 1, 2021, and the Times a sur-reply by December 3, 2021. The court continued the limited injunction and protective order to permit the parties the opportunity to be heard and fully submit their papers.

On December 14, 2021, at the written request of counsel to the Times, the court amended the order to show cause to clarify that the order does not prohibit the Times from various activities related to newsgathering and reporting of Project Veritas' attorney-client privileged documents.

This latest chapter between these parties began on November 11, 2021, at 1:07 P.M. when the Times emailed Project Veritas founder James O'Keefe and Project Veritas' outside counsel Benjamin Barr, stating, "We are planning to publish a story based on legal memos that Mr. Barr provided to Project Veritas. The memos provide legal advice about how different PV operations could violate various laws, including the Espionage Act and Section 1001. The memos give guidance about how PV can remain in Mr. Barr's view, on the right side of these laws"¹. The email asked for comment on the forthcoming story by 5:00 P.M. Without waiting until that stated time, at or before 3:02 P.M EST, the Times published on its website full copies of the privileged legal memoranda prepared by Mr. Barr for Project Veritas.² Then, at 5:54 P.M.³, the Times published the story entitled *Project Veritas and the Line Between Journalism and Political Spying*⁴ which explored Project Veritas' controversial reporting tactics, describing and quoting from Project Veritas' attorney-client documents. The story details how Project Veritas sought advice of counsel regarding the legality of potential news gathering tactics. The story quotes from three legal memoranda prepared by attorney Barr, providing legal advice to Project Veritas. In addition,

¹ Email from Goldman to O'Keefe & Barr, dated 11/11/21 (NYSCEF Doc. No. 166).

² These times were alleged set forth in Ms. Locke's letter to Joel Kurtzberg and David McCraw, the Times' counsels, dated November 12, 2021, and have not been disputed (NYSCEF Doc. No. 167).

³ Project Veritas claims that the time of the email is Central Standard Time, which would be 2:07 Eastern Standard Time (see Affirmation of Elizabeth M. Locke, NYSCEF Doc. No. 165).

⁴ Adam Goldman & Mark Mazetti, Project Veritas and the Line Between Journalism and Political Spying, THE NEW YORK TIMES, <https://www.nytimes.com/2021/11/11/us/politics/project-veritasjournalism-political-spying.html> (last accessed Nov. 22, 2021) (NYSCEF Doc. No. 174).

the Times shared copies of the memoranda with a Columbia Journalism School professor and sought comment. The Times' publication of the memoranda led Project Veritas to seek an injunction against it.

CPLR 3103

Project Veritas seeks relief pursuant to CPLR 3103(c). CPLR 3103(c) provides, in relevant part “[i]f any disclosure under this article has been *improperly or irregularly obtained* so that a substantial right of a party is prejudiced, the court, on motion, may make an appropriate order, including an order that the information be suppressed” (CPLR 3103) (emphasis added). The Second Department has held that:

Unlimited disclosure is not mandated, however, and a court may issue a protective order pursuant to CPLR 3103 denying, limiting, conditioning or regulating the use of any disclosure device “to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts. The supervision of disclosure and the setting of reasonable terms and conditions therefor rests within the sound discretion of the trial court and, absent an improvident exercise of that discretion, its determination will not be disturbed” (*Ligoure v City of New York*, 128 AD3d 1027, 1028 [2d Dept 2015]).

Project Veritas accuses the Times of improperly obtaining its privileged materials without authorization. In addition, Project Veritas contends that the Times engaged in efforts to obtain Project Veritas' privileged materials outside of approved discovery channels, from an unnamed and unknown individual that the Times allegedly knew was not authorized to disclose such materials. Project Veritas claims that these improper and irregular actions by the Times have substantially prejudiced its rights, and thus the court should issue a protective order mandating that the Times cease such conduct and immediately destroy or return to Project Veritas all ill-gotten,

privileged materials in the Times' possession (CPLR 3103[c]).

In support of its motion, Project Veritas claims that the primary nexus between the memoranda and this underlying defamation case is that they were authored by its counsel of record, Benjamin Barr. Barr's legal advice regarding several related topics goes to the heart of Veritas' video reporting on illegal ballot harvesting by members of Rep. Ilhan Omar's staff. In addition, according to Project Veritas, the content of the attorney-client memoranda relates directly to the Times' defenses in the defamation litigation, including on truth, fault, and damages.

Project Veritas claims that the Times' intrusion upon its protected attorney-client relationship is an affront to the sanctity of the attorney-client privilege and the integrity of the judicial process that demands this court's intervention. According to Project Veritas, it seeks only a narrow protective order to limit the Times from "improperly or irregularly obtaining" and disseminating the privileged communications of its litigation adversary. Project Veritas argues that "a decision denying this protective order—particularly in today's internet and social media age—will permit any would-be citizen journalist, blogger, or Instagram influencer to claim the right to publish their litigation adversary's attorney-client privileged communication with impunity. That is not, and cannot, be the law."⁵

Project Veritas concludes that if this court were to accept the Times' arguments that CPLR 3103(c) permits protective orders "only in situations involving information gathering through formal discovery methods and, in cases where a media entity is a party, only in situations where the information was acquired wrongfully or illegally, would result in a complete re-write of the

⁵ Reply Memorandum of Project Veritas, at 16 (NYSCEF Doc. No. 192).

text of the statute”.⁶

In opposition, the Times argues that the Court should not issue a protective order pursuant to CPLR 3103 because Project Veritas’ memoranda have nothing to do with the subject matter in the underlying defamation action, since they predate the Project Veritas video and this defamation action. The Times argues that CPLR 3103(c) does not empower courts to suppress any information that a party may obtain improperly or irregularly. The Times argues that the memoranda must be relevant to the claims or defenses in this defamation action and that the November 11, 2021 article and memoranda have nothing to do with Rep. Omar, alleged voter fraud, ballot harvesting, defamation law, or the Project Veritas video. The Times says it received the memoranda through “newsgathering efforts” that were obviously outside of the litigation process because it obtained a stay of discovery and no discovery has actually taken place in this action. Further, a news organization is not prevented from reporting on newsworthy information--even attorney-client privileged information--that is independently obtained outside of the discovery process. Relying on *Seattle Times Co. v Rhinehart* (467 US 20, 34 [1984]), the Times argues that CPLR 3103(c) empowers the court to control only the distribution and publication of information obtained as part of an action’s discovery process.

Taking these legal principles in mind, Project Veritas, as the party seeking relief under CPLR 3103(c), must first demonstrate that the subject memoranda were obtained “improperly or irregularly.” If it does so, the court’s analysis under CPLR 3103(c) continues requiring a determination as to whether a substantial right of a party has been prejudiced.

⁶ Reply Memorandum of Project Veritas, at 16 (NYSCEF Doc. No. 192).

Here, Project Veritas has established that it is the owner of the memoranda and the privilege, and it is not disputed that it did not waive its privilege. Since no discovery was exchanged, this is not a case where the documents were inadvertently turned over during discovery. Project Veritas has alleged that the Times knew that the individual that provided the memoranda was not authorized to disclose them. There is nothing in the record to show how the Times obtained the privileged memoranda that belong to Project Veritas. That information is solely within the Times' knowledge and possession, and it has not offered any explanation beyond vaguely stating that the memoranda were obtained through its "newsgathering efforts."⁷ However, in its Memorandum in Opposition, while attempting to distinguish the facts of the case of *Rose v Levine* from this case, the Times incredibly admitted that here "no *apparent* bribery...was used to obtain the memoranda."⁸ The court finds that Project Veritas has met its burden of showing that the subject memoranda were obtained by irregular means, if not both irregular and improper means.

Turning to the second prong of the CPLR 3103 analysis, Project Veritas must also show that it has been prejudiced as a result. The court finds that the attorney-client relationship between Benjamin Barr and Project Veritas has been undermined by counsel's confidential legal advice and thought processes being in the hands of a litigation adversary, and the subject of a request for public comment. This was compounded by the Times promptly publishing the memoranda to the rest of the world and thereafter within several hours publishing a second story, describing the contents of the memoranda. More specifically, here, at 2:07 P.M., the Times' reporters emailed

⁷ NYT Memorandum in Opposition, at 5 (NYSCEF Doc. No. 185).

⁸ See Defendant's Memorandum in Opposition, at FN 9 (NYSCEF Doc. No. 185).

James O'Keefe and Benjamin Barr that they had obtained the privileged memoranda where Barr as counsel gave advice to Project Veritas. Even though the email gave O'Keefe and Barr a deadline for comment, 5:00 P.M., at 3:02 P.M. the Times went ahead and published the entirety of the memoranda on its website ahead of the deadline it had set. At some point for reasons unknown, the Times voluntarily removed the link to the memoranda, but published an article quoting heavily from the privileged memoranda. This act by the Times to obtain and publish the confidential privileged memoranda can only be deemed to have prejudiced the rights of the plaintiff by directly compromising the confidential legal advice rendered by counsel.

Further, as Project Veritas correctly points out in its reply brief, there are a whole host of ways that the Times has gained strategic advantage in the litigation with the knowledge it gained from the memoranda, even without being able to admit them into evidence in this case. The Times' witnesses can now craft their responses to questions at a deposition using what they have learned. The Times' attorneys now have insight to formulate deposition topics and strategy based on the content of the memoranda. Indeed, in the November 11, 2021 article published at 5:54 P.M., the Times itself noted that the memoranda "give new insight into the workings of the group at a time when it faces potential legal peril in the diary investigation - and has signaled that its defense will rely in part on casting itself as a journalistic organization protected by the First Amendment."⁹ That "insight" for the Times is unquestionably concomitant prejudice to the plaintiff.

⁹ Adam Goldman & Mark Mazetti, Project Veritas and the Line Between Journalism and Political Spying, THE NEW YORK TIMES, <https://www.nytimes.com/2021/11/11/us/politics/project-veritasjournalism-political-spying.html> (last accessed Nov. 22, 2021) (NYSCEF Doc. No. 174).

The court has also considered the Times' contention that this court has no power to address the Times' publication of these memoranda, since they were obtained outside the discovery process. There is no dispute by Project Veritas that the memoranda were obtained by the Times outside of any discovery related to this action. Although the memoranda were written almost four years before the Times published them on November 11, 2021, similar themes and allegations by the Times against Project Veritas permeate the memoranda and the pleadings in this case.¹⁰ The Times' own reporting in the subject article confirms this: "Project Veritas is suing The New York Times over a 2020 story about a video the group made alleging voter fraud in Minnesota. Most news organizations consult regularly with lawyers, but some of Project Veritas's questions for its legal team demonstrate an interest in using tactics that test the boundaries of legality and are outside of mainstream reporting techniques."¹¹

Further, the Times' reliance on *Seattle Times Co. v Rhinehart* is misplaced here. In *Seattle Times Co.*, the issue was not the violation of the attorney-client privilege, but rather the use and publication of financial records obtained during disclosure of the Aquarian Foundation and its "spiritual leader," Rhinehart. Initially, the trial court denied any protective order, but after harassment and reprisal concerns were raised through affidavits of Aquarian donors and clients, the court ultimately granted an order prohibiting the publication of the donor and client names,

¹⁰ See Summons and Complaint, NYSCEF Doc. No. 1, ¶¶ 11-21; Memorandum of Law in Support of Motion to Dismiss, (NYSCEF Doc. No. 14 point IV); Affirmation in Support of Motion to Dismiss (NYSCEF Doc. No. 15, para 19-71).

¹¹ The sentences follow each other, with a solicitation ad by The Times inserted between them. The story consists of 58 sentences separated into 41 paragraphs, eschewing traditional paragraph structure. Adam Goldman & Mark Mazetti, Project Veritas and the Line Between Journalism and Political Spying, THE NEW YORK TIMES, <https://www.nytimes.com/2021/11/11/us/politics/project-veritas-journalism-political-spying.html> (last accessed Nov. 22, 2021) (NYSCEF Doc. No. 174).

addresses, and the amounts they contributed. In reviewing the trial court's order, the Supreme Court noted, "restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information" (467 U.S. 20, 33 [1984]). Thus, the Supreme Court made clear that the Seattle Times was not restricted from gathering information available through "traditional public source(s)" such as, interviewing Aquarian members or examining public records. This is consistent with other cases where the Supreme Court refused to block publication of private—but not privileged—information gathered outside discovery through "routine newspaper reporting techniques,"¹² and where the "Appellee has not contended that the name was obtained in an improper fashion or that it was not on an official court document open to public inspection."¹³ Likewise, here the Times is in no way restricted from gathering and publishing information available through traditional public sources. However, attorney-client privileged documents, by definition, are not available through a traditionally public source of information.

Attorney-Client Privilege

The attorney-client privilege is "the oldest of privileges for confidential communications" tracing its origins back nearly 450 years to 1577 England (see *Upjohn Co. v United States*, 449 U.S. 383, 389 [1981]; Richard S. Pike, *The English Law of Legal Professional Privilege: A Guide For American Attorneys*, 4 Loy. U. Chi. Int'l L. Rev. 51). The intent of the privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice" (*Upjohn Co. v*

¹² See *Smith v Daily Mail Pub. Co.*, 443 US 97, 103 (1979)

¹³ See *Cox Broadcasting v Cohn*, 420 US 469, 496 (1975)

United States, 449 U.S. at 389). Open dialogue between attorney and client is “deemed essential to effective representation” (*Spectrum Sys. Intl. Corp. v Chem. Bank*, 78 NY2d 371, 377 [1991]). The attorney-client privilege “exists to ensure that one seeking legal advice will be able to confide fully and freely in his [or her] attorney, secure in the knowledge that his [or her] confidences will not later be exposed to public view to his [or her] embarrassment or legal detriment” (*Siegel v Snyder*, 2021 WL 6057821 [2d Dept, December 22, 2021], citing *Matter of Priest v Hennessy*, 51 NY2d 62, 67–68 [1980]; see *Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616, 623 [2016]). Thus, the attorney-client privilege is not solely tied to the contemplation of litigation (*Spectrum Sys. Int’l Corp. v Chem. Bank*, 78 NY2d at 380, citing *Root v Wright*, 84 NY 72, 76 [1881]; *Bacon v Frisbie*, 80 NY 394, 400 [1880]).

The protections afforded by the attorney-client privilege have not only developed through over four centuries of common law, but are found in statute (CPLR 4503), the Code of Professional Responsibility (EC 4–1) and are strongly rooted in the constitutional right to counsel (U.S. Const. 6th Amend.; N.Y. Const., art. I, §6). The attorney-client privilege applies to confidential communications between clients and their attorneys made “in the course of professional employment” (CPLR 4503[a][1]). The communication itself must be “for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship” (*Spectrum Sys. Int’l Corp. v Chem. Bank*, 78 NY2d at 379, citing *Rossi v Blue Cross & Blue Shield*, 73 NY2d 588, 593 [1989]). The CPLR establishes “categories of protected materials, also supported by policy considerations: privileged matter, absolutely immune from discovery (CPLR 3101[b]); attorney’s work product, also absolutely immune (CPLR 3101[c])”

(*Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d at 376–377).

Despite stating that this privilege is “absolute”, the Court of Appeals has recognized that the privilege may give way to strong public policy considerations. For example, “[t]he attorney-client privilege constitutes an ‘obstacle’ to the truth-finding process, the invocation of which should be cautiously observed to ensure that its application is consistent with its purpose” (see *Matter of Priest v Hennessy*, 51 NY2d at 68; *Matter of Jacqueline, F.*, 47 NY2d 215, 219 [1979]). Even where the technical requirements of the privilege are satisfied, it may, nonetheless, yield in a proper case, where strong public policy requires disclosure (see *Matter of Priest v Hennessy*, 51 NY2d at 69; *Matter of Jacqueline, F.*, 47 NY2d 215).

The burden of establishing any right to protection is on the party asserting it; the protection claimed must be narrowly construed; and its application must be consistent with the purposes underlying the immunity (*Matter of Priest v Hennessy*, 51 NY2d at 69). Since Project Veritas seeks the protection of the attorney-client privilege, it has the burden of proving the existence of the privilege. Here, as demonstrated in its reporters’ email and in its November 11, 2021 article, the Times has told both Project Veritas and the world that the documents were attorney-client communication.¹⁴ Further, the Times has not claimed otherwise either before this court during oral argument, or in its opposition or in its sur reply. There is no dispute that Project Veritas is the holder of the privilege, and the Times has not claimed that it was waived by Project Veritas.

¹⁴ See Email from Goldman to O’Keefe & Barr, dated 11/11/21 (NYSCEF Doc. No. 166) and Adam Goldman & Mark Mazetti, Project Veritas and the Line Between Journalism and Political Spying, THE NEW YORK TIMES, <https://www.nytimes.com/2021/11/11/us/politics/project-veritasjournalism-political-spying.html> (last accessed Nov. 22, 2021) (NYSCEF Doc. No. 174).

The Constitution

Project Veritas also seeks remedies that go beyond the typical discovery process--to remove all references to descriptions of Project Veritas' privileged attorney-client information published on the Times' website on November 11, 2021; to return and/or immediately delete all copies of Project Veritas' said attorney-client privileged materials; to refrain from further publishing Veritas' attorney-client privileged materials; and to order the Times to cease further efforts to solicit and acquire Veritas' attorney-client privileged materials.

In opposition, the Times argues that it has a constitutional right to publish the memoranda, even if they are privileged, because Project Veritas' request to prohibit the Times from publishing newsworthy information is a classic prior restraint under the First Amendment.¹⁵ The Times claims that Project Veritas seeks to enjoin news reporting by journalists that is independent of and unrelated to this litigation and therefore not subject to the ordinary powers of the Court to regulate discovery. For the reasons set forth below, this Court does not agree.

The First Amendment of the U.S. Constitution 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.

The First Amendment was ratified within the Bill of Rights in 1791 (Michael Diederich, Jr., *The President, the States and Policing American Cities*, N.Y. St. B.J., September/October 2020, at 26, 27). This prohibition against abridging freedom of the press similarly applies to the

¹⁵The brief of amici curiae argues similar points on this issue.

States by virtue of the due process clause of the Fourteenth Amendment (*see* N.Y.Const., art. I, s 8; *Lewis v Am. Fed'n of Television & Radio Artists*, 34 NY2d 265, 272 [1974]).

At the philosophical conception of this nation, “the 1776 Virginia Declaration of Rights, drafted by George Mason with contributions from James Madison and Patrick Henry, recognized that the freedom of the Press is one of the greatest bulwarks of liberty, and can never be restrained but by despotic Governments” (Michael Miller, *Enemy of the People?*, N.Y. St. B.J., September 2018, at 5, 6; David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 Md. L. Rev. 429, 444 [1983]). Given their experience with King George III and a British Parliament that showed little regard for freedom of speech and of the press (and even less so in the American Colonies), the Framers of the Bill of Rights identified freedom of worship, speech, and press as important rights to spell out in the First Amendment.

Viewed as a whole, the Bill of Rights (Amendments 1-10) seeks to guarantee the rights of the governed individual. While the First Amendment clearly states that Congress shall make no law... abridging freedom of speech, or of the press,” the Ninth Amendment broadly, yet succinctly states, “The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.”

Like the attorney-client privilege, the First Amendment is vital to our republic, but also has limits. “For even though the broad sweep of the First Amendment seems to prohibit all restraints on free expression, this Court has observed that ‘freedom of speech does not comprehend the right to speak on any subject at any time’” (*Seattle Times Co. v Rhinehart*, 467 U.S. at 31, citing *American Communications Assn. v Douds*, 339 U.S. 382, 394–395 [1950]). Also, “[t]he right to speak and publish does not carry with it the right to gather information” (*Zemel v Rusk*, 381 U.S.

1, 17 [1965]). In this collision between attorney-client privilege and the free press, the interests on both sides are plainly rooted in the traditions and significant concerns of our society (*Cox Broad. Corp. v Cohn*, 420 U.S. 469, 491 [1975]).

“Prior restraint” on speech has been defined as when a law, regulation or judicial order suppresses speech on the basis of the speech's content¹⁶ and in advance of its actual expression¹⁷ (*United States v Quattrone*, 402 F.3d 304, 309 [2d Cir. 2005]). Prior restraints constitute “the most serious and the least tolerable infringement” on our freedoms of speech and press (*United States v Quattrone*, 402 F.3d at 309). “Prior restraints whatever the form, upon the rights of free speech and publication by the media bear a heavy presumption of constitutional invalidity” (*Matter of Natl. Broadcasting Co. v Cooperman*, 116 AD2d 287, 289–290 [2d Dept 1986]).

The Times urges that prior restraints “may be imposed only in the most exceptional cases,” and can only be issued “upon a showing on the record that such expression will immediately and irreparably create public injury” (*Porco v Lifetime Entertainment Services, LLC*, 116 AD3d 1264, 1266 [3d Dept 2014] (internal citations and quotation marks omitted) (an order enjoining the broadcast of a movie about a convicted murderer of his parents to be an unconstitutional prior restraint). A plaintiff seeking a prior restraint of expression of views must show that the public at large will be immediately and irreparably harmed (see *East Meadow Association v Board of Education of Union Free School District No. 3, County of Nassau*, 18 NY2d 129, 134 (1966) (prior

¹⁶ The vast majority of cases cited by the Times deal with restrictions based on content. The court has viewed the memoranda for the purposes of establishing whether they were attorney-client communications, and to determine whether they bear any nexus to this cause of action. Otherwise, their content is irrelevant to the holdings herein.

¹⁷ In this case, the Times published the memoranda on its web site, then voluntarily took them down prior to the instant motions being filed.

restraint of a Vietnam War critic/folk singer's concert requires "danger of immediate and irreparable injury to the public weal"). Prior restraints upon the rights of free speech and publication "may only be overcome upon a showing of a 'clear and present danger' of a serious threat to the administration of justice" (*Ash v Bd. of Managers of 155 Condo.*, 44 AD3d 324, 325 [1st Dept 2007]). The government may not impose a prior restraint on freedom of expression to silence an unpopular view, absent a showing on the record that such expression will immediately and irreparably create public injury (*see People ex rel. Arcara v Cloud Books, Inc.*, 68 NY2d 553, 558 (1986)).¹⁸

The list of exceptions to prior restraints is short. The Supreme Court has held that only in exceptional cases, a prior restraint may survive constitutional scrutiny. Project Veritas has a heavy burden to show justification for the imposition of such a restraint (*see Nebraska Press Ass'n v Stuart*, 427 U.S. 539, 558 [1976]). One exception might arise where the speech at issue falls into a category of expression that lies outside of the First Amendment's broad protections (*see Nebraska Press Ass'n v Stuart*, 427 U.S. at 590 [Brennan, J., concurring]). Thus, a prior restraint on the dissemination of child pornography is likely to survive First Amendment scrutiny (*see United States v Quattrone*, 402 F3d at 310). Among other matters not afforded First Amendment free speech and free press protection are: obscene speech and "fighting words" (*Roth v United States*, 354 U.S. 476 [1957] cf. *Harisiades v Shaughnessy*, 342 U.S. 580, 591–592 [1952]) and advocating the violent overthrow of the government (*Doe v Daily News, L.P.*, 173 Misc2d 321, 322–23 [Sup. Ct. NY Cty 1997]).

¹⁸ Memorandum of Law in Opposition, (NYSCEF Doc. No. 185 at 1, 7)

As the Supreme Court has held, “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 of the highest order” (*Smith v Daily Mail Publishing Co.*, 443 U.S. 97, 103 [1979]). The freedom to publish regarding **matters of public concern** is a bedrock principle of the First Amendment, and “state action to punish the publication of truthful information seldom can satisfy constitutional standards” (*Smith v Daily Mail Publishing Co.*, 443 U.S. at 102). In *Bartnicki v Vopper*, the Court held that the First Amendment outweighed any privacy interests at issue and the broadcast at issue was fully protected by the First Amendment (*Bartnicki v Vopper*, 532 U.S. 514 [2001]). The recordings were provided to the broadcasters by individuals who obtained them illegally, but the court held that “a stranger’s illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of **public concern**” (*Bartnicki v Vopper*, 532 U.S. at 535).

Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints (*Nicholson v Keyspan Corp.*, 14 Misc3d 1236(A) [Sup. Ct, Suffolk, Cty 2007]). “[I]f 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 of the highest order” such as to “suppres[s] . . . information that would set in motion a nuclear holocaust” (*New York Times Co. v. United States*, 403 U.S. 713, 726 [1971] [Brennan, J., concurring]).

As the party seeking to impose a prior restraint (to suppress the memoranda from publication and dissemination), Project Veritas bears a heavy burden of proof demonstrating justification for its imposition (*Ash v Bd. of Managers of 155 Condo.*, 44 AD3d 324, 325 [2007]).

The Times believes that this court has already burdened it with unconstitutional restriction, and that the First Amendment guarantees its ability to publish the memoranda. The Times relies upon the case of *Nicholson v Keyspan Corp* (14 Misc3d 1236[A] [Sup Ct, Suffolk County, 2007]). Acknowledging the importance of attorney-client privilege to our legal system, the court in *Nicholson* still refused to enjoin the news organizations from publishing privileged information. In *Nicholson*, the court held: “This broad constitutional prohibition on restraints on the press does not exempt from its operation comment on items covered by attorney client privilege if the document covered by attorney client privilege comes into conflict with the right of the press to publish and comment on matters of public concern as long as the press did not improperly conspire to obtain the material that was covered by the privilege” (14 Misc3d 1236(A) at 7-8). The court also noted, “even this privilege, important as it is, cannot be used to restrict the properly exercised, constitutionally protected freedom of the press to publish” (14 Misc3d 1236[A] at 9).

However, *Nicholson* is readily distinguishable from the case at bar. First, Justice Sgroi made a factual finding that the two media intervenors did not obtain the document at issue illegally or by improper means. In fact, in *Nicholson*, a party had actually leaked the document. Therefore, the court declined to issue an injunction against the two media outlets, but did issue one against the party (*Nicholson v Keyspan Corp.*, 14 Misc3d 1236[A] at 1-3). Finally, the documents were of public concern, as they related to significant environmental contamination. The court prefaced its decision by stating, “This case raises issues of public concern not only because of the effect of the plume on the health, safety and welfare of the persons directly in the path of the plume, but because the financial costs involved in remediating the plume of contaminants may be borne by the ratepayers of KeySpan if KeySpan passes those expenses through to the utility's customers and the

plume itself allegedly is or soon may be polluting the Great South Bay” (*Nicholson v Keyspan Corp.*, 14 Misc3d 1236[A] at 3). Further, notably, the defendant in *Nicholson*, Keyspan Corp. is a quasi-governmental entity, a utility company, whose actions impact the public at large, which was in the forefront of the court’s mind: “The subject matter of this litigation is of great public concern and the attorney client privilege exercised by the Defendants will be restrictively applied to encourage full and fair disclosure of information because this case will affect the health, safety and welfare of the public” (*Nicholson v Keyspan Corp.*, 14 Misc3d 1236[A] at 9).

In its sur reply, the Times also cites *Rodgers v U.S. Steel Corp.*, for the principle that “an order enjoining plaintiff’s counsel from sharing allegedly privileged materials ‘obtained otherwise than through the court’s processes’ was unconstitutional prior restraint” (see *Rodgers v U.S. Steel Corp.*, F2d 1001, 1004-1009 [3rd Cir 1976]). However, contrary to the Times’ contentions, the holding in *Rodgers* is inapposite, because the facts bear little resemblance to the facts here. The subject document in *Rodgers* was a government document, which outlined the methodology that the Department of Justice used to calculate workers’ back pay (not a private party’s attorney-client privileged memoranda). The District Court specifically stated, “This is not a lawyer’s work product” (here it is), and the Third Circuit determined that absent dissemination of the document, time constraints governing the solicitation and tender could prejudice 600 employees from being able to make an informed decision about whether or not to accept the settlement offer (*Rodgers v U.S. Steel Corp.*, F2d at 1004-1009).

The Eleventh Circuit grappled with balancing the First Amendment with the Sixth Amendment’s right to counsel when CNN obtained audio recordings of former Panamanian

President General Manuel Noriega and his criminal defense attorney. It noted that the Supreme Court has held, “[t]he First Amendment generally grants the press no right to information about a trial superior to that of the general public” (*U.S. v Noriega*, 917 F2d 1543, 1548 [11th Cir 1990], citing *Nixon v Warner Communications*, 435 US 589, 609 [1978]). The Eleventh Circuit went on to unequivocally hold “the general public has no right of access to private communications between a defendant and his counsel” (*U.S. v Noriega*, 917 F2d at 1548). There, CNN also held information that only it possessed (the tapes), and refused to turn them over. Similarly, here only the Times knows how it obtained Project Veritas’ attorney-client communications.

Other news organizations have voiced their support for the right to publish the attorney-client privileged memoranda, through the submission of the amici curiae brief by the Reporters Committee for Freedom of the Press, which includes The Associated Press, Daily News, Gannett, Reuters, Forbes, and the Washington Post, among others.¹⁹ These organizations fear that permitting litigants to obtain orders restraining the speech of news organizations in the manner contemplated by the Order to Show Cause would harm news organizations’ ability to publish journalism of public concern.

The first issue that the court first must decide is whether the speech at issue addresses a matter of public concern (*see Lewis v Cowen*, 165 F3d 154, 161 [2d Cir. 1999]). The parameters of the public concern test are poorly defined, but there is some guidance in the Supreme Court decision in *Connick v Myers* (461 U.S. 138, 146 [1983]), where the Supreme Court defined a matter of public concern as one that “relat[es] to any matter of political, social, or other concern to

¹⁹ Affirmation of Katie Townsend (NYSCEF Doc No. 187) and Amici Brief of Reporters Committee for Freedom of the Press (NYSCEF Doc. No. 188).

the community”, but cautioned that “[t]o presume that all matters which transpire within a government office are of public concern would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case” (*Connick*, 461 U.S. at 149). Instructive to this court’s analysis of what exactly constitutes a matter of public concern is the Court of Appeals decision in *Santer v. Board of Educ. of East Meadow Union Free School Dist.* 23 NY3d 251 (2014). Like the *Pickering* case it cited, *Santer* involved a case where a public school board disciplined a teacher for voicing opinions about the schools. *Santer* applied the “*Pickering Test*.” The first prong of the analysis is “whether the speech which led to an employee’s discipline relates to a matter of public concern” (23 NY3d at 263-264). The second prong is a balance between the individual’s interest in speaking and the government interest in effective operations (23 NY3d at 264). *Connick*, *Pickering*, and their progeny instruct that “Speech deals with matters of public concern when it can ‘be fairly considered as relating to any matter of political, social, or other concern to the community’...or when it ‘is the subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public’” (*Snyder v Phelps*, 562 U.S. 443, 453 [2011] quoting *San Diego v. Roe*, 543 U.S. 77, 83–84 [2004], and *Connick*, 461 U.S. at 146). Whether a public employee’s speech addresses a matter of public concern is a question of law to be determined in light of “the content, form, and context of a given statement, as revealed by the whole record” (*Santer v Bd. of Educ. of E. Meadow Union Free Sch. Dist.*, 23 NY3d 251, 263–64 (2014) (internal citations omitted); (*City of San Diego v Roe*, 543 U.S. 77, 83–84 [2004])).

The Court of Appeals held that an article about the arrest of a public school teacher for felony possession of heroin and unlawful possession of a hypodermic needle fell “within the sphere

of public concern”, due to the teacher’s occupation of instructing youth, and the issue of heroin addiction (*Chapadeau v Utica Observer-Dispatch*, 38 NY2d 196 [1975]). Consistent with that, when a trial court enjoined a plaintiff from publishing defamatory statements and a confidential psychological evaluation of the defendant and directed the plaintiff to remove a website featuring negative comments and statements about the defendant as well as depictions of vermin, the devil, and skulls and crossbones, the Second Department has held that the injunction “constituted an impermissible prior restraint on free speech”, except as to the prohibition regarding the psychological profile, which was not a matter of public concern (*Rose v Levine*, 37 AD3d 691, 692-693 [2d Dept 2007]).

Another example of content, form, and speech found not to implicate public concerns, was a plaintiff’s speech involving her private employment situation regarding allegations of abuse of overtime and workplace bullying (*see Lewis v Cowen*, 165 F.3d 154, 164 [2d Cir. 1999]). “In reaching this decision, the court should focus on the motive of the speaker and attempt to determine whether the speech was calculated to redress personal grievances or whether it had a broader public purpose” (*Lewis v Cowen*, 165 F.3d at 163–64). Likewise, a plaintiff who sought to confer with her union representative about defendants’ alleged efforts to impugn her reputation as a teacher implicated plaintiff’s own self-interest, not a matter of public concern—she was “not speaking out on matters of public concern but complaining about individual instances that affected her personally” (*Rutherford v Katonah-Lewisboro Sch. Dist.*, 670 F. Supp. 2d 230, 247 [S.D.N.Y. 2009]).

“Public concern” is also considered by the Civil Rights Law §79-h, which offers certain protections invoking actual and qualified privilege for professional journalists and newscasters from contempt.

8) “News” shall mean written, oral, pictorial, photographic, or electronically recorded information or communication concerning local, national or worldwide events or **other matters of public concern** or public interest or affecting the public welfare (Civil Rights Law §79-h).

Ironically, while all parties concede that there is no relevant caselaw that is “on all fours” with the facts herein, it is noteworthy that one U.S. District Court mused the following: “[W]hat if a confidential memorandum is stolen from an attorney's office and subsequently published in newspapers across the country? Clearly, the client should not be held to have waived the attorney-client privilege. The fact that the contents of a privileged document have become widely known is insufficient by itself to eliminate the privilege that covers the document. Although in practical terms the document has lost any semblance of confidentiality, the Court in legal terms must recognize that the client has not intentionally waived the privilege. To hold that public circulation eliminates the privilege would, in effect, give *any* individual who secured a privileged document the power to waive the attorney-client privilege by simply having the contents widely recounted in newspaper reports (see *Smith v Armour Pharm. Co.*, 838 F. Supp. 1573, 1577 [S.D. Fla. 1993]). As was the case when that court struggled with these issues, the law is still unsettled regarding the court's power to limit the use of documents obtained by means other than that court's discovery process (*see Smith v Armour Pharm. Co.*, 838 F Supp at 1578).

In light of these principles of law, the court rejects the Times' position that Project Veritas' attorney-client communications are a matter of public concern. Undoubtedly, every media outlet

believes that anything that it publishes is a matter of public concern. The state of our nation is that roughly half the nation prioritizes interests that are vastly different than the other half. Our smart phones beep and buzz all day long with news flashes that supposedly reflect our browsing and clicking interests, and we can tune in or read the news outlet that gives us the stories and topics that we want to see. But some things are not fodder for public consideration and consumption. These memoranda, and hundreds of thousands of similar attorney-client privileged documents that are in homes, offices, and businesses in every village, town, and city in this nation are only between an attorney and a client, and it does not matter one bit who the attorney and client are. While the content of the advice is irrelevant to this court's analysis, in this case, the subject memoranda here contain typical, garden variety, basic attorney-client advice that undoubtedly is given at nearly every major media outlet in America, including between the Times and its own counsel.

A client seeking advice from its counsel simply cannot be a subject of general interest and of value and concern to the public. It is not the public's business to be privy to the legal advice that this plaintiff or any other client receives from its counsel. Like a public employee who brings a First Amendment claim alleging a prior restraint on her freedom of speech must show that the speech touches on a matter of public concern (*United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 465–66 [1995]), it is quintessentially personal, not public, in nature (*Rutherford v Katonah-Lewisboro Sch. Dist.*, 670 F. Supp.2d 230, 248 [S.D.N.Y. 2009]).

It is clear that the memoranda themselves are not a matter of public concern, and therefore, the balance tips in favor of the attorney-client privilege. That is not to say that aspects of Project Veritas and/or its journalistic methods are not of public interest. The Times is perfectly free to investigate, uncover, research, interview, photograph, record, report, publish, opine, expose or

ignore whatever aspects of Project Veritas its editors in their sole discretion deem newsworthy, without utilizing Project Veritas' attorney-client privileged memoranda.

Here, the court's protective order does not act as an impermissible prior restraint on the Times. As important as the First Amendment's protection against prior restraints is, on the present facts, the erosion of the attorney-client privilege is a far more imminent concern. "What is also at stake in the dissemination of privileged information into the public domain is the privacy of the individuals mentioned or discussed therein and the importance of full and free communication between attorney and client. 'Hit and run' journalism is no more protected under the First Amendment, than speeding on a crowded sidewalk is permitted under a valid driver's license" (*Greenberg v CBS Inc.*, 69 AD2d 693, 700 [2d Dept 1979]). Steadfast fidelity to, and vigilance in protecting First Amendment freedoms cannot be permitted to abrogate the fundamental protections of attorney client privilege or the basic right of privacy.

Project Veritas' final contention is that the Times' attorneys violated the New York Rules of Professional Conduct ("NYRPC"). The court finds that there is no basis for this in the record. The court agrees with the Times' assertion made during oral argument, that an attorney is entitled and obligated to convey frank and open legal advice to his or her media client regarding issues such as these.²⁰ The court notes that if the Time' counsel's attorney-client advice were stolen or otherwise irregularly ended up in the hands of Project Veritas or any other media outlet, without the Times having waived its privilege, the communication would likewise not be a matter of public

²⁰ November 23, 2021 oral argument Tr., at p. 45

concern.²¹ From this record, nothing indicates that counsel for the Times strayed from ethical obligations.

Finally, with acknowledgement to Justice White, the holding today is grounded in the recognition that the First Amendment's primary aim is the full protection of speech upon issues of public concern, as well as the practical realities involved in the administration of justice and the attorney-client privilege. Although based upon the facts of the case here, the balance is struck for the latter, this is no defeat for the First Amendment. For it would indeed be a Pyrrhic victory for the great principles of free expression if the Amendment's safeguarding of the media's nearly unfettered right to broadcast issues concerning public affairs were confused with the attempt to constitutionalize the publication of the private, privileged communication that is presented here (*Connick v Myers*, 461 U.S. at 154).

The Times' "shot across the bow"²² of their litigation adversary cries out for court intervention, to protect the integrity of the judicial process, and to remedy the "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice" that the Times created on November 11, 2021 (CPLR 3103(a); *Ligoure v City of New York*, 128 AD3d at 1028). Having met the requirements of CPLR 3103(c), the court in its discretion must fashion an appropriate sanction that will adequately redress the violation (*Lipin v Bender*, 84 NY2d 562 [1994]). The Court of Appeals noted that CPLR 3103 bestows wide discretion to the court to enter *any* order, including an order of dismissal, or realistic remedies that is appropriate under the circumstances. "As the

²¹ Based on the scenario of non-governmental entities. Certainly, actions of public entities are more likely to be of public concern.

²² see Letter from Plaintiff's counsel to Defendant's counsel (NYSCEF Doc. No. 167).

drafters [of CPLR 3103] made clear, “[t]here is no limit but the needs of the parties on the nature of the [protective] order or the conditions of discovery” (*Lipin v Bender*, 84 NY2d at 572–73, citing First Preliminary Report of Advisory Comm on Practice and Procedure, 1957 NY Legis Doc No. 6 [b], at 124).

Accordingly, based upon the stated reasons, it is hereby

ORDERED, that the plaintiff Project Veritas’ motion (Seq. No. 8) is **granted** in part to the extent set forth below; and it is further

ORDERED, that the defendant New York Times and its agents, employees, legal counsel or other persons under its control are directed to immediately turn over to the plaintiff Project Veritas’ counsel all physical copies of the subject legal memoranda prepared by Project Veritas’ counsel, Benjamin Barr, that are in its control or possession; and it is further

ORDERED, that the defendant New York Times and its agents, employees, legal counsel, or other persons under its control are directed to immediately delete/destroy copies of the legal memoranda prepared by Project Veritas’ counsel, Benjamin Barr, from any computer, cloud server or other data collecting or disseminating sources, including but not limited to, all attachments to emails and cloud server devices, and to remove such documents from the internet and any web sites or servers over which they have control; and it is further

ORDERED, that the defendant New York Times’ counsel and the defendants herein are directed to use best efforts to retrieve copies of the legal memoranda prepared by Project Veritas’ counsel, Benjamin Barr, provided to third parties, including but not limited to, Bill Grueskin; and it is further

ORDERED, that the defendant New York Times’ counsel and the defendants herein are directed not to use the legal memoranda prepared by Project Veritas’ counsel, Benjamin Barr, or information obtained from those documents in this action for any purposes whatsoever; and it is further

ORDERED, that the defendant New York Times is directed to file with the court within ten (10) days of service with notice of entry of this order an affidavit/affirmation confirming its compliance hereto, setting forth in detail all documents that have been destroyed or removed from data collecting or disseminating sources, including emails and attachments thereto, the date that the documents and copies of documents were destroyed, and the method used to destroy the documents and copies of documents; and it is further

ORDERED, that, if applicable, all counsel are directed to file with the court, an affirmation setting forth any documents filed on NYSCEF containing excerpts of the subject attorney-client memoranda, and submit copies of the documents with proposed redactions, for consideration by the court for entry of an appropriate sealing order; and it is further

ORDERED, that the attorney-client memoranda that are the subject of this order shall not be shown, transmitted, or disseminated in any manner to any persons absent written order of this Court; and it is further

ORDERED, that the motion for leave to file brief of Amici Curiae in support of the New York Times (Motion Seq. No. 9) is granted; and it is further

ORDERED, that in the event the defendant New York Times fails to comply as directed herein, plaintiff Project Veritas shall upload to the NYSCEF file, no later than January 28, 2022, upon notice to defendants, an affidavit/affirmation of noncompliance and plaintiff is granted leave to seek any relief related thereto, including preclusion, striking of pleadings, and costs and/or sanctions; and it is further

ORDERED, that all other relief requested by any person or party not specifically addressed herein is denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: December 23, 2021
White Plains, New York



HON. CHARLES D. WOOD
Justice of the Supreme Court

To: All Parties by NYSCEF

Exhibit 2

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

PROJECT VERITAS,

Plaintiff,

- against -

THE NEW YORK TIMES COMPANY, MAGGIE ASTOR,
TIFFANY HSU, AND JOHN DOES 1-5,

Defendants.

Index No. 63921/2020

Hon. Charles D. Wood

NOTICE OF APPEAL

PLEASE TAKE NOTICE that Defendant The New York Times Company hereby appeals to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, from the annexed Decision and Order of the Supreme Court of the State of New York, Westchester County in the above captioned action, dated December 24, 2021 and corrected December 27, 2021, which granted in part Plaintiff's Motion for an Order to Show Cause (Mot. Seq. No. 008).

Dated: New York, New York
December 27, 2021

Respectfully submitted,

By: /s/ Joel Kurtzberg
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*Attorneys for Defendant The New York
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Counsel for Plaintiff Project Veritas

EXHIBIT 1

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

PROJECT VERITAS,

Plaintiff,

- *against* -

THE NEW YORK TIMES COMPANY, MAGGIE ASTOR,
TIFFANY HSU, AND JOHN DOES 1-5,

Defendants.

Index No. 63921/2020

(Wood, J.)

NOTICE OF ENTRY

PLEASE TAKE NOTICE that the within is a true copy of a Decision and Order of the Supreme Court of the State of New York, County of Westchester (Wood, J.), in the above captioned action, originally received December 24, 2021, corrected December 27, 2021, and duly entered and filed on December 27, 2021.

DATED: New York, New York
December 27, 2021

CAHILL GORDON & REINDEL LLP

/s/ Joel Kurtzberg

Joel Kurtzberg

Miles Wiley

32 Old Slip

New York, NY 10005

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*Attorneys for Defendants The New York
Times Company, Maggie Astor, Tiffany Hsu,
and John Does 1-5*

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

-----X
PROJECT VERITAS,

Plaintiff,

-against-

**THE NEW YORK TIMES COMPANY, MAGGIE ASTOR,
TIFFANY HSU, and JOHN DOES 1-5,**

Defendants.
-----X

WOOD, J.

**DECISION & ORDER
Index No. 63921/2020**

Seq. Nos. 8&9

New York State Courts Electronic Filing ("NYSCEF") document numbers 170-195 were read in connection with the instant motion brought by order to show cause by Project Veritas (Seq. No. 8) pursuant to CPLR 3103, against the defendants, seeking an order directing the defendant The New York Times Company ("the Times"): (1) to remove all references to or descriptions of Project Veritas' attorney-client privileged information published on the Times' website on November 11, 2021; (2) to return or immediately destroy all copies of Project Veritas' attorney-client privileged materials in the Times' possession; (3) to refrain from further publishing Veritas' attorney-client privileged materials; (4) to order the Times to cease further efforts to solicit and acquire Veritas' attorney-client privileged materials; and (5) for an interim order directing the Times to sequester and refrain from further publishing any of Project Veritas' attorney-client privileged materials.

As an initial matter, the court grants the separate motion brought by Reporters Committee

for Freedom of the Press (Seq. No. 9) seeking leave to file an amici curiae brief in support of the Times, and in response to the Court's Order to Show Cause.

NOW, based upon the foregoing, the motions are decided as follows:

The background of this case is set forth more fully in this court's decision and order entered on March 18, 2021. The Times filed a Notice of Appeal of that decision on April 8, 2021. The appeal is pending.

This court (Lefkowitz, J.) also denied the Times' application to stay discovery until a disposition of the pending appeal. The Times then sought a stay of discovery from the Appellate Division, Second Department, which was granted on October 27, 2021.

Project Veritas brought an order to show cause for the instant motion on November 18, 2021, which this court signed and entered, granting a temporary restraining order that directed the Times and its counsel to: (i) immediately refrain from further disseminating or publishing any of Project Veritas' privileged materials in the possession of the Times; (ii) cease further efforts to solicit or acquire Project Veritas' attorney-client privileged materials; and (iii) schedule argument on an expedited basis for November 23, 2021. On November 19, 2021, the Second Department denied a motion by the Times pursuant to CPLR 5704 that sought to vacate the Temporary Restraining Order issued by this court.

On November 23, 2021, after argument by all counsel on the relief requested by Project Veritas, this court set a briefing schedule, with Project Veritas to submit reply papers by December 1, 2021, and the Times a sur-reply by December 3, 2021. The court continued the limited injunction and protective order to permit the parties the opportunity to be heard and fully submit their papers.

On December 14, 2021, at the written request of counsel to the Times, the court amended the order to show cause to clarify that the order does not prohibit the Times from various activities related to newsgathering and reporting of Project Veritas' attorney-client privileged documents.

This latest chapter between these parties began on November 11, 2021, at 1:07 P.M. when the Times emailed Project Veritas founder James O'Keefe and Project Veritas' outside counsel Benjamin Barr, stating, "We are planning to publish a story based on legal memos that Mr. Barr provided to Project Veritas. The memos provide legal advice about how different PV operations could violate various laws, including the Espionage Act and Section 1001. The memos give guidance about how PV can remain in Mr. Barr's view, on the right side of these laws"¹. The email asked for comment on the forthcoming story by 5:00 P.M. Without waiting until that stated time, at or before 3:02 P.M EST, the Times published on its website full copies of the privileged legal memoranda prepared by Mr. Barr for Project Veritas.² Then, at 5:54 P.M.³, the Times published the story entitled *Project Veritas and the Line Between Journalism and Political Spying*⁴ which explored Project Veritas' controversial reporting tactics, describing and quoting from Project Veritas' attorney-client documents. The story details how Project Veritas sought advice of counsel regarding the legality of potential news gathering tactics. The story quotes from three legal memoranda prepared by attorney Barr, providing legal advice to Project Veritas. In addition,

¹ Email from Goldman to O'Keefe & Barr, dated 11/11/21 (NYSCEF Doc. No. 166).

² These times were alleged set forth in Ms. Locke's letter to Joel Kurtzberg and David McCraw, the Times' counsels, dated November 12, 2021, and have not been disputed (NYSCEF Doc. No. 167).

³ Project Veritas claims that the time of the email is Central Standard Time, which would be 2:07 Eastern Standard Time (see Affirmation of Elizabeth M. Locke, NYSCEF Doc. No. 165).

⁴ Adam Goldman & Mark Mazetti, Project Veritas and the Line Between Journalism and Political Spying, THE NEW YORK TIMES, <https://www.nytimes.com/2021/11/11/us/politics/project-veritasjournalism-political-spying.html> (last accessed Nov. 22, 2021) (NYSCEF Doc. No. 174).

the Times shared copies of the memoranda with a Columbia Journalism School professor and sought comment. The Times' publication of the memoranda led Project Veritas to seek an injunction against it.

CPLR 3103

Project Veritas seeks relief pursuant to CPLR 3103(c). CPLR 3103(c) provides, in relevant part “[i]f any disclosure under this article has been *improperly or irregularly obtained* so that a substantial right of a party is prejudiced, the court, on motion, may make an appropriate order, including an order that the information be suppressed” (CPLR 3103) (emphasis added). The Second Department has held that:

Unlimited disclosure is not mandated, however, and a court may issue a protective order pursuant to CPLR 3103 denying, limiting, conditioning or regulating the use of any disclosure device “to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts. The supervision of disclosure and the setting of reasonable terms and conditions therefor rests within the sound discretion of the trial court and, absent an improvident exercise of that discretion, its determination will not be disturbed” (*Ligoure v City of New York*, 128 AD3d 1027, 1028 [2d Dept 2015]).

Project Veritas accuses the Times of improperly obtaining its privileged materials without authorization. In addition, Project Veritas contends that the Times engaged in efforts to obtain Project Veritas' privileged materials outside of approved discovery channels, from an unnamed and unknown individual that the Times allegedly knew was not authorized to disclose such materials. Project Veritas claims that these improper and irregular actions by the Times have substantially prejudiced its rights, and thus the court should issue a protective order mandating that the Times cease such conduct and immediately destroy or return to Project Veritas all ill-gotten,

privileged materials in the Times' possession (CPLR 3103[c]).

In support of its motion, Project Veritas claims that the primary nexus between the memoranda and this underlying defamation case is that they were authored by its counsel of record, Benjamin Barr. Barr's legal advice regarding several related topics goes to the heart of Veritas' video reporting on illegal ballot harvesting by members of Rep. Ilhan Omar's staff. In addition, according to Project Veritas, the content of the attorney-client memoranda relates directly to the Times' defenses in the defamation litigation, including on truth, fault, and damages.

Project Veritas claims that the Times' intrusion upon its protected attorney-client relationship is an affront to the sanctity of the attorney-client privilege and the integrity of the judicial process that demands this court's intervention. According to Project Veritas, it seeks only a narrow protective order to limit the Times from "improperly or irregularly obtaining" and disseminating the privileged communications of its litigation adversary. Project Veritas argues that "a decision denying this protective order—particularly in today's internet and social media age—will permit any would-be citizen journalist, blogger, or Instagram influencer to claim the right to publish their litigation adversary's attorney-client privileged communication with impunity. That is not, and cannot, be the law."⁵

Project Veritas concludes that if this court were to accept the Times' arguments that CPLR 3103(c) permits protective orders "only in situations involving information gathering through formal discovery methods and, in cases where a media entity is a party, only in situations where the information was acquired wrongfully or illegally, would result in a complete re-write of the

⁵ Reply Memorandum of Project Veritas, at 16 (NYSCEF Doc. No. 192).

text of the statute”.⁶

In opposition, the Times argues that the Court should not issue a protective order pursuant to CPLR 3103 because Project Veritas’ memoranda have nothing to do with the subject matter in the underlying defamation action, since they predate the Project Veritas video and this defamation action. The Times argues that CPLR 3103(c) does not empower courts to suppress any information that a party may obtain improperly or irregularly. The Times argues that the memoranda must be relevant to the claims or defenses in this defamation action and that the November 11, 2021 article and memoranda have nothing to do with Rep. Omar, alleged voter fraud, ballot harvesting, defamation law, or the Project Veritas video. The Times says it received the memoranda through “newsgathering efforts” that were obviously outside of the litigation process because it obtained a stay of discovery and no discovery has actually taken place in this action. Further, a news organization is not prevented from reporting on newsworthy information--even attorney-client privileged information--that is independently obtained outside of the discovery process. Relying on *Seattle Times Co. v Rhinehart* (467 US 20, 34 [1984]), the Times argues that CPLR 3103(c) empowers the court to control only the distribution and publication of information obtained as part of an action’s discovery process.

Taking these legal principles in mind, Project Veritas, as the party seeking relief under CPLR 3103(c), must first demonstrate that the subject memoranda were obtained “improperly or irregularly.” If it does so, the court’s analysis under CPLR 3103(c) continues requiring a determination as to whether a substantial right of a party has been prejudiced.

⁶ Reply Memorandum of Project Veritas, at 16 (NYSCEF Doc. No. 192).

Here, Project Veritas has established that it is the owner of the memoranda and the privilege, and it is not disputed that it did not waive its privilege. Since no discovery was exchanged, this is not a case where the documents were inadvertently turned over during discovery. Project Veritas has alleged that the Times knew that the individual that provided the memoranda was not authorized to disclose them. There is nothing in the record to show how the Times obtained the privileged memoranda that belong to Project Veritas. That information is solely within the Times' knowledge and possession, and it has not offered any explanation beyond vaguely stating that the memoranda were obtained through its "newsgathering efforts."⁷ However, in its Memorandum in Opposition, while attempting to distinguish the facts of the case of *Rose v Levine* from this case, the Times incredibly admitted that here "no *apparent* bribery... was used to obtain the memoranda."⁸ The court finds that Project Veritas has met its burden of showing that the subject memoranda were obtained by irregular means, if not both irregular and improper means.

Turning to the second prong of the CPLR 3103 analysis, Project Veritas must also show that it has been prejudiced as a result. The court finds that the attorney-client relationship between Benjamin Barr and Project Veritas has been undermined by counsel's confidential legal advice and thought processes being in the hands of a litigation adversary, and the subject of a request for public comment. This was compounded by the Times promptly publishing the memoranda to the rest of the world and thereafter within several hours publishing a second story, describing the contents of the memoranda. More specifically, here, at 2:07 P.M., the Times' reporters emailed

⁷ NYT Memorandum in Opposition, at 5 (NYSCEF Doc. No. 185).

⁸ See Defendant's Memorandum in Opposition, at FN 9 (NYSCEF Doc. No. 185).

James O'Keefe and Benjamin Barr that they had obtained the privileged memoranda where Barr as counsel gave advice to Project Veritas. Even though the email gave O'Keefe and Barr a deadline for comment, 5:00 P.M., at 3:02 P.M. the Times went ahead and published the entirety of the memoranda on its website ahead of the deadline it had set. At some point for reasons unknown, the Times voluntarily removed the link to the memoranda, but published an article quoting heavily from the privileged memoranda. This act by the Times to obtain and publish the confidential privileged memoranda can only be deemed to have prejudiced the rights of the plaintiff by directly compromising the confidential legal advice rendered by counsel.

Further, as Project Veritas correctly points out in its reply brief, there are a whole host of ways that the Times has gained strategic advantage in the litigation with the knowledge it gained from the memoranda, even without being able to admit them into evidence in this case. The Times' witnesses can now craft their responses to questions at a deposition using what they have learned. The Times' attorneys now have insight to formulate deposition topics and strategy based on the content of the memoranda. Indeed, in the November 11, 2021 article published at 5:54 P.M., the Times itself noted that the memoranda "give new insight into the workings of the group at a time when it faces potential legal peril in the diary investigation - and has signaled that its defense will rely in part on casting itself as a journalistic organization protected by the First Amendment."⁹ That "insight" for the Times is unquestionably concomitant prejudice to the plaintiff.

⁹ Adam Goldman & Mark Mazetti, Project Veritas and the Line Between Journalism and Political Spying, THE NEW YORK TIMES, <https://www.nytimes.com/2021/11/11/us/politics/project-veritas-journalism-political-spying.html> (last accessed Nov. 22, 2021) (NYSCEF Doc. No. 174).

The court has also considered the Times' contention that this court has no power to address the Times' publication of these memoranda, since they were obtained outside the discovery process. There is no dispute by Project Veritas that the memoranda were obtained by the Times outside of any discovery related to this action. Although the memoranda were written almost four years before the Times published them on November 11, 2021, similar themes and allegations by the Times against Project Veritas permeate the memoranda and the pleadings in this case.¹⁰ The Times' own reporting in the subject article confirms this: "Project Veritas is suing The New York Times over a 2020 story about a video the group made alleging voter fraud in Minnesota. Most news organizations consult regularly with lawyers, but some of Project Veritas's questions for its legal team demonstrate an interest in using tactics that test the boundaries of legality and are outside of mainstream reporting techniques."¹¹

Further, the Times' reliance on *Seattle Times Co. v. Rhinehart* is misplaced here. In *Seattle Times Co.*, the issue was not the violation of the attorney-client privilege, but rather the use and publication of financial records obtained during disclosure of the Aquarian Foundation and its "spiritual leader," Rhinehart. Initially, the trial court denied any protective order, but after harassment and reprisal concerns were raised through affidavits of Aquarian donors and clients, the court ultimately granted an order prohibiting the publication of the donor and client names,

¹⁰ See Summons and Complaint, NYSCEF Doc. No. 1, ¶¶ 11-21; Memorandum of Law in Support of Motion to Dismiss, (NYSCEF Doc. No. 14 point IV); Affirmation in Support of Motion to Dismiss (NYSCEF Doc. No. 15, para 19-71).

¹¹ The sentences follow each other, with a solicitation ad by The Times inserted between them. The story consists of 58 sentences separated into 41 paragraphs, eschewing traditional paragraph structure. Adam Goldman & Mark Mazetti, Project Veritas and the Line Between Journalism and Political Spying, THE NEW YORK TIMES, <https://www.nytimes.com/2021/11/11/us/politics/project-veritas-journalism-political-spying.html> (last accessed Nov. 22, 2021) (NYSCEF Doc. No. 174).

addresses, and the amounts they contributed. In reviewing the trial court's order, the Supreme Court noted, "restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information" (467 U.S. 20, 33 [1984]). Thus, the Supreme Court made clear that the Seattle Times was not restricted from gathering information available through "traditional public source(s)" such as, interviewing Aquarian members or examining public records. This is consistent with other cases where the Supreme Court refused to block publication of private—but not privileged—information gathered outside discovery through "routine newspaper reporting techniques,"¹² and where the "Appellee has not contended that the name was obtained in an improper fashion or that it was not on an official court document open to public inspection."¹³ Likewise, here the Times is in no way restricted from gathering and publishing information available through traditional public sources. However, attorney-client privileged documents, by definition, are not available through a traditionally public source of information.

Attorney-Client Privilege

The attorney-client privilege is "the oldest of privileges for confidential communications" tracing its origins back nearly 450 years to 1577 England (see *Upjohn Co. v United States*, 449 U.S. 383, 389 [1981]; Richard S. Pike, *The English Law of Legal Professional Privilege: A Guide For American Attorneys*, 4 Loy. U. Chi. Int'l L. Rev. 51). The intent of the privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice" (*Upjohn Co. v*

¹² See *Smith v Daily Mail Pub. Co.*, 443 US 97, 103 (1979)

¹³ See *Cox Broadcasting v Cohn*, 420 US 469, 496 (1975)

United States, 449 U.S. at 389). Open dialogue between attorney and client is “deemed essential to effective representation” (*Spectrum Sys. Intl. Corp. v Chem. Bank*, 78 NY2d 371, 377 [1991]). The attorney-client privilege “exists to ensure that one seeking legal advice will be able to confide fully and freely in his [or her] attorney, secure in the knowledge that his [or her] confidences will not later be exposed to public view to his [or her] embarrassment or legal detriment” (*Siegel v Snyder*, 2021 WL 6057821 [2d Dept, December 22, 2021], citing *Matter of Priest v Hennessy*, 51 NY2d 62, 67–68 [1980]; see *Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616, 623 [2016]). Thus, the attorney-client privilege is not solely tied to the contemplation of litigation (*Spectrum Sys. Int’l Corp. v Chem. Bank*, 78 NY2d at 380, citing *Root v Wright*, 84 NY 72, 76 [1881]; *Bacon v Frisbie*, 80 NY 394, 400 [1880]).

The protections afforded by the attorney-client privilege have not only developed through over four centuries of common law, but are found in statute (CPLR 4503), the Code of Professional Responsibility (EC 4–1) and are strongly rooted in the constitutional right to counsel (U.S. Const. 6th Amend.; N.Y. Const., art. I, §6). The attorney-client privilege applies to confidential communications between clients and their attorneys made “in the course of professional employment” (CPLR 4503[a][1]). The communication itself must be “for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship” (*Spectrum Sys. Int’l Corp. v Chem. Bank*, 78 NY2d at 379, citing *Rossi v Blue Cross & Blue Shield*, 73 NY2d 588, 593 [1989]). The CPLR establishes “categories of protected materials, also supported by policy considerations: privileged matter, absolutely immune from discovery (CPLR 3101[b]); attorney’s work product, also absolutely immune (CPLR 3101[c])”

(*Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d at 376–377).

Despite stating that this privilege is “absolute”, the Court of Appeals has recognized that the privilege may give way to strong public policy considerations. For example, “[t]he attorney-client privilege constitutes an ‘obstacle’ to the truth-finding process, the invocation of which should be cautiously observed to ensure that its application is consistent with its purpose” (see *Matter of Priest v Hennessy*, 51 NY2d at 68; *Matter of Jacqueline, F.*, 47 NY2d 215, 219 [1979]). Even where the technical requirements of the privilege are satisfied, it may, nonetheless, yield in a proper case, where strong public policy requires disclosure (see *Matter of Priest v Hennessy*, 51 NY2d at 69; *Matter of Jacqueline, F.*, 47 NY2d 215).

The burden of establishing any right to protection is on the party asserting it; the protection claimed must be narrowly construed; and its application must be consistent with the purposes underlying the immunity (*Matter of Priest v Hennessy*, 51 NY2d at 69). Since Project Veritas seeks the protection of the attorney-client privilege, it has the burden of proving the existence of the privilege. Here, as demonstrated in its reporters’ email and in its November 11, 2021 article, the Times has told both Project Veritas and the world that the documents were attorney-client communication.¹⁴ Further, the Times has not claimed otherwise either before this court during oral argument, or in its opposition or in its sur reply. There is no dispute that Project Veritas is the holder of the privilege, and the Times has not claimed that it was waived by Project Veritas.

¹⁴ See Email from Goldman to O’Keefe & Barr, dated 11/11/21 (NYSCEF Doc. No. 166) and Adam Goldman & Mark Mazetti, Project Veritas and the Line Between Journalism and Political Spying, THE NEW YORK TIMES, <https://www.nytimes.com/2021/11/11/us/politics/project-veritasjournalism-political-spying.html> (last accessed Nov. 22, 2021) (NYSCEF Doc. No. 174).

The Constitution

Project Veritas also seeks remedies that go beyond the typical discovery process--to remove all references to descriptions of Project Veritas' privileged attorney-client information published on the Times' website on November 11, 2021; to return and/or immediately delete all copies of Project Veritas' said attorney-client privileged materials; to refrain from further publishing Veritas' attorney-client privileged materials; and to order the Times to cease further efforts to solicit and acquire Veritas' attorney-client privileged materials.

In opposition, the Times argues that it has a constitutional right to publish the memoranda, even if they are privileged, because Project Veritas' request to prohibit the Times from publishing newsworthy information is a classic prior restraint under the First Amendment.¹⁵ The Times claims that Project Veritas seeks to enjoin news reporting by journalists that is independent of and unrelated to this litigation and therefore not subject to the ordinary powers of the Court to regulate discovery. For the reasons set forth below, this Court does not agree.

The First Amendment of the U.S. Constitution 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.

The First Amendment was ratified within the Bill of Rights in 1791 (Michael Diederich, Jr., *The President, the States and Policing American Cities*, N.Y. St. B.J., September/October 2020, at 26, 27). This prohibition against abridging freedom of the press similarly applies to the

¹⁵The brief of amici curiae argues similar points on this issue.

States by virtue of the due process clause of the Fourteenth Amendment (*see* N.Y.Const., art. I, s 8; *Lewis v Am. Fed'n of Television & Radio Artists*, 34 NY2d 265, 272 [1974]).

At the philosophical conception of this nation, “the 1776 Virginia Declaration of Rights, drafted by George Mason with contributions from James Madison and Patrick Henry, recognized that the freedom of the Press is one of the greatest bulwarks of liberty, and can never be restrained but by despotic Governments” (Michael Miller, *Enemy of the People?*, N.Y. St. B.J., September 2018, at 5, 6; David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 Md. L. Rev. 429, 444 [1983]). Given their experience with King George III and a British Parliament that showed little regard for freedom of speech and of the press (and even less so in the American Colonies), the Framers of the Bill of Rights identified freedom of worship, speech, and press as important rights to spell out in the First Amendment.

Viewed as a whole, the Bill of Rights (Amendments 1-10) seeks to guarantee the rights of the governed individual. While the First Amendment clearly states that Congress shall make no law... abridging freedom of speech, or of the press,” the Ninth Amendment broadly, yet succinctly states, “The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.”

Like the attorney-client privilege, the First Amendment is vital to our republic, but also has limits. “For even though the broad sweep of the First Amendment seems to prohibit all restraints on free expression, this Court has observed that ‘freedom of speech does not comprehend the right to speak on any subject at any time’” (*Seattle Times Co. v Rhinehart*, 467 U.S. at 31, citing *American Communications Assn. v Douds*, 339 U.S. 382, 394–395 [1950]). Also, “[t]he right to speak and publish does not carry with it the right to gather information” (*Zemel v Rusk*, 381 U.S.

1, 17 [1965]). In this collision between attorney-client privilege and the free press, the interests on both sides are plainly rooted in the traditions and significant concerns of our society (*Cox Broad. Corp. v Cohn*, 420 U.S. 469, 491 [1975]).

“Prior restraint” on speech has been defined as when a law, regulation or judicial order suppresses speech on the basis of the speech's content¹⁶ and in advance of its actual expression¹⁷ (*United States v Quattrone*, 402 F.3d 304, 309 [2d Cir. 2005]). Prior restraints constitute “the most serious and the least tolerable infringement” on our freedoms of speech and press (*United States v Quattrone*, 402 F.3d at 309). “Prior restraints whatever the form, upon the rights of free speech and publication by the media bear a heavy presumption of constitutional invalidity” (*Matter of Natl. Broadcasting Co. v Cooperman*, 116 AD2d 287, 289–290 [2d Dept 1986]).

The Times urges that prior restraints “may be imposed only in the most exceptional cases,” and can only be issued “upon a showing on the record that such expression will immediately and irreparably create public injury” (*Porco v Lifetime Entertainment Services, LLC*, 116 AD3d 1264, 1266 [3d Dept 2014] (internal citations and quotation marks omitted) (an order enjoining the broadcast of a movie about a convicted murderer of his parents to be an unconstitutional prior restraint). A plaintiff seeking a prior restraint of expression of views must show that the public at large will be immediately and irreparably harmed (*see East Meadow Association v Board of Education of Union Free School District No. 3, County of Nassau*, 18 NY2d 129, 134 (1966) (prior

¹⁶ The vast majority of cases cited by the Times deal with restrictions based on content. The court has viewed the memoranda for the purposes of establishing whether they were attorney-client communications, and to determine whether they bear any nexus to this cause of action. Otherwise, their content is irrelevant to the holdings herein.

¹⁷ In this case, the Times published the memoranda on its web site, then voluntarily took them down prior to the instant motions being filed.

restraint of a Vietnam War critic/folk singer's concert requires "danger of immediate and irreparable injury to the public weal"). Prior restraints upon the rights of free speech and publication "may only be overcome upon a showing of a 'clear and present danger' of a serious threat to the administration of justice" (*Ash v Bd. of Managers of 155 Condo.*, 44 AD3d 324, 325 [1st Dept 2007]). The government may not impose a prior restraint on freedom of expression to silence an unpopular view, absent a showing on the record that such expression will immediately and irreparably create public injury (*see People ex rel. Arcara v Cloud Books, Inc.*, 68 NY2d 553, 558 (1986)).¹⁸

The list of exceptions to prior restraints is short. The Supreme Court has held that only in exceptional cases, a prior restraint may survive constitutional scrutiny. Project Veritas has a heavy burden to show justification for the imposition of such a restraint (*see Nebraska Press Ass'n v Stuart*, 427 U.S. 539, 558 [1976]). One exception might arise where the speech at issue falls into a category of expression that lies outside of the First Amendment's broad protections (*see Nebraska Press Ass'n v Stuart*, 427 U.S. at 590 [Brennan, J., concurring]). Thus, a prior restraint on the dissemination of child pornography is likely to survive First Amendment scrutiny (*see United States v Quattrone*, 402 F3d at 310). Among other matters not afforded First Amendment free speech and free press protection are: obscene speech and "fighting words" (*Roth v United States*, 354 U.S. 476 [1957] cf. *Harisiades v Shaughnessy*, 342 U.S. 580, 591–592 [1952]) and advocating the violent overthrow of the government (*Doe v Daily News, L.P.*, 173 Misc2d 321, 322–23 [Sup. Ct. NY Cty 1997]).

¹⁸ Memorandum of Law in Opposition, (NYSCEF Doc. No. 185 at 1, 7)

As the Supreme Court has held, “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 of the highest order” (*Smith v Daily Mail Publishing Co.*, 443 U.S. 97, 103 [1979]). The freedom to publish regarding **matters of public concern** is a bedrock principle of the First Amendment, and “state action to punish the publication of truthful information seldom can satisfy constitutional standards” (*Smith v Daily Mail Publishing Co.*, 443 U.S. at 102). In *Bartnicki v Vopper*, the Court held that the First Amendment outweighed any privacy interests at issue and the broadcast at issue was fully protected by the First Amendment (*Bartnicki v Vopper*, 532 U.S. 514 [2001]). The recordings were provided to the broadcasters by individuals who obtained them illegally, but the court held that “a stranger’s illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of **public concern**” (*Bartnicki v Vopper*, 532 U.S. at 535).

Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints (*Nicholson v Keyspan Corp.*, 14 Misc3d 1236(A) [Sup. Ct, Suffolk, Cty 2007]). “[I]f 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 of the highest order” such as to “suppres[s] . . . information that would set in motion a nuclear holocaust” (*New York Times Co. v. United States*, 403 U.S. 713, 726 [1971] [Brennan, J., concurring]).

As the party seeking to impose a prior restraint (to suppress the memoranda from publication and dissemination), Project Veritas bears a heavy burden of proof demonstrating justification for its imposition (*Ash v Bd. of Managers of 155 Condo.*, 44 AD3d 324, 325 [2007]).

The Times believes that this court has already burdened it with unconstitutional restriction, and that the First Amendment guarantees its ability to publish the memoranda. The Times relies upon the case of *Nicholson v Keyspan Corp* (14 Misc3d 1236[A] [Sup Ct, Suffolk County, 2007]). Acknowledging the importance of attorney-client privilege to our legal system, the court in *Nicholson* still refused to enjoin the news organizations from publishing privileged information. In *Nicholson*, the court held: “This broad constitutional prohibition on restraints on the press does not exempt from its operation comment on items covered by attorney client privilege if the document covered by attorney client privilege comes into conflict with the right of the press to publish and comment on matters of public concern as long as the press did not improperly conspire to obtain the material that was covered by the privilege” (14 Misc3d 1236(A) at 7-8). The court also noted, “even this privilege, important as it is, cannot be used to restrict the properly exercised, constitutionally protected freedom of the press to publish” (14 Misc3d 1236[A] at 9).

However, *Nicholson* is readily distinguishable from the case at bar. First, Justice Sgroi made a factual finding that the two media intervenors did not obtain the document at issue illegally or by improper means. In fact, in *Nicholson*, a party had actually leaked the document. Therefore, the court declined to issue an injunction against the two media outlets, but did issue one against the party (*Nicholson v Keyspan Corp.*, 14 Misc3d 1236[A] at 1-3). Finally, the documents were of public concern, as they related to significant environmental contamination. The court prefaced its decision by stating, “This case raises issues of public concern not only because of the effect of the plume on the health, safety and welfare of the persons directly in the path of the plume, but because the financial costs involved in remediating the plume of contaminants may be borne by the ratepayers of KeySpan if KeySpan passes those expenses through to the utility's customers and the

plume itself allegedly is or soon may be polluting the Great South Bay” (*Nicholson v Keyspan Corp.*, 14 Misc3d 1236[A] at 3). Further, notably, the defendant in *Nicholson*, Keyspan Corp. is a quasi-governmental entity, a utility company, whose actions impact the public at large, which was in the forefront of the court’s mind: “The subject matter of this litigation is of great public concern and the attorney client privilege exercised by the Defendants will be restrictively applied to encourage full and fair disclosure of information because this case will affect the health, safety and welfare of the public” (*Nicholson v Keyspan Corp.*, 14 Misc3d 1236[A] at 9).

In its sur reply, the Times also cites *Rodgers v U.S. Steel Corp.*, for the principle that “an order enjoining plaintiff’s counsel from sharing allegedly privileged materials ‘obtained otherwise than through the court’s processes’ was unconstitutional prior restraint” (see *Rodgers v U.S. Steel Corp.*, F2d 1001, 1004-1009 [3rd Cir 1976]). However, contrary to the Times’ contentions, the holding in *Rodgers* is inapposite, because the facts bear little resemblance to the facts here. The subject document in *Rodgers* was a government document, which outlined the methodology that the Department of Justice used to calculate workers’ back pay (not a private party’s attorney-client privileged memoranda). The District Court specifically stated, “This is not a lawyer’s work product” (here it is), and the Third Circuit determined that absent dissemination of the document, time constraints governing the solicitation and tender could prejudice 600 employees from being able to make an informed decision about whether or not to accept the settlement offer (*Rodgers v U.S. Steel Corp.*, F2d at 1004-1009).

The Eleventh Circuit grappled with balancing the First Amendment with the Sixth Amendment’s right to counsel when CNN obtained audio recordings of former Panamanian

President General Manuel Noriega and his criminal defense attorney. It noted that the Supreme Court has held, “[t]he First Amendment generally grants the press no right to information about a trial superior to that of the general public” (*U.S. v Noriega*, 917 F2d 1543, 1548 [11th Cir 1990], citing *Nixon v Warner Communications*, 435 US 589, 609 [1978]). The Eleventh Circuit went on to unequivocally hold “the general public has no right of access to private communications between a defendant and his counsel” (*U.S. v Noriega*, 917 F2d at 1548). There, CNN also held information that only it possessed (the tapes), and refused to turn them over. Similarly, here only the Times knows how it obtained Project Veritas’ attorney-client communications.

Other news organizations have voiced their support for the right to publish the attorney-client privileged memoranda, through the submission of the amici curiae brief by the Reporters Committee for Freedom of the Press, which includes The Associated Press, Daily News, Gannett, Reuters, Forbes, and the Washington Post, among others.¹⁹ These organizations fear that permitting litigants to obtain orders restraining the speech of news organizations in the manner contemplated by the Order to Show Cause would harm news organizations’ ability to publish journalism of public concern.

The first issue that the court first must decide is whether the speech at issue addresses a matter of public concern (*see Lewis v Cowen*, 165 F3d 154, 161 [2d Cir. 1999]). The parameters of the public concern test are poorly defined, but there is some guidance in the Supreme Court decision in *Connick v Myers* (461 U.S. 138, 146 [1983]), where the Supreme Court defined a matter of public concern as one that “relat[es] to any matter of political, social, or other concern to

¹⁹ Affirmation of Katie Townsend (NYSCEF Doc No. 187) and Amici Brief of Reporters Committee for Freedom of the Press (NYSCEF Doc. No. 188).

the community”, but cautioned that “[t]o presume that all matters which transpire within a government office are of public concern would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case” (*Connick*, 461 U.S. at 149). Instructive to this court’s analysis of what exactly constitutes a matter of public concern is the Court of Appeals decision in *Santer v. Board of Educ. of East Meadow Union Free School Dist.* 23 NY3d 251 (2014). Like the *Pickering* case it cited, *Santer* involved a case where a public school board disciplined a teacher for voicing opinions about the schools. *Santer* applied the “*Pickering Test*.” The first prong of the analysis is “whether the speech which led to an employee’s discipline relates to a matter of public concern” (23 NY3d at 263-264). The second prong is a balance between the individual’s interest in speaking and the government interest in effective operations (23 NY3d at 264). *Connick*, *Pickering*, and their progeny instruct that “Speech deals with matters of public concern when it can ‘be fairly considered as relating to any matter of political, social, or other concern to the community’...or when it ‘is the subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public’” (*Snyder v Phelps*, 562 U.S. 443, 453 [2011] quoting *San Diego v. Roe*, 543 U.S. 77, 83–84 [2004], and *Connick*, 461 U.S. at 146). Whether a public employee’s speech addresses a matter of public concern is a question of law to be determined in light of “the content, form, and context of a given statement, as revealed by the whole record” (*Santer v Bd. of Educ. of E. Meadow Union Free Sch. Dist.*, 23 NY3d 251, 263–64 (2014) (internal citations omitted); (*City of San Diego v Roe*, 543 U.S. 77, 83–84 [2004])).

The Court of Appeals held that an article about the arrest of a public school teacher for felony possession of heroin and unlawful possession of a hypodermic needle fell “within the sphere

of public concern”, due to the teacher’s occupation of instructing youth, and the issue of heroin addiction (*Chapadeau v Utica Observer-Dispatch*, 38 NY2d 196 [1975]). Consistent with that, when a trial court enjoined a plaintiff from publishing defamatory statements and a confidential psychological evaluation of the defendant and directed the plaintiff to remove a website featuring negative comments and statements about the defendant as well as depictions of vermin, the devil, and skulls and crossbones, the Second Department has held that the injunction “constituted an impermissible prior restraint on free speech”, except as to the prohibition regarding the psychological profile, which was not a matter of public concern (*Rose v Levine*, 37 AD3d 691, 692-693 [2d Dept 2007]).

Another example of content, form, and speech found not to implicate public concerns, was a plaintiff’s speech involving her private employment situation regarding allegations of abuse of overtime and workplace bullying (*see Lewis v Cowen*, 165 F.3d 154, 164 [2d Cir. 1999]). “In reaching this decision, the court should focus on the motive of the speaker and attempt to determine whether the speech was calculated to redress personal grievances or whether it had a broader public purpose” (*Lewis v Cowen*, 165 F.3d at 163–64). Likewise, a plaintiff who sought to confer with her union representative about defendants’ alleged efforts to impugn her reputation as a teacher implicated plaintiff’s own self-interest, not a matter of public concern—she was “not speaking out on matters of public concern but complaining about individual instances that affected her personally” (*Rutherford v Katonah-Lewisboro Sch. Dist.*, 670 F. Supp. 2d 230, 247 [S.D.N.Y. 2009]).

“Public concern” is also considered by the Civil Rights Law §79-h, which offers certain protections invoking actual and qualified privilege for professional journalists and newscasters from contempt.

8) “News” shall mean written, oral, pictorial, photographic, or electronically recorded information or communication concerning local, national or worldwide events or **other matters of public concern** or public interest or affecting the public welfare (Civil Rights Law §79-h).

Ironically, while all parties concede that there is no relevant caselaw that is “on all fours” with the facts herein, it is noteworthy that one U.S. District Court mused the following: “[W]hat if a confidential memorandum is stolen from an attorney's office and subsequently published in newspapers across the country? Clearly, the client should not be held to have waived the attorney-client privilege. The fact that the contents of a privileged document have become widely known is insufficient by itself to eliminate the privilege that covers the document. Although in practical terms the document has lost any semblance of confidentiality, the Court in legal terms must recognize that the client has not intentionally waived the privilege. To hold that public circulation eliminates the privilege would, in effect, give *any* individual who secured a privileged document the power to waive the attorney-client privilege by simply having the contents widely recounted in newspaper reports (see *Smith v Armour Pharm. Co.*, 838 F. Supp. 1573, 1577 [S.D. Fla. 1993]). As was the case when that court struggled with these issues, the law is still unsettled regarding the court's power to limit the use of documents obtained by means other than that court's discovery process (see *Smith v Armour Pharm. Co.*, 838 F Supp at 1578).

In light of these principles of law, the court rejects the Times' position that Project Veritas' attorney-client communications are a matter of public concern. Undoubtedly, every media outlet

believes that anything that it publishes is a matter of public concern. The state of our nation is that roughly half the nation prioritizes interests that are vastly different than the other half. Our smart phones beep and buzz all day long with news flashes that supposedly reflect our browsing and clicking interests, and we can tune in or read the news outlet that gives us the stories and topics that we want to see. But some things are not fodder for public consideration and consumption. These memoranda, and hundreds of thousands of similar attorney-client privileged documents that are in homes, offices, and businesses in every village, town, and city in this nation are only between an attorney and a client, and it does not matter one bit who the attorney and client are. While the content of the advice is irrelevant to this court's analysis, in this case, the subject memoranda here contain typical, garden variety, basic attorney-client advice that undoubtedly is given at nearly every major media outlet in America, including between the Times and its own counsel.

A client seeking advice from its counsel simply cannot be a subject of general interest and of value and concern to the public. It is not the public's business to be privy to the legal advice that this plaintiff or any other client receives from its counsel. Like a public employee who brings a First Amendment claim alleging a prior restraint on her freedom of speech must show that the speech touches on a matter of public concern (*United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 465–66 [1995]), it is quintessentially personal, not public, in nature (*Rutherford v Katonah-Lewisboro Sch. Dist.*, 670 F. Supp.2d 230, 248 [S.D.N.Y. 2009]).

It is clear that the memoranda themselves are not a matter of public concern, and therefore, the balance tips in favor of the attorney-client privilege. That is not to say that aspects of Project Veritas and/or its journalistic methods are not of public interest. The Times is perfectly free to investigate, uncover, research, interview, photograph, record, report, publish, opine, expose or

ignore whatever aspects of Project Veritas its editors in their sole discretion deem newsworthy, without utilizing Project Veritas' attorney-client privileged memoranda.

Here, the court's protective order does not act as an impermissible prior restraint on the Times. As important as the First Amendment's protection against prior restraints is, on the present facts, the erosion of the attorney-client privilege is a far more imminent concern. "What is also at stake in the dissemination of privileged information into the public domain is the privacy of the individuals mentioned or discussed therein and the importance of full and free communication between attorney and client. 'Hit and run' journalism is no more protected under the First Amendment, than speeding on a crowded sidewalk is permitted under a valid driver's license" (*Greenberg v CBS Inc.*, 69 AD2d 693, 700 [2d Dept 1979]). Steadfast fidelity to, and vigilance in protecting First Amendment freedoms cannot be permitted to abrogate the fundamental protections of attorney client privilege or the basic right of privacy.

Project Veritas' final contention is that the Times' attorneys violated the New York Rules of Professional Conduct ("NYRPC"). The court finds that there is no basis for this in the record. The court agrees with the Times' assertion made during oral argument, that an attorney is entitled and obligated to convey frank and open legal advice to his or her media client regarding issues such as these.²⁰ The court notes that if the Time' counsel's attorney-client advice were stolen or otherwise irregularly ended up in the hands of Project Veritas or any other media outlet, without the Times having waived its privilege, the communication would likewise not be a matter of public

²⁰ November 23, 2021 oral argument Tr., at p. 45

concern.²¹ From this record, nothing indicates that counsel for the Times strayed from ethical obligations.

Finally, with acknowledgement to Justice White, the holding today is grounded in the recognition that the First Amendment's primary aim is the full protection of speech upon issues of public concern, as well as the practical realities involved in the administration of justice and the attorney-client privilege. Although based upon the facts of the case here, the balance is struck for the latter, this is no defeat for the First Amendment. For it would indeed be a Pyrrhic victory for the great principles of free expression if the Amendment's safeguarding of the media's nearly unfettered right to broadcast issues concerning public affairs were confused with the attempt to constitutionalize the publication of the private, privileged communication that is presented here (*Connick v Myers*, 461 U.S. at 154).

The Times' "shot across the bow"²² of their litigation adversary cries out for court intervention, to protect the integrity of the judicial process, and to remedy the "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice" that the Times created on November 11, 2021 (CPLR 3103(a); *Ligoure v City of New York*, 128 AD3d at 1028). Having met the requirements of CPLR 3103(c), the court in its discretion must fashion an appropriate sanction that will adequately redress the violation (*Lipin v Bender*, 84 NY2d 562 [1994]). The Court of Appeals noted that CPLR 3103 bestows wide discretion to the court to enter *any* order, including an order of dismissal, or realistic remedies that is appropriate under the circumstances. "As the

²¹ Based on the scenario of non-governmental entities. Certainly, actions of public entities are more likely to be of public concern.

²² *see* Letter from Plaintiff's counsel to Defendant's counsel (NYSCEF Doc. No. 167).

drafters [of CPLR 3103] made clear, “[t]here is no limit but the needs of the parties on the nature of the [protective] order or the conditions of discovery” (*Lipin v Bender*, 84 NY2d at 572–73, citing First Preliminary Report of Advisory Comm on Practice and Procedure, 1957 NY Legis Doc No. 6 [b], at 124).

Accordingly, based upon the stated reasons, it is hereby

ORDERED, that the plaintiff Project Veritas’ motion (Seq. No. 8) is **granted** in part to the extent set forth below; and it is further

ORDERED, that the defendant New York Times and its agents, employees, legal counsel or other persons under its control are directed to immediately turn over to the plaintiff Project Veritas’ counsel all physical copies of the subject legal memoranda prepared by Project Veritas’ counsel, Benjamin Barr, that are in its control or possession; and it is further

ORDERED, that the defendant New York Times and its agents, employees, legal counsel, or other persons under its control are directed to immediately delete/destroy copies of the legal memoranda prepared by Project Veritas’ counsel, Benjamin Barr, from any computer, cloud server or other data collecting or disseminating sources, including but not limited to, all attachments to emails and cloud server devices, and to remove such documents from the internet and any web sites or servers over which they have control; and it is further

ORDERED, that the defendant New York Times’ counsel and the defendants herein are directed to use best efforts to retrieve copies of the legal memoranda prepared by Project Veritas’ counsel, Benjamin Barr, provided to third parties, including but not limited to, Bill Grueskin; and it is further

ORDERED, that the defendant New York Times’ counsel and the defendants herein are directed not to use the legal memoranda prepared by Project Veritas’ counsel, Benjamin Barr, or information obtained from those documents in this action for any purposes whatsoever; and it is further

ORDERED, that the defendant New York Times is directed to file with the court within ten (10) days of service with notice of entry of this order an affidavit/affirmation confirming its compliance hereto, setting forth in detail all documents that have been destroyed or removed from data collecting or disseminating sources, including emails and attachments thereto, the date that the documents and copies of documents were destroyed, and the method used to destroy the documents and copies of documents; and it is further

ORDERED, that, if applicable, all counsel are directed to file with the court, an affirmation setting forth any documents filed on NYSCEF containing excerpts of the subject attorney-client memoranda, and submit copies of the documents with proposed redactions, for consideration by the court for entry of an appropriate sealing order; and it is further

ORDERED, that the attorney-client memoranda that are the subject of this order shall not be shown, transmitted, or disseminated in any manner to any persons absent written order of this Court; and it is further

ORDERED, that the motion for leave to file brief of Amici Curiae in support of the New York Times (Motion Seq. No. 9) is granted; and it is further

ORDERED, that in the event the defendant New York Times fails to comply as directed herein, plaintiff Project Veritas shall upload to the NYSCEF file, no later than January 28, 2022, upon notice to defendants, an affidavit/affirmation of noncompliance and plaintiff is granted leave to seek any relief related thereto, including preclusion, striking of pleadings, and costs and/or sanctions; and it is further

ORDERED, that all other relief requested by any person or party not specifically addressed herein is denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: December 23, 2021
White Plains, New York



HON. CHARLES D. WOOD
Justice of the Supreme Court

To: All Parties by NYSCEF

Supreme Court of the State of New York

Appellate Division: Second Judicial Department

Informational Statement (Pursuant to 22 NYCRR 1250.3 [a]) - Civil

Case Title: Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.		For Court of Original Instance	
PROJECT VERITAS - against - THE NEW YORK TIMES COMPANY, MAGGIE ASTOR, TIFFANY HSU, AND JOHN DOES 1-5		Date Notice of Appeal Filed	
Case Type		Filing Type	
☒ Civil Action ☐ CPLR article 75 Arbitration ☐ Action Commenced under CPLR 214-g		☐ CPLR article 78 Proceeding ☐ Special Proceeding Other ☐ Habeas Corpus Proceeding	
☐ Transferred Proceeding ☐ CPLR Article 78 ☐ Executive Law § 298 ☐ CPLR 5704 Review		☒ Appeal ☐ Original Proceedings ☐ CPLR Article 78 ☐ Eminent Domain ☐ Labor Law 220 or 220-b ☐ Public Officers Law § 36 ☐ Real Property Tax Law § 1278	
Nature of Suit: Check up to three of the following categories which best reflect the nature of the case.			
☐ Administrative Review	☐ Business Relationships	☐ Commercial	☐ Contracts
☐ Declaratory Judgment	☐ Domestic Relations	☐ Election Law	☐ Estate Matters
☐ Family Court	☐ Mortgage Foreclosure	☐ Miscellaneous	☐ Prisoner Discipline & Parole
☐ Real Property (other than foreclosure)	☐ Statutory	☐ Taxation	☒ Torts

Informational Statement - Civil

Appeal	
Paper Appealed From (Check one only):	If an appeal has been taken from more than one order or judgment by the filing of this notice of appeal, please indicate the below information for each such order or judgment appealed from on a separate sheet of paper.
☐ Amended Decree ☐ Amended Judgement ☐ Amended Order ☒ Decision ☐ Decree	☐ Determination ☐ Finding ☐ Interlocutory Decree ☐ Interlocutory Judgment ☐ Judgment ☐ Order ☐ Order & Judgment ☐ Partial Decree ☐ Resettled Decree ☐ Resettled Judgment ☐ Resettled Order ☐ Ruling ☐ Other (specify):
Court: Supreme Court	County: Westchester
Dated: 12/27/2021	Entered: 12/27/2021
Judge (name in full): Hon. Charles D. Wood	Index No.: 63921/2020
Stage: ☒ Interlocutory ☐ Final ☐ Post-Final	Trial: ☐ Yes ☒ No If Yes: ☐ Jury ☐ Non-Jury
Prior Unperfected Appeal and Related Case Information	
Are any appeals arising in the same action or proceeding currently pending in the court? ☒ Yes ☐ No If Yes, please set forth the Appellate Division Case Number assigned to each such appeal. 2021-02719 Where appropriate, indicate whether there is any related action or proceeding now in any court of this or any other jurisdiction, and if so, the status of the case: Appeal 2021-02719 is fully briefed but has not been calendared for argument.	
Original Proceeding	
Commenced by: ☐ Order to Show Cause ☐ Notice of Petition ☐ Writ of Habeas Corpus	
Date Filed:	
Statute authorizing commencement of proceeding in the Appellate Division:	
Proceeding Transferred Pursuant to CPLR 7804(g)	
Court: Choose Court	County: Choose County
Judge (name in full):	Order of Transfer Date:
CPLR 5704 Review of Ex Parte Order:	
Court: Choose Court	County: Choose County
Judge (name in full):	Dated:
Description of Appeal, Proceeding or Application and Statement of Issues	
Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed. Defendant The New York Times Company hereby appeals to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, from the Decision and Order of the Supreme Court, dated December 24, 2021, which granted in part Plaintiff's Motion for an Order to Show Cause and ordered The New York Times Company and persons associated with it to (1) not disseminate or transmit certain legal memoranda obtained by The New York Times through the newsgathering efforts of its reporters; and (2) turn over to Plaintiff, delete/ destroy, and/ or seek to retrieve from others copies of the legal memoranda.	

Informational Statement - Civil

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review, the grounds for reversal, or modification to be advanced and the specific relief sought on appeal.

Defendant The New York Times Company respectfully submits that the Decision and Order, which prohibits The New York Times Company from disseminating or publishing certain newsworthy information and forces The New York Times Company "immediately" to destroy and/or produce to Project Veritas all copies of certain materials obtained as part of The Times's newsgathering activities, is a paradigmatic example of an unconstitutional prior restraint. See, e.g., *Alexander v. United States*, 509 U.S. 544, 550 (1993) ("Temporary restraining orders and permanent injunctions—i.e., court orders that actually forbid speech activities—are classic examples of prior restraints."). This extraordinary remedy, "the most serious and the least tolerable infringement on First Amendment rights," *Nebraska Press Association v. Stuart*, 427 U.S. 539, 559 (1976), was issued without any evidence of "immediate and irreparable injury" to the public. *East Meadow Association v. Board of Education of Union Free School District No. 3, County of Nassau*, 18 N.Y.2d 129, 134 (1966). The Order unconstitutionally infringes upon The New York Times Company's rights under both the First Amendment, which exist "to prevent previous restraints upon publication," *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931), and contravenes well-settled United States Supreme Court authority prohibiting such orders, see, e.g. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984); *Bartnicki v. Vopper*, 532 U.S. 514 (2001), and also under the even more speech-protective New York Constitution. Furthermore, in granting the Order, the lower court exceeded its authority under CPLR § 3103 and granted relief that is entirely unrelated to disclosure specifically, or even to the underlying defamation action more generally. Therefore, The New York Times Company respectfully requests that the Appellate Division stay the portions of the order purporting to require "immediate" actions by The New York Times Company—actions causing injury that could not be undone even if the Court later grants this appeal in full—and that it vacate the entire order.

Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

No.	Party Name	Original Status	Appellate Division Status
1	The New York Times Company	Defendant	Appellant
2	Maggie Astor	Defendant	None
3	Tiffany Hsu	Defendant	None
4	Project Veritas	Plaintiff	Respondent
5			
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Attorney Information			
Instructions: Fill in the names of the attorneys or firms for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided. In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.			
Attorney/Firm Name: Jay Ward Brown/ Ballard Spahr LLP			
Address: 1909 K Street, NW, 12th Floor			
City: Washington	State: DC	Zip: 20006-1157	Telephone No: (202) 508-1136
E-mail Address: brownjay@ballardspahr.com			
Attorney Type: ☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
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Address: 1675 Broadway, 19th Floor			
City: New York	State: NY	Zip: 10019-5820	Telephone No: (212) 850-6139
E-mail Address: sullivant@ballardspahr.com			
Attorney Type: ☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 1, 2, 3			
Attorney/Firm Name: Elizabeth Seidlin-Bernstein/ Ballard Spahr LLP			
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City: Philadelphia	State: PA	Zip: 19103-7599	Telephone No: (215) 988-9774
E-mail Address: seidline@ballardspahr.com			
Attorney Type: ☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 1, 2, 3			
Attorney/Firm Name: Robert Spolzino/ Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone, LLP			
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Attorney Type: ☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
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Party or Parties Represented (set forth party number(s) from table above): 4			
Attorney/Firm Name: Elizabeth M. Locke, P.C./ Clare Locke LLP			
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City: Alexandria	State: VA	Zip: 22314	Telephone No: (202) 628-7400
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Attorney Type: ☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 4			

Informational Statement - Civil

Attorney Information			
Instructions: Fill in the names of the attorneys or firms for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided. In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.			
Attorney/Firm Name: Andrew C. Phillips/ Clare Locke LLP			
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Party or Parties Represented (set forth party number(s) from table above):			
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Address:			
City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			
Attorney/Firm Name:			
Address:			
City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			
Attorney/Firm Name:			
Address:			
City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			

Informational Statement - Civil

AFFIRMATION OF SERVICE

Joel Kurtzberg, an attorney duly admitted to practice before the Courts of the State of New York, affirms the following under penalty of perjury:

I am over eighteen years of age, am not a party to this action, and reside in the County of New York, State of New York. On the 27th day of December 2021, I served the foregoing **NOTICE OF APPEAL** and **INFORMATIONAL STATEMENT** via the Court's electronic filing system and electronic mail upon the following counsel of record:

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Counsel for Plaintiff Project Veritas

Dated: December 27, 2021

/s/ Joel Kurtzberg

Exhibit 3

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

PROJECT VERITAS,

Plaintiff,

-against-

THE NEW YORK TIMES COMPANY, MAGGIE
ASTOR, TIFFANY HSU, and JOHN DOES 1-5,

Defendants.

Index No.

COMPLAINT**COMPLAINT**

Plaintiff Project Veritas, by and through its attorneys, bring the following Complaint against Defendants The New York Times Company d/b/a The New York Times (“The New York Times” or “The Times”), reporters Maggie Astor and Tiffany Hsu, and their editors (John Does 1-5), and in support of its Complaint, avers as follows:

SUMMARY OF THE ACTION

1. This defamation action arises out of the publication of a false and defamatory news story authored by Defendant Maggie Astor, a politics reporter for the New York Times, and published in both the online and print versions of The Times. The story was first published on The New York Times website on September 29, 2020 with the headline, “Project Veritas Video Was a ‘Coordinated Disinformation Campaign,’ Researchers Say,” repeated the same day in an abbreviated form online with the headline, “Researchers say a Project Veritas video accusing Ilhan Omar of voter fraud was a ‘coordinated disinformation campaign,’” and then published the following day in the print version of The Times with the headline, “Project Veritas Releases Misleading Video, Part of What Experts Call a Coordinated Effort.”

2. The story concerned a bombshell investigative video report published two days earlier by the prominent independent journalistic organization, Project Veritas.

3. The Project Veritas investigative report, titled, “Ilhan Omar Connected Cash-For-Ballots Voter Fraud Scheme Corrupts Elections,” reported on illegal voting practices taking place in Congresswoman Ilhan Omar’s congressional district and specifically within the Somali-American community of Minneapolis, Minnesota.

4. The Project Veritas investigative report was presented in the signature style that has earned Project Veritas a reputation for groundbreaking and unassailable independent journalism—it was based on, and it presented to viewers, *actual audio and video evidence* of corrupt and illegal activity, as well as interviews with both identified and confidential sources who provided firsthand accounts of their knowledge of these unlawful activities.

5. The centerpiece of the Project Veritas investigative report was a series of videos posted to Snapchat in early July 2020 by a Minneapolis man named Liban Mohamed. Mr. Mohamed, who is the brother of then-Minneapolis City Council candidate Jamal Osman, filmed himself bragging about “harvesting” hundreds of absentee ballots from Minneapolis voters—a practice that is plainly illegal under Minnesota election law. In one video, Mr. Mohamed displayed a vast number of ballots littering his car’s dashboard while boasting in Somali, “[n]umbers don’t lie! You can see my car here is full. All these here are absentee ballots. Can’t you see? Look at all these, my car is full,” and “[j]ust today we got 300 (ballots) for Jamal Osman.” In another video, Mr. Mohamed filmed himself exiting an apartment complex with his hand stuffed with voters’ ballots and boasting, “[t]wo in the morning. Still hustling.”

6. Project Veritas’ investigative report also featured interviews and recorded conversations with named, knowledgeable sources in the Minneapolis Somali-American

community, who alleged that this illegal practice of ballot harvesting is widely practiced in that community by Democrat candidates.

7. The investigative report also presented recorded allegations from multiple named sources who connected the man seen in the self-incriminating Snapchat videos—and the practice of illegal ballot harvesting—to the campaign of Congresswoman Ilhan Omar, who was elected to the U.S. House of Representatives in 2018 and serves as the representative for the strongly-Democrat Minnesota district that includes Minneapolis, in which a large portion of the State's Somali-American community resides.

8. The Project Veritas investigative report then presented evidence of other fraudulent voter activity, including campaigns exchanging cash for absentee ballots. These allegations came directly from multiple named and confidential sources captured on video and audio detailing the cash-for-ballot schemes—including firsthand witnesses and actual participants in the fraudulent activity.

9. Multiple sources in the Project Veritas investigative report connected these activities directly to Rep. Ilhan Omar's campaign, and specifically to her Deputy Campaign Director Alli Isse Gainey, who multiple sources alleged to be the ringleader of a scheme systematically targeting large apartment complexes filled with mostly elderly Somali-American voters, and offering cash in exchange for absentee ballots.

10. The Project Veritas investigative report was released on Sunday, September 27, 2020—coincidentally, the same day that The New York Times released its story about President Trump's tax returns. The Times expected its long and hard-fought-for story on the President's taxes to be big news—and it was, but it was also overshadowed in large part by the bombshell

Project Veritas report, which provided irrefutable proof of illegal voting practices by Democrats just weeks before the upcoming presidential and congressional elections.

11. The Times' newsroom was incensed at what it viewed as Project Veritas stealing its thunder. And it was especially infuriated because The Times views Project Veritas and its founder James O'Keefe with vitriolic disdain—a man who, in their view, is a little more than a “conservative activist,” not a bona fide journalist. The well documented liberal bias of The Times' newsroom also provided an incentive to try and quickly discredit the Project Veritas investigative report and minimize the damning investigation into the illegal voting practices by Democrat candidates depicted in the Project Veritas report as the country heads into a hotly contested Presidential election during a global pandemic where there is increasing public concern about the integrity of early and mail-in voting.

12. To accomplish its goal of discrediting Project Veritas' investigative report, ironically, The Times conspired with a left-leaning group of academics and college students to near-simultaneously have that group publish a blog post claiming that the Project Veritas investigation was a coordinated disinformation campaign, followed only an hour later by a New York Times story hyping that blog post. This coordinated disinformation campaign was designed to give the blog post The New York Times' institutional stamp of approval and to increase its visibility and publicity. They worked together to convince the public that Project Veritas' investigation should be disregarded outright as a deceptive, untruthful report, published not by a journalistic organization, but a “conservative activist” attempting to mislead the public about Democrat Congresswoman Ilhan Omar—and they falsely pinned Project Veritas' timing of the report to a coordinated effort with President Trump's reelection campaign to divert attention away from The Times' story about the President's taxes.

13. The result was Ms. Astor's stories in The Times, which did not merely report on the inaccurate claims in that blog post. Instead, the Times story went further, falsely and without any basis labelling the Project Veritas investigative video report "deceptive," falsely claiming that it relied solely on "unidentified sources," falsely claiming that it offered no evidence of ballot harvesting, and falsely claiming that Project Veritas committed this "deception" in an effort to take attention away from The Times' story on President Trump's taxes.

14. Notably, although the online version of The Times' story hyperlinked to a number of materials—including the blog post and The Times' own tax returns story—The Times made a conscious decision not to include a hyperlink to the Project Veritas investigative report that was the subject of the stories. Ms. Astor and The Times intentionally omitted any such hyperlink because they knew that most of their primarily left-leaning audience would not have actually viewed Project Veritas' report, and that their readers were unlikely to take the time to go search for the investigative report itself. Ironically, this knowledge created an opportunity for Ms. Astor and The Times to commit their own deception on The Times' readers—falsely characterizing Project Veritas' investigative report about illegal ballot harvesting as "deceptive," falsely claiming Project Veritas relied only on unidentified sources, and falsely claiming that Project Veritas proffered no evidence of ballot harvesting, all while intentionally concealing Project Veritas' own video from The Times' readers. Encouraging The Times' readership to view the Project Veritas report for themselves would have been counterproductive to Ms. Astor's and The Times' efforts to smear Project Veritas, because the Project Veritas report itself demonstrates the falsity of Ms. Astor's and The Times' claims—because the report does show video proof of illegal ballot harvesting by named, fully identifiable individuals, and multiple on-the-record sources describing

how the practice is commonplace by Democrats in Congresswoman Omar's district, including by individuals working on the Congresswoman's own campaign.

15. As set forth above, each of these claims was demonstrably and provably false—and Ms. Astor and The Times knew it. There was nothing “deceptive” about the Project Veritas investigative report, nor did Project Veritas selectively edit or doctor any of the interviews or recorded conversations therein. It presented to viewers an undeniably authentic, self-incriminating video posted by a ballot-harvester of his own volition, and it presented interviews and conversations with highly knowledgeable community sources describing, in their own words—not Project Veritas’—the illegal voting practices victimizing citizens within the Somali-American community. And Project Veritas made an independent decision—not at the direction or behest of President Trump's reelection campaign—to move up the release of its investigative report on Saturday, September 26—well before The Times released its report on the President's taxes.

16. In fact, the primary *named, on-the-record* source in the Project Veritas investigative report—Mr. Omar Jamal—is regularly relied on as an on-the-record source for The New York Times, which has published *at least ten news articles* quoting him on matters relating to Minneapolis' Somali-American community and identifying him as a knowledgeable community leader and political insider.

17. But Ms. Astor and The Times intentionally chose to conceal from The Times' readers that Omar Jamal, Project Veritas' primary source, is considered credible and reliable by The Times—indeed, Ms. Astor and The Times intentionally omitted from these articles *any* mention of the fact that Project Veritas relied upon multiple named, on-the-record sources for its reporting. Notably, The Times also intentionally elected not to reach out to Omar Jamal—an individual whose contact information The Times clearly has in its possession—before publication

to ask if Mr. Jamal's words were presented accurately. Ms. Astor and The Times also purposefully avoided contacting the most obvious source of information about Project Veritas' decision when and why to release its investigative report—Project Veritas itself—before publication.

18. These actions were in blatant violation of journalistic standards requiring reporters to reach out to obvious sources of corroboration or refutation and of The Times own policies and ethical guidelines requiring its reporters to seek comment from a story subject before publishing. Ms. Astor and The Times' intentional decision not to do so here demonstrates Ms. Astor and her editors' reckless disregard for the truth, their bias, their ill-will, and their political and retaliatory motives to publicly smear and discredit Project Veritas publicly as quickly and thoroughly as possible.

19. When Project Veritas demanded a correction of The Times' false claims about its investigative reporting, The Times' lawyers responded by claiming that the statements in question were simply Ms. Astor's "opinion," and thus, the lawyers argued, not actionable defamatory statements. Remarkably, The Times' lawyers blessed what they described as Ms. Astor and her editor's decision to litter the pages of The Times' political section with her personal political "opinion" in a blatant violation of The Times' own policies strictly prohibiting reporters from offering their subjective opinions in news stories.

20. But of course, Ms. Astor is a politics reporter for the Times' newsroom, not its Op/Ed department, and The Times' own policies require "strict neutrality in reporting on politics and government," and state that "[j]ournalists have no place on the playing fields of politics." If the Times' lawyers' after-the-fact, made-for-litigation argument was sincere, then Ms. Astor and her editors would still have been obligated to immediately remove any statements of her "opinion" immediately from this news story and publish a correction. But they have not done so, because

Ms. Astor and her editors know well that they intended to present these false claims to The Times' readers as statements of fact, so that the public would believe that the Project Veritas investigative report was in fact deceptive and that it lacked any named sources or evidence supporting allegations of illegal voting activity in Minneapolis.

21. Ms. Astor and The Times knew well that accusing a journalistic organization of publishing a deceptive news report is inherently and massively damaging to its professional reputation—and that was the whole point.

22. After Project Veritas demanded a retraction and threatened to file a lawsuit when The Times refused, The Times retaliated by doubling down and publishing the same false and defamatory claims in an October 25, 2020 online story by Times media reporter Tiffany Hsu, which was also published in the print edition the following day. Like Ms. Astor's stories, Ms. Hsu's online and print stories called Project Veritas' video "false" and "deceptive," and asserted that it "claimed without named sources or verifiable evidence" that ballots were being collected illegally.

23. Project Veritas brings this action to vindicate its rights under civil law, to restore its reputation as an institution devoted to groundbreaking journalism courageously exposing institutional corruption wherever it may lie, and to establish Defendants' liability for the harm that they have caused to Project Veritas' reputation due to the reckless publication of these false and defamatory statements. Project Veritas seeks an award of presumed and compensatory damages for the publication of this false story and, given the willful and malicious nature of Defendants' conduct in knowingly publishing falsehoods out of a desire to cause harm to Project Veritas, Plaintiff also seek an award of punitive damages.

THE PARTIES

24. Plaintiff Project Veritas is an independent journalistic organization founded in 2011 by journalist James O’Keefe, who serves as its President, Chief Executive Officer, and Chairman of its Board of Directors. Project Veritas is a non-profit, nonstock corporation incorporated under the laws of the Commonwealth of Virginia, with its principal place of business in Mamaroneck, New York.

25. Defendant The New York Times Company is a publicly traded New York corporation with its principal place of business at The New York Times Building, 620 Eighth Avenue, New York, New York. It publishes *The New York Times*, which has the third largest circulation of any U.S.-based newspaper.

26. Defendant Maggie Astor is a political reporter for The Times. She is a citizen of the State of New York and resides in New York City. Ms. Astor was the credited author of The Times’ September 29, 2020 story, “Project Veritas Was a ‘Coordinated Disinformation Campaign,’ Researchers Say,” The Times’ September 29, 2020 story, “Researchers say a Project Veritas video accusing Ilhan Omar of voter fraud was a ‘coordinated disinformation campaign,’” and The Times’ September 30, 2020 story, “Project Veritas Releases Misleading Video, Part of What Experts Call a Coordinated Effort.”

27. Defendant Tiffany Hsu is a media reporter for The Times. She is a citizen of the State of New York and resides in New York City. Ms. Hsu was the credited author of The Times’ October 25, 2020 story, “Conservative News Sites Fuel Voter Fraud Misinformation,” which was also published in The Times’ print edition on October 26, 2020 with the headline, “‘False Voter Fraud Stories Are Churning on Conservative News Sites.’”

28. The John Doe Defendants are unknown parties employed by The New York Times who acted as the editors for the defamatory stories at issue authored by Defendants Maggie Astor and Tiffany Hsu. The identities of these individuals are presently unknown to Plaintiff. Before initiating this litigation, Project Veritas requested that The New York Times identify the editors who worked on these stories, and The Times ignored the request.

JURISDICTION AND VENUE

29. This Court has subject matter jurisdiction over this suit under N.Y. Const. Art. VI §§ 7, 11 and N.Y. Jud. Law § 190(3) because Plaintiff's claims for damages are in excess of \$25,000.

30. This Court has personal jurisdiction over Defendant The New York Times Company under N.Y. CPLR §§ 301 and 302 because Defendant is a New York corporation with its principal place of business in New York City. Defendant transacts business in New York and researches, prepares, and publishes The New York Times in New York City. Defendant is registered to conduct business in New York and maintains an agent for service of process in New York. Moreover, Plaintiff's claims in this case arise from Defendant's act of transacting business in New York and of researching and publishing the defamatory publications in question in New York.

31. This Court has personal jurisdiction over Defendant Maggie Astor under N.Y. CPLR §§ 301 and 302, because Defendant is domiciled in the State of New York, and is employed by The New York Times Company and has her principal place of business and employment as a reporter at The New York Times Company's headquarters in New York City.

32. This Court has personal jurisdiction over Defendant Tiffany Hsu under N.Y. CPLR §§ 301 and 302, because Defendant is domiciled in the State of New York, and is employed by

The New York Times Company and has her principal place of business and employment as a reporter at The New York Times Company's headquarters in New York City

33. Venue is proper in Westchester County pursuant to N.Y. CPLR § 503 in that Plaintiff Project Veritas has its principal place of business in Mamaroneck, New York and therefore resides in Westchester County.

FACTUAL ALLEGATIONS

Project Veritas is a Not-For-Profit Journalistic Organization Dedicated to Investigating and Uncovering Corruption

34. Project Veritas was established in 2011 as a not-for-profit journalism enterprise.

35. Project Veritas' mission is to focus on investigating and exposing corruption, dishonesty, self-dealing, waste, fraud, and other misconduct in both public and private institutions to achieve a more ethical and transparent society.

36. Project Veritas and its band of "guerilla journalists" often work undercover and enlist the help of whistleblowing insiders to identify and expose institutional corruption.

37. One of the calling cards of Project Veritas' journalism is to enlist the help of knowledgeable insiders as sources and, importantly, to strive to obtain audio and/or video evidence that shows irrefutable proof of wrongdoing.

38. Some of Project Veritas' successes have included: exposing Democrat New York City officials admitting on camera that rampant voter fraud exists in the city and is allowed to flourish to benefit the party; capturing a CNN producer admitting on camera that the network is biased against Donald Trump and that few within CNN's ranks take journalistic ethics seriously; and publishing leaked insider "hot mic" recordings of an ABC reporter detailing how ABC management spiked her story that would have exposed the pedophile Jeffrey Epstein years before the public became aware of his crimes.

39. Project Veritas' stated core values include moral courage, leadership, collaboration, and resilience.

40. The organization is guided by a set of published ethical values—and value Number 1 is that “truth is paramount.” Project Veritas reporting must be based on facts with clear and irrefutable video and audio content. As stated on the Project Veritas website: “[w]e never deceive our audience. We do not distort the facts or the context. We do not ‘selectively edit.’”

41. In fact, Project Veritas' efforts at transparency and truth-telling are so robust that it prominently features on its website a “Mistakes” section, which lists and acknowledges errors that Project Veritas has made and explains what occurred and the lessons learned. Most mainstream media outlets do not do this at all—or to the extent they do, they bury errors in a rote and difficult-to-find “corrections” section that makes no effort to explain to readers how the mistake was made and what will be done to prevent errors in the future.

Project Veritas Releases a Bombshell Report on Illegal Voting Practices Taking Place Within Minneapolis' Somali-American Community

42. On September 27, 2020, Project Veritas published a news report titled, “Ilhan Omar Connected Cash-for-Ballots Voter Fraud Scheme Corrupts Elections.”

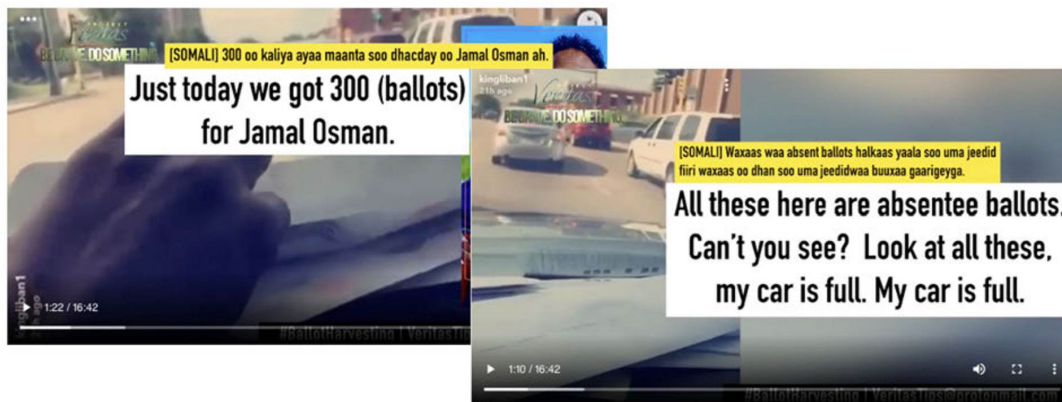
43. Project Veritas published the report on its website, as well as on various social media and video-sharing sites.

44. Much of the investigative report is centered on self-recorded video clips posted to the social media site Snapchat in the first week of July 2020 by a man named Liban Mohamed. At the time, Mr. Mohamed's younger brother—a man named Jamal Osman—was running for a vacant seat on the Minneapolis City Council to represent Ward 6.

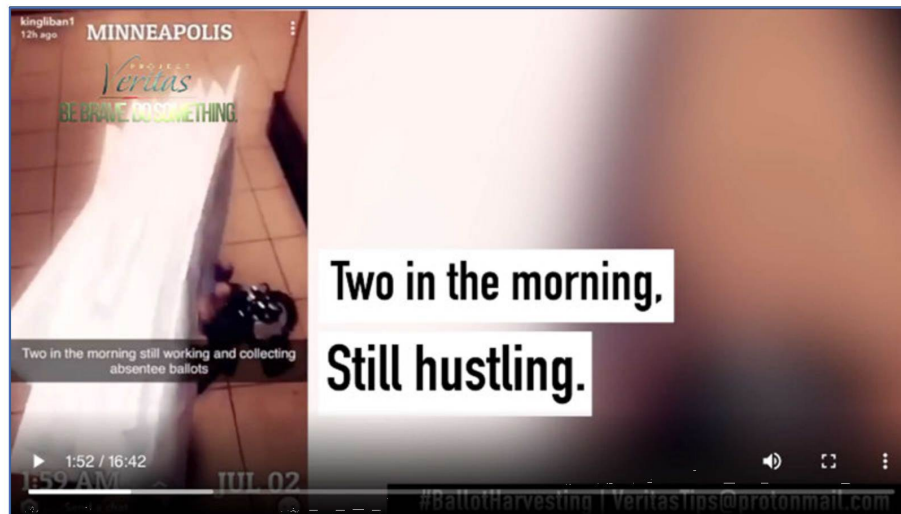
45. Ward 6 is Minneapolis' most densely populated district, and a large part of its population is made up of residents of Somali heritage. Mr. Osman ultimately won that election in August 2020 and currently sits on the City Council.

46. In the videos that he posted to Snapchat, Liban Mohamed openly brags about having a car filled with hundreds of absentee ballots that he collected from voters.

47. In one of the videos, Mr. Mohamed states: "You can see my car is full. All these here are absentees' ballots. Can't you see? Look at all these, my car is full. All these are for Jamal Osman... We got 300 today for Jamal Osman." The video clearly depicts Mohamed driving in his car which is full of ballots and envelopes.



48. Another video posted by Mohamed shows him walking out of what appears to be an apartment building with his hand full of envelopes of ballots, while saying, "[t]wo in the morning. Still hustling."



49. Mr. Mohamed also wrote a caption on his video that stated: “Two in the morning still working and collecting absentee ballots.”

50. This activity, known as “ballot harvesting,” is a felony under Minnesota election law, which prohibits any person from delivering more than three absentee ballots on behalf of others.

51. In other words, in these videos, Liban Mohamed blatantly incriminates himself and admits to serious violations of Minnesota’s election laws.

52. Moreover, Mr. Mohamed’s videos show what plainly appear to be open envelopes—meaning that the ballots Mr. Mohamed illegally harvested were not sealed. This strongly suggests even more nefarious conduct, as the ballots may have been collected without even having been filled out (and certainly not sealed) by the actual voter. Notably, other local sources featured in Project Veritas’ investigative report directly alleged that Democrat operatives in Minneapolis have been openly paying voters to exchange their blank voter forms for cash, with the ballots then filled out by staff working for the candidate.

53. Obviously, such a practice is highly illegal and an affront to the very idea of open and fair elections. Offering money in exchange for votes is a felony under both Minnesota and federal election law.

54. The Project Veritas report also featured interviews with multiple firsthand sources who stated that Liban Mohamed has also worked for Rep. Omar's campaign.

55. Outside of the self-incriminating videos Mr. Mohamed filmed of himself, the primary on-the-record source for the Project Veritas report was a man named Omar Jamal. Mr. Jamal is a longtime community leader and political consultant in the Minneapolis Somali-American community who has founded several community organizations and is also employed full-time as a community service officer for the Ramsey County Sheriff's Office. He is regularly quoted on the record in mainstream media organizations as a source who is credible and knowledgeable about events in Minneapolis' Somali-American community—including frequently by The New York Times itself.

56. In a videotaped interview, Mr. Jamal stated that Liban Mohamed not only worked for his brother Jamal Osman's campaign, but for Rep. Ilhan Omar as well.

57. During his interview, Mr. Jamal alleged that there was widespread voter fraud within and victimizing the citizens of the Minneapolis Somali-American community, and he also worked with Project Veritas to record interviews and conversations with various participants who detailed how the scheme works.

58. First, as featured in the Project Veritas investigative report, Mr. Jamal recorded a telephone conversation with Liban Mohamed himself, who detailed the vote harvesting scheme depicted in his self-incriminating videos. During that conversation, Mr. Mohamed confirmed that teams of ballot harvesters in the community would request absentee ballots from elderly votes, and

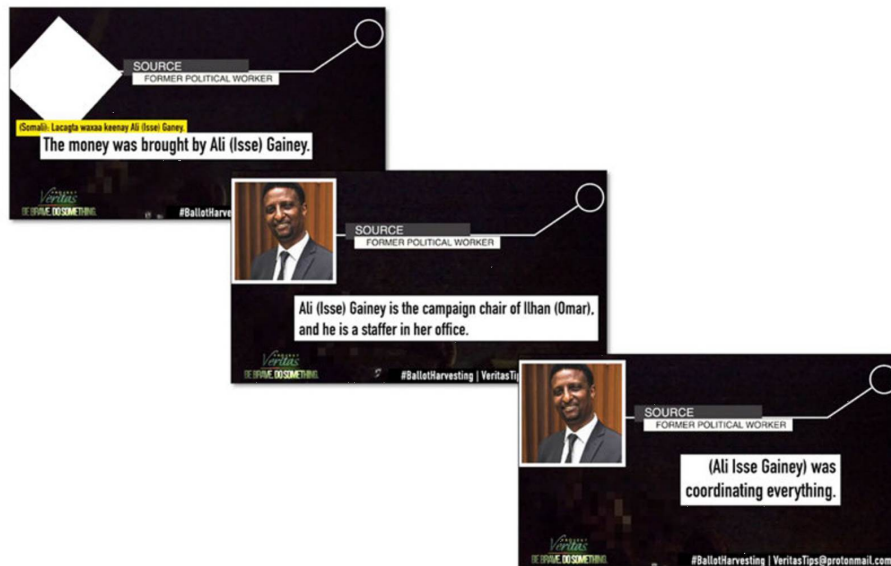
then return to pick those ballots up when they arrived. Mr. Jamal stated that this practice of requesting and collecting absentee ballots from elderly voters is widespread.

59. The Project Veritas investigative report also features footage of an interview with a confidential source who is a firsthand witness to these practices—a ballot harvester, who matter-of-factly admitted that ballot harvesters working for Rep. Ilhan Omar and other Democrat candidates would visit apartment buildings and fill out absentee ballot request forms for voters, then return to pick up the ballots when they arrived *and fill them out as well*. This source also stated that these voters were then paid for their votes once the voters signed their completed ballots.

60. Another confidential source, a former Minneapolis political worker, described in a recorded interview how specific apartment towers filled with primarily elderly voters were targeted by campaign workers for ballot harvesting. This source described how ballot harvesters would arrive with bags of money and pay voters cash for their absentee ballots.

61. The very same source identified the mastermind of this scheme as Alli Isse Gainey. Mr. Gainey worked on Rep. Omar's 2018 congressional campaign and is identified on campaign finance disclosures as being involved in "CANVASSING, FIELDWORK ORGANIZING, [and] POLICY CONSULTING" for Ms. Omar's campaign.¹

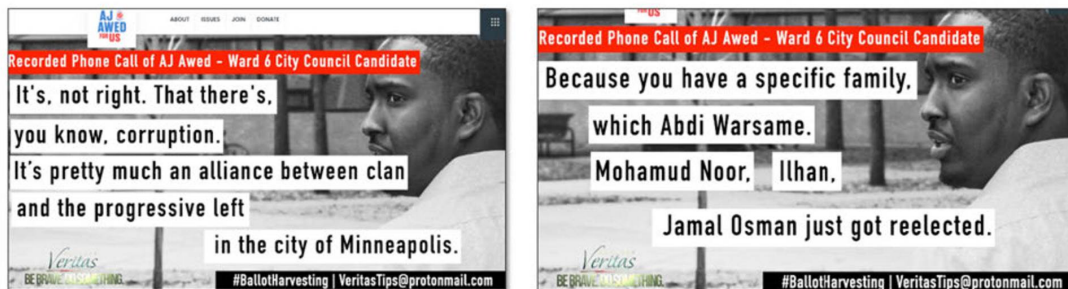
¹ https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00680934&recipient_name=Gainey&two_year_transaction_period=2020.



62. Omar Jamal confirmed this confidential source's claims, stating in an interview with Project Veritas that Mr. Gainey was one of the individuals known to offer cash for votes for Rep. Ilhan Omar:



63. The Project Veritas investigative report also featured a recorded conversation with AJ Awed, who ran against Jamal Osman in 2020 for the Minneapolis City Council seat representing Ward 6. Mr. Awed similarly bemoaned the corruption in Minneapolis elections, and charged that the perpetrators included Rep. Ilhan Omar and Jamal Osman (brother of Liban Mohamed), who were all part of an extended Somali-American family (or “clan”) engaged in corrupt voting activity.



64. The Project Veritas report concludes with a call by Project Veritas for the Attorneys General of Minnesota and the United States to investigate these allegations.

The Project Veritas Report Was Coincidentally Released on the Same Day The Times Published a Report About President Trump's Tax Returns

65. On the same day that Project Veritas published its investigative report about illegal voting practices in Minneapolis, The New York Times published a detailed story about President Trump's business and tax history, which claimed to be based upon tax return data provided to The Times by an unidentified source.

66. There had been years of speculation about President Trump's income and the amount he paid in taxes as he had long declined to release his tax returns as most presidential candidates traditionally have. President Trump's refusal to release his tax returns was a controversial and much-discussed issue during the 2016 presidential campaign, and in the years

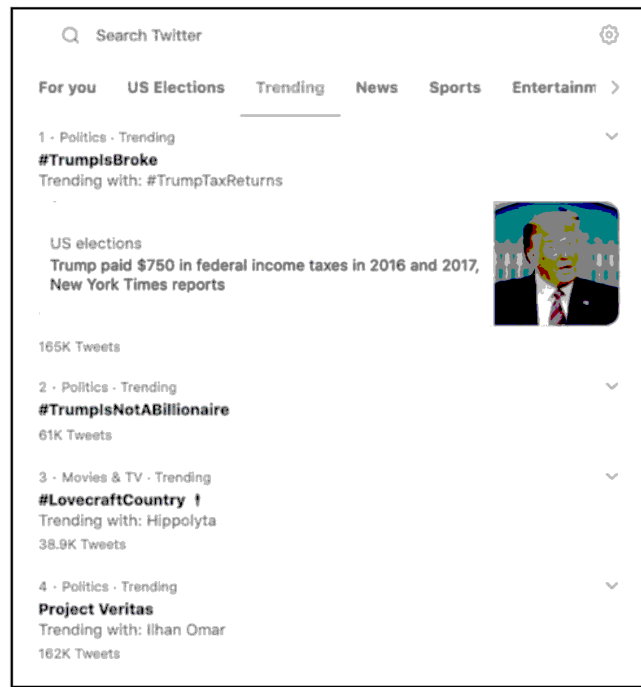
since they have been sought—thus far unsuccessfully—by congressional committees and the New York State Attorney General.

67. Then, on the eve of the first 2020 presidential debate, The Times finally obtained what it called “some of the most sought-after, and speculated about, records in recent memory.” Among other revelations based on those returns, The Times report claimed that over the last decade, President Trump paid very little in income taxes—in many years zero dollars, and in recent years only \$750.

68. Because of the controversy and mystery created by President Trump’s refusal to voluntarily release his tax returns, The Times believed it had scored a reporting coup and expected that its story would get significant attention and be the biggest news of the day.

69. Coincidentally, Project Veritas decided to release its report on illegal voting practices the same day. Although the publication of the report was originally scheduled for September 28—a Monday—Project Veritas decisionmakers ultimately decided on Saturday, September 26 to move up its release to Sunday, September 27, because they believed the investigative report would likely reach a greater audience on a Sunday than it would on a workday.

70. The Project Veritas report quickly went viral and became one of top trending topics on Twitter—competing with The New York Times tax returns story for prominence. Within just two hours of the publication of the Project Veritas report, it had been the subject of nearly as many tweets as The New York Times’ tax returns story (162k vs 165k).



71. In fact, total views of the Project Veritas investigative report on Twitter and YouTube alone soon eclipsed The Times' total number of subscribers.

Ms. Astor and The Times Retaliate by Coordinating with a Left-Wing Group to Publish a False Story Designed to Try and Discredit Project Veritas' Groundbreaking Reporting

72. The New York Times' political reporting team was upset that its much-hyped story about a Republican president's tax returns was upstaged by an independent journalism group's story presenting, in an election year, evidence of systematic and widespread voting fraud by Democrat candidates.

73. This resentment was driven not just by journalistic competitiveness, but also The Times' well-documented bias against Republicans and conservatives, and in favor of Democrats and liberals.

74. Ms. Astor herself clearly harbors such biases. She is a registered Democrat, and she was once interviewed by The New York Sun while wearing a shirt that said, “I hated Bush before it was cool.”

75. On information and belief, Ms. Astor’s editors, the John Doe Defendants, also hold biases against individuals and groups that they perceive as being Republican or conservative, are likewise registered Democrats, also dislike Project Veritas and its founder James O’Keefe, and were similarly upset that Project Veritas’ ballot harvesting investigation overshadowed The Times’ reporting on the President’s taxes.

76. The Times, Ms. Astor, and Ms. Astor’s editors therefore set out to try and discredit Project Veritas’ report as quickly and as thoroughly as possible.

77. On September 29, 2020—just two days after Project Veritas released its report—The Times published Ms. Astor’s story on its website with the headline, “Project Veritas Video Was a ‘Coordinated Disinformation Campaign,’ Researchers Say.”

78. The “dek” (or subheading) of the story stated, “The timing of the deceptive video, which accuses Ilhan Omar of voter fraud, indicates that several conservatives, including Donald Trump Jr., may have known about it in advance.”

79. The first sentence of the story then says: “A deceptive video released on Sunday by the conservative activist James O’Keefe, which claimed through unidentified sources and with no verifiable evidence that Representative Ilhan Omar’s campaign had collected ballots illegally, was probably part of a coordinated disinformation effort, according to researchers at Stanford University and the University of Washington.”

80. The “researchers” referred to in the headline of the story are a group of academics—including students—from Stanford University and the University of Washington. Under the

auspices of a joint project called the “Election Integrity Partnership” (hereinafter, “EIP”) these “researchers” had published a blog post on September 29—the same day The Times published Ms. Astor’s story—claiming that the Project Veritas investigative report was part of a “coordinated elite disinformation campaign,” and suggesting that the timing of its release was coordinated with the Trump campaign to draw attention away from The New York Times’ tax return story.

81. Although The Times presented its story as merely reporting on the researchers’ blog post—The Times’ lawyers would later characterize it as “a fairly plain-vanilla account of research done by academics”—The Times did not tell its readers the whole story.

82. In fact—ironically, given the claim that the Project Veritas report was a “coordinated” effort—The Times and EIP had *themselves* coordinated to sync both the substance and timing of the researchers’ blog post with a story in The New York Times publicizing it.

83. Metadata from the websites of The Times and EIP reveals that The Times published Ms. Astor’s story on the researchers’ study less than **63 minutes** after the EIP blog post was published. This information is readily available in the source code that can be accessed by right-clicking on the respective webpages:

EIP Article

14:08 Pacific = 5:08pm Eastern

NY Times Article

22:11 Zulu = 6:11pm Eastern

84. The ‘source code’ is the computer code created by the owner of the web page to construct live web pages, and it is published by the owner of the web page at time the page goes live. Anyone may access the source code by simply right-clicking on the selected page and choosing “view source.” The source code supports *all* the visible text on a web page, including non-visible information from the web page such as the date and time of publication or any modifications to the web page. The source code often will contain the time of publication in ‘coordinated universal time’ (“UTC”), also known as “Zulu time,” indicated by the letter ‘Z’ at the end of the time-stamp—or in local time, followed by either a plus sign preceding the number of hours local time is *ahead* of UTC-time, or a minus sign followed by the number of hours *behind* UTC-time.

85. Here, the EIP webpage’s source code indicates that the blog post was published at “14:08:54-0700”: the absence of the ‘z’ indicates that the time-stamp reflects local time, and the “-0700” demonstrates that local time is seven hours *behind* UTC time. Pacific Daylight Time (“PDT”) is seven hours behind UTC time, and thus, EIP published its post at 2:08 pm PDT—which is 5:08 pm Eastern Daylight Time (“EDT”).

86. The Times’ own source code indicates that Ms. Astor’s article was published at “22:11:25-000z,” which means that the article was published at 10:11 pm UTC. Because EDT is four hours behind UTC time, the source code reflects that The Times published Ms. Astor’s story at 6:11 pm EDT. Thus, The Times published its story fewer than 63 minutes after the EIP blog post was published.

87. Obviously, in the span of only one hour, Ms. Astor would not have been able to (1) read and digest EIP’s *twelve-hundred-word* post; (2) contact the authors of EIP’s post for

comment; (3) contact others quoted in the story for comment; (3) write her own nearly *thousand-word* article; and (4) submit her draft article to her editors at The Times for review and approval.

88. The inescapable conclusion revealed by the timing of Ms. Astor's story is that EIP provided her with a draft of its blog post well in advance of when it was actually published, so that The New York Times could publish its own story highlighting the blog post shortly after it was released, thus greatly increasing its reach and visibility.

89. The clear evidence of orchestration between EIP and The Times also raises serious questions concerning the provenance of the EIP blog post, and whether The Times conceived the idea and thesis of the blog post in the first instance—that Project Veritas moved up the publication of its investigative report in an effort to distract from The Times' story on the President's tax returns—to create a pretextual basis for a New York Times story attacking the Project Veritas report.

90. Regardless of whose idea this was (EIP or The Times), it is clear that it was actually The New York Times' story that was part of a coordinated disinformation campaign, with The Times teaming up with individuals who it knew to be left-leaning academics to further a joint goal of discrediting the Project Veritas report providing evidence of illegal voting activities by Democrat politicians. Working with The Times behind the scenes, the EIP researchers were also able to raise their profile by having their work featured in The New York Times, while The Times also found a way to mount an attack on the report that it viewed as upstaging its tax returns story.

91. Notably, one of the authors of the EIP blog post, Alex Stamos, is the former Chief Security Officer of Facebook. While at Facebook, he was one of the architects of the site's efforts to engage in active deboosting of conservative Facebook pages—a program that was exposed by a Project Veritas investigation in June 2020. Upon information and belief, Ms. Astor and her

editors were aware of Mr. Stamos' history with Project Veritas and his obvious bias and motive to smear Project Veritas.

92. Additionally, although The Times (falsely) purported to be impartially reporting on an academic study, the characterization of the Project Veritas investigative report as "deceptive" does not appear in the EIP blog post. That false and defamatory label was added by Ms. Astor, her editors, and The Times. Nor does the EIP blog post identify anything in the Project Veritas investigative report that is false, misleading, or deceptive.

93. The following day, September 30, 2020, The Times published Ms. Astor's story in its print edition.

94. The print version of the story appeared on page A22 of The Times' Monday, September 30, 2020 edition. It bore a different headline than the online version: "Project Veritas Releases Misleading Video, Part of What Experts Call a Coordinated Effort."

95. Like the online version of the story, the print version accused Project Veritas and Mr. O'Keefe of publishing a "deceptive" news report: "A deceptive video released on Sunday by the conservative activist James O'Keefe, which claimed through unidentified sources and with no verifiable evidence that Representative Ilhan Omar's campaign had collected ballots illegally, was probably part of a coordinated disinformation effort, according to researchers at Stanford University." The article's title also falsely accuses Project Veritas of releasing a "misleading" video.

96. The print version of the story also featured a call-out in large, bolded type, which said: "Making claims without evidence of ballot harvesting."

Project Veritas Releases Misleading Video, Part of What Experts Call a Coordinated Effort

By MAGGIE ASTOR

A deceptive video released on Sunday by the conservative activist James O'Keefe, which claimed through unidentified sources and with no verifiable evidence that Representative Ilhan Omar's campaign had collected ballots illegally, was probably part of a coordinated disinformation effort, according to researchers at Stanford University.

Mr. O'Keefe and his group, Project Veritas, appear to have made an abrupt decision to release the video sooner than planned after The New York Times published a sweeping investigation of President Trump's taxes, the researchers said. They also noted that the timing and metadata of a Twitter post in which Mr. Trump's son shared the video suggested that he might have known about it in advance.

Project Veritas had hyped the video on social media for several days before publishing it. In posts, amplified by other prominent con-

servative accounts, Mr. O'Keefe teased what he said was evidence of voter fraud, and urged people to sign up at "ballot-harvesting.com" to receive the supposed evidence when it came out. (None of the material in the video actually proved voter fraud.)

Mr. O'Keefe's promotional posts had said the video would be released on Monday, but Project Veritas released it on Sunday instead, a few hours after the publication of The Times's investigation. The Stanford researchers concluded that this timing was unlikely to be a coincidence "given the huge marketing about a 9/28 release date," they wrote in an analysis that Alex Stamos, who led the research team at the Stanford Internet Observatory, shared with The Times.

"It's a great example of what a coordinated disinformation campaign looks like: pre-seeding the ground and then simultaneously hitting from a bunch of different accounts at once," Mr. Stamos said.

Many of the same accounts that had shared promotional tweets also shared the video as soon as it was released, moving it quickly into Twitter's trending topics alongside The Times's tax investigation.

Roughly an hour after The Times published its article, Mike Lindell, chief executive of MyPillow and honorary chairman of Mr. Trump's Minnesota campaign, tweeted a video of himself saying that Project Veritas's supposed exposé would be released that night at 9 p.m. Eastern time.

"I just met James O'Keefe of Project Veritas, and James showed me footage of systematic voter fraud," Mr. Lindell said. He did not respond to a request for comment on Tuesday.

Mr. O'Keefe posted the video on Twitter at 9 p.m. on the dot, and the president's son Donald Trump Jr. tweeted it just seven minutes later. Two minutes after that, the president's "war room" account retweeted him, and the president himself soon began commenting.

Notably, the video that the younger Mr. Trump posted did not have the "from James O'Keefe" label that appeared when other Twitter users shared the video uploaded by Mr. O'Keefe.

"This detail, along with video metadata demonstrating that the Donald Trump Jr. version of the

Making claims without evidence of ballot harvesting.

video was separately uploaded and re-encoded by Twitter, indicates that the Trump campaign possibly had access to the video before the general public and raises questions of coordination," the Stanford researchers wrote, noting also that Mr. Trump posted the video on Facebook 16 minutes before Mr. O'Keefe posted it there.

Asked for comment, the Trump campaign said that Donald Trump Jr. had received a downloadable link to the video after it was publicly released. It did not comment on Mr. Lindell's post or on the timing of the video's release, and a spokesman for the younger Mr. Trump did not respond to a request for comment.

The video contains footage of a man, identified as Liban Mohamed, showing off ballots he says he has collected for a Minneapolis City Council candidate — something that, depending on when the video was filmed, may not have been illegal, because a district court judge in July temporarily suspended Minnesota's ban on third parties collecting and returning large numbers of completed ballots, Mr. Mohamed was not working for Ms. Omar.

The video then claims that Democratic operatives connected to Ms. Omar's campaign paid voters to hand over blank mail-in ballots and filled them out. This

would be illegal, but the allegations come solely from unnamed people who speak with Project Veritas operatives in the video and whose faces are not shown.

On Monday, the Minneapolis Police Department said it was "looking into the validity" of the claims in the video, which a spokesman for Ms. Omar described as "a coordinated right wing effort to delegitimize a free and fair election."

Mr. O'Keefe and Project Veritas have a long history of releasing manipulated or selectively edited footage purporting to show illegal conduct by Democrats and liberal groups.

The Stanford researchers reported the video to multiple social media platforms. Facebook added a link to its "misinformation center" to one upload of the video but placed no notice on the original upload. Twitter, YouTube and Reddit took no action. TikTok was the only platform that removed all uploads of the video.

Ms. Astor and The Times Knew the Claim—That the Project Veritas Report Was Deceptive—Was Baseless and False

97. At the time that they published the story in question, Ms. Astor, her editors, and The Times knew that the claims that Project Veritas' investigative report is "deceptive," "misleading," relies on "unidentified sources," and contains no "evidence" of illegal ballot collecting was false.

98. For one thing, it is clear from the story itself that Ms. Astor had watched Project Veritas' investigative video report, and thus she and her editors subjectively knew that there was nothing "deceptive" about it.

99. Rather, the Project Veritas report is based entirely on interviews and recorded conversations with knowledgeable sources, firsthand witnesses, and actual participants in illegal voting activity—many of whom are identified by name and provided information on the record.

100. As noted, much of the investigative report is centered on the video clips that campaign worker Liban Mohamed himself posted to Snapchat, in which he openly brags about illegally harvesting hundreds of absentee ballots in gross violation of Minnesota law that permits a person to collect and submit no more than three absentee ballots from others. Mr. Mohamed is

identified by name and his connections to other Democrat Minnesota politicians, including Rep. Ilhan Omar, are set forth by named sources in the Project Veritas report.

101. Obviously, there was nothing deceptive or misleading about Project Veritas presenting Mr. Mohamed's own recorded and self-incriminating statements, and his own recorded admissions **are** verifiable evidence of illegal conduct.

102. Indicative of The Times' transparent bias—and its efforts to try and discredit the import of the Project Veritas report by any means necessary—is Ms. Astor's claim in the story that “depending on when the [Mohamed] video was filmed, [his conduct] may not have been illegal, because a district court judge in July temporarily suspended Minnesota's ban on third parties collecting and returning large numbers of completed ballots.” The print version of the story doubled down this claim by expressly accusing Project Veritas of “[m]aking claims without evidence of ballot harvesting.”

103. In fact, that court ruling referred to in the online and print stories **did not** render ballot harvesting legal—it merely suspended enforcement of the law for a brief period before that district court decision was reversed on appeal by the Minnesota Supreme Court.

104. The district court ruling temporarily delaying enforcement of the law against ballot harvesting was issued on July 28, 2020. The Project Veritas investigative report clearly stated—and Ms. Astor and the Times therefore knew—that Mr. Mohamed posted his ballot harvesting videos to Snapchat in the first week of July 2020. In fact, as reflected in the Project Veritas report, the self-filmed video of Mr. Mohamed bragging about “hustling” to collect a large number of absentee ballots from an apartment building, clearly bears a date of July 2, 2020:



105. Thus, at the time that Mr. Mohamed bragged online about his ballot harvesting activities, there is no question that such conduct was illegal—and Ms. Astor, her editors, and The Times knew as much.

106. However, because Ms. Astor and The Times knew that much of their intended audience had not actually watched the Project Veritas investigative report and would therefore not know when Mr. Mohamed posted his videos, they intentionally omitted that detail and referred to this later-in-time, inapplicable court ruling in an effort to misleadingly suggested to The Times' readers that Mr. Mohamed's conduct may not have been a criminal act. And the print version of the story flatly claimed that the Project Veritas report contained no "evidence of ballot harvesting," even though Ms. Astor and The Times knew that the self-incriminating videos Mr. Mohamed posted of himself provided objective and irrefutable evidence of illegal ballot harvesting.

107. Ironically, Ms. Astor and The Times engaged in this sleight-of-hand deception in an effort to buttress the false claim that Project Veritas' investigative report was "deceptive."

108. Additionally, Ms. Astor and The Times knew that the claim that Project Veritas' investigative report connecting Rep. Ilhan Omar to illegal voting activity relied exclusively on "unidentified sources" is false.

109. Even if that statement were true, it would hardly render Project Veritas' journalism "deceptive," as The Times itself regularly relies on confidential and even anonymous sources in its published stories.

110. In fact, The Times' own published standards and practices expressly permit The Times to "agree[] not to identify people who provide information for [its] articles," and to use "anonymous sources" when The Times deems the information they provide to be "newsworthy and credible."² According to the official position of The Times, confidential sources are often *more credible* than named sources, because in sensitive situations sources "will be candid only if they know their name won't be used."

111. But notwithstanding The Times' position that confidential and anonymous sources are often more reliable than named sources, the claim that Project Veritas report relied solely on "unidentified sources" is not true—and Ms. Astor, her editors, and The Times knew it. The allegation in the Project Veritas report that ballot-harvester Liban Mohamed is connected to Rep. Ilhan Omar's campaign is attested to from the mouths of *two* named sources: Minneapolis City Council candidate AJ Awed, and community leader Omar Jamal.

112. Obviously, it was not deceptive for Project Veritas to publish the comments of Mr. Awed concerning Mr. Mohamed, his brother Jamal Osman, Rep. Omar, and widespread corruption in Minneapolis elections. It is self-evident that Mr. Awed was a credible and knowledgeable source, given that he is a local Somali-American politician who ran as a candidate in the same election as Mr. Mohamed's brother, Jamal Osman.

113. Outside of the self-incriminating videos Mr. Mohamed filmed of himself, the primary on-the-record source for the Project Veritas report was a man named Omar Jamal.

² <https://www.nytimes.com/2018/06/14/reader-center/how-the-times-uses-anonymous-sources.html>.

Mr. Jamal is a longtime community leader and political consultant in the Minneapolis Somali-American community who has founded several community organizations and is also employed full-time as a community service officer for the Ramsey County Sheriff's Office.

114. Mr. Jamal connected Mr. Mohamed and his illegal conduct to Rep. Ilhan Omar, detailed the breadth of ballot harvesting and cash-for-ballots schemes in Minneapolis, identified Rep. Omar's Deputy Campaign Manager Alli Isse Gainey as a known ringleader of these activities, and helped Project Veritas to record interviews and conversations with numerous witnesses and participants with knowledge of these illegal activities.

115. Thus, The Times' claim that the Project Veritas report relied solely on "unidentified sources" is patently false, and The Times knew it. But Ms. Astor's story contains no mention whatsoever of the statements made in the Project Veritas investigative report by Mr. Awed and Mr. Jamal, because acknowledging their inclusion in the report would have completely contradicted the false claim that the Project Veritas report relied solely on unidentified sources.

116. As for Omar Jamal, it is no surprise that Ms. Astor's story failed to inform readers of his participation in the investigative report as a named, on-the-record source, because doing so would have completely undercut The Times' narrative that the Project Veritas report was deceptive and relied on "unidentified sources" with "no verifiable evidence." As Ms. Astor, her editors, and The Times knew, there is nothing inherently deceptive about a journalistic investigation relying on the word of a prominent, respected and credible source with firsthand knowledge of what is taking place in his community.

117. In fact, Mr. Jamal has long been considered by The New York Times itself to be a credible source of information concerning matters involving Minneapolis' Somali-American community. On many occasions, he has appeared in The New York Times as a named source in

stories concerning goings-on in that community, and he has been photographed for The Times as well:



118. In total, since 2006, Mr. Jamal has been quoted as an on-the-record source in *at least ten* New York Times stories. A June 2006 story in The Times' international edition about Islamic militiamen in Somalia quoted Mr. Jamal calling on the United States to intervene and identified him as the "director of the Somali Justice and Advocacy Center in St. Paul, Minnesota, a hub for expatriate Somalis."³ An August 2007 Times story about a bridge collapse in Minneapolis quoted Mr. Jamal as a spokesperson for one of the victim's families and identified him as "a leader of Somalis" in the city.⁴ A follow up story about that same incident also quoted Mr. Jamal and identified him as the director of the Somali Justice Advocacy Center.⁵ A March

³ "Islamic militia extends its hold across Somalia," International Herald Tribune (June 14, 2006), *available at* <https://www.nytimes.com/2006/06/14/world/africa/14iht-somalia.1974923.html?searchResultPosition=5>.

⁴ Pam Belluck, "For Families of Missing, an Agonizing Limbo," The New York Times (Aug. 4, 2007), *available at* <https://www.nytimes.com/2007/08/04/us/04missing.html?searchResultPosition=7>.

⁵ Monica Davey, "In Bridge Collapse, Refugee Group Faces a New Ordeal," The New York Times (Aug. 8, 2007), *available at* <https://www.nytimes.com/2007/08/08/us/08bridge.html?searchResultPosition=4>.

2015 Times story about a Somali-American man from Minneapolis who traveled to Syria to join ISIS quoted Mr. Jamal regarding the fear and devastation of the man's family and identified Mr. Jamal as a "Somali-American activist in Minneapolis."⁶ An April 2016 Times story about TSA employees targeting Somali-Americans for terrorism screenings quoted Mr. Jamal and identified him as "a community activist."⁷ A June 2016 story about three Somali-Americans convicted of attempting to join the Islamic State quoted Mr. Jamal on the community perception of the case and identified him as "a Somali community activist."⁸ An April 2019 Times story about a Minneapolis police shooting quoted Mr. Jamal regarding the Somali-American community's views of the case and identified Mr. Jamal as "a consultant and activist."⁹ A different April 2019 story about the same police shooting case quoted Mr. Jamal on the community's views of the case and identified him as "a Somali-American activist and consultant."¹⁰ And a June 7, 2020 Times story about how protests of police brutality were affecting Minneapolis' Somali-American community quoted Mr. Jamal and identified him as working "in a sheriff's office in St. Paul."¹¹

⁶ Scott Shane, "From Minneapolis to ISIS: An American's Path to Jihad," The New York Times (Mar. 21, 2015), available at <https://www.nytimes.com/2015/03/22/world/middleeast/from-minneapolis-to-isis-an-americans-path-to-jihad.html?searchResultPosition=14>.

⁷ Ron Nixon, "Minnesota TSA Manager Says He Was Told to Target Somali-Americans," The New York Times (Apr. 27, 2016), available at <https://www.nytimes.com/2016/04/28/us/politics/minnesota-tsa-manager-says-he-was-told-to-target-somali-americans.html?searchResultPosition=11>.

⁸ Jack Healy & Matt Furer, "3 Somali-Americans Found Guilty of Trying to Join Islamic State," The New York Times (June 3, 2016), available at <https://www.nytimes.com/2016/06/04/us/somali-americans-verdict-minneapolis-isis.html?searchResultPosition=6>.

⁹ Mitch Smith, "A 911 Call, an Unarmed Woman and a Single Shot: The Mystery of a Police Shooting," The New York Times (Apr. 13, 2019), available at <https://www.nytimes.com/2019/04/13/us/mohamed-noor-trial-minneapolis.html?searchResultPosition=13>.

¹⁰ Mitch Smith, "Minneapolis Police Officer Convicted of Murder in Shooting of Australian Woman," The New York Times (Apr. 30, 2019), available at <https://www.nytimes.com/2019/04/30/us/minneapolis-police-noor-verdict.html?searchResultPosition=10>.

¹¹ Kimiko de Freytas-Tamura, "In Minneapolis, Somali-Americans Find Unwelcome Echoes of Strife at Home," The New York Times (June 7, 2020), available at <https://www.nytimes.com/2020/06/07/us/minneapolis-somalis-george-floyd.html?searchResultPosition=12>.



119. In an April 2019 Times story, Mr. Jamal was quoted as a source *specifically on the subject of Congresswoman Ilhan Omar*, criticizing her for focusing too much on Israel during her first term at the expense of housing and education issues facing her district. Mr. Jamal was identified by The Times in that story as “a political consultant in St. Paul, Minn.”¹²

120. And finally, in September 2013, the Times published an Op/Ed by Mr. Jamal concerning the terrorist group Al Shabab and the concern that it could seek to mount attacks in the United States.¹³

121. In sum, there can be no dispute that The Times itself considers Mr. Jamal to be a credible and knowledgeable source with respect to issues in the Somali-American community of

¹² John Eligon, “Unchecked ‘Hate’ Toward Rep. Ilhan Omar Has American Muslims Shuddering,” The New York Times (Apr. 25, 2019), available at <https://www.nytimes.com/2019/04/25/us/ilhan-omar-muslim-reactions.html?searchResultPosition=1>.

¹³ Omar Jamal, “The Question Now is When and Where in the U.S. the Shabab Will Attack,” The New York Times (Sept. 30, 2013), available at <https://www.nytimes.com/roomfordebate/2013/09/30/does-al-shabab-pose-a-threat-on-american-soil/the-question-now-is-when-and-where-in-the-us-the-shabab-will-attack>.

Minneapolis-St. Paul generally, and with respect to local politics and Rep. Omar specifically. The Times knew that reliance on Mr. Jamal as a source regarding these matters is hardly “deceptive,” because the so-called “Paper of Record” has itself relied on Mr. Jamal as a source extensively.

122. Not surprisingly, Ms. Astor’s story calling Project Veritas’ investigative report “deceptive” intentionally omitted The Times’ own extensive reliance on Mr. Jamal as an on-the-record source because including that information would have undermined The Times’ preconceived narrative that Project Veritas published a “deceptive” video report.

123. Ms. Astor, her editors, and The Times also intentionally elected not to reach out to any of the named individuals in the Project Veritas video—including, but not limited to, Mr. Mohamed, Mr. Jamal, and Mr. Awed—to ask if they were quoted accurately or if the audio and video depictions of their own words in the Project Veritas investigative report were in any way altered or doctored.

124. This intentional decision not to reach out to obvious sources of corroboration or refutation for the claim that the Project Veritas investigative report was “deceptive” reflects a purposeful avoidance of the truth, and thus actual malice.

125. Additionally, Ms. Astor, her editors, and The Times intentionally chose not to contact or seek comment from Project Veritas before publishing this false and defamatory story. This was a clear violation of The Times’ own “Guidelines on Integrity” applicable to all news reporters, which explicitly provide that story subjects must be given an opportunity to respond to *any* negative statements The Times plans to publish about them:¹⁴

¹⁴ <https://www.nytimes.com/editorial-standards/guidelines-on-integrity.html>.

Rebuttals

Few writers need to be reminded that we seek and publish a response from anyone criticized in our pages. But when the criticism is serious, we have a special obligation to describe the scope of the accusation and let the subject respond in detail. No subject should be taken by surprise when the paper appears, or feel that there was no chance to respond.

126. Finally, it is noteworthy that The Times story also intentionally omitted a link to the Project Veritas investigative report that would have allowed readers to judge for themselves whether The Times' false claims that it was deceptive, that it relied only on "unidentified sources," that it contained no "evidence" of illegal voting activity, and that it did not offer any evidence of unlawful ballot harvesting were truthful. The absence of a hyperlink to the Project Veritas investigative report is particularly conspicuous because Ms. Astor's story *did* contain hyperlinks to many other materials mentioned in the story, including the EIP blog post, The Times' own story on President Trump's tax returns, and a statement published to Twitter by a spokesperson for Rep. Omar calling the Project Veritas report "a right wing effort to delegitimize a free and fair election."

127. The omission of a hyperlink to the Project Veritas investigative report—*the main subject of The Times' story*—was intentional and designed to prevent The Times' readers from viewing the Project Veritas report for themselves and thus having a ready means to determine that The Times' statements about Project Veritas were false.

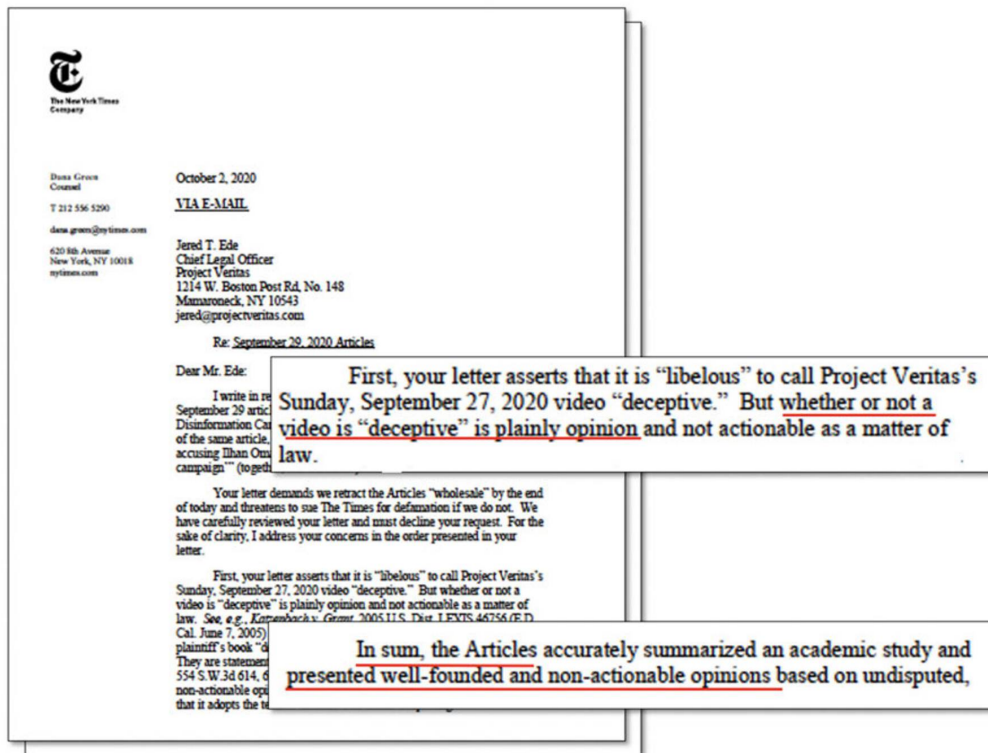
128. At bottom, there simply was no factual basis whatsoever for Ms. Astor and The Times to claim that Project Veritas' investigative report was "deceptive," that it relied exclusively on "unidentified sources," and that it presented "no evidence" of illegal voting activity—and Ms. Astor, her editors, and The Times were on subjective notice at the time of publication that these claims were false. These statements about Project Veritas were therefore published with actual malice.

**Project Veritas Demands a Retraction and The Times' Lawyers Refuse—Absurdly
Claiming its News Story Was “Opinion”**

129. On September 30, 2020—the day after The Times published the online version of Ms. Astor’s story—Project Veritas Chief Legal Officer Jered T. Ede sent a letter via email to Ms. Astor and New York Times Executive Editor Dean Baquet.

130. Mr. Ede’s letter demanded an immediate retraction of the story calling Project Veritas’ investigative report “deceptive.” Mr. Ede’s letter specifically noted that The Times’ story contained no factual basis for that claim, and that the assertions that the Project Veritas report relied on “unidentified sources” and offered no “evidence” of illegal voting activity were readily disproven by reference to the video report itself.

131. On October 2, 2020, Dana Green, in-house Counsel for The New York Times Company, sent a response letter to Mr. Ede via email. In that letter, Ms. Green stated that The Times refused to make any correction to, or retraction of, the story. With respect to the story’s claim that the Project Veritas investigative report was “deceptive,” Ms. Green repeatedly asserted that this statement was merely Ms. Astor and The Times’ “opinion”:



132. But this claim is belied by the fact that the story appeared not in The Times' Op/Ed section, but rather the "Politics" *news* section. And Ms. Astor is not an opinion writer for The Times—she is a "political reporter":



133. The Times' own "Ethical Journalism" standards expressly state that The Times' "fundamental purpose" is to ensure that its news reports reflect "impartiality and neutrality," and

political reporters like Ms. Astor are prohibited from “do[ing] anything that damages The Times’s reputation for strict neutrality in reporting on politics and government.”¹⁵

134. Thus, The Times’ own ethical policies prohibit a political news reporter like Ms. Astor from offering her “opinion” in a news story covering politics and government. If Ms. Astor and her editors truly considered the claim that Project Veritas’ report is “deceptive” to be merely Ms. Astor’s opinion, then under The Times’ own binding policies they would not have been permitted to publish it.

135. Moreover, The Times proudly publicizes and trumpets these policies to the public on its website. Thus, a reasonable reader of a Times news story would not expect to see a reporter’s “opinion” appear in a news story, and a reasonable reader therefore would have understood the claim that Project Veritas’ investigative report was “deceptive” to be a statement of fact, not a statement of opinion.

136. Ms. Astor herself also stated in a recent interview that part of her job is to ensure that she **does not** inject her own opinions into news stories that she writes for The Times.¹⁶

137. Despite The Times’ legal department taking the post hoc position that the “deceptive” statement was Ms. Astor’s opinion—and thus that it should never have appeared in a news story per The Times’ own policies and guidelines—to date, The Times’ newsroom and editors have not taken any action to remove Ms. Astor’s so-called “opinion” from the story. This definitively puts the lie to the lawyers’ made-for-litigation claim that the “deceptive” statement was intended to be merely an expression of Ms. Astor’s opinion, and demonstrates that Ms. Astor

¹⁵ <https://www.nytimes.com/editorial-standards/ethical-journalism.html#introductionAndPurpose>.

¹⁶ “Media Bias: Should Journalists Always Strive to Be Objective?” *Issues & Controversies*, Infobase, (Sept. 22, 2020), available at icof.infobaselearning.com/recordurl.aspx?ID=6296.

and her editors must have intended and understood—and still intend and understand—it to be a statement of fact concerning Mr. O’Keefe and Project Veritas.

138. The Times’ lawyers’ after-the-fact claim that this statement is merely “opinion” is therefore ridiculous and nonsensical. Instead, it is a tacit acknowledgement that the statement in Ms. Astor’s story is not factually supportable and cannot be defended as objectively true.

139. Even if the claim that Project Veritas’ investigative report was “deceptive” were a statement of opinion, it would be an opinion based on false statements of fact—namely that Project Veritas’ video relied solely on “unidentified sources” and offered “no evidence of ballot harvesting.”

140. That being the case, The Times’ own “Guidelines on Integrity” required that the story be corrected to remove the statement. Indeed, The Times’ policies require a correction even where a published statement is “imprecise” or “incomplete.”

141. Thus, The Times implicitly admitted that Ms. Astor’s assertion that Project Veritas’ investigative report is “deceptive” has no factual support, and yet Ms. Astor, her editors, and The Times still refused to correct it. This further demonstrates Ms. Astor and The Times’ reckless disregard for the truth and actual malice towards Project Veritas.

142. After Times lawyer Dana Green responded to Project Veritas’ letter with the claim that Ms. Astor’s statements were merely “opinion,” Project Veritas’ outside counsel Clare Locke LLP sent a letter to New York Times Deputy General Counsel David McCraw on October 9, 2020.¹⁷ Clare Locke LLP again demanded a retraction of Ms. Astor’s false statements, and noted

¹⁷ Ltr. L. Locke to D. McCraw re “False Allegations Regarding Project Veritas,” (Oct. 9, 2020) (attached hereto as Ex. A.)

that it was illogical for The Times to take the position that statements in one of its news articles were opinion because that would clearly violate The Times' own policies.

143. In response, Mr. McCraw defended Ms. Astor's characterization of the Project Veritas video report as "deceptive" as factually true—thus completely undermining Ms. Green's previous assertion that the statement was merely Ms. Astor's "opinion."

144. The Times has also continued to flagrantly violate its own "rebuttals" policy post-publication of Ms. Astor's stories, which further demonstrates Defendants actual malice toward Project Veritas.

145. On October 16, 2020, Clare Locke LLP again wrote to Mr. McCraw demanding a retraction of Ms. Astor's stories.¹⁸ In that letter, Clare Locke LLP noted The Times' previous reliance on Omar Jamal as a credible source, as well as the less than 63-minute difference in publication timing of the EIP blog post and Ms. Astor's September 29, 2020 story.

146. Attached to that letter, Clare Locke LLP provided a redlined version of Ms. Astor's September 29 story which, among other things, suggested an update to the story to "reflect statements from Project Veritas." In that document, Clare Locke LLP provided The Times with several quotes from Project Veritas rebutting the false claims that Ms. Astor made in her story.

147. Again, despite The Times' own ethical policies clearly requiring that The Times "seek and publish a response from anyone criticized in [The Times'] pages," The Times' lawyers and editors refused to update the story to include the rebuttals from Project Veritas in violation of The Times' own internal policies.

¹⁸ Ltr. L. Locke to D. McCraw re "False Allegations Regarding Project Veritas," (Oct. 16, 2020) (attached hereto as Ex. B.)

The Times Retaliates Against Project Veritas for Threatening Litigation

148. After The Times' lawyers refused to correct or retract the false statements in Ms. Astor's stories and absurdly claimed that they were merely a news reporter's opinion, counsel for Project Veritas indicated that litigation may result if The Times persisted in standing behind these false and defamatory statements.

149. In retaliation, The Times elected to double down on those statements and repeat its defamation of Project Veritas.

150. On October 25, 2020 The Times published on its website a story by Tiffany Hsu with the headline, "Conservative News Sites Fuel Voter Fraud Misinformation." Ms. Hsu's story claimed that in the run-up to the 2020 presidential election, "right-leaning news sites" have been publishing "false or misleading headlines and articles" designed to back claims by President Trump that "mail-in ballots threaten the integrity of the election."

151. Ms. Hsu's story was published the following day in the print version of The New York Times with the headline, "False Voter Fraud Stories Are Churning on Conservative News Sites."

152. After citing various supposed examples of this so-called "propaganda feedback loop" of "false voter fraud stories," Ms. Hsu's story then turned to Project Veritas:

In a similar cycle, the Fox News host Sean Hannity and conservative publications magnified the reach of a deceptive video released last month by Project Veritas, a group run by the conservative activist James O'Keefe. The video claimed without named sources or verifiable evidence that the campaign for Representative Ilhan Omar, a Minnesota Democrat, was collecting ballots illegally.

153. The Times, Ms. Hsu, and Ms. Hsu's editors knew that these claims were false at the time of publication. Indeed, at the time of publication, The Times had already been put on notice that substantially similar claims published by Ms. Astor and The Times in September 2020

were false and defamatory, and counsel for Project Veritas had directed The Times to specific portions of the Project Veritas investigative report itself that demonstrably disproved these claims.

154. The Times and Ms. Hsu nevertheless repeated the gist of the false claims previously made in Ms. Astor's stories in an effort to retaliate against Project Veritas for demanding a correction of Ms. Astor's stories and threatening to file a defamation lawsuit if The Times refused.

155. Like Ms. Astor, Ms. Hsu and her editors reviewed the Project Veritas investigative report before publishing a story about it, and thus they subjectively knew that her story's claims—that the report was “false,” “deceptive,” and cited no “named sources”—were false.

156. Like Ms. Astor, Ms. Hsu is a registered Democrat and was motivated by political bias and a preconceived narrative that voter fraud in a Republican-hyped problem is largely overstated in her effort to portray Project Veritas' investigative report uncovering evidence of voter fraud by Democrat candidates as “false” and “deceptive.” She, like Ms. Astor, was upset that Project Veritas' story had overshadowed The Times' reporting on the President's taxes. She, like Ms. Astor, views Project Veritas and Mr. O'Keefe with contempt and does not view Project Veritas as a legitimate journalism enterprise. On information and belief, Ms. Hsu's editors share these political biases and motivations.

157. Once again, in flagrant violation of The Times' own policies and ethical guidelines, Ms. Hsu, her editors, and The Times intentionally chose not to seek comment or rebuttal from Project Veritas before Ms. Hsu's story was published.

158. Like Ms. Astor's stories, Ms. Hsu's story contained no link to the Project Veritas investigative report that would have allowed readers to judge for themselves the truth of the claims that the report was “false,” “deceptive,” lacked any “named sources,” and provided no “verifiable evidence” of illegal ballot collection by Rep. Omar and her associates.

159. Of course, at the time that Ms. Hsu's story was published, The Times' lawyers had already taken the position that the claim that Project Veritas' investigative report is "deceptive" is merely opinion. But like Ms. Astor, Ms. Hsu is a news reporter, and her story was published in the Media News section of The Times' website. Like Ms. Astor, Ms. Hsu is prohibited by The Times' ethical policies for ethical journalism from injecting her opinion into news stories.

160. Notably, Ms. Hsu's own article in the print edition is headlined, "**False Voter Fraud Stories Are Churning on Conservative News Sites**":



161. The Times' editors and Ms. Hsu, in selecting this very title about "false voter fraud stories"—and including Project Veritas' purportedly "deceptive video" as one such example of a "false voter fraud stor[y]"—clearly believed the claim that Project Veritas' investigative report was "deceptive" was a statement of fact capable of being proven "false"—just as the story's headline proclaims.

162. But when Project Veritas' counsel noted the inclusion of what The Times' lawyers had previously characterized as "opinion" in Ms. Hsu's story and demanded a retraction,¹⁹ The Times' lawyers simply ignored the request.

163. Thus, the republication of this false claim in Ms. Hsu's story is yet another tacit acknowledgment by The Times and its editors that The Times considers this false claim to be a statement of fact capable of being proven "false," and not a statement of opinion.

Defendants' Statements About Project Veritas Are Defamatory *Per Se*

164. Defendants' false claims that Project Veritas published a "false" and "deceptive" news report that solely relied on "unidentified sources," contained no "named sources," and presented no "evidence of ballot harvesting" are not only false, but defamatory *per se*.

165. The cardinal tenet of the journalism profession is to present truthful information to readers and viewers. In fact, The Times' own published "Standards of Journalism" state that "[t]he reputation of The Times rests" upon the "perception" that The Times' reporting is fair and open, and that its employees' "first duty is to make sure that the integrity of The Times is not blemished."²⁰

166. The same document states that telling readers "the complete, unvarnished truth" is required, and that failure by a Times journalist to do so "may lead to disciplinary action, potentially including dismissal."

167. Similarly, Project Veritas' stated organizational values list as Rule #1: "Truth is paramount," and state that Project Veritas does not distort facts or context. Rule # 11 is that Project

¹⁹ Ltr. L. Locke to D. McCraw re "False and Defamatory New York Times Reporting on Project Veritas," (Oct. 28, 2020) (attached hereto as Ex. C.)

²⁰ <https://www.nytimes.com/editorial-standards/ethical-journalism.html#introductionAndPurpose>.

Veritas does not “manufacture content,” but instead presents the words of its investigative sources accurately and fairly.

168. Thus, Ms. Astor, Ms. Hsu, their editors, and The Times impugned the integrity and ethics of Project Veritas by accusing it of violating a basic tenet of the journalism profession as well as Project Veritas’ own ethical standards and primary institutional ethos.

169. Given the nature and standards of the profession, it is self-evident that accusing a journalistic organization of publishing a false and deceptive news report—as The Times accused Project Veritas—would tend to injure that organization in its business, trade, or profession.

170. The publication of the online and print versions of these stories did in fact cause substantial harm to Project Veritas’ reputations.

171. As one of the most widely circulated papers in the United States and the world, the reach of these defamatory statements was considerable. According to The Times’ itself, its print version boasts a daily circulation of nearly half a million copies in the United States,²¹ and The Times has an additional 5.7 million digital subscribers.²²

172. Given its status and prominence, it was entirely foreseeable to Defendants that the false and defamatory statements about Project Veritas in Ms. Astor and Ms. Hsu’s stories would be widely republished by other media outlets and individuals.

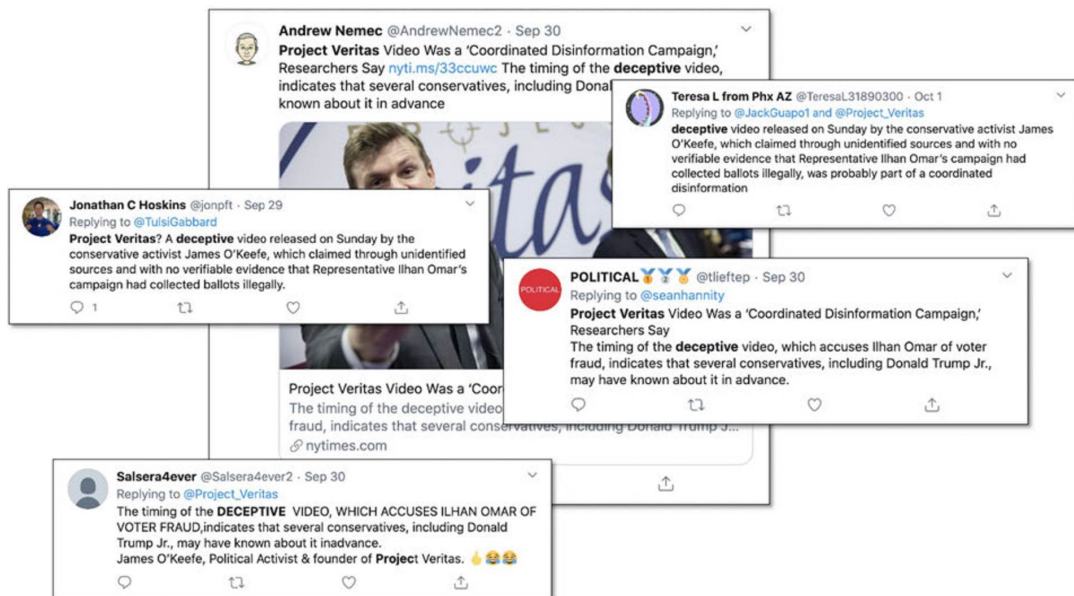
173. In fact, the false statements in Ms. Astor’s stories were widely republished, increasing the reputational harm to Project Veritas. As noted, The Times itself republished a variant of Ms. Astor’s false claims in Ms. Hsu’s story less than a month later, and various other

²¹ <https://nytmekiakit.com/newspaper-guidelines>.

²² <https://www.nytimes.com/2020/08/05/business/media/nyt-earnings-q2.html#:~:text=The%20company%20added%20669%2C000%20net%20new%20digital%20subscribers%2C%20making%20the,10%20million%20subscriptions%20by%202025>.

media outlets and blogs either republished Ms. Astor's false claims verbatim or repeated the claim that the Project Veritas investigative report was "deceptive."²³

174. Additionally, Ms. Astor and The Times' claim that Project Veritas published a "deceptive" video was adopted and republished by various social media users:



175. Ms. Astor, her editors, and The Times are liable for the damage caused by the foreseeable and intended republication of their false and defamatory statements concerning Project Veritas.

Defendants' Tortious Conduct Has Caused Plaintiff to Suffer Special Damages

176. In addition to the significant reputational harm that Defendants' conduct has caused, Defendants' actions have also caused Project Veritas to suffer special damages.

²³ See, e.g., Maggie Astor, "Stanford researchers say Ilhan Omar video appears to be 'coordinated disinformation campaign,'" Twin Cities Pioneer Press (Sept. 29, 2020), available at <https://www.twincities.com/2020/09/29/stanford-researchers-say-ilhan-omar-video-appears-to-be-coordinated-disinformation-campaign/>; Rick Hases, "Project Veritas Video Was a 'Coordinated Disinformation Campaign,' Researchers Say," ElectionLawBlog (Sept. 29, 2020), available at <https://electionlawblog.org/?p=115984>.

177. By falsely labeling Project Veritas' investigative report "false" and "deceptive," Defendants used the institutional weight of The New York Times to discredit Project Veritas' journalism in the eyes of the public. This caused Project Veritas' significant investment of time, energy, and resources on this groundbreaking investigation to be essentially wasted.

178. Project Veritas estimates it has spent \$141,000 in hard costs (e.g., travel, accommodations, security, transcription services, and other external costs, which exclude any internal costs such as production costs or Project Veritas employee time) to research and produce its investigative reporting on illegal voting practices in Minneapolis. The Times' tortious acts proximately caused a loss of that investment.

179. In an effort to attempt to mitigate the harm caused by the publication of the false statements in Ms. Astor and Ms. Hsu's stories, Project Veritas immediately sought a correction of said statements. The Times' lawyers refused.

180. As a result, Project Veritas had to engage outside defamation counsel, Clare Locke LLP, to seek a retraction from The Times.

181. Clare Locke LLP attorneys have to date sent three separate letters to The New York Times' lawyers demanding a correction of Ms. Astor and Ms. Hsu's false statements about Project Veritas, but The Times has maintained its refusal to issue any correction or retraction.

182. To date, Clare Locke LLP's fees for efforts specifically targeted at mitigating the harm to Project Veritas by seeking retractions from Defendants are estimated to be \$37,000, exclusive of any costs associated with preparing this Complaint and legal fees associated with litigation. But for The Times' refusal to issue a prompt correction when first demanded by Project Veritas, Project Veritas would not have incurred these special damages.

**AS AND FOR A FIRST CAUSE OF ACTION – DEFAMATION
FOR PUBLICATION OF THE ORIGINAL STORY ON THE NEW YORK TIMES
WEBSITE ON SEPTEMBER 29, 2020**

(Against Defendants Maggie Astor, The New York Times, and John Does 1-5)

183. Plaintiff repeats and re-alleges each of the foregoing paragraphs as if set forth fully herein.

184. Defendants The New York Times, Maggie Astor, and Ms. Astor’s editors authored and published false and defamatory statements about Project Veritas in the September 29, 2020 story published by The New York Times on its website with the headline, “Project Veritas Video Was a ‘Coordinated Disinformation Campaign,’ Researchers Say.”

185. The story was posted at the URL <https://www.nytimes.com/2020/09/29/us/politics/project-veritas-ilhan-omar.html>, and it remains online at that location. A true and correct copy of the online version of the story is attached hereto as Exhibit D.

186. The September 29 story, which was published to a worldwide audience on The Times’ website, included the following false and defamatory statements:

The timing of the deceptive video, which accuses Ilhan Omar of voter fraud, indicates that several conservatives, including Donald Trump Jr., may have known about it in advance.

A deceptive video released on Sunday by the conservative activist James O’Keefe, which claimed through unidentified sources and with no verifiable evidence that Representative Ilhan Omar’s campaign had collected ballots illegally, was probably part of a coordinated disinformation effort, according to researchers at Stanford University and the University of Washington.

187. These statements were meant to, and in fact did, create the false and misleading impression that Project Veritas published a deceptive video news report that relied solely on “unidentified sources,” that contained no “evidence” of illegal ballot harvesting, and that was

manipulated and selectively edited to misrepresent the facts to the millions of people that viewed Project Veritas' groundbreaking investigative report.

188. These statements were reasonably understood by those reading them to be statements of fact regarding Project Veritas.

189. As set forth herein, these statements are false.

190. These statements are of and concerning Project Veritas. Indeed, Project Veritas founder, CEO, and Board Chairman Mr. O'Keefe is mentioned by name as the publisher of the supposedly "deceptive" report, and the very next sentence of the story states that the video report was published by "Mr. O'Keefe and his group, Project Veritas..."

191. The reading public would have understood, and did understand, these statements to be of and concerning Project Veritas.

192. Defendants had no applicable privilege or legal authorization to publish these false and defamatory statements or, if they did, they abused that privilege.

193. These statements are libelous because they tend to expose Plaintiff to public contempt, ridicule, aversion or disgrace, and to induce an evil opinion of Plaintiff in the minds of right-thinking persons, and to deprive Plaintiff of friendly intercourse in society.

194. These statements defamed Project Veritas by falsely accusing a journalistic organization of relying solely on "unidentified sources", offering no "evidence" in support of an investigative report, and manipulating and selectively editing an investigative news report in order to deceive and mislead viewers—a cardinal sin that is the most egregious and fundamental violation of journalistic ethics and standards, as well as of Project Veritas' own stated mission and ethical tenets.

195. These statements are libelous *per se* because they impugn the basic integrity, ethics, and competence of Project Veritas as a journalistic organization.

196. These statements are libelous *per se* because they would tend to harm, and indeed have harmed, Project Veritas in its trade, business, and profession, and would tend to assail, and indeed have assailed, Project Veritas' integrity and journalistic ethics.

197. These statements are libelous *per se* because they impute unfitness in the performance of one's profession or trade to Project Veritas.

198. Defendants published these statements with actual malice in that they had knowledge that the statements were false, or they published the statements with reckless disregard for their truth or falsity.

199. Defendants published these statements with actual malice in that they recklessly disregarded information in their possession—including the Project Veritas video report itself and the fact that Project Veritas' on the record source had himself been a source The Times relied upon for information about the Minneapolis Somali community—demonstrating the falsity of these statements.

200. Defendants published these statements with actual malice in that they purposefully avoided the truth and intentionally failed to seek comment from the most obvious sources of corroboration or refutation before publishing these statements—including Project Veritas, Mr. O'Keefe, and Mr. Jamal.

201. Defendants also repeatedly failed to retract or correct these false and defamatory statements despite at least four separate requests that they do so, thereby further demonstrating that they published these statements with actual malice.

202. Defendants also acted with actual malice by publishing a preconceived narrative—working hand in hand with EIP to develop the thesis and preconceived storyline for this article before publication, without reaching out to Project Veritas for comment to include its rebuttal in the article.

203. Defendants also acted with actual malice and common law malice because they were motivated by political bias and ill will towards a journalistic organization that they perceive as mere “conservative activist[s]” and for which they hold vitriolic disdain.

204. Defendants acted with actual malice and common law malice because they acted with bias, ill will, and a retaliatory motive to harm Project Veritas for upstaging The New York Times story about President Trump’s tax returns.

205. Defendants acted with actual malice and common law malice because they sought to harm the reputation of a journalistic competitor that they disdain because its reporting negatively impacted Democrat candidates shortly before a hotly contested election, and because Defendants believe that issues of voter fraud are exaggerated or do not exist.

206. Defendants acted with actual malice by flagrantly violating their own published standards and policies, including by failure to seek comment before publication, including supposed “opinions” in their news pages, and refusing to retract false statements.

207. Defendants published the false and defamatory statements in the September 29 online story with common law malice toward Plaintiff and with the specific intent to cause damage to Project Veritas.

208. As a result of the false and defamatory statements published by Defendants, Project Veritas’ professional reputation has been impugned.

209. As a result of the false and defamatory statements published by Defendants and Defendants' repeated refusals to correct or retract those statements, Plaintiff has been forced to make an expenditure of no less than \$25,000 in an effort to remedy the defamation.

210. As a result of the false and defamatory statements published by Defendants, Plaintiff has been exposed to public hatred, ridicule, and contempt.

211. As a result of the false and defamatory statements published by Defendants, Plaintiff has suffered economic damage—including the investment of significant funds to research and produce the investigative report Defendants sought to discredit—and will suffer further economic damage.

212. In view of the foregoing, Plaintiff is entitled to actual, presumed, punitive, and other damages in an amount to be specifically determined at trial.

**AS AND FOR A SECOND CAUSE OF ACTION – DEFAMATION
FOR PUBLICATION OF THE SECOND STORY ON THE NEW YORK TIMES
WEBSITE ON SEPTEMBER 29, 2020**

(Against Defendants Maggie Astor, The New York Times, and John Does 1-5)

213. Plaintiff repeats and re-alleges each of the foregoing paragraphs as if set forth fully herein.

214. Defendants The New York Times, Maggie Astor, and Ms. Astor's editors authored and published false and defamatory statements about Project Veritas in the September 29, 2020 story published by The New York Times on its website with the headline, "Researchers say a Project Veritas video accusing Ilhan Omar of voter fraud was a 'coordinated disinformation campaign.'"

215. The story was posted at the URL <https://www.nytimes.com/2020/09/29/us/researchers-say-a-project-veritas-video-accusing-ilhan-omar-of-voter-fraud-was-a-coordinated-disinformation-campaign.html>, and it remains online at

that location. A true and correct copy of the online version of the story is attached hereto as Exhibit

E.

216. This second September 29 story, which was published to a worldwide audience on The Times' website, included the following false and defamatory statements:

The timing of the deceptive video, which accuses Ilhan Omar of voter fraud, indicates that several conservatives, including Donald Trump Jr., may have known about it in advance.

A deceptive video released on Sunday by the conservative activist James O'Keefe, which claimed through unidentified sources and with no verifiable evidence that Representative Ilhan Omar's campaign had collected ballots illegally, was probably part of a coordinated disinformation effort, according to researchers at Stanford University and the University of Washington.

217. These statements were meant to, and in fact did, create the false and misleading impression that Project Veritas published a deceptive video news report that relied solely on "unidentified sources," that contained no "evidence" of illegal ballot harvesting, and that was manipulated and selectively edited to misrepresent the facts to the millions of people that viewed Project Veritas' groundbreaking investigative report.

218. These statements were reasonably understood by those reading them to be statements of fact regarding Project Veritas.

219. As set forth herein, these statements are false.

220. These statements are of and concerning Project Veritas. Indeed, Project Veritas founder, CEO, and Board Chairman Mr. O'Keefe is mentioned by name as the publisher of the supposedly "deceptive" report, and the very next sentence of the story states that the video report was published by "Mr. O'Keefe and his group, Project Veritas..."

221. The reading public would have understood, and did understand, these statements to be of and concerning Project Veritas.

222. Defendants had no applicable privilege or legal authorization to publish these false and defamatory statements or, if they did, they abused that privilege.

223. These statements are libelous because they tend to expose Plaintiff to public contempt, ridicule, aversion or disgrace, and to induce an evil opinion of Plaintiff in the minds of right-thinking persons, and to deprive Plaintiff of friendly intercourse in society.

224. These statements defamed Project Veritas by falsely accusing a journalistic organization of relying solely on “unidentified sources”, offering no “evidence” in support of an investigative report, and manipulating and selectively editing an investigative news report in order to deceive and mislead viewers—a cardinal sin that is the most egregious and fundamental violation of journalistic ethics and standards, as well as of Project Veritas’ own stated mission and ethical tenets.

225. These statements are libelous *per se* because they impugn the basic integrity, ethics, and competence of Project Veritas as journalistic organization.

226. These statements are libelous *per se* because they would tend to harm, and indeed have harmed, Project Veritas in its trade, business, and profession, and would tend to assail, and indeed have assailed, Project Veritas’ integrity and journalistic ethics.

227. These statements are libelous *per se* because they impute unfitness in the performance of one’s profession or trade to Project Veritas.

228. Defendants published these statements with actual malice in that they had knowledge that the statements were false, or they published the statements with reckless disregard for their truth or falsity.

229. Defendants published these statements with actual malice in that they recklessly disregarded information in their possession—including the Project Veritas video report itself and

the fact that Project Veritas' on the record source had himself been a source The Times relied upon for information about the Minneapolis Somali community—demonstrating the falsity of these statements.

230. Defendants published these statements with actual malice in that they purposefully avoided the truth and intentionally failed to seek comment from the most obvious sources of corroboration or refutation before publishing these statements—including Project Veritas, Mr. O'Keefe, and Mr. Jamal.

231. Defendants also repeatedly failed to retract or correct these false and defamatory statements despite at least four separate requests that they do so, thereby further demonstrating that they published these statements with actual malice.

232. Defendants also acted with actual malice by publishing a preconceived narrative—working hand in hand with EIP to develop the thesis and preconceived storyline for this article before publication, without reaching out to Project Veritas for comment to include its rebuttal in the article.

233. Defendants also acted with actual malice and common law malice because they were motivated by political bias and ill will towards a journalistic organization that they perceive as mere “conservative activist[s]” and for which they hold vitriolic disdain.

234. Defendants acted with actual malice and common law malice because they acted with bias, ill will, and a retaliatory motive to harm Project Veritas for upstaging The New York Times story about President Trump's tax returns.

235. Defendants acted with actual malice and common law malice because they sought to harm the reputation of a journalistic competitor that they disdain because its reporting negatively

impacted Democrat candidates shortly before a hotly contested election, and because Defendants believe that issues of voter fraud are exaggerated or do not exist.

236. Defendants acted with actual malice by flagrantly violating their own published standards and policies, including by failure to seek comment before publication, including supposed “opinions” in their news pages, and refusing to retract false statements

237. Defendants published the false and defamatory statements in this September 29 online story with common law malice toward Plaintiff and with the specific intent to cause damage to Project Veritas.

238. As a result of the false and defamatory statements published by Defendants, Project Veritas’ professional reputation has been impugned.

239. As a result of the false and defamatory statements published by Defendants and Defendants’ repeated refusals to correct or retract those statements, Plaintiff has been forced to make an expenditure of no less than \$25,000 in an effort to remedy the defamation.

240. As a result of the false and defamatory statements published by Defendants, Plaintiff has been exposed to public hatred, ridicule, and contempt.

241. As a result of the false and defamatory statements published by Defendants, Plaintiff has suffered economic damage—including the investment of significant funds to research and produce the investigative report Defendants sought to discredit—and will suffer further economic damage.

242. In view of the foregoing, Plaintiff is entitled to actual, presumed, punitive, and other damages in an amount to be specifically determined at trial.

**AS AND FOR A THIRD CAUSE OF ACTION – DEFAMATION
FOR PUBLICATION OF THE STORY IN THE NEW YORK TIMES PRINT EDITION
ON SEPTEMBER 30, 2020**

(Against Defendants Maggie Astor, The New York Times, and John Does 1-5)

243. Plaintiff repeats and re-alleges each of the foregoing paragraphs as if set forth fully herein.

244. Defendants The New York Times, Maggie Astor, and Ms. Astor’s editors authored and published false and defamatory statements about Project Veritas in the story published on page A22 of The New York Times September 30, 2020 print edition with the headline, “Project Veritas Releases Misleading Video, Part of What Experts Call a Coordinated Effort.”

245. A true and correct copy of the story as it appeared in the September 30, 2020 print version of The New York Times is attached hereto as Exhibit F.

246. The September 30 print version of the story, which was published to a nationwide audience of nearly half a million people, included the following false and defamatory statements:

Project Veritas Releases Misleading Video

A deceptive video released on Saturday by the conservative activist James O’Keefe, which claimed through unidentified sources and with no verifiable evidence that Representative Ilhan Omar’s campaign had collected ballots illegally, was probably part of a coordinated disinformation effort, according to researchers at Stanford University.

Making claims without evidence of ballot harvesting.

247. These statements were meant to, and in fact did, create the false and misleading impression that Project Veritas published a misleading and deceptive video news report that relied solely on “unidentified sources,” that contained no “evidence” of illegal ballot harvesting, and that was manipulated and selectively edited to misrepresent the facts to the millions of people that viewed Project Veritas’ groundbreaking investigative report.

248. These statements were reasonably understood by those reading them to be statements of fact regarding Project Veritas.

249. As set forth herein, these statements are false.

250. These statements are of and concerning Project Veritas. Indeed, Project Veritas founder, CEO, and Board Chairman Mr. O’Keefe is mentioned by name as the publisher of the supposedly “deceptive” video report, and the very next sentence of the story states that the video report was published by “Mr. O’Keefe and his group, Project Veritas...”

251. The reading public would have understood, and did understand, these statements to be of and concerning Project Veritas.

252. Defendants had no applicable privilege or legal authorization to publish these false and defamatory statements or, if they did, they abused that privilege.

253. These statements are libelous because they tend to expose Plaintiff to public contempt, ridicule, aversion or disgrace, and to induce an evil opinion of Plaintiff in the minds of right-thinking persons, and to deprive Plaintiff of friendly intercourse in society.

254. These statements defamed Project Veritas by falsely accusing a journalistic organization of relying solely on “unidentified sources”, offering no “evidence” in support of an investigative report, and manipulating and selectively editing an investigative news report in order to deceive and mislead viewers—a cardinal sin that is the most egregious and fundamental violation of journalistic ethics and standards, as well as of Project Veritas’ own stated mission and ethical tenets.

255. These statements are libelous *per se* because they impugn the basic integrity, ethics, and competence of Project Veritas as a journalistic organization.

256. These statements are libelous *per se* because they would tend to harm, and indeed have harmed, Project Veritas in its trade, business, and profession, and would tend to assail, and indeed have assailed, Project Veritas' integrity and journalistic ethics.

257. These statements are libelous *per se* because they impute unfitness in the performance of one's profession or trade to Project Veritas.

258. Defendants published these statements with actual malice in that they had knowledge that the statements were false, or they published the statements with reckless disregard for their truth or falsity.

259. Defendants published these statements with actual malice in that they recklessly disregarded information in their possession—including the Project Veritas video report itself and the fact that Project Veritas' on the record source had himself been a source The Times relied upon for information about the Minneapolis Somali community—demonstrating the falsity of these statements.

260. Defendants published these statements with actual malice in that they purposefully avoided the truth and intentionally failed to seek comment from the most obvious sources of corroboration or refutation before publishing these statements—including Project Veritas, Mr. O'Keefe, and Mr. Jamal.

261. Defendants also repeatedly failed to retract or correct these false and defamatory statements despite at least four separate requests that they do so, thereby further demonstrating that they published these statements with actual malice.

262. Defendants also acted with actual malice by publishing a preconceived narrative—working hand in hand with EIP to develop the thesis and preconceived storyline for this article

before publication, without reaching out to Project Veritas for comment to include its rebuttal in the article.

263. Defendants also acted with actual malice and common law malice because they were motivated by political bias and ill will towards a journalistic organization that they perceive as mere “conservative activist[s]” and for which they hold vitriolic disdain.

264. Defendants acted with actual malice and common law malice because they acted with bias, ill will, and a retaliatory motive to harm Project Veritas for upstaging The New York Times story about President Trump’s tax returns.

265. Defendants acted with actual malice and common law malice because they sought to harm the reputation of a journalistic competitor that they disdain because its reporting negatively impacted Democrat candidates shortly before a hotly contested election, and because Defendants believe that issues of voter fraud are exaggerated or do not exist.

266. Defendants acted with actual malice by flagrantly violating their own published standards and policies, including by failure to seek comment before publication, including supposed “opinions” in their news pages, and refusing to retract false statements.

267. Defendants published the false and defamatory statements in the September 30 print story with common law malice toward Plaintiff and with the specific intent to cause damage to Project Veritas.

268. As a result of the false and defamatory statements published by Defendants, Project Veritas’ professional reputation has been impugned.

269. As a result of the false and defamatory statements published by Defendants and Defendants’ repeated refusals to correct or retract those statements, Plaintiff has been forced to make an expenditure of no less than \$25,000 in an effort to remedy the defamation.

270. As a result of the false and defamatory statements published by Defendants, Plaintiff has been exposed to public hatred, ridicule, and contempt.

271. As a result of the false and defamatory statements published by Defendants, Plaintiff has suffered economic damage—including the investment of significant funds to research and produce the investigative report Defendants sought to discredit—and will suffer further economic damage.

272. In view of the foregoing, Plaintiff is entitled to actual, presumed, punitive, and other damages in an amount to be specifically determined at trial.

**AS AND FOR A FOURTH CAUSE OF ACTION – DEFAMATION
FOR PUBLICATION OF MS. HSU’S STORY ON THE NEW YORK TIMES WEBSITE
ON OCTOBER 25, 2020
(Against All Defendants)**

273. Plaintiff repeats and re-alleges each of the foregoing paragraphs as if set forth fully herein.

274. Defendants The New York Times, Tiffany Hsu, and Ms. Hsu’s editors published false and defamatory statements about Project Veritas in the October 25, 2020 story published by The New York Times on its website with the headline, “Conservative News Sites Fuel Voter Fraud Misinformation.”

275. The story was posted at the URL <https://www.nytimes.com/2020/10/25/business/media/voter-fraud-misinformation.html>, and it remains online at that location. A true and correct copy of the online version of the story is attached hereto as Exhibit G.

276. The October 25 story, which was published to a worldwide audience on The Times’ website, included the following false and defamatory statements:

In a similar cycle, the Fox News host Sean Hannity and conservative publications magnified the reach of a deceptive video released last month by Project Veritas, a group run by the conservative activist James O’Keefe. The video claimed without named sources or verifiable evidence that the campaign for Representative Ilhan Omar, a Minnesota Democrat, was collecting ballots illegally.

277. These statements were meant to, and in fact did, create the false and misleading impression that Project Veritas published a deceptive video news report that lacked any “named sources,” contained no “evidence” of illegal ballot harvesting, and that was manipulated and selectively edited to misrepresent the facts to the millions of people that viewed Project Veritas’ groundbreaking investigative report.

278. These statements were reasonably understood by those reading them to be statements of fact regarding Project Veritas.

279. As set forth herein, these statements are false.

280. These statements are of and concerning Project Veritas. Indeed, Project Veritas is mentioned by name as the publisher of the supposedly “deceptive” report.

281. The reading public would have understood, and did understand, these statements to be of and concerning Project Veritas.

282. Defendants had no applicable privilege or legal authorization to publish these false and defamatory statements or, if they did, they abused that privilege.

283. These statements are libelous because they tend to expose Plaintiff to public contempt, ridicule, aversion or disgrace, and to induce an evil opinion of Plaintiff in the minds of right-thinking persons, and to deprive Plaintiff of friendly intercourse in society.

284. These statements defamed Project Veritas by falsely accusing a journalistic organization of relying solely on no “named sources”, offering no “evidence” in support of an investigative report, and manipulating and selectively editing an investigative news report in order

to deceive and mislead viewers—a cardinal sin that is the most egregious and fundamental violation of journalistic ethics and standards, as well as of Project Veritas’ own stated mission and ethical tenets.

285. These statements are libelous *per se* because they impugn the basic integrity, ethics, and competence of Project Veritas as a journalistic organization.

286. These statements are libelous *per se* because they would tend to harm, and indeed have harmed, Project Veritas in its trade, business, and profession, and would tend to assail, and indeed have assailed, Project Veritas’ integrity and journalistic ethics.

287. These statements are libelous *per se* because they impute unfitness in the performance of one’s profession or trade to Project Veritas.

288. Defendants published these statements with actual malice in that they had knowledge that the statements were false, or they published the statements with reckless disregard for their truth or falsity.

289. Defendants published these statements with actual malice in that they recklessly disregarded information in their possession—including the Project Veritas video report itself and the fact that Project Veritas’ on the record source had himself been a source The Times relied upon for information about the Minneapolis Somali community—demonstrating the falsity of these statements.

290. Defendants published these statements with actual malice in that they purposefully avoided the truth and intentionally failed to seek comment from the most obvious sources of corroboration or refutation before publishing these statements—including Project Veritas, Mr. O’Keefe, and Mr. Jamal.

291. Defendants also repeatedly failed to retract or correct these false and defamatory statements despite at least four separate requests that they do so, thereby further demonstrating that they published these statements with actual malice.

292. Defendants also acted with actual malice by publishing a preconceived narrative—working hand in hand with EIP to develop the thesis and preconceived storyline for this article before publication, without reaching out to Project Veritas for comment to include its rebuttal in the article.

293. Defendants also acted with actual malice and common law malice because they were motivated by political bias and ill will towards a journalistic organization that they perceive as mere “conservative activist[s]” and for which they hold vitriolic disdain.

294. Defendants acted with actual malice and common law malice because they acted with bias, ill will, and a retaliatory motive to harm Project Veritas for upstaging The New York Times story about President Trump’s tax returns and for seeking a correction of Ms. Astor’s stories.

295. Defendants acted with actual malice and common law malice because they sought to harm the reputation of a journalistic competitor that they disdain because its reporting negatively impacted Democrat candidates shortly before a hotly contested election, and because Defendants believe that issues of voter fraud are exaggerated or do not exist.

296. Defendants acted with actual malice by flagrantly violating their own published standards and policies, including by failure to seek comment before publication, including supposed “opinions” in their news pages, and refusing to retract false statements.

297. Defendants published the false and defamatory statements in Ms. Hsu's October 25 story with common law malice toward Plaintiff and with the specific intent to cause damage to Project Veritas.

298. As a result of the false and defamatory statements published by Defendants, Project Veritas' professional reputation has been impugned.

299. As a result of the false and defamatory statements published by Defendants and Defendants' repeated refusals to correct or retract those statements, Plaintiff has been forced to make an expenditure of no less than \$25,000 in an effort to remedy the defamation.

300. As a result of the false and defamatory statements published by Defendants, Plaintiff has been exposed to public hatred, ridicule, and contempt.

301. As a result of the false and defamatory statements published by Defendants, Plaintiff has suffered economic damage—including the investment of significant funds to research and produce the investigative report Defendants sought to discredit—and will suffer further economic damage.

302. Ms. Astor and her editors are liable for Ms. Hsu's and The Times' foreseeable and intended republication of the false statements that she made about Plaintiff in her September 29, 2020 and September 30, 2020 stories.

303. In view of the foregoing, Plaintiff is entitled to actual, presumed, punitive, and other damages in an amount to be specifically determined at trial.

**AS AND FOR A FIFTH CAUSE OF ACTION – DEFAMATION
FOR PUBLICATION OF MS. HSU'S STORY IN THE NEW YORK TIMES PRINT
EDITION ON OCTOBER 26, 2020
(Against All Defendants)**

304. Plaintiff repeats and re-alleges each of the foregoing paragraphs as if set forth fully herein.

305. Defendants The New York Times, Tiffany Hsu, and Ms. Hsu's editors published false and defamatory statements about Project Veritas in the story published on page B6 of The New York Times October 26, 2020 print edition with the headline, "False Voter Fraud Stories Are Churning on Conservative News Sites." A true and correct copy of the online version of the story is attached hereto as Exhibit H.

306. The October 26 story, which was published to a nationwide audience of nearly half a million people, included the following false and defamatory statements:

False Voter Fraud Stories Are Churning on Conservative News Sites.

In a similar cycle, the Fox News host Sean Hannity and conservative publications magnified the reach of a deceptive video released last month by Project Veritas, a group run by the conservative activist James O'Keefe. The video claimed without named sources or verifiable evidence that the campaign for Representative Ilhan Omar, a Minnesota Democrat, was collecting ballots illegally.

307. These statements were meant to, and in fact did, create the false and misleading impression that Project Veritas published a deceptive video news report that lacked any "named sources," contained no "evidence" of illegal ballot harvesting, and that was manipulated and selectively edited to misrepresent the facts to the millions of people that viewed Project Veritas' groundbreaking investigative report.

308. These statements were reasonably understood by those reading them to be statements of fact regarding Project Veritas.

309. As set forth herein, these statements are false.

310. These statements are of and concerning Project Veritas. Indeed, Project Veritas is mentioned by name as the publisher of the supposedly "deceptive" report.

311. The reading public would have understood, and did understand, these statements to be of and concerning Project Veritas.

312. Defendants had no applicable privilege or legal authorization to publish these false and defamatory statements or, if they did, they abused that privilege.

313. These statements are libelous because they tend to expose Plaintiff to public contempt, ridicule, aversion or disgrace, and to induce an evil opinion of Plaintiff in the minds of right-thinking persons, and to deprive Plaintiff of friendly intercourse in society.

314. These statements defamed Project Veritas by falsely accusing a journalistic organization of relying solely on no “named sources”, offering no “evidence” in support of an investigative report, and manipulating and selectively editing an investigative news report in order to deceive and mislead viewers—a cardinal sin that is the most egregious and fundamental violation of journalistic ethics and standards, as well as of Project Veritas’ own stated mission and ethical tenets.

315. These statements are libelous *per se* because they impugn the basic integrity, ethics, and competence of Project Veritas as a journalistic organization.

316. These statements are libelous *per se* because they would tend to harm, and indeed have harmed, Project Veritas in its trade, business, and profession, and would tend to assail, and indeed have assailed, Project Veritas’ integrity and journalistic ethics.

317. These statements are libelous *per se* because they impute unfitness in the performance of one’s profession or trade to Project Veritas.

318. Defendants published these statements with actual malice in that they had knowledge that the statements were false, or they published the statements with reckless disregard for their truth or falsity.

319. Defendants published these statements with actual malice in that they recklessly disregarded information in their possession—including the Project Veritas video report itself and

the fact that Project Veritas' on the record source had himself been a source The Times relied upon for information about the Minneapolis Somali community—demonstrating the falsity of these statements.

320. Defendants published these statements with actual malice in that they purposefully avoided the truth and intentionally failed to seek comment from the most obvious sources of corroboration or refutation before publishing these statements—including Project Veritas, Mr. O'Keefe, and Mr. Jamal.

321. Defendants also repeatedly failed to retract or correct these false and defamatory statements despite at least four separate requests that they do so, thereby further demonstrating that they published these statements with actual malice.

322. Defendants also acted with actual malice by publishing a preconceived narrative—working hand in hand with EIP to develop the thesis and preconceived storyline for this article before publication, without reaching out to Project Veritas for comment to include its rebuttal in the article.

323. Defendants also acted with actual malice and common law malice because they were motivated by political bias and ill will towards a journalistic organization that they perceive as mere “conservative activist[s]” and for which they hold vitriolic disdain.

324. Defendants acted with actual malice and common law malice because they acted with bias, ill will, and a retaliatory motive to harm Project Veritas for upstaging The New York Times story about President Trump's tax returns and for seeking a correction of Ms. Astor's stories.

325. Defendants acted with actual malice and common law malice because they sought to harm the reputation of a journalistic competitor that they disdain because its reporting negatively

impacted Democrat candidates shortly before a hotly contested election, and because Defendants believe that issues of voter fraud are exaggerated or do not exist.

326. Defendants acted with actual malice by flagrantly violating their own published standards and policies, including by failure to seek comment before publication, including supposed “opinions” in their news pages, and refusing to retract false statements.

327. Defendants published the false and defamatory statements in Ms. Hsu’s October 26 story with common law malice toward Plaintiff and with the specific intent to cause damage to Project Veritas.

328. As a result of the false and defamatory statements published by Defendants, Project Veritas’ professional reputation has been impugned.

329. As a result of the false and defamatory statements published by Defendants and Defendants’ repeated refusals to correct or retract those statements, Plaintiff has been forced to make an expenditure of no less than \$25,000 in an effort to remedy the defamation.

330. As a result of the false and defamatory statements published by Defendants, Plaintiff has been exposed to public hatred, ridicule, and contempt.

331. As a result of the false and defamatory statements published by Defendants, Plaintiff has suffered economic damage—including the investment of significant funds to research and produce the investigative report Defendants sought to discredit—and will suffer further economic damage.

332. Ms. Astor and her editors are liable for Ms. Hsu’s and The Times’ foreseeable and intended republication of the false statements that she made about Plaintiff in her September 29, 2020 and September 30, 2020 stories.

333. In view of the foregoing, Plaintiff is entitled to actual, presumed, punitive, and other damages in an amount to be specifically determined at trial.

**AS AND FOR A SIXTH CAUSE OF ACTION – RESPONDEAT SUPERIOR
(Against Defendant The New York Times)**

334. Plaintiff repeats and re-alleges each of the foregoing paragraphs as if set forth fully herein.

335. The acts of Defendants Maggie Astor and John Does 1-5 in authoring, editing, and publishing the September 29, 2020 online story, “‘Project Veritas Video Was a ‘Coordinated Disinformation Campaign,’ Researchers Say,” were undertaken within the scope of their employment as a political news reporter and editors, respectively, for The New York Times. The tortious acts of Ms. Astor and John Does 1-5 were generally foreseeable and a natural consequence of their employment.

336. The acts of Defendants Maggie Astor and John Does 1-5 in authoring, editing, and publishing the September 29, 2020 online story, “‘Researchers say a Project Veritas video accusing Ilhan Omar of voter fraud was a ‘coordinated disinformation campaign,’” were undertaken within the scope of their employment as a political news reporter and editors, respectively, for The New York Times. The tortious acts of Ms. Astor and John Does 1-5 were generally foreseeable and a natural consequence of their employment.

337. The acts of Defendants Maggie Astor and John Does 1-5 in authoring, editing, and publishing the September 30, 2020 print story, “Project Veritas Releases Misleading Video, Part of What Experts Call a Coordinated Effort,” were undertaken within the scope of their employment as a political news reporter and editors, respectively, for The New York Times. The tortious acts of Ms. Astor and John Does 1-5 were generally foreseeable and a natural consequence of their employment.

338. The acts of Defendants Tiffany Hsu and John Does 1-5 in authoring, editing, and publishing the October 25, 2020 online story, “Conservative News Sites Fuel Voter Fraud Misinformation,” were undertaken within the scope of their employment as a media news reporter and editors, respectively, for The New York Times. The tortious acts of Ms. Hsu and John Does 1-5 were generally foreseeable and a natural consequence of their employment.

339. The acts of Defendants Tiffany Hsu and John Does 1-5 in authoring, editing, and publishing the October 26, 2020 print story, “False Voter Fraud Stories Are Churning on Conservative News Sites,” were undertaken within the scope of their employment as a media news reporter and editors, respectively, for The New York Times. The tortious acts of Ms. Hsu and John Does 1-5 were generally foreseeable and a natural consequence of their employment.

340. As a result of the tortious conduct of Defendants Maggie Astor, Tiffany Hsu, and John Does 1-5 committed within the scope of their employment by The New York Times and in furtherance of the business of The New York Times, Plaintiff was damaged.

341. Defendant The New York Times is liable for the torts of its employees committed within the scope of their employment and in furtherance of the business of The New York Times.

DEFENDANTS’ CONDUCT WARRANTS PUNITIVE DAMAGES

342. Defendants’ conduct warrants the imposition of punitive damages. The factors justifying punitive damages include, at a minimum, the following:

- a. Defendants knowingly made false and defamatory statements about Plaintiff;
- b. Defendants knew that these false and defamatory statements about Plaintiff would damage Plaintiff’s business, goodwill, reputation, and professional standing;
- c. Defendants acted with a high degree of moral turpitude and wanton dishonesty in publishing these statements about Plaintiff;

- d. Defendants intentionally ignored, purposefully avoided, and recklessly disregarded information available to them that rebutted the false statements they published about Plaintiff;
- e. Defendants acted with knowledge that their statements were false, or with reckless disregard for the statements' truth or falsity;
- f. Defendants flagrantly violated their own policies and standards in an effort to cause harm to Plaintiff;
- g. Defendants published false statements about Plaintiff based on a preconceived storyline that Project Veritas is not a legitimate journalistic organization and that voter fraud does not exist or is greatly exaggerated, and Defendants purposefully avoided and recklessly disregarded facts that contradicted that preconceived storyline;
- h. Defendants published the defamatory statements about Plaintiff in an effort to retaliate against Plaintiff for drawing attention away from The New York Times story about the President's tax returns;
- i. Defendants published the defamatory statements about Plaintiff out of bias and ill will because Defendants disagree with what they perceive to be Plaintiff's political leanings; and
- j. Despite learning, even prior to publication of the online and print versions of the stories that the statements about Plaintiff were and are false and defamatory, Defendants have refused to retract or correct these false statements and have instead continued to make them available to a worldwide audience online on The New York Times' website.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment in Plaintiff's favor, and against Defendants The New York Times Company, Maggie Astor, Tiffany Hsu, and John Does 1-5 as follows:

- (1) Actual, presumed, and punitive damages in excess of \$25,000, in an amount to be specifically determined at trial;
- (2) A limited, narrowly tailored injunction prohibiting the republication by Defendants of any statement adjudicated to be defamatory;
- (3) All costs, disbursements, fees, and interest as authorized by New York Law and Rules; and
- (4) Such other and additional remedies as the Court may deem just and proper.

Dated: October 30, 2020

Respectfully Submitted,

/s/ Amy L. Bellantoni

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Attorneys for Plaintiff Project Veritas

FILED: WESTCHESTER COUNTY CLERK 11/02/2020 04:37 PM

INDEX NO. 63921/2020

NYSCEF DOC. NO. 2

RECEIVED NYSCEF: 11/02/2020

Exhibit A



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L L P

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October 9, 2020

Via Email

David McCraw
Senior Vice President & Deputy General Counsel,
The New York Times Company,
620 8th Ave,
New York, NY 10018
Email: mccrad@nytimes.com

Re: *False Allegations regarding Project Veritas*

Dear David:

I write on behalf of my client, Project Veritas.

On September 29, 2020, The New York Times published two articles online, and on September 30, 2020 a third article in its print edition, that falsely accused Project Veritas of releasing a “deceptive video” as part of a “coordinated disinformation campaign” in coordination with the Trump Presidential reelection campaign. The articles also strongly suggest that it did so to take attention away from The Times’ own article regarding President Trump’s tax returns.¹ These articles contain numerous false and defamatory claims, and there are clear indicia that The Times acted with actual malice in publishing them. To avoid litigation that would be costly and not in the interests of either of our clients, I am asking (again) that The Times retract them.

As an initial matter, the articles are false and defamatory because they accuse Project Veritas and its founder, James O’Keefe, of creating a “deceptive video.” Remarkably, The Times is defending that statement as its “opinion.” See Letter D. Green to J. Ede (“But whether a video is

¹ Maggie Astor, *Project Veritas Video Was a ‘Coordinated Disinformation Campaign,’ Researchers Say*, THE NEW YORK TIMES (Sept. 29, 2020), <https://www.nytimes.com/2020/09/29/us/politics/project-veritas-ilhan-omar.html>; Maggie Astor, *Researchers say Project Veritas accusing Ilhan Omar of voter fraud was a ‘coordinated disinformation campaign’*, THE NEW YORK TIMES (Sept. 29, 2020), <https://www.nytimes.com/2020/09/29/us/researchers-say-a-project-veritas-video-accusing-ilhan-omar-of-voter-fraud-was-a-coordinated-disinformation-campaign.html> (together, “the September 29 Articles”).



‘deceptive’ is plainly opinion and not actionable as a matter of law.”). Nonsense. The Times clearly suggests that Project Veritas altered, ‘doctored,’ or selectively edited the video in order to *deceive* or fraudulently induce the public to believe a narrative that was not true.² More specifically, The Times makes the (false) claim that Project Veritas made a “deceptive video” and then engaged in a widespread and coordinated effort to create the perception that the “deceptive video” was *accurate* when the underlying video was manipulated. Of course, juries are asked every day to determine, as a factual matter, whether a business has engaged in deceptive conduct in marketing a product—it is one of the legal elements of every consumer protection statute on the books, including in The Times’ own home jurisdiction.³ And whether the video was purportedly “deceptive,” because according to The Times it relied on “unidentified sources and with no verifiable evidence that Representative Ilhan Omar’s campaign had collected ballots illegally,” for some other reason, or not “deceptive” at all is a question for the jury.⁴ (We do find it highly ironic that The Times is complaining of the use of “unidentified sources”—which were *on video*—given The Times’ routine usage of anonymous and confidential sources who rarely, if ever, appear on video.) Notably, Ms. Green relies on an *unpublished* California case to support her “opinion” defense, but we are confident that a fulsome review of myriad cases we have cited below will help change The Times’ perspective on this point.

Not only is the question of whether Project Veritas published a “deceptive video” a question of fact capable of a defamatory meaning, it is also defamatory *per se*. Although The Times pejoratively characterized Mr. O’Keefe as a “conservative activist” in the September 29 articles, he is a journalist and Project Veritas is a non-profit journalism enterprise whose very purpose is to conduct undercover investigations.⁵ Their mandate is to “investigate[] and expose[] corruption, dishonesty, self-dealing, waste, fraud, and other misconduct in both public and private institutions.”⁶ Falsely

² *Flowers v. Carville*, 310 F.3d 1118, 1128 (9th Cir. 2002) (holding that plaintiff stated a claim for defamation where defendants alleged that plaintiff published “doctored” or “selectively edited” tapes because such statements “insinuate [plaintiff engaged in] deception”); see also *Manufactured Home Communities, Inc. v. Cty. of San Diego*, 544 F.3d 959, 964 (9th Cir. 2008) (holding that accusations implying that plaintiff deliberately misled the public for its own benefit were defamatory); *Brokers’ Choice of Am., Inc. v. NBC Universal, Inc.*, 757 F.3d 1125, 1136-40 (10th Cir. 2014) (holding that plaintiff stated a claim for defamation where plaintiff alleged that he was the subject of a deceptively edited interview which falsely implied plaintiff used predatory tactics to grow his business); *Sherrod v. Breitbart*, 304 F.R.D. 73, 74-75 (D.D.C. 2014) (holding that plaintiff stated a claim for defamation where she contended that defendant published a deceptively edited video implying that plaintiff discriminates against persons on the basis of race); cf. *Partridge v. State*, 100 N.Y.S.3d 730, 734 (N.Y. App. Div. 2019).

³ N.Y. Gen. Bus. Law §§ 349(h) (creating private right of action for deceptive trade practices); see also *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 262 (2d Cir. 1995) (upholding jury award of damages because defendants engaged in “deceptive acts and practices” under N.Y. Gen. Bus. Law § 349); *Dank v. Sears Holding Management Corp.*, 940 N.Y.S.2d 648, 650 (N.Y. App. Div. 2012) (upholding trial court’s submission of question whether defendant engaged in deceptive trade practices to a jury); cf. *Microsoft Corp. v. Bristol Technology, Inc.*, 250 F.3d 152, 153 (2d Cir. 2001) (whether defendant engaged in deceptive trade practices was a jury issue under Connecticut Unfair Trade Practices Act).

⁴ *Flowers*, 310 F.3d at 1127 (holding that where a statement is susceptible to more than one meaning, “one of which is defamatory, the resolution of the ambiguity is a question of fact for the jury”); *G.L. v. Markowitz*, 955 N.Y.S.2d 643, 645 (N.Y. App. Div. 2012) (“If the contested statements are reasonably susceptible of a defamatory connotation, then it becomes the jury’s function to say whether that was the sense in which the words were likely to be understood by the ordinary and average [listener].”) (internal quotation marks and citations omitted); *Arrigoni v. Velalla*, 110 A.D.2d 601, 604-05, 488 N.Y.S.2d 184 (N.Y. App. Div. 1985) (same).

⁵ See Project Veritas, Overview, <https://www.projectveritas.com/about/>.

⁶ *Id.*



attributing to Mr. O'Keefe and to Project Veritas a claim that they intentionally manipulated their broadcast video in a deceptive manner attributes to them conduct unfit for their profession and trade, as a journalist and journalism enterprise.⁷ And, as you know, damages are presumed in a defamation *per se* case under New York law.⁸ Some of those damages include, for example, the cost for me to prepare this letter after The Times' refused to issue a retraction when Project Veritas' in-house counsel wrote to it.⁹

As a factual matter, the video itself is in no way "deceptive." The video centers on self-recorded videos from Mr. Liban Mohamed, which Mr. Mohamed publicly shared on social media and only later deleted. In one self-recorded video, Mr. Mohamed explains while driving his car that he has collected enough absentee ballots to fill his entire car, and then he pans the camera to reveal the numerous absentee ballots resting on the dashboard.¹⁰ In another, Mr. Mohamed alleges that he collected 300 ballots "just today" for Mr. Jamal Osman.¹¹ And that barely scratches the surface of videos created and published to social media by Mr. Mohamed, which include shots of Mr. Mohamed collecting ballots as late as 2:00 a.m. and footage of Mr. Mohamed in his car with another person holding what appear to be a large number of ballots.¹² Again: these are *not* videos taken or recorded by Project Veritas; these are videos recorded, and uploaded, by Mr. Mohamed himself to his personal social media account and later deleted. Mr. Mohamed, in a recorded phone call with a Project Veritas journalist, also said that he worked for Jamal Osman.¹³ And Mr. Omar Jamal confirmed that Mr. Mohamed worked for Rep. Omar and Jamal Osman.¹⁴ Mr. Jamal also specifically connected Rep. Omar with the cash-for-ballots scheme when he alleged that her Deputy

⁷ *Spring v. County of Monroe*, 57 N.Y.S.3d 799, 802 (N.Y. App. Div. 2017) (holding that accusations that plaintiff is dishonest with respect to plaintiff's practice of plaintiff's profession); *Gatz v. Otis Ford, Inc.*, 691 N.Y.S.2d 113, 114 (N.Y. App. Div. 1999) (statements implying that plaintiff was dishonest in his profession were defamatory *per se*); *Grimaldi v. Schillaci*, 484 N.Y.S.2d 159 (N.Y. App. Div. 1984) (same); *Dardashtian v. Gitman*, No. 17-Civ-4327, 2017 WL 6398717, at *8 (S.D.N.Y. Nov. 8, 2020) ("A statement constitutes defamation *per se* if there is some reference, direct or indirect, in the words or in the circumstances attending their utterance, which connects the charge of incompetence or dishonesty to the particular profession or trade engaged in by plaintiff."); see N.Y. Jurisprudence 2d: Defamation and Privacy § 31 (noting that charges that a person is dishonest in connection with his or her occupation or with reference to the carrying on of his or her business).

⁸ *Geraci v. Probst*, 938 N.E.2d 917, 923 (N.Y. 2010) ("Damages will likewise be presumed for statements that charge a person with committing a serious crime or that would tend to cause injury to a person's profession or business."); *Lieberman v. Gelstein*, 605 N.E.2d 344, 347 (N.Y. 1992) (same).

⁹ See, e.g., *Den Norske Ameriekalinje Actieselskabet v. Sun Printing & Publishing Ass'n*, 122 N.E. 463 (N.Y. 1919) (holding defamation plaintiff may recover reasonable expenses incurred mitigating damages); see also *Houston v. New York Post Co.*, No. 93-CIV-4408, 1997 WL 10034, at *6 (S.D.N.Y. Jan. 10, 1997) (holding defamation plaintiff is entitled to expenses incurred for mitigating damages, and therefore permitting plaintiff to plead where plaintiff claimed that \$30,000.00 in mitigation expenses for obtaining a retraction from defendant).

¹⁰ See Project Veritas, *Ilhan Omar Connected Cash-For-Ballots Voter Fraud Scheme Corrupts Elections*, <https://www.projectveritas.com/news/ilhan-omar-connected-cash-for-ballots-voter-fraud-scheme-corrupts-elections/>, at 1:05-1:117.

¹¹ *Id.* at 1:21-24.

¹² *Id.* at 1:39-1:57.

¹³ *Id.* at 5:59-6:24.

¹⁴ *Id.* at 2:00; 3:55.



Director in Minneapolis, Ali Isse Gainey who has done fieldwork in the past for her,¹⁵ “is part of people who are using cash to get votes.”¹⁶

Several unnamed sources also corroborated that Rep. Omar and others are involved in illegal ballot-harvesting. In one recorded interview, an unnamed source stated that canvassers working for Rep. Omar came to his apartment complex; told a number of the people living there that they would apply for absentee ballots; and, when those living in the complex received the ballots, the canvassers returned, filled out the ballots for Rep. Omar; and paid those people when they signed the absentee ballots and then mailed the ballots in.¹⁷ Another anonymous source said that Mr. Gainey brought “bags” of money and paid those who voted for Rep. Omar, and she identified Mr. Gainey as a “campaign chair of Ilhan, a staffer in her office.”¹⁸

The fact that Project Veritas utilized unnamed sources certainly is not evidence that the video was “deceptive”—unless of course The Times is prepared to concede that its own reporting that all too frequently relies on anonymous and confidential sources¹⁹ is, by the same token, “deceptive.” Is The New York Times prepared to admit that any facts *only* supported by “unnamed sources” are not credible? For instance, is The Times willing to admit that an article published on October 6, 2020, ‘*We Need to Take Away Children, No Matter How Young, Justice Dept. Officials Said*, which is “based on a review of the 86-page draft report and interviews with three government officials who read it in recent months” but “who *spoke on the condition of anonymity* because they had not been authorized to discuss it publicly,” is not a “deceptive” article?²⁰ Or is the recent report that “a

¹⁵ See, e.g., Federal Election Commission, Schedule B 2018 (reporting that Mr. Gainey received payments from Rep. Omar’s campaign in 2018); Info on Congress.com, *Campaign Finance Report for Rep. Omar*, (Last visited on October 7, 2020), https://ioncongress.com/index.php?page=Finance&member_id=O000173&chamber=house (reporting that Mr. Gainey raised \$83,147.00 from July 9, 2018-July 10, 2020 for Rep. Omar’s campaign, based on reporting to the Federal Election Commission).

¹⁶ See Project Veritas, *Ilhan Omar Connected Cash-For-Ballots Voter Fraud Scheme Corrupts Elections*, <https://www.projectveritas.com/news/ilhan-omar-connected-cash-for-ballots-voter-fraud-scheme-corrupts-elections/>, at 7:28.

¹⁷ *Id.* at 4:29-5:41.

¹⁸ *Id.* at 6:49.

¹⁹ See, e.g., Emily Cochrane, *Trump says he is pulling the plug on stimulus talks.*, The New York Times (Oct. 6, 2020), <https://www.nytimes.com/2020/10/06/world/trump-says-he-is-pulling-the-plug-on-stimulus-talks.html?searchResultPosition=5> (“Ms. Pelosi had told lawmakers on a private caucus call moments before Mr. Trump’s tweets that Democrats were ‘waiting for them to approve our language to crush the virus and how we put money in the pockets of the American people,’ according to a Democratic aide on the call, who disclosed her remarks on condition of anonymity.”); Liam Stack, *Backlash Grows in Orthodox Jewish Areas Over Virus Crackdown by Cuomo*, The New York Times (Oct. 7, 2020), <https://www.nytimes.com/2020/10/07/nyregion/orthodox-jews-nyc-coronavirus.html?searchResultPosition=1> (reporting that a man beaten in Brooklyn, NY “was identified as Berish Getz by a relative, who spoke on the condition of anonymity out of fear for their safety”); Jonathan Martin, *Citing Joe Biden’s ‘Wishes,’ Pro-Biden Group Will Not Air Ad Recounting the Deaths of His First Wife and His Daughter*, The New York Times (Oct. 8, 2015), <https://www.nytimes.com/politics/first-draft/2015/10/08/citing-joe-bidens-wishes-pro-biden-group-will-not-air-ad-recounting-the-deaths-of-his-first-wife-and-his-daughter/?searchResultPosition=60> (relying on an “unnamed source close to Mr. Biden” regarding Mr. Biden’s unwillingness to “politically capitalize on the tragedies they [the Biden family] have endured”).

²⁰ Michael D. Shear, Katie Benner, and Michael S. Schmidt, ‘*We Need to Take Away Children, No Matter How Young, Justice Dept. Officials Said*, The New York Times (October 6, 2020),



volunteer in the British portion of the [covid-19 vaccine] trial had received a diagnosis of transverse myelitis, a rare but serious inflammation of the spinal cord,” also “deceptive” because it was based on “an *unnamed source*”²¹ Should The Times’ readers regard those as facts as not credible? And if The Times stands by those reports, why is The Times treating Project Veritas’ reporting with such hostility simply because it includes statements—*and videos*—from unnamed sources?

Apart from the legal risk The Times has taken by publishing this false claim, we are also confused by Ms. Green’s “opinion” defense when these articles appeared on Times’ Politics news page authored by one of its political reporters:



Did Ms. Astor recently become part of The Times’ editorial team and her Times’ bio has simply not been updated—and The Times erroneously published her “opinion” piece on the news side, rather than editorial side of the paper? Or is The Times conceding that it publishes its political opinions on its news pages when it is covering a purportedly “political activist” whose “conservative” politics it does not like? Wouldn’t that be a violation of The Times’ own standards for “[e]thical [j]ournalism,” which demand “strict neutrality in reporting on politics and government” and which clearly and unambiguously declare that “[j]ournalists have no place on the playing fields of politics”?²² Or is this a made-for-litigation argument by Ms. Green that, based on the caselaw we cite above, holds little weight? Regardless of which of these is correct (hint: it’s the last one!), it is problematic for The Times. And at minimum, the placement of this article by this reporter suggests that The Times’ own news editors believed that the statement was a *verifiable* statement of fact—not an opinion.

Separate from the false and defamatory claim that Project Veritas published a “deceptive video,” The Times also makes the false and defamatory statement that it was part of a coordinated “disinformation campaign” with President Trump’s reelection campaign—in violation of campaign finance laws²³—by pointing to the fact that individuals associated with the campaign like Donald

<https://www.nytimes.com/2020/10/06/us/politics/family-separation-border-immigration-jeff-sessions-rod-rosenstein.html?searchResultPosition=2>.

²¹ Sheryl Gay Stolberg, *Health Official Tries to Reassure Public That Science Will Set Vaccine Approval*, The New York Times (Sept. 9, 2020), <https://www.nytimes.com/2020/09/09/us/politics/coronavirus-vaccine-trump.html?searchResultPosition=5> (emphasis added).

²² The New York Times, *Ethical Journalism, Participation in Public Life*, available at <https://www.nytimes.com/editorial-standards/ethical-journalism.html#protectingThePapersNeutrality> (“No newsroom or editorial employee may do anything that damages The Times’s reputation for strict neutrality in reporting on politics and government. ... Journalists have no place on the playing fields of politics.”).

²³ See 11 C.F.R. §§ 109; 100.52; 300.2.



Trump Jr. and Mike Lindell also retweeted or published the video shortly after it was published. In fact, The Times falsely claimed that Project Veritas changed the release date and time of the video specifically to counterbalance negative press the President's reelection campaign would receive based on The Times' article regarding President Trump's tax returns. That is false. ***The truth is that Project Veritas made an independent decision to move up the release date of this video on Saturday, September 26—well before The Times' story was published on Sunday, September 27.*** Internal Project Veritas emails and documents will prove this unequivocally. And I would be happy to share them with you under appropriate circumstances. Project Veritas and Mr. O'Keefe simply did not know that The Times' was set to publish its story on the same day, and the timing of this video release had simply nothing to do with The Times whatsoever.

The facts The Times points to as purportedly supporting its false and defamatory claims are 1) Mike Lindell tweeted the new release time for the video before Project Veritas did; and 2) Donald Trump Jr. tweeted a version of the video soon *after* Project Veritas' release that apparently may have had different metadata than the version that Project Veritas released on Twitter. But Mr. O'Keefe provided many different individuals—including a variety of main stream media outlets—advance notice and an embargoed copy of the video, several of which occurred *before* The Times published its story on President Trump's taxes, and many more of which occurred virtually simultaneously with The Times' story, which explains why the metadata on Mr. Trump Jr.'s version may very well be different than that on the version Project Veritas posted. But, to be clear, Project Veritas researched, produced, edited, paid for, and selected the time and mode of release of this video (on its own website and on its own social media) entirely of its own volition and independent of any communication with any individual associated with President Trump's reelection campaign. Period. The Times' entirely unsupported accusation that Project Veritas rushed the release of this video in coordination with—and in aid of—President Trump's campaign as a result of The Times' reporting is false, and it is defamatory *per se* because it attributes to Project Veritas illegal and unethical conduct in violation of federal campaign finance laws, which prohibit a campaign from “coordinating” with third parties without paying for and disclosing those expenditures.²⁴

It is no response to claim that The Times' only used the term “coordinated” and “coordination” in its colloquial sense and not in a manner to convey illegal conduct in violation of federal campaign finance laws. As an initial matter, The Times' deliberately selected to include the quote from Stanford and The University of Washington that this “raises questions of coordination,” clearly implying some nefarious and unethical conduct. And as a legal matter, of course, where there

²⁴ *Geraci v. Probst*, 938 N.E.2d 917, 922 (N.Y. 2010) (allegations of illegal activity are defamatory *per se*); *Treppel v. Biovail Corp.*, No. 03-civ-3002, 2005 WL 2086339, at *6, 10 (S.D.N.Y. Aug. 30, 2005) (statements that CEO directed company to engage in “illegal” corporate accounting constituted defamation *per se* because it “tend[s] to disparage [counterclaimant] in his position as [CEO]”); see also *Liberman v. Gelstein*, 605 N.E.2d 344, 348 (N.Y. 1992) (allegations of criminal conduct are defamatory *per se*); *Fehlhaber v. Board of Educ. of Utica City School Dist.*, No. 6:09-CV-1380, 2012 WL 2571302, at *15 (N.D.N.Y. July 3, 2012) (same); see also *Restis v. American Coalition Against Nuclear Iran, Inc.*, 53 F. Supp. 3d 705, 714, 724-25 (S.D.N.Y. 2014) (plaintiff stated defamation claim for defendant accusing plaintiff of engaging in illegal business venture with Iran).



are two plausible interpretations of a statement—one defamatory and the other not—it is a question for the jury to sort out.²⁵

Not only are The Times’ allegations defamatory *per se*, but there is clear and convincing evidence that they were published with actual malice. To begin with, The Times failed to contact Project Veritas regarding *internal* editorial decisions about editing the video or about *when* to release the video is evidence that The Times purposefully avoided the most obvious sources who could corroborate or refute these allegations. Naturally, the best source of information regarding internal decisions about video-editing and the timing of publication is Project Veritas. Such purposeful avoidance of obvious sources is evidence of actual malice.²⁶

Furthermore, The Times’ failure to provide Project Veritas an opportunity to comment on the allegations is a clear violation of basic journalistic standards, which is additional evidence of malice.²⁷ Had The Times’ bothered to reach out, Project Veritas would have informed it of the truth, including by showing it internal company emails demonstrating the timing of its decision to publish this video. And had The Times’ reached out, Project Veritas would have informed The Times that the underlying “study” by “researchers” at Stanford and the University of Washington was fraught with factual errors and its own violations of basic journalistic standards. For instance, none of the authors of the “study” contacted Project Veritas before publication. Additionally, Project Veritas would have explained how the “researchers” of the “study” selectively omitted material information, including the fact that Project Veritas was the first to publish the updated release date and time of the video.

A failure to retract is also evidence of malice.²⁸ Mr. Ede wrote to The Times to ask for a retraction of these articles, providing some of the very information I have here, including that the

²⁵ *Yonaty v. Mincolla*, 945 N.Y.S.2d 774, 775 (N.Y. App. Div. 2012) (“If the contested statements are reasonably susceptible of a defamatory connotation it becomes the jury’s function to say whether that was the sense in which the words were likely to be understood by the ordinary and average person.”); *Corporate Training Unlimited, Inc. v. National Broadcasting Co., Inc.*, 981 F. Supp. 112, 118 (E.D.N.Y. 1997) (“If the statement is subject to defamatory meaning, it is then for the jury to determine whether a plaintiff has been defamed.”); *Church of Scientology Intern. V. Eli Lilly & Co.*, 778 F. Supp. 661, 666 (S.D.N.Y. 1991) (if statements are reasonably susceptible to a defamatory meaning, then it is “for the jury to decide if the defamatory meaning was the one actually understood by readers of the statements.”); *James v. Gannett Co.*, 353 N.E.2d 834, 838 (N.Y. 1976) (same).

²⁶ *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 157 (1967) (a failure to interview key witnesses with direct knowledge of the accuracy of the statements is evidence of malice); *Quigley v. Rosenthal*, 43 F. Supp. 2d 1163, 1180 (D. Colo. 1999) (“Failure to investigate obvious sources of refutation or corroboration of statements, especially when there is no time-pressure on their publication, may indicate not only negligence, but the higher standard of actual malice.”).

²⁷ See *Eramo v. Rolling Stone, LLC*, 209 F. Supp. 3d 862, 871 (W.D. Va. 2016) (departure from journalistic standards is “supportive evidence” of actual malice); *Morsette v. “The Final Call,”* 309 A.D.2d 249, 258-59 (N.Y. App. Div. 2003) (gross departure from standards of responsible journalism supports a finding of liability and punitive damages); see also Sheila Coronel, et al., *Rolling Stone’s Investigation: ‘A Failure That Was Avoidable,’* COLUMBIA JOURNALISM REVIEW (Apr. 5, 2015) (noting that a reporter “should routinely share specific, derogatory details” with a story subject in order to allow a meaningful opportunity to “point out holes or contradictions”), https://www.cjr.org/investigation/rolling_stone_investigation.php.

²⁸ *Biro v. Conde Nast*, 963 F. Supp. 2d 255, 281 (S.D.N.Y. 2013) (failure to retract may tend to support a finding of actual malice); *Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1071 (5th Cir. 1987) (same).



“study” The Times purportedly relied upon, itself, was littered with factual inaccuracies.²⁹ Ms. Green responded with a two-page, cursory letter (relying on unpublished or otherwise non-controlling caselaw) concluding that these articles “present well-founded and non-actionable opinions” and “The Times stands by its reporting.”³⁰

The Times’ decision to ignore key sources of corroboration or refutation, its failure to adhere to its own journalistic standards by failing to call an obvious source of information and by its decision to include purported “opinions” outside of its editorial pages, and its refusal to retract suggest that The Times is continuing to ignore the facts and is insisting on standing by this story reflects its preconceived narrative about Project Veritas—that is, that Project Veritas regularly distorts videos with the purported intent of deceiving the public to adopt Project Veritas’ “conservative activis[m].” A blind adherence to a preconceived narrative is also evidence of malice.³¹ Other media companies have acted more responsibly. As The Times itself acknowledged, other major social media outlets with fact-checking protocols did not find the video misleading. Twitter, YouTube, and Reddit specifically took *no action* whatsoever regarding the video—not even marking the video as “misleading.” Nor did Facebook mark the video as misleading.

We also recognize that The Times has a financial incentive and retaliatory motive to discredit its competitors—especially a competitor whose video The Times is targeting has been viewed by more individuals than the total number of Times subscribers.³² Indeed, the entire gist of these articles suggest that The Times was angry that Project Veritas’ work overshadowed what The Times’ hoped would be an explosive exposé on the President’s tax returns. How long had The Times been working to obtain the President’s tax returns to write this story? How infuriated were those at The Times that James O’Keefe’s work overshadowed this long and hard-fought for story about the President’s taxes? How much money and time had The Times spent on securing the President’s tax returns? Were the September 29 articles part of The Times’ own coordinated effort to punish and retaliate against Mr. O’Keefe and Project Veritas? Litigation undoubtedly would result in discovery into these questions particularly where, as here, they strongly suggest The Times had a financial or retaliatory motive to harm, and harbored ill-will and hostility toward, Project Veritas—all of which are further evidence of malice.³³

²⁹ Letter from Jered T. Ede, Chief Legal Officer, to Maggie Astor & Dean Baquet re Retraction of September 29 Articles (Sept. 30, 2020).

³⁰ Letter from Dana Green to Jered Ede (Oct. 2, 2020).

³¹ See *Eramo*, 209 F. Supp. 3d at 872 (“[E]vidence that a defendant conceived a story line in advance of an investigation and then consciously set out to make the evidence conform to the preconceived story is evidence of actual malice.”) (quoting *Harris v. City of Seattle*, 52 Fed. Appx. 565, 568 (9th Cir. 2005); *Gilmore v. Jones*, 370 F. Supp. 3d 630, 673 (W.D. Va. 2019) (noting that evidence that defendants pursued a preconceived narrative is probative of actual malice); *Butowsky v. Folkenflik*, No. 4:18-CV-442, 2019 WL 2518833, at 44 (E.D. Tex. Apr. 17, 2019) (evidence that a media outlet pursued a “preconceived narrative” is probative of actual malice).

³² Compare Digital Revenue Exceeds Print for 1st Time For New York Times Company, Aug. 5, 2020, available at <https://www.nytimes.com/2020/08/05/business/media/nyt-earnings-q2.html> (“The Times has 6.5 million total subscriptions...”), with 5.9 million views on Twitter, 1.1 million views on YouTube, alone, of Project Veritas’ video, which excludes any views from Project Veritas’ own website.

³³ *Enigma Software Grp. USA, LLC v. Bleeping Computer LLC*, 194 F. Supp. 3d 263, 288 (S.D.N.Y. 2016); *Lieberman*, 605 N.E.2d at 352 (evidence that defendant was motivated to make false statements about plaintiff out of spite, bias, or ill



Taken together, The Times' reckless disregard or purposeful avoidance of the most obvious sources, its failure to adhere to basic journalistic standards, its willingness to rely on dubious sources to advance a preconceived narrative, and its financial incentive and hostility towards Project Veritas, and its refusal to retract this story constitute clear and convincing evidence of actual malice.³⁴

It is no response to argue that The Times is not liable for these false and defamatory statements because these articles merely republished the claims made in a "study" authored by "researchers" at the Stanford Internet Observatory and the University of Washington Center for an Informed Public.³⁵ As an initial matter, The Times clearly adopted the claim that Project Veritas' video was "deceptive" when it described the video with that adjective in the very first sentence of both articles as a matter of fact: "A deceptive video released on Sunday, which claimed through unidentified sources and with no verifiable evidence that Representative Ilhan Omar's campaign had collected ballots illegally, was probably part of a coordinated disinformation effort, according to researchers at Stanford University and the University of Washington." That sentence, read with its plain and ordinary meaning, attributes only that it was part of a "disinformation campaign" to these "researchers": The claim that the video is "deceptive" The Times adopted for itself.³⁶ (That is further evidence by The Times' factual statement later in the article that "[n]one of the material in the video actually proved voter fraud.") Moreover, The Times—not Stanford or the University of Washington—selected to include quotes in these articles from these "researchers" that the timing of the video release was "a great example of what a coordinated disinformation campaign looks like" while simultaneously making the conscious decision to exclude any comment from Project Veritas in the article because, of course, it did not call Project Veritas for comment. In addition, The Times—not Stanford or the University of Washington—elected to include in its own article that Project Veritas' release was coordinated with the Trump reelection campaign in an effort to overshadow The Times' own reporting. Finally, as we have already explained, the "researchers" for this "study" made their own serious factual errors and never called Project Veritas for comment—a fact The Times purposefully avoided and that Project Veritas would have shared had The Times made an effort to call before publication of these articles.

will tends to support a finding of actual malice); *Diorio v. Ossining Union Free Sch. Dist.*, 946 N.Y.S.2d 195, 198 (N.Y. App. Div. 2012) (same); *Spirito v. Peninsula Airport Comm'n*, 350 F. Supp. 3d 471, 481 (E.D. Va. 2018) (evidence of ill-will can bolster an inference of actual malice); *Brown v. Petrolite Corp.*, 965 F.2d 38, 47 (5th Cir. 1992).

³⁴ See *Eramo*, 209 F. Supp. 3d at 872 (denying defendant's motion for summary judgment and finding "[a]lthough failure to adequately investigate, a departure from journalistic standards, or ill will or intent to injure will not singularly provide evidence of actual malice, the court believes that proof of all three is sufficient to create a genuine issue of material fact").

³⁵ See Isabella Garcia-Camargo, Alex Stamos, Elena Cryst, Joe Bak-Coleman, Kate Starbird & Joey Schafer, *Project Veritas #BallotHarvesting Amplification, ELECTION INTEGRITY PARTNERSHIP* (Sept. 29, 2020), <https://www.eipartnership.net/rapid-response/project-veritas-ballot-harvesting>.

³⁶ *Goldman v. Reddington*, 417 F. Supp. 3d 163, 175 (E.D.N.Y. 2019) (concluding that a defendant could be held liable for a Facebook message that she screenshotted because she "appear[ed] to take ownership of it" by posting the screenshot and "adding her own commentary," and because "those who repeat another's defamatory statements are not sheltered from liability" (record citation and quotation marks omitted)); *Enigma Software Grp. USA LLC v. Bleeping Comput. LLC*, 194 F. Supp. 3d 263, 287 (S.D.N.Y. 2016) ("A speaker who repeats another's defamatory statement is not made immune from liability for defamation merely because another person previously made the same demeaning claim"); *Law Firm of Daniel P. Foster, P.C. v. Turner Broadcast. Sys., Inc.*, 844 F.2d 955, 960 (2d Cir. 1988).



I trust you understand my client's seriousness of purpose. I do not think protracted, expensive litigation is in either of our clients' interests. You know me and my firm well—we do not make idle litigation threats that we do not follow through on. Unfortunately, this is one of those situations that I do believe will result in the filing of a complaint if The Times does not issue a retraction. Because of that, until this matter is resolved, we must insist that The Times, the authors, their editors, and any other individuals who participated in the reporting and editing of the September 29 Articles, preserve and retain all documents, data, and electronically stored information relating in any way to this publication. For the avoidance of doubt, this document hold request includes, without limitation, the ongoing obligation to preserve and retain: (i) all communications with sources and/or potential sources, including phone records, social media posts or direct messages (including on those platforms like Signal, which may be set to automatically delete communications); (ii) all communications with all persons who have performed or are performing any work related to the September 29 Articles; (iii) all communications between the authors, editors, fact-checkers, and/or attorneys involved with this September 29 articles; and (iv) all notes regarding the September 29 Articles, as well as all drafts or versions of it. Because we believe that The Times acted out of retaliation for overshadowing, and The Times' story attributes a motive to Project Veritas regarding, The Times' own reporting on the President's tax returns, we must insist that this document preservation notice extend equally to reporting on that story as well. These items should be preserved regardless of the medium, format, or device on which they are hosted, and regardless of whether they appear in documents, drafts, notes, emails, text messages, voicemail messages, social media posts, audio and video recordings, or in any other form. Please confirm receipt of this letter and that you intend to adhere to our request to retain documents as set forth above. We can confirm that we are already preserving documents on our end.

We look forward to your prompt response.

Sincerely,

A handwritten signature in blue ink, appearing to read "Elizabeth Locke", written in a cursive style.

Elizabeth M. Locke, P.C.

FILED: WESTCHESTER COUNTY CLERK 11/02/2020 04:37 PM

INDEX NO. 63921/2020

NYSCEF DOC. NO. 3

RECEIVED NYSCEF: 11/02/2020

Exhibit B



C L A R E L O C K E

L L P

ELIZABETH M. LOCKE, P.C.

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Alexandria, Virginia 22314

(202) 628-7400

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October 16, 2020

Via Email

David McCraw
Senior Vice President & Deputy General Counsel,
The New York Times Company,
620 8th Ave,
New York, NY 10018
Email: mccrad@nytimes.com

Re: *False Allegations regarding Project Veritas*

Dear David:

I write in response to your October 12 letter.

We were very disappointed to hear that The New York Times is continuing to stand behind these false and defamatory articles, characterizing them as “a fairly plain-vanilla account of research.” While we do appreciate the time and effort you claim The Times is taking to consider the issues I previously raised, that characterization strikes us, frankly, as disingenuous. There is not a single sentence within these articles that even attempts to consider Project Veritas’ perspective—much less disclose to The Times’ readers that these “researchers” were engaging in rank “speculation” or that—as we conclusively demonstrate with The Times’ and Election Integrity Project’s websites own metadata—The New York Times and the Election Integrity Project were engaged in their very own “coordinated disinformation campaign.”

As an initial matter, you claim The Times’ description of the video as “deceptive” is appropriate because “the video was billed as proving that Rep. Ilhan Omar had engaged in illegal ‘vote harvesting’” and “[i]t did not in fact offer up such proof.” But this argument sets up a strawman to knock down. Project Veritas never marketed the video as showing Rep. Omar or her campaign engaging in illegal activities. Notably, your letter cites no example of Project Veritas marketing the video in the way you describe. Instead, Project Veritas clearly and plainly described the video as individuals ***connected with*** Rep. Omar engaging in this kind of illegal conduct.



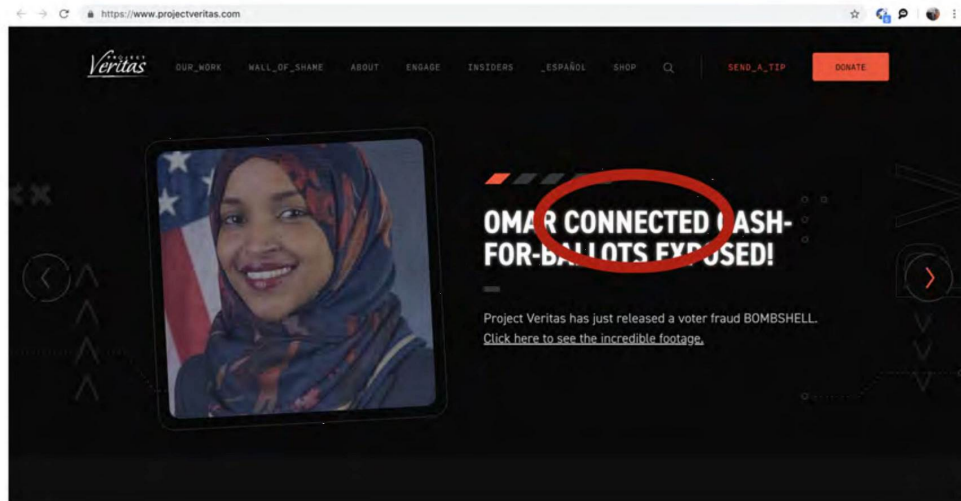
When the video was released, both Project Veritas and James O'Keefe billed the video as revealing that Rep. Ilhan Omar was "connected" to a cash-for-ballots scheme:¹



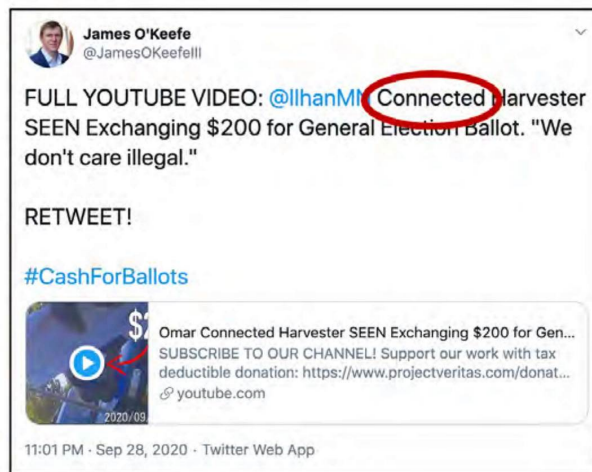
Project Veritas has continued to advertise the "#BallotHarvesting" video simply as an illegal ballot-harvesting scheme "connected" to Rep. Omar:²

¹ Project Veritas (Twitter) @Project_Veritas (Sept. 27, 2020, 9:15 PM), https://twitter.com/Project_Veritas/status/1310387690995617793; James O'Keefe (Twitter) @JamesOKeefeIII (Sept. 27, 2020, 9:00 PM), <https://twitter.com/JamesOKeefeIII/status/1310383750040219649>.

² Project Veritas, "HomePage," <https://www.projectveritas.com/> (first carousel promoting the #BallotHarvesting video); Project Veritas, *Ilhan Omar Connected to Cash-For-Ballots Voter Fraud Scheme Corrupts Elections: 'These Here Are All Absentee Ballots... Look... My Car is Full...'*, (Sept. 27, 2020, last visited on Oct. 15, 2020), <https://www.projectveritas.com/news/ilhan-omar-connected-cash-for-ballots-voter-fraud-scheme-corrupts-elections/>.



Project Veritas promoted the second video on “#BallotHarvesting” using the “connected” language as well:³



³ See, e.g., Project Veritas (Twitter) @Project_Veritas (Sept. 28, 2020 10:33 PM), https://twitter.com/Project_Veritas/status/1310769622568898560; James O'Keefe (Twitter) @JamesOKeefeIII (Sept. 28, 11:01 PM), <https://twitter.com/JamesOKeefeIII/status/131076658056613889> (“FULL YOUTUBE VIDEO:@IlhanMN Connected to Harvester SEEN exchanging \$200 for General Election Ballot. “We don’t care illegal” RETWEET! #CashForBallots”).



And the video *did* provide substantial evidence of that claim, including by showing video of illegal ballot harvesting by Mr. Osman, who three separate sources (including Omar Jamal, who is entirely on the record) say has worked directly for Rep. Omar's campaign. And as we previously explained, Mr. Jamal also specifically connected Rep. Omar with the cash-for-ballots scheme when he alleged that her Deputy Director in Minneapolis—Ali Isse Gainey, who has done fieldwork for her in the past⁴—“is part of people who are using cash to get votes.”⁵

Notably, The Times itself clearly considers Mr. Jamal to be a credible and knowledgeable source with respect to issues concerning the Somali-American community in Minneapolis and Ms. Omar in particular. The Times has quoted and featured Mr. Jamal on the record in numerous stories, for example here:⁶



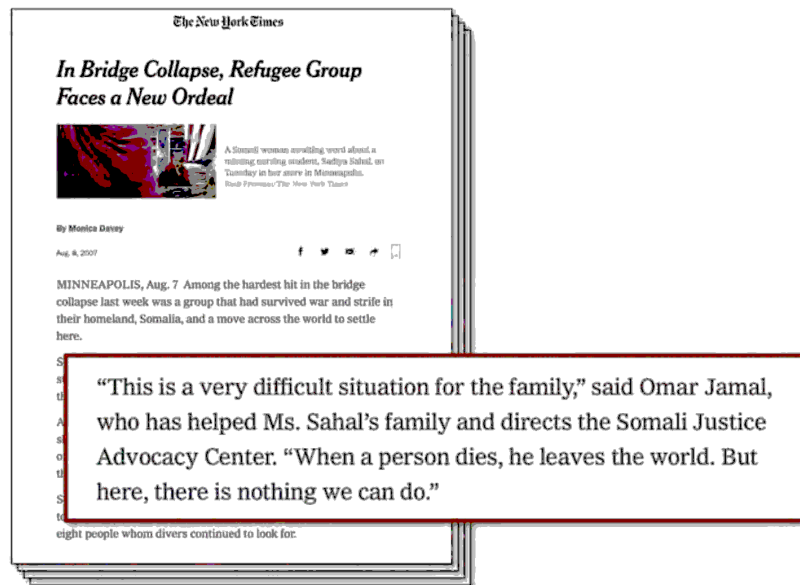
⁴ See, e.g., Federal Election Commission, Schedule B 2018 (reporting that Mr. Gainey received payments from Rep. Omar's campaign in 2018); Info on Congress.com, *Campaign Finance Report for Rep. Omar*, (Last visited on October 7, 2020), https://ioncongress.com/index.php?page=Finance&member_id=O000173&chamber=house (reporting that Mr. Gainey raised \$83,147.00 from July 9, 2018-July 10, 2020 for Rep. Omar's campaign, based on reporting to the Federal Election Commission).

⁵ See Project Veritas, *Ilhan Omar Connected Cash-For-Ballots Voter Fraud Scheme Corrupts Elections*, <https://www.projectveritas.com/news/ilhan-omar-connected-cash-for-ballots-voter-fraud-scheme-corrupts-elections/>, at 7:28.

⁶ See Kimiko de Freytas-Tamura, “In Minneapolis, Somali-Americans Find Unwelcome Echoes of Strife at Home,” The New York Times (June 7, 2020) (quoting Mr. Jamal on the impact of racial unrest and crackdowns on protestors in the Minneapolis Somali-American community), available at <https://www.nytimes.com/2020/06/07/us/minneapolis-somalis-george-floyd.html>.



And here:⁷



Indeed, The Times even published an Op/Ed Mr. Jamal authored in 2013:⁸

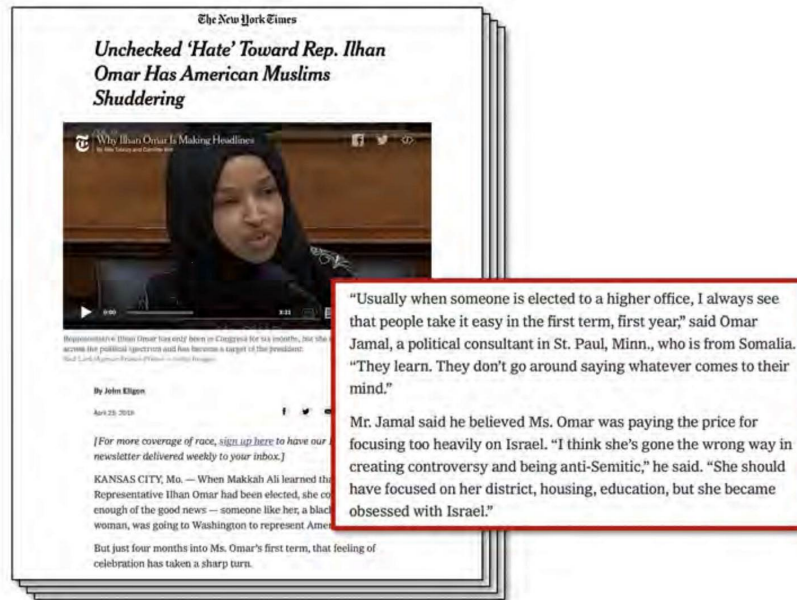


⁷ Monica Davey, "In Bridge Collapse, Refugee Group Faces a New Ordeal," The New York Times (Aug. 8, 2007) (quoting Mr. Jamal on how a deadly bridge collapse impacted the Somali-American community in Minneapolis), available at <https://www.nytimes.com/2007/08/08/us/08bridge.html?searchResultPosition=4>;

⁸ Omar Jamal, "The Question Now is When and Where in the U.S. the Shabab Will Attack," The New York Times Op/Ed (Sept. 30, 2013), available at <https://www.nytimes.com/roomfordebate/2013/09/30/does-al-shabab-pose-a-threat-on-american-soil/the-question-now-is-when-and-where-in-the-us-the-shabab-will-attack>.



In fact, The New York Times itself has quoted Mr. Jamal *specifically on the subject of Congresswoman Omar*.⁹



Of course, an on-the-record witness statement by a person with knowledge of this kind of illegal activity—whom The Times obviously believes is credible enough to repeatedly use as a source in its own reporting—is evidence that those connected with Rep. Omar engaged in illegal ballot harvesting—and it would be fully admissible in a court of law.

We are surprised that The Times is ignoring the clear language that these individuals are “connected” to Rep. Omar—because it is precisely the same kind of language The Times regularly uses when it attempts to implicate a person in power with those engaged in illegal or unethical conduct.¹⁰

⁹ See, e.g., John Eligon, “Unchecked ‘Hate’ Toward Rep. Ilhan Omar Has American Muslims Shuddering,” The New York Times (Apr. 25, 2019), available at <https://www.nytimes.com/2019/04/25/us/ilhan-omar-muslim-reactions.html>.

¹⁰ See, e.g., Mark Mazzetti, G.O.P.-Led Senate Details Ties Between 2016 Trump Campaign and Russia, The New York Times (August 18, 2020), <https://www.nytimes.com/2020/08/18/us/politics/senate-intelligence-russian-interference-report.html?searchResultPosition=43> (“The report suggested that Mr. Manafort was compromised by his financial ties with Russian and Ukrainian oligarchs, who themselves were connected to Mr. Kilimnik, the Russian intelligence operative.”); Katie Glueck, Michael S. Schmidt, Mike Isaac, Allegation on Biden Prompts Pushback from Social Media Companies, The New York Times (October 14, 2020), <https://www.nytimes.com/2020/10/14/us/politics/hunter-biden-ukraine-facebook-twitter.html?searchResultPosition=1> (noting that “Rudy Giuliani’s alliance with figures connected to Russian intelligence has been widely reported”); Russ Buttnier, Susanne Craig, and Mike McIntire, Long-



Nor does *Buckley v. Littell* help The Times' position. *Littell's* text and analysis is so fact-specific, it simply does not apply here. First, *Littell's* pronouncement that the term "deceiver" was not actionable was entirely intertwined with its analysis of the question of whether Mr. Buckley was "acting as a deceiver in the purveying of fascist material," and the Second Circuit had already determined earlier in the case that there was significant "ambiguity and looseness of the term[]" "fascist," *id.* at 891, and that in that particular context, "the statement from the disputed passage that a fellow traveler 'functions as a deceiver' is subject to the interpretation that the deception might be innocent and unintentional" because under the circumstances, "one can 'function as a deceiver' without doing so intentionally," *id.* at 892. Second, calling someone a "deceiver" is much more akin to name-calling than making specific, factual claims that a journalist published a deceptive video because that video did not live up to the journalist's marketing efforts. And The Times' only two bases for claiming the video is deceptive have been fully debunked—namely that Project Veritas 1) relied only on unidentified sources (but see Omar Jamal's on-the-record video statements); and 2) failed to prove Rep. Omar engaged in voter fraud (but see screen captures and paragraph above debunking this strawman argument).

Regarding your claim that "it is not really a fair reading of the piece" to say the story implied illegal coordination with the Trump campaign, your own letter demonstrates why that is precisely the way an objective reader would understand The Times' article. By selecting the quote from Stanford and the University of Washington that the research "raises questions of coordination" with the Trump campaign (your emphasis), The Times' articles use precisely the same legal term of art "coordination" that is prohibited in the context of "campaigns" under federal law—and suggest the campaign and Project Veritas need to answer those "questions" to explain why this "coordination" is not nefarious. The Times' may disagree with this reading, but ultimately it will be a question for a trier of fact.

The Times' defense of its article also claims that Stanford and the University of Washington were merely engaged in "speculation" and The Times properly "presented [it] as speculation." Except nowhere in The Times' article do the words "speculation," "conjecture," "surmise," "without proof," or "without evidence" ever appear (except, of course, when The Times' uses those last two when speaking about Project Veritas). If the researchers' claims were so clearly "speculation," why didn't The Times label them as such? And more importantly, if The Times knew that Stanford and the University of Washington were engaging in such "speculation" as to clearly provable facts, why didn't The Times' call Project Veritas to see if that "speculation" was accurate? Here, "the press [did not

Concealed Records Show Trump's Chronic Losses and Years of Tax Avoidance, The New York Times (September 29, 2020), <https://www.nytimes.com/interactive/2020/09/27/us/donald-trump-taxes.html?searchResultPosition=15> (alleging that then-Presidential Candidate Donald Trump met with a lawyer "connected to the Kremlin"); Joshua Robinson, *Mike Piazza Leaves Quickly, and Quietly, After Citi Field Ceremony*, The New York Times (April 13, 2009), <https://www.nytimes.com/2009/04/14/sports/baseball/14piazza.html?searchResultPosition=3> (Mike Piazza was "connected to allegations of steroid use in a recently published book, 'The Rocket That Fell to Earth' by Jeff Pearlman").



use its] latitude to present competing points of view” at all—it purposefully avoided Project Veritas’ point of view altogether. Regardless of what appears to be The Times’ intentional, fundamental lapse of journalistic standards, as you well know, using magic words like “I believe,” or “probably,” before a false statement does not insulate a publisher from liability.¹¹

As to the question of why The Times would publish as fact the groundless speculation of these “researchers” that Project Veritas engaged in a “coordinated disinformation campaign,” and also baselessly label Project Veritas’ reporting as “deceptive,” the answer is hidden in plain sight. Metadata from the websites of the “Election Integrity Project” and The New York Times (attached hereto as Exhibit A) show that this “research” was published only **62 minutes** before The Times published Ms. Astor’s story about it:

EIP Article

14:08 Pacific = 5:08pm Eastern

NY Times Article

22:11 Zulu = 6:11pm Eastern

The image displays two side-by-side screenshots of web page metadata. The left screenshot, titled 'EIP Article', shows metadata for a page from the Election Integrity Project. A red box highlights the timestamp '14:08 Pacific = 5:08pm Eastern'. Below this, another red box highlights the 'datePublished' and 'headline' fields, which are circled in red. The right screenshot, titled 'NY Times Article', shows metadata for a page from The New York Times. A red box highlights the timestamp '22:11 Zulu = 6:11pm Eastern'. Below this, another red box highlights the 'datePublished' and 'article:modified' fields, which are also circled in red.

Obviously, in the span of only one hour, Ms. Astor did not discover, read and digest Stanford and the University of Washington’s 1,200 word post, interview its authors, write her own nearly one-thousand word story about it, call the Trump Campaign and Mike Lindell for comment, submit that story to her editors for review and approval, and see it published on The Times’ website. ***This***

¹¹ See, e.g., *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-19 (1990) (holding that simply couching a defamatory statement—for instance, ‘Jones is a liar’—in terms of opinion—‘in my opinion Jones is a liar’—does not dispel the factual implications contained in the statement); *Garrett v. Tandy Corp.*, 295 F.3d 94, 104 (1st Cir. 2002) (“We conclude, therefore, that a speaker’s use of a prefatory term such as ‘I suspect’ does not automatically inoculate [the speaker] against liability for defamation”); *Enigma Software Grp USA LLC v. Bleeping Comp. LLC*, 194 F. Supp. 3d 263, 286 (S.D.N.Y. 2016) (finding that qualifying statements such as “my personal recommendation” or “in my opinion” . . . do not transform [the speaker’s posts] into nonactionable pure opinion”) (internal citations and quotations omitted); *Davis v. Boehm*, 22 N.E.3d 999, 1007 (N.Y. 2014) (holding that plaintiff stated a defamation notwithstanding language couched in terms of “I believe”).



timeline makes it clear that EIP secretly gave The New York Times a draft copy of their “research” to write a story in advance of publication—precisely so that EIP’s post could be followed up very shortly after with a New York Times stamp of approval that would greatly increase the attention and publicity that EIP’s smearing of Project Veritas would receive. The Times never disclosed this coordination with EIP to its readers.

At bottom, it is clear that The New York Times and Stanford and the University of Washington were engaging in precisely the same nefarious conduct this “research” and these articles accused Project Veritas of. Their coordinated effort furthers both The Times’ and the researchers’ bias-driven desires to undermine journalism that reflected poorly on a prominent Democratic politician, as well as the Times’ vindictiveness about the Project Veritas report upstaging The Times’ story about Donald Trump’s taxes. *In short, and quite ironically, this Times story was itself the product of a “coordinated disinformation campaign”—a collaboration between The Times and left-leaning academics who shared the goal of discrediting Project Veritas and its groundbreaking report, as quickly and thoroughly as possible.* That is textbook actual malice.¹² And The Times’ own failure to disclose this “coordination” to its readers, while simultaneously reporting on Project Veritas’ purported “coordination” is plain and simple hypocrisy. Our only real question at this point—and we are confident discovery would reveal—whose idea this “research” was in the first place. Did it originate with The Times? The Times’ readers deserve to know the answer to this question.

We reiterate our demand to retract these baseless, obviously coordinated, and defamatory articles. In the interest of aiding The Times so that it can reach its “only goal . . . to make sure [its] story is factually accurate for [its] readers,” I am attaching hereto (Exhibit B) a redline of the September 29 online article with minimum changes necessary to provide a much more fair, balanced, and accurate account of EIP’s report, the actual facts surrounding Project Veritas’ decision to move up the release of the video, what the video actually showed, Project Veritas’ response and reaction to these “researchers” “thoroughly misguided” “speculation,” and a meaningful disclosure of The Times’ own involvement in coordinating with EIP to promote this defamation of Project Veritas. As you will see, the article as written simply cannot stand—and the corrections are too extensive to be made such that the original article’s gist remains the same. To be clear, Project Veritas does not think that these corrections go far enough—this redline demonstrates how inaccurate The Times’ article is and how meaningful changes to reflect the facts fully gut the original article. I would welcome the opportunity to speak with you about it, and go through it line by line, if it would be helpful.

¹² See *Eramo v. Rolling Stone, LLC*, 209 F. Supp. 3d 862, 872 (W.D. Va. 2016) (bias, ill will, and intent to injure are evidence of actual malice).



Sincerely,

A handwritten signature in blue ink that reads "Elizabeth Locke".

Elizabeth M. Locke, P.C.

FILED: WESTCHESTER COUNTY CLERK 11/02/2020 04:37 PM

INDEX NO. 63921/2020

NYSCEF DOC. NO. 3

RECEIVED NYSCEF: 11/02/2020

EXHIBIT A

```
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2 <html xmlns:og="http://opengraphprotocol.org/schema/"
  xmlns:fb="http://www.facebook.com/2008/fbml" lang="en-US" >
3   <head>
4     <meta http-equiv="X-UA-Compatible" content="IE=edge,chrome=1">
5     <meta name="viewport" content="width=device-width, initial-scale=1">
6     <!-- This is Squarespace. --><!-- eipartnership -->
7   <base href="">
8   <meta charset="utf-8" />
9   <title>Project Veritas #BallotHarvesting Amplification &mdash; Election Integrity
    Partnership</title>
10  <link rel="shortcut icon" type="image/x-icon" href="https://images.squarespace-
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11  <link rel="canonical" href="https://www.eipartnership.net/rapid-response/project-
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12  <meta property="og:site_name" content="Election Integrity Partnership"/>
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15  <meta property="og:longitude" content="-74.000988"/>
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    right-wing activist group, Project Veritas, released a video alleging illegal ballot
    harvesting in Minnesota. The video made several falsifiable claims that have either been
    debunked by subsequent reporting or are without any factual support. As the video c"/>
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    Integrity Partnership"/>
24  <meta itemprop="url" content="https://www.eipartnership.net/rapid-response/project-
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    wing activist group, Project Veritas, released a video alleging illegal ballot harvesting
    in Minnesota. The video made several falsifiable claims that have either been debunked by
    subsequent reporting or are without any factual support. As the video c"/>
26  <meta itemprop="thumbnailUrl"
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29  <meta itemprop="author" content="Isabella Garcia-Camargo"/>
30  <meta itemprop="datePublished" content="2020-09-29T14:08:54-0700"/>
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32  <meta itemprop="publisher" content="Election Integrity Partnership"/>
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```
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Campaign,' Researchers Say - The New York Times</title>
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veritas/28elections-briefings-veritas-facebookJumbo.jpg"/><meta data-rh="true" name="byl"
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content="https://static01.nyt.com/images/2020/09/28/multimedia/28elections-briefings-
veritas/28elections-briefings-veritas-thumbStandard.jpg"/><meta data-rh="true"
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Misinformation,Video Recordings, Downloads and Streaming,2020 Election,Donald Trump
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INDEX NO. 63921/2020

NYSCEF DOC. NO. 3

RECEIVED NYSCEF: 11/02/2020

EXHIBIT B

Project Veritas Debunks Researchers' Claims Viral Video Was a 'Coordinated Disinformation Campaign'

Researchers speculate the timing of the video, which shows ballot harvesting by individuals Project Veritas' sources claim are connected to Ilhan Omar, indicates that several conservatives, including Donald Trump Jr., may have known about it in advance. But Project Veritas has demonstrated through its own analysis of The New York Times' and the Election Integrity Partnership's websites that the research and this New York Times article were part of a "coordinated disinformation campaign."

UPDATE: This article has been updated to reflect statements from Project Veritas. The Times regrets its decision not to call Project Veritas before publication, and we regret our decision not to disclose to our readers that The Times coordinated with the Election Integrity Partnership to publish this article based on, and to promote, the Election Integrity Partnership's research about Project Veritas before it was publicly available—the same conduct we have claimed in this article Project Veritas has engaged in.

A viral video released on Sunday by guerilla journalist James O'Keefe, which claimed through both on-the-record and confidential sources that individuals connected with Representative Ilhan Omar's campaign had collected ballots illegally, was probably part of a coordinated effort to promote the video among conservative social media influencers, according to researchers at Stanford University and the University of Washington.

According to the researchers, Mr. O'Keefe and his group, Project Veritas, appear to have made an abrupt decision to release the video sooner than planned after The New York Times published a sweeping investigation of President Trump's taxes. But documents reviewed by The New York Times show that Project Veritas made the decision to move up its release early Sunday morning, well before The Times' story about the President's taxes was released on Sunday afternoon.

The researchers also speculated that the timing and metadata of a Twitter post in which Mr. Trump's son shared the video suggested that he might have known about it in advance.

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Project Veritas had hyped the video on social media for several days before publishing it. In posts amplified by other prominent conservative accounts, Mr. O’Keefe teased what he said was evidence of voter fraud, and urged people to sign up at “ballot-harvesting.com” to receive the supposed evidence when it came out. While critics claim none of the material in the video definitively proved voter fraud, the video did feature clear evidence of ballot-harvesting—a practice of collecting multiple ballots in an election, which is illegal under Minnesota law—by Liban Mohamed. Project Veritas also released a Part 2 to its ballot-harvesting exposé on September 29 that appears to show a ballot harvester instructing a voter how to fill out a ballot and then paying the voter \$200 cash, which is a felony under state and federal law. Project Veritas’ on-the-record source, Omar Jamal, an individual whom The Times has featured in its own reporting (including on issues related to Rep. Omar), claimed that Mr. Mohamed has worked for Rep. Omar’s campaign. Two other confidential sources heard on the video confirmed Mr. Jamal’s account.

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Mr. O’Keefe’s promotional posts had said the video would be released on Monday, but Project Veritas released it on Sunday instead, a few hours after the publication of The Times’s investigation. The researchers concluded, without any verifiable evidence, that this timing was unlikely to be a coincidence “given the huge marketing about a 9/28 release date,” they wrote in an analysis that Alex Stamos, who led the research team at the Stanford Internet Observatory, shared with The Times.

“Project Veritas’ decision to advance the release by 12 hours was entirely the result of internal decision making out of a recognition that our viewers were more likely to view the video on a Sunday night than early Monday morning; nothing more,” said Jered T. Ede, Project Veritas’ Chief Legal Officer. The Times reviewed internal emails from Mr. O’Keefe to his staff from the early hours Sunday morning, before The Times released its reporting on President Trump’s taxes, communicating the decision. Project Veritas also says that Stanford Internet Observatory never called for comment, and had it done so, Project Veritas could have debunked their claims sooner.

“It’s a great example of what a coordinated disinformation campaign looks like: pre-seeding the ground and then simultaneously hitting from a bunch of different accounts at once,” Mr. Stamos said.

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“Mr. Stamos and his crew of sophomore and senior undergraduate students make many wild guesses with little evidence,” countered Mr. Ede. “Every social media platform rejected these sophomoric claims of ‘disinformation,’ and we are proud that our efforts to shed light on this illegal conduct has led the Minneapolis police department to initiate a criminal investigation.”

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Ede was particularly critical of The Times’ own effort to coordinate this story with the University researchers, which he called “a disinformation campaign.”

“Metadata from The Times’ and the Election Integrity Partnership’s own websites show that the research was released only one hour before The Times published this article. There is simply no way in a single hour Ms. Astor was able to discover, read and digest this 1,200 word ‘research’ article, interview its authors, write her own nearly one-thousand word story about it, call the Trump Campaign and Mike Lindell for comment, submit that story to her editors for review and approval, and see it published on The Times’ website.”

Regarding the ballot harvesting video, Mr. Ede readily acknowledged that Project Veritas made efforts to promote the video’s release, including sharing an embargoed copy with many in the mainstream media and social media influencers.

Many of the same accounts that had shared promotional tweets also shared the video as soon as it was released, moving it quickly into Twitter’s trending topics alongside The Times’s tax investigation.

Roughly an hour after The Times published its article, Mike Lindell, chief executive of MyPillow and honorary chairman of Mr. Trump’s Minnesota campaign, tweeted a video of himself saying that Project Veritas’s exposé would be released that night at 9 p.m. Eastern time.

“I just met James O’Keefe of Project Veritas, and James showed me footage of systematic voter fraud,” Mr. Lindell said. He did not respond to a request for comment on Tuesday.

Mr. O’Keefe posted the video on Twitter at 9 p.m. on the dot, and the president’s son Donald Trump Jr. tweeted it just seven minutes later. Two minutes after that, the president’s “war room” account retweeted him, and the president himself soon began commenting.

Notably, the video that the younger Mr. Trump posted did not have the “from James O’Keefe” label that appeared when other Twitter users shared the video uploaded by Mr. O’Keefe.

“This detail, along with video metadata demonstrating that the Donald Trump Jr. version of the video was separately uploaded and re-encoded by Twitter, indicates that the Trump campaign possibly had access to the video before the general public and raises questions of coordination,” the Stanford and University of Washington researchers wrote, noting also that Mr. Trump posted the video on Facebook 10 minutes before Mr. O’Keefe posted it there.

Ede says that “Project Veritas has confirmed that it provided many individuals—including journalists in the mainstream media—with a separate copy of the video, which explains the difference in the metadata between the versions we and Donald Trump Jr. posted.”

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Asked for comment, the Trump campaign said that Donald Trump Jr. had received a downloadable link to the video after it was publicly released. It did not comment on Mr. Lindell's post or on the timing of the video's release, and a spokesman for the younger Mr. Trump did not respond to a request for comment.

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The video contains footage of Liban Mohamed showing off dozens of ballots he says he has collected for his brother, recently elected Minneapolis City Council member Jamal Osman, which is a violation of Minnesota's ban on third parties collecting more than three ballots in any given election. "Just today we got 300 for Jamal Osman ... I have 300 ballots in my car right now," Liban Mohamed says in Somali.

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Some have questioned the illegality of the practice, depending on when the video was filmed. In late July, a Ramsey County District Judge issued a preliminary order temporarily enjoining Minnesota's Secretary of State from enforcing Minnesota laws limiting voter assistance to no more than three persons, which the Minnesota Supreme Court reversed on September 4. Preliminarily suspending enforcement of the practice does not render the practice legal, but simply prevents prosecution of the crime while the judge determines whether the law is viable. Regardless, Project Veritas claims Mohamed posted his videos and Project Veritas obtained them before the district court order. One of the videos bears a July 1 timestamp. Mr. Mohamed did not claim he was working for Ms. Omar at the time of the video, although Project Veritas' sources, including Mr. Jamal, who The Times has also used as a source for information regarding the Somali community in Minnesota, claim that he has also worked with her campaign.

Deleted: a Minneapolis City Council candidate — something that, depending on when the video was filmed, may not have been illegal, because a district court judge in July temporarily suspended Minnesota's ban on third parties collecting and returning large numbers of completed ballots.

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The video then claims that Democratic operatives connected to Ms. Omar's campaign paid voters to hand over blank mail-in ballots and filled them out. This would be illegal, and the allegations come from both identifiable and unnamed people in the video.

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On Monday, the Minneapolis Police Department said it was "looking into the validity" of the claims in the video, which a spokesman for Ms. Omar described as "a coordinated right wing effort to delegitimize a free and fair election."

Mr. O'Keefe and Project Veritas have a long history of releasing footage purporting to show illegal conduct by Democrats and liberal groups, and some Republicans as well.

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The researchers reported the video to multiple social media platforms. None of the social media platforms Project Veritas used said they found a basis to support the researchers' conclusion that the video constituted "disinformation." While Facebook added a link to its "voting information center" to one upload of the video, it placed no notice on the original upload. Twitter, YouTube and Reddit took no action. TikTok was the only platform that removed all uploads of the video, although Project Veritas never uploaded its own version of the video on TikTok.

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NYSCEF DOC. NO. 4

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Exhibit C



C L A R E L O C K E

L L P

ELIZABETH M. LOCKE, P.C.

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Alexandria, Virginia 22314

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www.clarelocke.com

October 28, 2020

Via Email

David McCraw
Senior Vice President & Deputy General Counsel,
The New York Times Company,
620 8th Ave,
New York, NY 10018
Email: mccrad@nytimes.com

Re: False and Defamatory New York Times Reporting on Project Veritas

Dear David:

As you know, my firm is preparing a complaint against The New York Times and certain of its employees regarding recent false and defamatory statements published by The Times concerning Project Veritas. Can you please let me know who the primary editors were for each of the following New York Times stories?

- Maggie Astor, "Project Veritas Video Was a 'Coordinated Disinformation Campaign,' Researchers Say," The New York Times (Sept. 29, 2020) (published online);
- Maggie Astor, "Researchers say a Project Veritas video accusing Ilhan Omar of voter fraud was a 'coordinated disinformation campaign,'" The New York Times (Sept. 29, 2020) (published online);
- Maggie Astor, "Project Veritas Releases Misleading Video, Part of What Experts Call a Coordinated Effort," (Sept. 30, 2020) (published in print);
- Tiffany Hsu, "Conservative News Sites Fuel Voter Fraud Misinformation," The New York Times (Oct. 25, 2020) (published online); and
- Tiffany Hsu, "False Voter Fraud Stories Are Churning on Conservative News Sites," The New York Times (Oct. 26, 2020) (published in print).



Separately, the Tiffany Hsu stories referenced above contains the following statement, which is substantially similar to the false claims in Ms. Astor's previous stories:

In a similar cycle, the Fox News host Sean Hannity and conservative publications magnified the reach of a deceptive video released last month by Project Veritas, a group run by the conservative activist James O'Keefe. The video claimed without named sources or verifiable evidence that the campaign for Representative Ilhan Omar, a Minnesota Democrat, was collecting ballots illegally.

Notably, we were a little surprised—given The Times' "opinion" defense—to see The Times grouping in Project Veritas' "deceptive video" among those "[f]alse [v]oter [f]raud [s]tories" in Ms. Hsu's article. Is The New York Times now taking the position that there is such a thing as a "false opinion"? And is Ms. Hsu, like Ms. Astor, also including her "opinion" in the news pages in violation of The Times' own standards for "Ethical Journalism"? We know better—and so does The Times. The Times' October 26 article is just another example of why the claim that Project Veritas released a "deceptive video" is not an "opinion" at all. For the reasons previously stated, Project Veritas requests that The Times immediately retract these statements. We assume that The Times will not issue a retraction, but please let me know as soon as possible if we are mistaken in our assumption.

Please extend The Times' preservation of documents (to the same extent as we have previously outlined) to Ms. Hsu, her editors, and any other individuals who worked on these October 25 and 26 articles.

Finally, as you may be aware, Project Veritas just released another investigative report on voter fraud containing clear evidence and admissions of illegal practices taking place in Bexar County, Texas, by an individual working for a number of state and federal candidates—including a Republican congressional candidate.¹ Thus far, we have not seen any reporting by The Times on this investigation. Please let me know when we can expect to. If we do not, we will assume it is because it undercuts The Times' preconceived narrative that Project Veritas is a "conservative activist" group seeking to spread "deceptive" claims of voter fraud by Democrat candidates.

I look forward to hearing from you.

Best,

A handwritten signature in blue ink, appearing to read "Elizabeth Locke".

Elizabeth M. Locke, P.C.

¹ <https://www.projectveritas.com/news/ballot-chaser-raquel-rodriguez-boasts-judges-legislators-in-my-pocket-im/>.

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NYSCEF DOC. NO. 5

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Exhibit D

Project Veritas Video Was a 'Coordinated Disinformation Campaign,' Researchers Say

The timing of the deceptive video, which accuses Ilhan Omar of voter fraud, indicates that several conservatives, including Donald Trump Jr., may have known about it in advance.



By Maggie Astor

Sept. 29, 2020

A deceptive video released on Sunday by the conservative activist James O’Keefe, which claimed through unidentified sources and with no verifiable evidence that Representative Ilhan Omar’s campaign had collected ballots illegally, was probably part of a coordinated disinformation effort, according to researchers at Stanford University and the University of Washington.

Mr. O’Keefe and his group, Project Veritas, appear to have made an abrupt decision to release the video sooner than planned after The New York Times published a sweeping investigation of President Trump’s taxes, the researchers said. They also noted that the timing and metadata of a Twitter post in which Mr. Trump’s son shared the video suggested that he might have known about it in advance.

Project Veritas had hyped the video on social media for several days before publishing it. In posts amplified by other prominent conservative accounts, Mr. O’Keefe teased what he said was evidence of voter fraud, and urged people to sign up at “ballot-harvesting.com” to receive the supposed evidence when it came out. (None of the material in the video actually proved voter fraud.)

Mr. O’Keefe’s promotional posts had said the video would be released on Monday, but Project Veritas released it on Sunday instead, a few hours after the publication of The Times’s investigation. The researchers concluded that this timing was unlikely to be a coincidence “given the huge marketing about a 9/28 release date,” they wrote in an analysis that Alex Stamos, who led the research team at the Stanford Internet Observatory, shared with The Times.

“It’s a great example of what a coordinated disinformation campaign looks like: pre-seeding the ground and then simultaneously hitting from a bunch of different accounts at once,” Mr. Stamos said.

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Many of the same accounts that had shared promotional tweets also shared the video as soon as it was released, moving it quickly into Twitter’s trending topics alongside The Times’s tax investigation.

Roughly an hour after The Times published its article, Mike Lindell, chief executive of MyPillow and honorary chairman of Mr. Trump’s Minnesota campaign, tweeted a video of himself saying that Project Veritas’s supposed exposé would be released that night at 9 p.m. Eastern time.

“I just met James O’Keefe of Project Veritas, and James showed me footage of systematic voter fraud,” Mr. Lindell said. He did not respond to a request for comment on Tuesday.

Mr. O’Keefe posted the video on Twitter at 9 p.m. on the dot, and the president’s son Donald Trump Jr. tweeted it just seven minutes later. Two minutes after that, the president’s “war room” account retweeted him, and the president himself soon began commenting.

Notably, the video that the younger Mr. Trump posted did not have the “from James O’Keefe” label that appeared when other Twitter users shared the video uploaded by Mr. O’Keefe.

“This detail, along with video metadata demonstrating that the Donald Trump Jr. version of the video was separately uploaded and re-encoded by Twitter, indicates that the Trump campaign possibly had access to the video before the general public and raises questions of coordination,” the Stanford and University of Washington researchers wrote, noting also that Mr. Trump posted the video on Facebook 10 minutes before Mr. O’Keefe posted it there.

Election 2020 >

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- [Biden heads to Iowa as coronavirus ravages the state.](#)
- [As Trump and Biden criss-cross the Midwest, the key could be 'a purple region within a purple state.'](#)
- [Biden and Obama will hold their first joint rallies on Saturday in Detroit and Flint, Mich.](#)

Asked for comment, the Trump campaign said that Donald Trump Jr. had received a downloadable link to the video after it was publicly released. It did not comment on Mr. Lindell's post or on the timing of the video's release, and a spokesman for the younger Mr. Trump did not respond to a request for comment.

The video contains footage of a man, identified as Liban Mohamed, showing off ballots he says he has collected for a Minneapolis City Council candidate — something that, depending on when the video was filmed, may not have been illegal, because a district court judge in July temporarily suspended Minnesota's ban on third parties collecting and returning large numbers of completed ballots. Mr. Mohamed was not working for Ms. Omar.

The video then claims that Democratic operatives connected to Ms. Omar's campaign paid voters to hand over blank mail-in ballots and filled them out. This would be illegal, but the allegations come solely from unnamed people who speak with Project Veritas operatives in the video and whose faces are not shown.

On Monday, the Minneapolis Police Department said it was "looking into the validity" of the claims in the video, which a spokesman for Ms. Omar described as "a coordinated right wing effort to delegitimize a free and fair election."

Mr. O'Keefe and Project Veritas have a long history of releasing manipulated or selectively edited footage purporting to show illegal conduct by Democrats and liberal groups.

The researchers reported the video to multiple social media platforms. Facebook added a link to its "voting information center" to one upload of the video but placed no notice on the original upload. Twitter, YouTube and Reddit took no action. TikTok was the only platform that removed all uploads of the video.

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Exhibit E

The New York Times

<https://nyti.ms/3kTpxKs>

Researchers say a Project Veritas video accusing Ilhan Omar of voter fraud was a 'coordinated disinformation campaign.'

The timing of a deceptive video, which accuses Ilhan Omar of voter fraud, indicates that several conservatives, including Donald Trump Jr., may have known about it in advance.



By Maggie Astor

Sept. 29, 2020

A deceptive video released on Sunday by the conservative activist James O'Keefe, which claimed through unidentified sources and with no verifiable evidence that Representative Ilhan Omar's campaign had collected ballots illegally, was probably part of a coordinated disinformation effort, according to researchers at Stanford University.

Mr. O'Keefe and his group, Project Veritas, appear to have made an abrupt decision to release the video sooner than planned after The New York Times published a sweeping investigation of President Trump's taxes, the researchers said. They also noted that the timing and metadata of a Twitter post in which one of Mr. Trump's sons shared the video suggested that he might have known about it in advance.

Project Veritas had hyped the video on social media for several days before publishing it. In posts amplified by other prominent conservative accounts, Mr. O'Keefe teased what he said was evidence of voter fraud, and urged people to sign up at "ballot-harvesting.com" to receive the supposed evidence when it came out. (None of the material in the video actually proved voter fraud.)

Mr. O'Keefe's promotional posts had said the video would be released on Monday, but Project Veritas released it on Sunday instead, a few hours after the publication of The Times's investigation. The Stanford researchers concluded that this timing was unlikely to be a coincidence.

"It's a great example of what a coordinated disinformation campaign looks like: pre-seeding the ground and then simultaneously hitting from a bunch of different accounts at once," said Alex Stamos, who led the research team at the Stanford Internet Observatory.

Maggie Astor is a political reporter based in New York. Previously, she was a general assignment reporter and a copy editor for The Times and a reporter for The Record in New Jersey. @MaggieAstor

A version of this article appears in print on , Section A, Page 22 of the New York edition with the headline: Project Veritas Releases Misleading Video, Part of What Experts Call a Coordinated Effort

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NYSCEF DOC. NO. 7

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Exhibit F

THE NEW YORK TIMES NATIONAL WEDNESDAY, SEPTEMBER 30, 2020

Election

Defective Ballots Mailed to New York City Voters, Prompting Confusion

From Page A1

The foggy was briefly addressed on Thursday at a Board of Elections meeting, as Mr. Ryan, a Democrat, said the error was limited to "one print run." He said the vendor would bear the cost of sending out new ballots to all potentially affected voters.

"It is essential that confidence be established in this process so that we make certain that all of the voters who potentially have a problem have skilled and fair opportunity to remedy that problem," Mr. Ryan said.

Officials also encouraged voters to email or call a hotline if they received an erroneous ballot, but phone lines already appear to be jammed. Two voters who called on Monday reported being told and "do something" in time.

Merrily Basso, who lives in the Bushwick neighborhood of Brooklyn, received an absentee ballot on Monday with a stranger's name on it. She looked him up and discovered that he lived nearby. Concerned, she called the Brooklyn Board of Elections twice. The first time, they hung up. The second time, the phone just rang.

So she called the New York City Board of Elections. They were roughly 10 calls ahead of her in line. She hung up.

Rich Rotondo, a resident of the Cobble Hill neighborhood of Brooklyn who works as a project manager for the city, said he and his partner got ballots with the wrong information on them.

Curious if their neighbors were having a similar experience, they stopped someone who lives in their building and asked him to open his absentee ballot.

"And he opened it and his was wrong," Mr. Rotondo said.

Stephanie Stal contributed reporting.



Scores of people, mostly in Brooklyn, reported receiving absentee ballots with mismatched names and addresses between the outer and return envelopes. (Personal information has been redacted.)

"Nobody has the right one."

Michael Weiss, a musician who lives in Park Slope, Brooklyn, said he received a ballot with a name that was not his. He said he was not the person listed on the ballot.

"She opened her mail to find another neighbor's ballot in her envelope, which I took and handed over to him around the corner of course he also received some one else's ballot in the mail," Mr. Weiss said.

Phoenix Graphics, a family-owned firm that prints mail on its ability to deliver a high-quality product on time and within budget.

Mr. Weiss was with the city Board of Elections since at least 2012, according to city records, including during the June primary. The company's \$1.6 million postal contract — which the board awarded under an emergency procurement in June — lasts through the end of the year.

So, he said, the company's president and chief executive, did not reply to multiple requests for comment.

Wrong ballots issued by voters will be invalid. Voters who incorrectly sign envelopes, however, will still be able to vote — via a second ballot, or in person, according to

Sarah Steiner, an election lawyer. She added that inspectors were not a voter's absentee ballot.

"I'm worried because anything that confuses voters at this point makes them wary of voting or suspicious of the process is damaging to democracy," Mr. Steiner said.

Douglas Kellner, co-chair of the New York State Board of Elections, said he had received reports of the problem in the city, as well as far more isolated problems in Nassau County, where he is mayor.

"The downside of introducing widespread absentee balloting is

that, once the boards of elections start counting on the process of mailing, then they lose quality control and direct supervision of what goes on," Mr. Kellner, a Democrat, said in an interview. "This is a good example of the problem."

Melissa DeLoza, the secretary to Gov. Andrew M. Cuomo, criticized the Board of Elections during a news conference on Tuesday. "I say that we're troubled by this is the understatement of the year."

The timing error comes on the heels of a June primary election that was riddled with problems in New York.

Overwhelmed by an avalanche of mailed ballots — 46 percent of voters sent absentee ballots compared with just 1 percent in previous years — election officials spent more than a month counting ballots in some closely watched congressional races.

Tens of thousands of absentee ballots, especially in Brooklyn, were also disqualified because of technical issues like missing postmarks, a missing signature or an improperly sealed envelope.

State officials have taken some steps to address those problems ahead of the November election, implementing reforms to allow voters to fix errors with their ballots and expanding options for voters to physically drop off their absentee ballots at early polling sites and election offices.

Officials are also encouraging people to vote in person at early poll sites, which open statewide on Oct. 24 and are expected to have shorter lines than Election Day poll sites, to avoid overwhelming the postal service and election boards with mail-in ballots.

State election officials are expecting more than five million absentee ballots in the presidential election, or four times the number

received in June, and some have already warned that results might not be known until early December.

"I'm disappointed to say the least," said Max Elymberg, a resident of the Bushwick neighborhood of Brooklyn who got the

A new error on the heels of a problematic June primary.

wrong ballot on Monday. "There's so much stress around this election, as I'm very sure you are aware. They're really noting the sense of absentee voting, for sure, and it's not a good start."

Some voters have also expressed frustration about postage. While the executive order that expanded mail-in voting for the June primaries required election boards to provide prepaid postage on ballot envelopes, there are no such requirements for the general election. This time around, voters at New York City must apply their own postage before mailing their ballots.

The ballot contains other errors, too. It instructs voters to "mark the oval to the left of that choice, even though the oval is actually above — candidates names. There has also been some confusion surrounding a missing label printed on mail-in ballots that reads: "OFFICIAL ABSENTEE MILITARY BALLOT."

On Monday, the Board of Elections clarified that all absentee ballots, regardless of whether the voter was in the military, included that label, and that the ballot was correct.

Schiff Sees Disinformation Rise With Trump's Attacks

By JULIAN E. BARNES

WASHINGTON — American intelligence officials have seen an uptick in Russian disinformation about mail-in ballots as President Trump has escalated his attacks on voting by mail, Representative Adam B. Schiff, the Democratic chairman of the House Intelligence Committee, said in an interview.

American intelligence agencies have not explicitly linked the increase in Russian disinformation operations to the president's comments. They would not make such a link without specific intelligence about the Kremlin's marching orders. Intelligence and other officials acknowledged that Russia always focuses its disinformation efforts on existing controversies to amplify ongoing arguments.

Mr. Trump's false assertions have also fueled the spread of misperceptions about widespread mail-in voting. Experts have repeatedly said absentee voting is secure, and there was little public controversy over it until the president began his attacks.

After Mr. Trump began stepping up his criticism of mail-in voting, Mr. Schiff, Democrat of California, asked the intelligence agencies if he had overheard any track any rise in Russian disinformation efforts.

"Sure enough, it wasn't long before the intelligence community started using exactly that," Mr. Schiff said. "It was too easy and predictable an option for the Russians. They have been smearing Trump's false assertions on absentee voting."

Intelligence officials have said

they have seen no attempts by the Russian or other foreign powers to interfere with mail-in voting, spread fake ballots or change absentee vote counts.

Last week, Christopher A. Wray, the F.B.I. director, told lawmakers he saw no coordinated foreign effort. He has also warned about Russian disinformation efforts aimed at benefiting Mr. Trump's re-election.

On Monday the F.B.I. and the Homeland Security Department's Cybersecurity and Infrastructure Security Agency warned about foreign intelligence services and hackers spreading disinformation about voting systems to undermine confidence in the election.

Hackers have been spreading false information about compromised voting systems in an attempt to manipulate public opinion and cast doubt on the integrity of the election, according to the new warning.

Mr. Schiff predicted that if the presidential vote is close and coming down to a few states, Russia and other foreign powers would most likely step up their disinformation campaigns, amplifying Mr. Trump's criticism of mail-in voting and accusations of election fraud.

"The Russians will almost certainly emphasize the president's false charges and come to much closer to the American streets as they can," Mr. Schiff said.

Russia has denied — and mocked — American claims it is interfering in the election. It has denied cyberattacks to influence the vote. In recent days it has been pushing for an international pro-



Sorting mail-in ballot requests in Clatsop, Ore. Representative Adam B. Schiff saw an uptick in disinformation about voting by mail.

hibition on cyberattacks, without addressing its own role. On Monday, Russian officials highlighted a new article by Sergey V. Lavrov, the Russian foreign minister, that argued the world was facing "a real cyberpandemic," a rash of cyberattacks on health care, fiscal and education establishments.

The federal government, in its Monday warning, said the best way for Americans to insulate themselves from disinformation about the election is to seek information from trustworthy

sources and "new, early, verified claims with a healthy dose of skepticism."

Some cybersecurity experts have said that foreign actors may try to disrupt state and local websites around the election to try to restrict the flow of accurate information. Others say experts believe a wave of transnational-style attacks on local governments could also amplify disinformation campaigns to sow doubt about voting systems.

"I am not sure the direct attacks

will be so widespread that they can directly affect a specific vote on any widespread basis," said Karl Slight, a senior security research manager with Trustwave, a cybersecurity company. "But the damage to public trust is a hard thing to get back."

Because voting is done on a local level, the election infrastructure is resilient, and it would be extraordinarily difficult for an attacker to hack enough local governments to change the results of state or national elections.

But voting confidence in the election does not require Russia or another foreign power to change a single vote, Mr. Schiff said. It was far easier for adversaries to cause Americans to doubt than they can rely on the results of the election.

On Monday, the Minneapolis Police Department said it was "looking into the validity" of the claims in the video, which a spokesman for Ms. Omar described as "a hoax."

Mr. O'Rourke and Project Veritas have a long history of releasing manipulated or selectively edited footage purporting to show illegal conduct by Democrats and liberal groups.

The scandal researchers reported the video to multiple social media platforms. Facebook added a link to its "wrong information center" to one upload of the video but placed no notice on the original upload. Twitter, YouTube and Reddit took no action. TikTok was the only platform that removed all uploads of the video.

Project Veritas Releases Misleading Video, Part of What Experts Call a Coordinated Effort

By MAGGIE ASTOR

A deceptive video released on Sunday by the conservative activist James O'Rourke, which claimed through manipulated sources and with no verifiable evidence that Representative Ilhan Omar's campaign had collected ballots illegally, was probably part of a coordinated disinformation effort, according to researchers at Stanford University.

Mr. O'Rourke and his group, Project Veritas, appear to have made an explicit decision to release the video sooner than planned after The New York Times published a sweeping investigation of President Trump's race, the researchers said. They also noted that the timing and inclusion of a Twitter post in which Mr. Trump's son claimed the video suggested that he might have known about it in advance.

Project Veritas had tweeted the video on social media for several days before publishing it. It posts amplified by other prominent con-

servative accounts. Mr. O'Rourke noted what he said was evidence of voter fraud, and urged people to sign up at "ballot-harvesting.com" to receive the supposed evidence when it came out. None of the material in the video actually existed.

Mr. O'Rourke's promotional posts had said the video would be released on Monday, but Project Veritas released it on Sunday instead, a new timeline of the publication of the Times's investigation. The Stanford researchers concluded that this timing was unlikely to be a coincidence "given the large marketing across a 24-hour release date" they wrote in an analysis that Alex Stamos, who led the research team in the Stanford Internet Observatory, shared with The Times.

"It's a great example of what a coordinated disinformation campaign looks like: pre-selecting the ground and then simultaneously hitting from a bunch of different accounts at once," Mr. Stamos said.

Many of the same accounts that had shared promotional tweets also shared the video as soon as it was released, among it quickly into Twitter's trending topics alongside the Times's investigation.

Shortly an hour after The Times published its article, Mr. Lindell, chief executive of Project Veritas, tweeted a link to the video. The video was posted by Project Veritas's supposed expose would be released that night at 1 p.m. Eastern time.

"I just met James O'Rourke of Project Veritas, and James showed me footage of systematic voter fraud," Mr. Lindell said. He did not respond to a request for comment on Tuesday.

Mr. O'Rourke posted the video on Twitter as it put on the day, and the president's son Donald Trump Jr. retweeted it just seven minutes later. Two minutes after that, the president's "near roach" account retweeted him, and the president himself soon began commenting.

Nowadays, the video that the younger Mr. Trump posted did not have the "from James O'Rourke" link that appeared when other Twitter users shared the video, loaded by Mr. O'Rourke.

"This detail, along with video metadata demonstrating that the Trumps did not respond to a request for comment."

The video contains footage of a man, identified as Lihai Mohamed, showing off ballots he says he has collected for a Minneapolis City Council candidate — something, that, depending on the video was filmed, may not have been illegal, because a district court judge in July temporarily suspended Minnesota's law on third parties collecting and returning large numbers of campaign ballots. Mr. Mohamed was not working for Ms. Omar.

The video then claims that Democratic operatives connected to Ms. Omar's campaign paid voters to hand over blank mail-in ballots, and filled them out. This

video was separately uploaded and re-shared by Twitter, indicating that the Trump campaign possibly had access to the video before the general public and could question its authenticity.

The Stanford researchers wrote, noting also that Mr. Trump posted the video on Facebook 10 minutes before Mr. O'Rourke posted it there.

Asked for comment, the Trump campaign said that Donald Trump Jr. had received a downloadable link to the video after it was publicly released. It did not comment on Mr. Lindell's post or on the link.

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would be illegal, but the allegations came solely from unnamed people who spoke with Project Veritas operatives as the video and whose faces are not shown.

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FILED: WESTCHESTER COUNTY CLERK 11/02/2020 04:37 PM

INDEX NO. 63921/2020

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Exhibit G

The New York Times

<https://nyti.ms/31C0xP9>

Conservative News Sites Fuel Voter Fraud Misinformation

Breitbart, The Washington Examiner and others amplify false claims of rampant cheating in what a new Harvard study calls a “propaganda feedback loop.”



By Tiffany Hsu

Published Oct. 25, 2020 Updated Oct. 26, 2020

In the final stretch of the 2020 campaign, right-leaning news sites with millions of readers have published dozens of false or misleading headlines and articles that effectively back unsubstantiated claims by President Trump and his allies that mail-in ballots threaten the integrity of the election.

The Washington Examiner, Breitbart News, The Gateway Pundit and The Washington Times are among the sites that have posted articles with headlines giving weight to the conspiracy theory that voter fraud is rampant and could swing the election to the left, a theory that has been repeatedly debunked by data.

On Sept. 25, Gateway Pundit posted an article headlined “EXCLUSIVE: California Man Finds THOUSANDS of What Appear to be Unopened Ballots in Garbage Dumpster — Workers Quickly Try to Cover Them Up — We are Working to Verify.” The envelopes turned out to be empty and discarded legally in 2018. Gateway Pundit later updated the headline, but not before its original speculation had gone viral.

The Right Scoop published an article on Oct. 7 headlined “DESTROYED: Tons of Trump mail-in ballot applications SHREDDED in back of tractor-trailer headed for Pennsylvania.” The material was actually printing waste from a direct mail company. The publication later changed the headline to reflect that the claim had been debunked.

Another right-wing site, Daily Wire, posted a Sept. 24 article about ballots in Pennsylvania under the headline “FEDS: Military Ballots Discarded in ‘Troubling’ Discovery. All Opened Ballots were Cast for Trump.” Headlines on the same issue in The Washington Times were similar: “Feds investigating discarded mail-in ballots cast for Trump in Pennsylvania” and “FBI downplays election fraud as suspected ballot issues found in Pennsylvania, Texas.” A Washington Times opinion piece on the matter had the headline “Trump ballots in trash, oh my.”

Several days after the reports, neither Daily Wire nor The Washington Times appeared to have followed up with articles on the announcement from Pennsylvania’s elections chief that the discarded ballots were a “bad error” by a seasonal contractor, not “intentional fraud.” Mr. Trump cited the discarded Pennsylvania ballots several times as an example of fraud, including in last month’s presidential debate.

Major polls have shown Mr. Trump lagging behind the Democratic presidential nominee, Joseph R. Biden Jr., in an election that will have significantly more people than usual voting by mail because of the coronavirus. False claims about mail-in voting have been a staple of the president’s campaign. At last month’s debate, he claimed without evidence, “This is going to be a fraud like you’ve never seen.”

In June, Mr. Trump posted on Twitter that “Mail-In Ballots will lead to a RIGGED ELECTION!” He linked to a Breitbart article that included a transcript of Attorney General William P. Barr’s telling the Fox News host Maria Bartiromo that voting by mail “absolutely opens the floodgates to fraud.”

In August, The New York Post published an article that relied on one anonymous source, identified as a Democratic operative, who claimed that he had engaged in voter fraud for decades. The Blaze, Breitbart, Daily Caller, FoxNews.com and The Washington Examiner posted their own versions of the article. It was also promoted by Donald Trump Jr. and his brother Eric, the Trump campaign’s communications team, the “Fox & Friends” television program and Tucker Carlson’s Fox News show, according to a recent Harvard University study.

The Harvard researchers described a “propaganda feedback loop” in right-wing media. The authors of the study, published this month through the school’s Berkman Klein Center for Internet and Society, reported that popular news outlets, rather than social media platforms, were the main drivers of a disinformation campaign meant to sow doubts about the integrity of the election.

So far in October, Breitbart has published nearly 30 articles with the tag “voter fraud.” President Trump has posted links to several Breitbart articles on Twitter, including one in August in which a Republican-appointed poll challenger estimated that up to 20,000 absentee primary ballots had been improperly counted in Detroit, a city “known for voting heavily Democrat,” the article said. The Detroit News later reported that election officials in Michigan said the problems “weren’t examples of fraud and don’t call into question the integrity of the results.”



Counting mail-in ballots this month at the Miami-Dade County Elections Department. Saul Martinez for The New York Times

As the country faces a third wave of Covid-19 cases, tens of millions of Americans plan to mail their ballots, and more than 25 states have expanded access to universal mail voting. The voting system, stressed by greater demand, has struggled in places with ballots sent to incorrect addresses or improperly filled out. But intentional voter fraud is extremely uncommon and rarely organized, according to decades of research.

That's true even though specific totals vary depending on the source. Among the billions of votes cast from 2000 to 2012, there were 491 cases of absentee-ballot fraud, according to an investigation conducted at Arizona State University's journalism school. Election experts have calculated that, in a 20-year period, fraud involving mailed ballots has affected 0.00006 percent of individual votes, or one case per state every six or seven years.

In June, The Washington Post and the nonprofit Electronic Registration Information Center analyzed data from three vote-by-mail states and found 372 possible cases of double voting or voting on behalf of dead people in 2016 and 2018, or 0.0025 percent of the 14.6 million mailed ballots.

Some conservative publications have nodded at the scarcity. In an Oct. 1 article about Facebook's bans of ads that promote a narrative of widespread voter fraud, The Blaze noted "isolated reports of voter fraud in America in recent months." A Fox News article on the same day pointed out a "false claim" by Mr. Trump that a mail worker in West Virginia had sold ballots. The Fox News article quoted a state official who said the incident had never happened.

Mr. Trump's effort to discredit mail-in voting follows decades of disinformation about voter impersonation, voting by noncitizens and double voting, often promoted by Republican leaders.

Voting by mail under normal circumstances does not appear to give either major party an advantage, according to a study this spring by Stanford University's Institute for Economic Policy Research. But many conservative outlets have promoted the idea that fraud involving mailed ballots could tip the scales in favor of Democrats.

Stephen J. Stedman, a senior fellow at the Freeman Spogli Institute for International Studies at Stanford, said he thought "about disinformation in this country as almost an information ecology — it's not an organic thing from the bottom up."

Last month, sites including The Gateway Pundit, The Washington Examiner and Breitbart followed a report from a Fox affiliate in Wisconsin about mail that had been found in a ditch and reportedly included absentee ballots. The story was promoted by the Trump adviser Jason Miller; the White House press secretary, Kayleigh McEnany; the Fox News host Tucker Carlson; and the president himself.

After the outcry, all but unnoticed, The Milwaukee Journal Sentinel reported that the batch of mail hadn't included absentee ballots from Wisconsin and that it was unclear if there had been ballots from other states. The liberal media watchdog group Media Matters for America traced several other examples.

In a similar cycle, the Fox News host Sean Hannity and conservative publications magnified the reach of a deceptive video released last month by Project Veritas, a group run by the conservative activist James O'Keefe. The video claimed without named sources or verifiable evidence that the campaign for Representative Ilhan Omar, a Minnesota Democrat, was collecting ballots illegally.

Mr. Stedman said right-leaning outlets sometimes conflated fraud with the statistically insignificant administrative mishaps that occur in every American election.

"The pandemic is making this a true administrative nightmare, where administrators who have never done this on this scale have just a few months to do it, and they now also have the Trump administration trying to take advantage of every single mistake to say, 'See, that's fraud,'" Mr. Stedman said. "It can't end well."

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INDEX NO. 63921/2020

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Exhibit H

