



August 31, 2022

Indiana Supreme Court
Disciplinary Commission
251 N. Illinois Street, Suite 1650
Indianapolis, IN 46204

VIA ELECTRONIC MAIL: [REDACTED]

Dear Disciplinary Commission:

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 Disciplinary Commission investigate the actions taken by Kevin Koons relating to his representation of Donald J. Trump in his effort to overturn the 2020 presidential election. Mr. Koons served as an attorney representing Mr. Trump in litigation commenced in Wisconsin – *Donald J. Trump for President, Inc. v. Wisconsin Election Commission, et al.* and argued the matter at a district court hearing. As a member of Mr. Trump’s litigation effort, he worked alongside Sidney Powell, Rudy Giuliani, Lin Wood, and John Eastman as they abused the judicial system to promote and amplify bogus, unsupported claims of fraud to discredit an election that Mr. Trump lost.

The effort to overturn the 2020 presidential election contained multiple spokes. One involved litigating 65 bogus lawsuits around the country. Another involved arranging a slate of false electors from seven states to submit certificates to Congress declaring themselves to be the duly appointed electors from their respective states. Yet a third spoke focused on pressuring Vice President Pence to rely on the false elector certificates to disregard the votes from those states and declare Mr. Trump the winner of the Electoral College. A fourth sought to convince state legislatures to overturn the will of the voters by holding special sessions to rescind the electoral votes cast for Mr. Biden and instead award them to Mr. Trump. And, of course, a fifth spoke included summoning Mr. Trump’s supporters to Washington, D.C. and, having spent months lying to them about fraud and a stolen election, sending them to the Capitol, agitated and armed, to stop the electoral vote count.

These efforts were interconnected – and Mr. Koons lent his Indiana law license to the scheme by filing a frivolous lawsuit untethered to either law or fact and in seeking an extreme remedy

unheard of in any court of law. In fact, the litigation Mr. Koons advanced only makes sense when viewed as part of the larger effort to sow such discord and doubt into the election's outcome that Mr. Pence would be justified in disregarding Wisconsin's electoral votes. Read in that light, Mr. Koons's filed complaint – that does not even bother to include a single cause of action – can be understood.

But it also amplifies why his conduct violated Indiana's Rules of Professional Conduct. Indeed, a full investigation by the Disciplinary Commission will demonstrate the egregious nature of Mr. Koons's actions, especially when considered in light of his purposes, the direct and possible consequences of his behavior, and the serious risk that Mr. Koons will repeat such conduct unless disciplined.

BACKGROUND

Joe Biden received over 81 million votes in November 2020, defeating Mr. Trump by over seven million votes and over four percentage points.¹ Mr. Trump's head of the U.S. Cybersecurity and Infrastructure Security Agency, Christopher Krebs, [announced](#) that the “November 3rd election was the most secure in American history. . . . There is no evidence that any voting system deleted or lost votes or changed votes or was in any way compromised.” Mr. Trump [fired him](#). William Barr, Mr. Trump's own Attorney General, [declared that the Department of Justice](#) has “not seen fraud on a scale that could have effected a different outcome in the election.” Attorney General Barr announced his resignation less than two weeks later, but not before again confirming that the 2020 elections had been free and fair.²

Many of Mr. Trump's own senior advisors agreed with Attorney General Barr and Mr. Krebs.³ Indeed, Deputy (and later Acting) Attorney General Jeffrey Rosen and Associate (and later Acting) Deputy Attorney General Richard Donoghue regularly refuted the false information and allegations that Mr. Trump and his allies asserted about a fraudulent election.⁴ Mr. Rosen has testified that on December 15, 2020, at a meeting that included Mark Meadows, White House Chief of Staff, he and others told Mr. Trump that the information he was receiving from his political allies was not correct.⁵ And Mr. Donoghue has testified to the Select Committee to

¹ See Federal Election Commission, *Official 2020 Presidential General Election Results*, available at <https://www.fec.gov/resources/cms-content/documents/2020presgeresults.pdf>.

² M. Balsamo, *Disputing Trump, Barr says no widespread election fraud*, Associated Press (Dec. 1, 2020), <https://perma.cc/4U8N-SMB5>.

³ See Deposition of Jason Miller (Feb. 3, 2022), available at <https://january6th.house.gov/sites/democrats.january6th.house.gov/files/2022.03.02%20%28ECF%20160%29%20Opposition%20to%20Plaintiff%27s%20Privilege%20Claims%20%28Redacted%29.pdf>; Interview of Jeffrey Rosen (Aug. 7, 2021), United States Senate Committee on the Judiciary, 117th Cong. 30, available at <https://www.judiciary.senate.gov/rosen-transcript-final>.

⁴ See Interview of Jeffrey Rosen *see also* Interview of Richard Donoghue (Oct. 1, 2021), available at <https://january6th.house.gov/sites/democrats.january6th.house.gov/files/2022.03.02%20%28ECF%20160%29%20Opposition%20to%20Plaintiff%27s%20Privilege%20Claims%20%28Redacted%29.pdf>

⁵ Interview of Jeffrey Rosen.

Investigate the January 6th Attack on the United States Capitol (Select Committee) that on December 27, 2020, he told Mr. Trump “in very clear terms” that after “dozens of investigations, hundreds of interviews” looking at “Georgia, Pennsylvania, Michigan, and Nevada,” the Department of Justice – Mr. Trump’s own Department of Justice – had concluded that “the major allegations are not supported by the evidence developed.”⁶

Despite clear proof that no fraud occurred, and that no one stole the election from him, Mr. Trump and his lawyers sought to overturn the legitimate results by filing 65 baseless lawsuits across the country.⁷ None succeeded and, in fact, courts have imposed sanctions on the lawyers who participated in these suits and referred them for sanctions to their respective state bars.⁸

CONDUCT GIVING RISE TO THE COMPLAINT

Mr. Koons helped lead the charge on behalf of Mr. Trump in Wisconsin.

On December 2, 2020 – more than four weeks after the presidential election – Mr. Koons filed the Complaint in *Donald J. Trump for President, Inc. v. Wisconsin Election Commission, et al.* Mr. Koons initiated the matter despite the fact that the day before, on December 1, 2020, Mr. Trump filed a petition to commence an original action with the Wisconsin Supreme Court.⁹ When the Wisconsin Supreme Court denied Mr. Trump’s petition, the Court held that a state-court action under Wisconsin’s statutory scheme provided Mr. Trump’s “exclusive judicial remedy.”¹⁰ At the same time, Mr. Trump filed state-court lawsuits challenging recounts in Dane and Milwaukee Counties.¹¹ Nevertheless, Mr. Koons pushed forward with the federal action he filed.

The 72-page, 302-paragraph filing challenged election processes that had been in place for months or longer prior to Election Day, sought through judicial fiat a reversal of the election’s outcome, and, incredibly, *did not even include a cause of action.*¹² That was not a technical

⁶ Interview with Richard Donoghue.

⁷ W. Cummings, J. Garrison & J. Sergent, *By the numbers: President Donald Trump’s failed efforts to overturn the election*, USA Today (Jan. 6, 2021), available at <https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/>.

⁸ See, e.g., *King v. Whitmer*, No. 20-13134 (U.S. Dist. Ct. E. Dist. Mich. Aug. 25, 2021), available at https://www.michigan.gov/documents/ag/172_opinion_order_King_733786_7.pdf.

⁹ *Trump v. Evers*, No. No. 2020AP1971-OA, Pet. for Original Action (Wis. Dec. 1, 2020).

¹⁰ *Trump v. Evers*, No. 2020AP1971-OA (Wis. Dec. 3, 2020) (Hagedorn, J., concurring) (internal footnote omitted).

¹¹ *Trump v. Biden*, No. 2020CV7092, Order for Consolidation and for Appointment of Judicial Officer (Milwaukee Cty. Cir. Ct. Dec. 3, 2020), No. 2020CV2514 (Dane Cty. Cir. Ct. Dec. 3, 2020).

¹² *Trump v. Wisconsin Elections Commission, et al.*, Case No. 2:20-cv-01785 (E.D. Wisc. 2020), Compl., available at https://storage.courtlistener.com/recap/gov.uscourts.wied.92761/gov.uscourts.wied.92761.1.0_4.pdf.

failing, either. The Complaint failed to lay the factual basis that would establish the requisite elements for any cause of action. Instead, Mr. Koons, on behalf of Mr. Trump, repeatedly offered different explanations for the relief requested. All lacked merit – or even a foundational relationship with the law.

Though lacking a cause of action, the allegations Mr. Koons raised in the Complaint matched those asserted in the concurrently filed federal and state court actions. Specifically, these federal and state actions sought to invalidate ballots submitted by those who claimed indefinitely confined status, ballots for which election officials filled in witness address information, and ballots cast in Democracy in the Park events. Mr. Koons’s federal action also sought relief based on Center for Tech and Civic Life grants to municipalities, even though the federal court had already twice denied relief when brought to the court on the same theory.¹³

Importantly, the Complaint Mr. Koons filed did not allege fraud or misdoings by any voter. Instead, the challenge centered on official policies and guidance – all of which occurred prior to Election Day. Indeed, in some instances, the litigation focused on decisions made by Wisconsin officials more than a year (and multiple elections) before the 2020 presidential election.

Nevertheless, Mr. Koons pushed to have the District Court invalidate the entire election, calling it during a hearing on the matter, “a failed election and of no legal consequence.”¹⁴ In other words, Mr. Koons claimed that every ballot cast in the 2020 presidential election was invalid – unimportant and of no effect. Instead, he argued that, “Once it is established that the election was unconstitutional and that it did not meet the standards of Article II, the election must be considered void.”¹⁵ Incredibly, Mr. Koons sought this remedy through a preliminary injunction and without a trial.

District Court judge Brett Ludwig, himself appointed to the bench by Mr. Trump, rejected Mr. Koons’s efforts.

This is an *extraordinary* case... Hoping to secure federal court help in undoing his defeat, plaintiff asserts that the defendants, a group of more than 20 Wisconsin officials, violated his rights under the “Electors Clause” in Article II, Section 1 of the Constitution... Plaintiff’s requests for relief are even more *extraordinary*... Plaintiff’s ask has since continued to evolve. In his briefing, he says he wants “injunctive relief” requiring the Governor to “issue a certificate of determination consistent with, and only consistent with, the appointment of electors by the Wisconsin legislature.” In argument, counsel made plain that plaintiff wants the Court to declare the election a failure, with the

¹³ *Wis. Voters All. v. City of Racine*, No. 20-C-1487, 2020 WL 6129510, at *1-2 (E.D. Wis. Oct. 14, 2020), injunction pending appeal denied, 2020 WL 6591209 (E.D. Wis. Oct. 21, 2020).

¹⁴ *Trump v. Wisconsin Elections Commission*, et al., Case No. 2:20-cv-01785 (E.D. Wisc. 2020) Tr. from Dec. 10, 2020 Hearing at 65:18-20.

¹⁵ *Id.* at 70:4-6.

results discarded, and the door thus opened for the Wisconsin Legislature to appoint Presidential Electors in some fashion other than by following the certified voting results....

Plaintiff's Electors Clause claims fail as a matter of law and fact.

...

This is an *extraordinary* case. A sitting president who did not prevail in his bid for reelection has asked for federal court help in setting aside the popular vote based on disputed issues of election administration, issues he plainly could have raised before the vote occurred. This Court has allowed plaintiff the chance to make his case and he has lost on the merits. In his reply brief, plaintiff "asks that the Rule of Law be followed." It has been.¹⁶

Further, in a footnote the District Court noted that:

Plaintiff's complaint also refers to the First Amendment and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. At the December 9, 2020 final pre-hearing conference, plaintiff disclaimed reliance on any First Amendment or Due Process claims. While counsel purported to reserve the Equal Protection claim, *the complaint offers no clue of a coherent Equal Protection theory* and plaintiff offered neither evidence nor argument to support such a claim at trial. It is therefore abandoned.¹⁷

Because the substance of Mr. Koons's litigation mirrored that advanced in state court, the Wisconsin Supreme Court's treatment of Mr. Koons's arguments is also informative. In that case, the Wisconsin Supreme Court denied Mr. Trump's effort to invalidate several categories of ballots it argued were unlawfully cast. Importantly, like in the federal action that Mr. Koons oversaw, Mr. Trump did not identify any particular voter who was not entitled to vote, instead seeking to disenfranchise groups of voters because they might not have complied fully with Wisconsin's voting rules. For example, Mr. Trump asked the Wisconsin Supreme Court to invalidate all ballots cast by voters who claimed indefinitely confined status since March 25, 2020 – but only in the two most Democratic counties: Dane and Milwaukee.

¹⁶ *Trump v. Wisconsin Elections Commission*, et al., Case No. 2:20-cv-01785 (E.D. Wisc. 2020) Decision and Order, available at

<https://storage.courtlistener.com/recap/gov.uscourts.wied.92761/gov.uscourts.wied.92761.134.05.pdf>.

¹⁷ *Id.* at fn. 1.

The opinion, written by one of the four Republicans on the Wisconsin Supreme Court, rejected all of Mr. Trump’s arguments. In fact, with regard to the “indefinitely confined status” category, the Court called Mr. Trump’s effort “meritless on its face.”¹⁸ The Court explained:

The Campaign does not challenge the ballots of individual voters. Rather, the Campaign argues that all voters claiming indefinitely confined status since the date of the erroneous Facebook advice should have their votes invalidated, whether they are actually indefinitely confined or not. Although the number of individuals claiming indefinitely confined status has increased throughout the state, the Campaign asks us to apply this blanket invalidation of indefinitely confined voters only to ballots cast in Dane and Milwaukee Counties, a total exceeding 28,000 votes. The Campaign's request to strike indefinitely confined voters in Dane and Milwaukee Counties as a class without regard to whether any individual voter was in fact indefinitely confined has no basis in reason or law; it is wholly without merit.¹⁹

The Court further held that the laches doctrine barred the other three requests, which focused on policy decisions that had been announced and implemented as far as 2010.²⁰ The Court held, “Voters reasonably conformed their conduct to the voting policies communicated by their election officials. Rather than raise its challenges in the weeks, months, or even years prior, the Campaign waited until after the votes were cast. Such delay in light of these specific challenges is unreasonable.”²¹

In sum, the Court stated:

The claims here are not of improper electoral activity. Rather, they are technical issues that arise in the administration of every election. In each category of ballots challenged, voters followed every procedure and policy communicated to them, and election officials in Dane and Milwaukee Counties followed the advice of WEC where given. Striking these votes now—after the election, and in only two of Wisconsin's 72 counties when the disputed practices were followed by hundreds of thousands of absentee voters statewide—would be an extraordinary step for this court to take. We will not do so.²²

¹⁸ *Trump v. Biden*, 2020 WI 91, ¶ 3, 394 Wis. 2d 629, 633, 951 N.W.2d 568, 570, *cert. denied*, 141 S. Ct. 1387, 209 L. Ed. 2d 128 (2021).

¹⁹ *Id.* at ¶ 8.

²⁰ *Id.* at ¶ 10.

²¹ *Id.* at ¶ 22.

²² *Id.* at ¶ 31.

Mr. Koons pursued his matter as part of a larger scheme to corrode public confidence in the 2020 election, which itself was designed to convince state legislatures to reverse the results or to justify Mr. Pence’s disregarding several “contested” states’ electoral votes to hand the presidency to Mr. Trump. A federal court has already found that the concerted efforts amounted to a criminal conspiracy. Mr. Koons used his law license to further the cause. His actions warrant discipline.

**A SUBSTANTIAL BASIS EXISTS FOR THE DISCIPLINARY COMMISSION TO
INVESTIGATE MR. KOONS’S CONDUCT AND TO
IMPOSE APPROPRIATE DISCIPLINE**

The Disciplinary Commission should investigate Mr. Koons’s actions on the following basis:

1. Mr. Koons 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.”

“Knowledge” under the Rules of Professional Conduct can be “inferred from circumstances.”²³

Thus, “[i]t is unethical for an attorney to prosecute in any court a proceeding which is frivolous or has no merit.”²⁴ Moreover, filing multiple matters that raise the same claims violates Rule 3.1.²⁵

The issues that Mr. Koons raised on behalf of Mr. Trump lacked any basis in law or fact. As a preliminary matter, Mr. Koons filed a complaint that did not even include any actual causes of action. Further, he asserted due process and First Amendment issues, then disclaimed them a few days later, and Mr. Koons’s arguments regarding the equal protection claim he “reserved” offered “no clue of a coherent [] theory.” Finally, the very same claims that Mr. Koons advanced the Wisconsin Supreme Court found to be “meritless on its face.” In other words, an attorney with decades of experience would also be able to tell the claim lacked merit.

In short, for the many reasons provided above, Mr. Koons’s conduct violated Rule 3.1.

²³ Rule 1.0(f).

²⁴ [Nat'l City Bank, Indiana v. Shortridge, 689 N.E.2d 1248, 1251 \(Ind. 1997\)](#), supplemented sub nom. Nat'l City Bank, Ind. v. Shortridge, 691 N.E.2d 1210 (Ind. 1998).

²⁵ [In re Oliver, 729 N.E.2d 582, 585 \(Ind. 2000\)](#), reinstatement granted, 917 N.E.2d 1223 (Ind. 2009).

2. Mr. Koons 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. Koons sought to have millions of voters lose their right to decide the 2020 presidential election. As the Third Circuit stated when deciding another matter brought by Mr. Trump:

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 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.²⁶

Mr. Koons disregarded the potential consequences of his proposed remedy – showing no respect for the rights of millions of third persons whose votes would be invalidated – and his actions warrant discipline.

3. Mr. Koons 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. Koons participated in a purposefully dishonest effort to undermine the 2020 election. He brought frivolous claims that the Constitution, prior court decisions, and relevant statutes barred. The bare “factual” bases he relied on were supported by false statements and wild speculation from discredited sources.

Furthermore, Mr. Koons assisted others in violating the Rules of Professional Conduct. His efforts were coordinated with a litigation team comprising Rudy Giuliani and John Eastman. Mr. Giuliani has already been found to have violated the Rules of Professional Conduct by the

²⁶ *Donald J. Trump for President, Inc.*, 830 F. App'x at 390.

Supreme Court of the State of New York, Appellate Division.²⁷ Ms. Powell actively participated in the *Feehan* litigation.

Similarly, Mr. Koons's actions must be scrutinized and disciplined.

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.”²⁸ 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.”²⁹ 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.

That members of our esteemed profession would engage in such actions – conduct that contributed to substantial harm to American democracy – should cause considerable distress within the entire legal community.

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.³⁰

Mr. Koons chose to offer his professional license to an assault on our democracy. He pursued litigation that lacked any basis in law or fact. He participated in an organized effort to sow discord and doubt about the 2020 elections. He helped lead the charge in Wisconsin to disenfranchise millions of his fellow citizens because he did not like how they voted.

²⁷ *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](https://www.nycourts.gov/courts/ad1/calendar/List_Word/2021/06_Jun/24/PDF/Matter%20of%20Giuliani%20(2021-00506)%20PC.pdf).

²⁸ *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 465 (1978).

²⁹ *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1056, 1072 (1991).

³⁰ *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.

For the reasons set forth above, we respectfully request that the Disciplinary Commission investigate Mr. Koons's conduct and pursue appropriate discipline.

Sincerely,

A handwritten signature in cursive script that reads "Michael Tote".

Managing Director

A solid black rectangular redaction box covering the name of the signatory.

On behalf of The 65 Project