July 7, 2022

Ramona M. Mariani
Office of Disciplinary Counsel
1601 Market Street, Suite 3320
Philadelphia, PA 19103

VIA FACSIMILE: [redacted]

Dear Ms. Mariani:

The 65 Project is a bipartisan, nonprofit effort to protect democracy from abuse of the legal system by holding accountable lawyers who engage in fraudulent and malicious efforts to overturn legitimate elections.

We write to request that the Office of Disciplinary Counsel investigate the actions taken by Bruce Marks (Attorney Identification No. 41299) relating to his efforts to overturn the 2020 presidential election. Mr. Marks assisted Mr. Trump's litigation team in *Donald J. Trump for President, Inc., et al. v. Boockvar, et al.*, 4:20-cv-02078 (M.D. Pa.), in which he sought to have the court disenfranchise nearly seven million voters. As the district court stated when denying the effort:

> This Court has been unable to find any case in which a plaintiff has sought such a drastic remedy in the contest of an election, in terms of the sheer volume of votes asked to be invalidated. One might expect that when seeking such a startling outcome, a plaintiff would come formidably armed with compelling legal arguments and factual proof of rampant corruption, such that this Court would have no option but to regrettably grant the proposed injunctive relief despite the impact it would have on such a large group of citizens.
>
> That has not happened. Instead, this Court has been presented with strained legal arguments without merit and speculative accusations, unpled in the operative complaint and unsupported by evidence. In the United States of America, this cannot justify the disenfranchisement of a single voter, let alone all the voters of its

> sixth most populated state. Our people, laws, and institutions demand more.[1]

Mr. Marks not only advised Mr. Trump's campaign, but he also attended the November 17, 2020 hearing and misled the District Court regarding the holding in a matter in which Mr. Marks had been a party.

Pennsylvania's Rules of Professional Conduct require more. "The primary purpose of our lawyer discipline system in Pennsylvania is to protect the public, preserve the integrity of the courts, and deter unethical conduct." *Off. of Disciplinary Couns. v. Czmus*, 586 Pa. 22, 32–33, 889 A.2d 1197, 1203 (2005) (citing *In re Iulo,* 564 Pa. 205, 766 A.2d 335, 339 (2001)). "Truth is the cornerstone of the judicial system; a license to practice law requires allegiance and fidelity to truth." *Office of Disciplinary Counsel v. Surrick,* 561 Pa. 167, 749 A.2d 441, 449 (2000) (citation omitted). "Whenever an attorney is dishonest, that purpose is served by disbarment." *Office of Disciplinary Counsel v. Grigsby,* 493 Pa. 194, 425 A.2d 730, 733 (1981).

By offering his law license to a frivolous lawsuit untethered to either law or fact and that sought an extreme remedy unheard of in any court of law, Mr. Marks ignored the ethical standards to which he is bound. His conduct violated Rules of Professional Conduct 3.1 (Meritorious Claims and Contentions), 3.3 (Candor Toward Tribunal), and 8.4 (Misconduct).

A full investigation by the Office of Disciplinary Counsel will demonstrate the egregious nature of Mr. Marks's actions, especially when considered in light of the purposes they served.

CONDUCT GIVING RISE TO THE COMPLAINT

Donald Trump lost the 2020 presidential election.[2] He also lost Pennsylvania and its 20 electoral votes.[3] In an effort to overturn the legitimate results, Mr. Trump and his allies filed at least 65 baseless lawsuits across the country, alleging conspiracies and fraud and claiming the election was stolen. They brought these claims despite the fact that officials across the country and at every level of government have called the 2020 election "the most secure in American history."[4]

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[1] *Donald J. Trump for President, Inc., et al. v. Boockvar, et al.*, 4:20-cv-02078 (M.D. Pa.) Nov. 21, 2020 Memorandum Opinion ("Memorandum Opinion") at 2.
[2] *See* United States National Archives, Electoral College Results – 2020, available at https://www.archives.gov/electoral-college/2020.
[3] *See* Certificate of Ascertainment, Commonwealth of Pennsylvania, available at https://www.archives.gov/files/electoral-college/2020/ascertainment-pennsylvania.pdf.
[4] Maria Henriquez, *Director of CISA Chris Krebs Says There's No Evidence of Foreign Interference in the 2020 Election*, Security Magazine (Nov. 5, 2020), https://www.securitymagazine.com/articles/93846-director-of-cisa-chris-krebs-says-theres-no-evidence-of-foreign-interference-in-the-2020-election.

None of Mr. Trump's efforts succeeded. In some instances, courts have imposed sanctions on the lawyers who participated in the lawsuits and referred them for sanctions by their respective state bars.[5] The disciplinary arms of various state bars are pursuing the matters.[6]

On November 9, 2020, lawyers representing Donald J. Trump for President, Inc. and two individuals filed filed a Complaint for Declaratory and Injunctive Relief, which initiated *Donald J. Trump for President, Inc., et al. v. Boockvar, et al.* Over the next eighteen days, the State would spend significant time and resources defending against this, and several other, matters. Although Mr. Marks did not formally enter an appearance on behalf of Plaintiffs, he attended – and spoke at – the November 17, 2020 hearing on the Defendants' Motion to Dismiss. Mr. Marks stood with Mr. Giuliani, the Trump Campaign's lead attorney, and stated:[7]

> MR. MARKS: Your Honor, my name is Bruce Marks. I have not formally been engaged by the plaintiffs yet, but I have been assisting in the preparation.
>
> THE COURT: All right. Thank you.
>
> MR. MARKS: I'm an attorney.
>
> THE COURT: Yes, I'm familiar with you, Mr. Marks, at least by reputation. Anyone else?

During the hearing, the District Court asked whether Plaintiffs could cite any case "from this circuit expressly addressing the theory of competitive standing."[8] Mr. Marks then interjected and identified *Marks v. Stinson* as such a case – and Mr. Marks was the plaintiff in that matter.[9] Mr. Marks proceeded to provide the facts and holding of the case and the District Court then, again,

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[5] *See, e.g.*, *King v. Whitmer*, Case No. 21-13134 (E.D. Mich.), Aug. 25, 2021 Opinion and Order, available at https://www.michigan.gov/documents/ag/172_opinion__order_King_733786_7.pdf; *Washington Election Integrity Coalition United v. Inslee*, Case No. 100202-0, May 17, 2022 Clerk's Ruling Setting Amount of Attorney Fees and Expenses, available at https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/029_Order_DeputyClerkRulingSetAttrnyFees.pdf.

[6] *See, e.g.*, *In the Matter of Rudolph W. Giuliani*, Supreme Court of the State of New York Appellate Division, First Judicial Dept., May 3, 2021, available at https://www.nycourts.gov/courts/ad1/calendar/List_Word/2021/06_Jun/24/PDF/Matter%20of%20Giuliani%20(2021-00506)%20PC.pdf; *State Bar Announced John Eastman Ethics Investigation*, available at https://www.calbar.ca.gov/About-Us/News/News-Releases/state-bar-announces-john-eastman-ethics-investigation; *State Bar Sues Trump Lawyer Sidney Powell, available at* https://www.houstonchronicle.com/politics/texas/article/Texas-State-Bar-sues-Trump-lawyer-Sidney-Powell-16989673.php; *Two Former U.S. Officials Help Ethics Probe of Trump Ally Clark, Source Says*, available at https://www.reuters.com/world/us/exclusive-two-former-us-officials-help-ethics-probe-trump-ally-clark-source-says-2022-03-29/.

[7] *Donald J. Trump for President, Inc., et al. v. Boockvar, et al.*, 4:20-cv-02078 (M.D. Pa.) Nov. 17, 2020 Transcript of Oral Argument Proceedings In Re: Motion to Dismiss at 10:5-11.

[8] *Id.* at 130:1-3.

[9] *Id.* at 130:4-16.

specifically asked: "And this addressed competitive standing?"[10] Mr. Marks assured the Court that it did:

> Mr. Marks: Yes, it was standing. They held that I, as the candidate – I wasn't incorporated. I'm not like Donald Trump.
>
> The Court: Understood.
>
> Mr. Marks: That I, as the candidate had standing because the state actors – it was a civil rights claim just like here, it was also an equal protection claim – that I had standing because the government couldn't put its thumb on the scale in favor of one candidate over the other. And that's what happened in my case because they were violating the law and giving absentee ballots themselves to campaign workers who were, you know –
>
> The Court: Understood. All right. That's good.[11]

Except, as it turned out, Mr. Marks misrepresented the case to the District Court. It had nothing to do with competitive standing. The words do not appear even once in the opinion Mr. Marks assured the District Court "addressed competitive standing." And this cannot be an instance of Mr. Marks simply misremembering the holding of one case of many he was prepared to discuss. This was a case in which he was the plaintiff. This was a case that he interjected to directly flag for the District Court.

Following the hearing, the District Court granted Defendants' motion to dismiss and rejected the request to amend the complaint for a second time. The Third Circuit Court of Appeals affirmed.

Mr. Marks identified himself as advising the Trump Campaign on this litigation and appeared at the hearing and spoke on behalf of the campaign. In recent weeks, Mr. Marks has signed a declaration that affirmed his legal role in the efforts.[12] As the District Court and Court of Appeals made clear, the Trump Campaign pressed these matters without any proper basis in law or fact. They sought remedies that served a political agenda, but that lacked any legal rationale or merit.

Mr. Marks violated his obligations under the Rules of Professional Conduct. For evidence of that, your office should consider the following:

The lawsuit named Secretary of State Boockvar and Seven Democratic County Boards of Elections as Defendants. The factual basis for suing Secretary Boockvar and the seven Democratic counties rested on the two Individual Plaintiffs having had their mail-in votes

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[10] *Id*. at 130:20.
[11] *Id*. at 131:21-132:8.
[12] *Eastman v. Thompson, et al*., Case No. 8:22-cv-00099 (C.D. Cal.), Plaintiff's Br. in Support of Privilege Assertions 29-30, available at https://storage.courtlistener.com/recap/gov.uscourts.cacd.841840/gov.uscourts.cacd.841840.345.0.pdf.

canceled. Prior to election day, Secretary Boockvar had sent an email to counties encouraging them to allow mail-in voters to cure their ballots if any problems are detected during the pre-canvas period. Importantly, the two Individual Plaintiffs' ballots were canceled not by any of the Defendants, but by Lancaster and Fayette counties – neither of which Plaintiffs chose to sue. In other words, the Trump Campaign brought this matter not against the counties who caused the alleged harm, but against counties whose voters favored Joe Biden.

The requested relief for the alleged harm of Lancaster and Fayette Counties canceling the two Individual Plaintiffs' ballots was to prevent Defendants from certifying the entire election. The Individual Plaintiffs theorized that failing to count their ballots violated the Equal Protection Clause. As a remedy to the alleged violation, they sought either: (1) an order "prohibit[ing] the Defendant County Boards of Elections and Defendant Secretary Boockvar from certifying the results of the 2020 General Election in Pennsylvania on a Commonwealth-wide basis" or (2) an order "prohibit[ing] Defendants from certifying the results of the General Elections which include the tabulation of absentee and mail-in ballots which Defendants improperly permitted to be cured."[13] Thus, Individual Plaintiffs asserted as their injury the denial of their right to vote and to redress that injury, they sought to have millions of others' right to vote denied. As the District Court noted:

> Neither of these orders would redress the injury the Individual Plaintiffs allege they have suffered. Prohibiting certification of the election results would not reinstate the Individual Plaintiffs' right to vote. It would simply deny more than 6.8 million people their right to vote. "Standing is measured based on the theory of harm and the specific relief requested." It is not "dispensed in gross: A plaintiff's remedy must be tailored to redress the plaintiff's particular injury." Here, the answer to invalidated ballots is not to invalidate millions more.[14]

The District Court Found that Plaintiffs Concocted Their Theories to Avoid Controlling Precedent. Plaintiffs initially asserted seven causes of action. Four days later, the Third Circuit Court of Appeals issued an opinion in another case that directly affected Plaintiffs' ability to assert several of their claims. As such, they amended their complaint and excised five of the seven original causes of action, leaving just one equal protection claim and one cause of action premised on the Constitution's Electors and Elections Clause.[15] The Court stated that the equal protection claim was, "like Frankenstein's Monster…haphazardly stitched together from two distinct theories in an attempt to avoid controlling precedent."[16] The Plaintiffs sought to make a broad attack on the mail-in voting procedures, a claim that Third Circuit precedent clearly and directly prevented. So, instead, for purposes of standing, they cited as the basis for

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[13] *Donald J. Trump for President, Inc., et al. v. Boockvar, et al.*, 4:20-cv-02078 (M.D. Pa.) Am. Compl.
[14] Memorandum Opinion at 18.
[15] Even then, Plaintiffs acknowledged that under the new Third Circuit case, they lacked standing to raise the Electors and Elections Clause claim, but stated they included it to preserve the issue for appellate review. Nevertheless, when Plaintiffs later appealed the District Court's order, they did not appeal the Electors and Elections Clause issue.
[16] Memorandum Opinion at 11.

the lawsuit the canceling of Individual Plaintiffs' ballots and then "on the merits, Plaintiffs appear to have abandoned this theory of harm and instead raise their broader argument that the lack of a uniform prohibition against notice-and-cure is unconstitutional."[17] It was "not lost on the Court" that such a "mix-and-match" effort improperly sought to bypass precedent contrary to the Plaintiffs' claims.[18]

The Plaintiff Trump Campaign Failed to Offer a Theory of Its Injury or a Basis for its Claim. The Individual Plaintiffs at least asserted a valid theory for their harm – a denial of their vote – even if they did not sue the counties that caused the harm and even if they sought an unconstitutional, legally baseless remedy. But:

> The standing inquiry as to the Trump Campaign is particularly nebulous because neither in the [First Amended Complaint] nor in its briefing does the Trump Campaign clearly assert what its alleged injury is. Instead, the Court was required to embark on an extensive project of examining almost every case cited to by Plaintiffs to piece together the theory of standing as to this Plaintiff – the Trump Campaign.[19]

In conducting that review, the District Court found that the Plaintiff Trump Campaign was advancing two theories: associational standing and competitive standing. With regard to associational standing, Plaintiff Trump Campaign relied on "inapposite"[20] cases and also failed to inform the Court of another "particularly relevant, very recent decision" in which a federal court rejected the Trump Campaign's exact argument that it was now advancing in *Boockvar.*[21] With regards to its competitive standing argument, the Court found the assertion "at best, misguided."[22] The Plaintiff relied on cases that had no similarity to the present matter or that actually "contradict" their arguments. "It is telling," the Court further stated, "that the only case from the Third Circuit cited to by Plaintiffs, *Marks v. Stinson*, does not contain a discussion of competitive standing or any other theory of standing applicable in federal court."[23] In short, the Court held that "the Trump Campaign has not pled a cognizable theory."[24]

Importantly, *Marks v. Stinson* is the very case that Mr. Marks assured the District Court addressed competitive standing.

The Claims Plaintiffs Asserted Lacked Even Plausibility. To survive the motion to dismiss, Plaintiffs needed only to have asserted claims that were plausible when accepting their well-pleaded facts as true. The Court dismissed Plaintiffs claims even under this deferential standard. With regards to the Individual Plaintiffs, the Court held that Defendants could not credibly be

[17] *Id*. at 12.
[18] *Id*.
[19] *Id*. at 18-19.
[20] *Id*. at 19.
[21] *Id*.
[22] *Id*. at 21.
[23] *Id*. at 22.
[24] *Id*. at 23.

alleged to impose a burden on Individual Plaintiffs' right to vote by lifting the burden on their own residents' ability to vote. "Expanding the right to vote for some residents of a state does not burden the rights of others."[25] The Trump Campaign lacked even that level of plausibility. As the Court noted, "Plaintiffs' brief in opposition to the motions to dismiss spends only *one* paragraph discussing the merits of its equal-protection claim."[26] That one paragraph raised two arguments – one of which was not pleaded within the Amended Complaint and the other of which relied on *Bush v. Gore* and failed because "(1) they misapprehend the issues at play in that case; and (2) the facts of this case are distinguishable."[27]

The Pleadings Included Allegations Recycled from a Lawsuit Dismissed a Month Earlier in a 138-page Opinion. Nearly half of the paragraphs in the complaint duplicated allegations made in *Donald J. Trump for President, Inc. v. Boockvar*, 2:20-cv-00966-NR (W.D. Pa.). The Court in that case granted summary judgment to defendants, holding that plaintiff relied on "hypotheticals, rather than actual events" and that the plaintiffs' theory "does not appear to be any law to support it."[28] Importantly, the plaintiffs did not even appeal that decision.

The Complaint and Amended Complaint Make Over Three Dozen References to "Fraud," But Do Not Actually Assert Any Claims Premised on Fraud. In an effort to support their public propaganda, Plaintiffs littered their pleadings with allegations or references to fraud or fraudulent actions. But, importantly, none of their actual claims rested on any claims of fraud or improper conduct. Indeed, as Plaintiffs' counsel stated at the motion to dismiss hearing, the Trump Campaign "doesn't plead fraud. … [T]his is not a fraud case."[29]

The District Court Denied Plaintiffs' Motion for Leave to File a Second Amended Complaint and the Third Circuit Upheld That Order. Despite a favorable standard that encourages district courts to freely grant leave to file amended complaints, the District Court denied the request. The Plaintiffs appealed that decision and the Third Circuit upheld the District Court, finding that allowing an amended complaint would be inequitable and futile. The Court focused on the fact that that, like the two other complaints: (1) the Second Amended Complaint "is light on facts,"[30] (2) that "[t]he Campaign has already litigated and lost most of these issues"[31] and instead was improperly seeking to "collaterally attack those prior rulings,"[32] (3) no factual allegations actually support the causes of action;[33] and (4) "the Second Amended Complaint seeks breathtaking relief: barring the Commonwealth from certifying its results or else declaring the election results defective and ordering the Pennsylvania General Assembly,

[25] *Id*. at 29.
[26] *Id*. at 32 (ephasis in original).
[27] *Id*. at 34.
[28] *Donald J. Trump for President, Inc. v. Boockvar*, 2:20-cv-00966-NR (W.D. Pa.) Oct. 10, 2020 Opinion at 82, 108.
[29] *Donald J. Trump for President, Inc., et al. v. Boockvar, et al.*, 4:20-cv-02078 (M.D. Pa.) Nov. 17, 2020 Transcript of Oral Argument Proceedings In Re: Motion to Dismiss at 137:18.
[30] Donald J. Trump for President, Inc. v. Sec'y of Pennsylvania, 830 F. App'x 377, 386 (3d Cir. 2020).
[31] *Id*. at 387.
[32] *Id*.
[33] *Id*. at 388.

not the voters, to choose Pennsylvania's presidential electors. It cites no authority for this drastic remedy."[34]

A SUBSTANTIAL BASIS EXISTS FOR THE OFFICE OF DISCIPLINARY COUNSEL TO INVESTIGATE MS. KERNS'S CONDUCT AND TO IMPOSE APPROPRIATE DISCIPLINE

The Office of Disciplinary Counsel should investigate Mr. Marks's actions on the following basis:

1. Mr. Marks Violated Rule 3.1 By Bringing and Defending a Matter He Knew Lacked Merit

Rule 3.1 provides, in part, as follows: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."

Comment 2 states that: "The action is frivolous…if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law."

Further, "[a] claim advanced in a proceeding is considered frivolous if it lacks any basis in law and fact." *Adams v. Dep't of Pub. Welfare*, 781 A.2d 217, 220 (Pa. Commw. Ct. 2001).

As the District Court's and Third Circuit's treatment of the matter demonstrate, the Complaint and Amended Complaint that the Trump Campaign filed lacked any basis in law or fact. As a sampling of their views of the litigation:

- "This Court has been unable to find any case in which a plaintiff has sought such a drastic remedy in the contest of an election, in terms of the sheer volume of votes asked to be invalidated."[35]
- "This Court has been presented with strained legal arguments without merit and speculative accusations, unpled in the operative complaint and unsupported by evidence."[36]
- "This claim, like Frankenstein's Monster, has been haphazardly stitched together from two distinct theories in an attempt to avoid controlling precedent."[37]
- "That Plaintiffs are trying to mix-and-match claims to bypass contrary precedent is not lost on the Court. The Court will thus analyze Plaintiffs' claims as if they had been raised properly and asserted as one whole for purposes of standing and the merits."[38]

[34] *Id*.
[35] Memorandum Opinion at 2.
[36] *Id*.
[37] *Id*. at 11.
[38] *Id*. at 12.

- "The former finds no support in the operative pleading, and neither states an equal protection violation."[39]
- "That deficiency aside, to the extent this new theory is even pled, Plaintiffs fail to plausibly plead that there was 'uneven treatment' of Trump and Biden watchers and representatives. Paragraphs 132-143 of the [First Amended Complaint] are devoted to this alleged disparity. None of these paragraphs support Plaintiffs' argument."[40]
- "Granting Plaintiffs' requested relief would necessarily require invalidating the ballots of every person who voted in Pennsylvania. Because this Court has no authority to take away the right to vote of even a single person, let alone millions of citizens, it cannot grant Plaintiffs' requested relief."[41]
- "Rather than requesting that their votes be counted, they seek to discredit scores of other votes, but only for one race. This is simply not how the Constitution works."[42]
- Four times in the Third Circuit opinion, the Court refers to the Plaintiffs citing no authority for its propositions:
    - "The Campaign cites no authority suggesting that an actor discriminates by treating people equally while harboring a partisan motive, and we know of none."[43]
    - "[T]he Second Amended Complaint seeks breathtaking relief: barring the Commonwealth from certifying its results or else declaring the election results defective and ordering the Pennsylvania General Assembly, not the voters, to choose Pennsylvania's presidential electors. It cites no authority for this drastic remedy."[44]
    - "It cites no federal authority regulating poll watchers or notice and cure. It alleges no specific discrimination. And it does not contest that it lacks standing under the Elections and Electors Clauses. These claims cannot succeed."[45]
    - "But nothing in the Due Process Clause requires having poll watchers or representatives, let alone watchers from outside a county or less than eighteen feet away from the nearest table. The Campaign cites no authority for those propositions, and we know of none. (Ditto for notice-and-cure procedures.) And the Campaign litigated and lost that claim under state law too."[46]

Indeed, perhaps the Third Circuit said it most clearly: "Free, fair elections are the lifeblood of our democracy. Charges of unfairness are serious. But calling an election unfair does not make it so. Charges require specific allegations and then proof. We have neither here…*The Campaign's claims have no merit*."[47]

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[39] *Id*. at 33.
[40] *Id*.
[41] *Id*. at 32.
[42] *Id*. at 31.
[43] *Donald J. Trump for President, Inc*., 830 F. App'x at 388.
[44] *Id*.
[45] *Id*. at 389.
[46] *Id*. at 387.
[47] *Id*. at 381 (emphasis added).

"Knowledge" under the Rules of Professional Conduct can be "inferred from circumstances."[48]

Ample evidence demonstrates that Mr. Marks knew of the frivolous nature of the litigation he supported and advised on. As the District Court noted, the Plaintiffs "haphazardly stitched together" their claims to avoid controlling precedent.[49] Further, these matters had already been litigated (and lost) as state-law claims. Additionally, the lawyers defended the Trump Campaign's equal protection claim in a single paragraph. Moreover, the clear disconnect between the asserted injuries and requested relief would be apparent to any lawyer seeking to make a meritorious and redressable claim. Finally, both the District Court and Court of Appeals repeatedly refer to the Plaintiffs' failure to allege relevant facts or cite any authority for their legal propositions.

As such, Mr. Marks violated Rule 3.1 and should be disciplined.

2. Mr. Marks Violated Rule 3.3 By Making False Statements Regarding Law to the Court and Failing to Correct Those Statements

Rule 3.3(a)(1) provides that a "lawyer shall not knowingly make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."

Comment 4 states that, "Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities."

The District Court asked a direct and specific question to Plaintiffs' counsel: could they provide any case "from this circuit expressly addressing the theory of competitive standing."[50]

Mr. Marks then spoke up and offered a matter in which he participated: *Marks v. Stinson*. After Mr. Marks explained that case, the District Court asked again: "And this addressed competitive standing?"

The import of the District Court's questions was clear: it sought to know whether the case "expressly" addressed "competitive standing." Mr. Marks falsely affirmed it did.[51] The District Court, in its opinion, noted that the case did not address competitive standing. In fact, the term does not appear in the *Marks v. Stinson* opinion. Mr. Marks never corrected his false statement to the District Court, despite an opportunity to do so.

In addition to this directly false statement made by Mr. Marks, the District Court's opinion also notes that Plaintiffs improperly sought to avoid controlling precedent by concocting theories and

[48] Rule 1.0(f).
[49] Memorandum Opinion at 11.
[50] *Donald J. Trump for President, Inc., et al. v. Boockvar, et al.*, 4:20-cv-02078 (M.D. Pa.) Nov. 17, 2020 Transcript of Oral Argument Proceedings In Re: Motion to Dismiss at 130:20.
[51] *Id*. at 131:21-132:8.

that the Trump Campaign cited cases that was, "at best, misguided."[52] In fact, the District Court noted that the way in which the Plaintiffs presented their arguments required the Court itself to "embark on an extensive project of examining almost every case cited to by Plaintiffs to piece together the theory of standing as to this Plaintiff – the Trump Campaign."[53] In doing so, the District Court found that not a single case cited by the Plaintiffs stood for the proposition they were making about the Trump Campaign's standing.

That is not candor, that is misrepresentation. It is one thing for an attorney to rely on a case or two that fail to ultimately support the attorney's proposition. But, here, the entire basis for the Trump Campaign's assertion of standing lacked merit. And as the District Court's opinion demonstrates, the Plaintiffs' lawyers were not forthright about that fact – they hid that and forced the District Court to discern it for itself. Such conduct violates the Rules of Professional Conduct.

3. Mr. Marks Violated Rule 4.4 Command That Lawyers Respect the Rights of Third Parties

Pursuant to Rule 4.4, "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person."

Comment 1 to the Rule states, "Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons."

In the interests of his client, Mr. Marks sought to have between 1.5 million and 6.8 million Pennsylvanians lose their right to vote. Incredibly, while asserting that, "Every legal – not illegal – vote should be counted,"[54] Plaintiffs sought the opposite. Paradoxically, while challenging the denial of two people's right to vote, the remedy Plaintiffs fought for was the canceling of every validly cast ballot.[55] The District Court stated as much: "Granting Plaintiffs' requested relief would necessarily require invalidating the ballots of every person who voted in Pennsylvania. Because this Court has no authority to take away the right to vote of even a single person, let alone millions of citizens, it cannot grant Plaintiffs' requested relief."[56]

The Court of Appeals went further, directly calling the Plaintiffs' effort one that would harm others:

> Granting relief would harm millions of Pennsylvania voters too. The Campaign would have us set aside 1.5 million ballots without even alleging fraud. As the deadline to certify votes has already passed, granting relief would disenfranchise those voters or sidestep the expressed will of the people. Tossing out those ballots

[52] Memorandum Opinion at 21.
[53] *Id*. at 18-19.
[54] Am. Compl. ¶ 1.
[55] Am. Compl. at p. 62.
[56] Memorandum Opinion at 32.

could disrupt every down-ballot race as well. There is no allegation of fraud (let alone proof) to justify harming those millions of voters as well as other candidates.[57]

4. Mr. Marks Engaged in Misconduct that Violates Rule 8.4

Under Rule 8.4, "It is professional misconduct for a lawyer to…violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; [or] engage in conduct involving dishonesty, fraud, deceit or misrepresentation; [or] engage in conduct that is prejudicial to the administration of justice."

Mr. Marks acknowledged in open court that he was advising and assisting Mr. Giuliani and Mr. Trump's legal team. That effort sought to dishonestly undermine the 2020 election. The legal team brought frivolous claims that the Constitution, prior court decisions, and relevant statutes barred. The bare "factual" bases Mr. Trump relied on were supported by false statements and wild speculation. As both the District Court and Court of Appeals found, no legal or factual grounds existed for the claims Mr. Marks assisted in bringing.

Moreover, although the District Court generously called some of the legal arguments Plaintiffs advanced as "at best, misguided,"[58] they were actually misrepresentations of law. "When alleged attorney misconduct is misrepresentation in violation of professional conduct rule prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation, prima facie case is made where record establishes that misrepresentation was knowingly made, or made with reckless ignorance of truth or falsity of representation." *Office of Disciplinary Counsel v. Price*, 732 A.2d 599, 557 Pa. 166. The fact that the District Court also found a Frankensteinian effort to concoct legal arguments to evade controlling precedent demonstrates the knowing nature of the misrepresentations and dishonesty involved in this matter.

Furthermore, Mr. Marks assisted others in violating the Rules of Professional Conduct. Mr. Giuliani actively participated in the *Boockvar* litigation and Mr. Marks attended the November 17, 2020 hearing with Mr. Giuliani and informed the District Court that he had been advising and working with Mr. Giuliani.[59] The Appellate Division of the Supreme Court of New York has suspended Mr. Giuliani for his role in the efforts to overturn the 2020 election – and specifically cited the *Boockvar* litigation as a basis for his discipline.[60] Thus, Mr. Marks has assisted others in violating the Rules of Professional Conduct, thereby violating Rule 8.4.

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[57] *Donald J. Trump for President, Inc.*, 830 F. App'x at 390.
[58] Memorandum Opinion at 21.
[59] *Donald J. Trump for President, Inc., et al. v. Boockvar, et al.*, 4:20-cv-02078 (M.D. Pa.) Nov. 17, 2020 Transcript of Oral Argument Proceedings In Re: Motion to Dismiss at 10:5-7.
[60] *In the Matter of Rudolph W. Giuliani*, Supreme Court of the State of New York Appellate Division, First Judicial Dept., May 3, 2021 at 11-14, available at https://www.nycourts.gov/courts/ad1/calendar/List_Word/2021/06_Jun/24/PDF/Matter%20of%20Giuliani%20(2021-00506)%20PC.pdf.

The United States Supreme Court has long recognized in upholding disciplinary actions that "speech by an attorney is subject to greater regulation than speech by others."[61] As officers of the court an attorney is "an intimate and trusted and essential part of the machinery of justice" and a "crucial source of information and opinion."[62] Although attorneys, of course, maintain First Amendment rights, the actions in question here cross far beyond protected speech. Indeed, disciplinary boards and courts considering the conduct of other lawyers involved in the effort to overturn the 2020 election have rejected assertions that the attorneys enjoyed First Amendment protections for their conduct.

> False statements intended to foment a loss of confidence in our elections and resulting loss of confidence in government generally damage the proper functioning of free society. When those false statements are made by an attorney, it also erodes the public's confidence in the integrity of attorneys admitted to our bar and damages the profession's role as a crucial source of reliable information.[63]

Mr. Marks chose to offer his professional license to an assault on our democracy. He assisted Mr. Trump's legal team in pursuing litigation that lacked any basis in law or fact. He participated in an organized effort to sow discord and doubt about the 2020 elections.

For the reasons set forth above, we respectfully request that the Office of Chief Disciplinary Counsel investigate Mr. Marks's conduct and pursue appropriate discipline.

Sincerely,

Michael Teter
Managing Director
[redacted]

On behalf of The 65 Project

[61] *Ohralik v. Ohio State Bar Assn*., 436 U.S. 447, 465 (1978).
[62] *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1056, 1072 (1991).
[63] *In the Matter of Rudolph W. Giuliani*, Supreme Court of the State of New York Appellate Division, First Judicial Dept., May 3, 2021 at 30-31.