



February 15, 2023

Lawyers Professional Responsibility Board
445 Minnesota Street, Suite 2400
St. Paul, Minnesota 55101-2139

Dear Lawyers Professional Responsibility Board:

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 and undermine American democracy.

We write to request that the Lawyers Professional Responsibility Board investigate the actions recently taken by Jesse Hersch Kibort to abuse the judicial system and promote bogus, unsupported claims of fraud – all as a means to delegitimize our electoral system.

Mr. Kibort worked on one matter, in the state of Arizona: *Lake v. Hobbs*. This lawsuit lacked any basis in law or fact. Indeed, this lawsuit was created by politicians and attorneys to create a false narrative about election security and the health of American democracy solely based on conjecture and conspiracy theories. The actions in *Lake v. Hobbs* were so troubling that Mr. Kibort and his co-counsels have already been subjected to Rule 11 sanctions for their conduct in this matter.

A full investigation by the Lawyers Professional Responsibility Board will demonstrate the egregious nature of Mr. Kibort's actions, especially when considered in light of his purposes, the direct and possible consequences of his behavior, and the serious risk that Mr. Kibort will repeat such conduct unless disciplined.

BACKGROUND

Joe Biden received over 1.6 million votes in Arizona in the 2020 Presidential Election, defeating Mr. Trump by approximately 11,000 votes.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

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

or lost votes or changed votes or was in any way compromised.” Even the Arizona GOP-backed audit of the 2020 Arizona election came to a similar conclusion.²

Nonetheless, Kari Lake, the Republican candidate for Governor of Arizona, continued to promote baseless conspiracies about the 2020 election and cast doubt about the 2022 midterm elections.³ In fact, Kari Lake has continually said she would not concede if she lost, and as of this filing she has still not conceded her electoral defeat to Governor-elect Katie Hobbs.⁴

To raise the specter of voting irregularities and election security ahead of the 2022 midterm elections, Kari Lake filed *Lake v. Hobbs* to undermine faith in the Arizonian electoral system and lay the groundwork for challenging results that Kari Lake disagrees with. After her loss in the midterms, Kari Lake did just that, and filed two lawsuits alleging unsubstantiated voting irregularities and fraud.⁵

Mr. Kibort filed a fraudulent, conspiracy-laden, lawsuit that has been the cornerstone of undermining the democratic process in Arizona. He should be thoroughly investigated for his conduct.

CONDUCT GIVING RISE TO THE COMPLAINT

Mr. Kibort helped lead the charge on behalf of Ms. Lake in Arizona.

On April 22, 2022, Mr. Kibort initiated *Lake v. Hobbs* in the United States District Court for the District of Arizona. The complaint Mr. Kibort filed in this case relies solely on unfounded conspiracy theories, easily proven false, with no basis in law or fact.

For example, in *Lake v. Hobbs*, which is full of baseless claims, the Plaintiffs stated:

The official result totals do not match the equivalent totals from the Final Voted File (VM55). These discrepancies are significant with a total ballot delta of 11,592 between the official canvass and the VM55 file when considering both the counted and uncounted ballots ... a large number of files on the Election Management System (EMS) Server and HiPro Scanner machines were deleted including ballot images,

² Bob Christie and Christina Cassidy, *GOP Review Finds No Proof Arizona Election Stolen from Trump*, AP (Sept. 24, 2021), <https://apnews.com/article/donald-trump-elections-arizona-phoenix-conspiracy-theories-d38321441bcd6cea58421f6871b4f74e>.

³ Maeve Reston, *Kari Lake Raises Unfounded Doubts About Election Results in Arizona Governor Race That's Too Early to Call*, CNN (Nov. 9, 2022), <https://www.cnn.com/2022/11/09/politics/kari-lake-arizona-governor-race/index.html>.

⁴ Summer Concepcion, *Kari Lake Refuses to Say Whether She Would Accept Loss in Arizona Election*, NBCNEWS (Oct. 16, 2022), <https://www.nbcnews.com/politics/2022-election/kari-lake-refuses-say-whether-accept-loss-arizona-election-rcna52475>.

⁵ *Kari Lake Campaign Files Lawsuit Seeking Arizona Election Day Records*, DEMOCRACY DOCKET (Nov. 28, 2022), <https://www.democracydocket.com/news-alerts/kari-lake-campaign-files-lawsuit-seeking-arizona-election-day-records/>; Alexandra Berzon, et. al, *Kari Lake Sues Arizona's Largest County, Seeking to Overturn Her Defeat*, NY Times (Dec. 9, 2022), <https://www.nytimes.com/2022/12/09/us/politics/kari-lake-election-lawsuit.html>.

election related databases, result files, and log files. These files would have aided in our review and analysis of the election systems as part of the audit. The deletion of these files significantly slowed down much of the analysis of these machines. Neither of the ‘auditors’ retained by Maricopa County identified this finding in their reports.⁶

However, this is a far cry from the truth. There was, in fact, no substantial difference between the official results and the audit results. As Judge John J. Tuchi of the United States District Court for the District of Arizona cited in his order granting the Defendant’s motion to dismiss, “[t]here were no substantial differences between the hand count of the ballots provided and the official election canvass results for Maricopa County. This is an important finding because the paper ballots are the best evidence of voter intent and there is no reliable evidence that the paper ballots were altered to any material degree.”⁷

Further, no election files or ballot images were deleted in Arizona following the 2020 election. As the Defendants noted in their motion for sanctions, “all the hard drives and corresponding data files from the November 2020 General Election were maintained and safely secured by Maricopa County; the files the Cyber Ninjas claimed were missing were either not subpoenaed and so not provided, or were not located because of the Cyber Ninjas’ ineptitude.”⁸ The Plaintiffs, instead of acknowledging the audit undermined their argument of fraud and impropriety, cherry-picked statements to promote lies about the security of Arizona elections.

But these are not the only lies Mr. Kibort used to promote baseless conspiracy theories. To argue that Arizona had a huge risk of election tampering and manipulation, Mr. Kibort argued that “[a]ll electronic voting machines can be connected to the internet or cellular networks, directly or indirectly, at various steps in the voting, counting, tabulating, and/or reporting process.”⁹ This is patently false. As the Defendants noted, “Maricopa County’s vote tabulation system is not, never has been, and cannot be connected to the Internet. The Arizona Senate’s Special Master confirmed that Maricopa County uses an air-gapped system that ‘provides the necessary isolation from the public Internet, and in fact is in a self-contained environment’ with ‘no wired or wireless connections in or out of the Ballot Tabulation Center’ so that ‘the election network and election devices cannot connect to the public Internet.’”¹⁰

Mr. Kibort also promoted lies about basic Arizona election procedures, that should have been resolved had Mr. Kibort conducted a reasonable inquiry into his own client’s allegations. First, as part of the Plaintiff’s request for relief, Mr. Kibort argued for a paper ballot voting system.¹¹ Second, Mr. Kibort claimed that Arizona does not have its election equipment subjected to

⁶ *Lake v. Hobbs*, Case No. 2:22-cv-00677-JJT (D. Ariz.) May 4, 2022, First Amended Compl. at 13-14.

⁷ *Lake v. Hobbs*, Case No. 2:22-cv-00677-JJT (D. Ariz.) Aug. 26, 2022, Order Granting Motion to Dismiss at 4 n.2.

⁸ *Lake v. Hobbs*, Case No. 2:22-cv-00677-JJT (D. Ariz.) Aug. 10, 2022, Motion for Sanctions at 3.

⁹ *Lake v. Hobbs*, Case No. 2:22-cv-00677-JJT (D. Ariz.) May 4, 2022, First Amended Compl. at 6.

¹⁰ *Lake v. Hobbs*, Case No. 2:22-cv-00677-JJT (D. Ariz.) Aug. 10, 2022, Motion for Sanctions at 5.

¹¹ *Lake v. Hobbs*, Case No. 2:22-cv-00677-JJT (D. Ariz.) May 4, 2022, First Amended Compl. at 38.

independent experts.¹² Finally, Mr. Kibort claimed that Arizona does not subject its elections to post-election vote-verifying audits.¹³

All three of these factual allegations are blatantly false. Arizona currently, and has always, used a paper ballot system, independent experts do test election technologies, including tests conducted by the independent Election Assistance Commission, and Arizona performs its legally mandated audits consistently.¹⁴

Judge Tuchi, instead of finding widespread election security issues, discovered that Arizona had actually created an incredibly secure voting system. He noted that “[d]efendants have taken numerous steps to ensure such security failures do not exist or occur in Arizona or Maricopa County. As the Court chronicled in painstaking detail in Section I.B, every vote cast can be tied to a paper ballot (see A.R.S. §§ 16-442.01; § 16-446(B)(7); 2019 EPM at 80), voting devices are not connected to the Internet (see Doc. 29, Ex. 6) any ports are blocked with tamper evident seals (see Tr. 177:5-20), and access to voting equipment is limited (see Tr. at 179:15-20).”¹⁵

As with so many of these lies, the veracity of these claims could easily have been debunked with publicly available information, and with a reasonable inquiry from Mr. Kibort. Instead, he decided to promote these falsehoods, and file his complaint anyway.

These complaints were not only factually deficient, but they were legally deficient as well. Mr. Kibort was unable to meet the burden of proving any of the factors necessary for an injunction. As Judge Tuchi stated, “[t]o obtain a preliminary injunction, a plaintiff must show that ‘(1) [it] is likely to succeed on the merits, (2) [it] is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in [its] favor, and (4) an injunction is in the public interest.’ *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). Plaintiffs cannot meet any of the factors.”¹⁶

Furthermore, Mr. Kibort’s claims were clearly barred by the Eleventh Amendment. Mr. Kibort argued that his claims qualified for the *Ex Parte Young* exception the Eleventh Amendment, but the court noted that the exception only applies to “claims seeking prospective injunctive relief against state officials to remedy a state’s ongoing violation of federal law” but that “Plaintiffs do not plausibly allege a violation of federal law.”¹⁷

Not only was the central claim in *Lake v. Hobbs* legally dubious, but the lawsuit was so legally deficient that it lacked basic requirements to be heard in court. In fact, the court held that “even upon drawing all reasonable inferences in Plaintiffs’ favor, the Court finds that their claimed injuries are indeed too speculative to establish an injury in fact, and therefore standing.”¹⁸

¹² *Id.* at 11.

¹³ *Id.* at 14.

¹⁴ *Lake v. Hobbs*, Case No. 2:22-cv-00677-JJT (D. Ariz.) Aug. 10, 2022, Motion for Sanctions at 2-3.

¹⁵ *Lake v. Hobbs*, Case No. 2:22-cv-00677-JJT (D. Ariz.) Aug. 26, 2022, Order Granting Motion to Dismiss at 15 n.13.

¹⁶ *Id.* at 2 n.1.

¹⁷ *Id.* at 12, 16.

¹⁸ *Id.* at 14.

Moreover, the court found that any future harm could only come to pass after “a long chain of hypothetical contingencies” occurred.¹⁹

And these factual and legal allegations led to Rule 11 and 28 U.S.C. § 1927 sanctions. This is because “any objectively reasonable investigation of this case would have led to publicly available and widely circulated information contradicting Plaintiffs’ allegations and undercutting their claims. Thus, Plaintiffs either failed to conduct the reasonable factual and legal inquiry required under Rule 11, or they conducted such an inquiry and filed this lawsuit anyway.”²⁰ The court then held that “Plaintiffs made false, misleading, and unsupported factual assertions in their FAC and MPI and that their claims for relief did not have an adequate factual or legal basis grounded in a reasonable pre-filing inquiry.”²¹

Including these types of allegations to support any lawsuit would be problematic. More troubling, though, is that Mr. Kibort sought to undermine a basic tenet of our democracy, the right to vote, to achieve political ends for his client.

But the goal was never a complete victory in the courts. Mr. Kibort’s main objective was to use the courts to delay, to confuse, and to harm our electoral process. This became evident to Judge Tuchi, who stated that “Plaintiffs waited nearly two weeks after the hearing to ask to submit another declaration, in what appears to be an effort to get the last word and cast doubt on Mr. Jarrett’s testimony at a point when the County could no longer respond. The Court will not allow such potential gamesmanship.”²² This was not a good faith effort to make sure the right person won.

Mr. Kibort knew he had neither the law nor the facts on his side, and yet he filed this lawsuit anyway. He did this to undermine faith in our electoral system.

Mr. Kibort’s actions warrant discipline.

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

The Lawyers Professional Responsibility Board should investigate Mr. Kibort’s actions on the following basis:

¹⁹ *Id.*

²⁰ *Lake v. Hobbs*, Case No. 2:22-cv-00677-JJT (D. Ariz.) Dec. 1, 2022, Order on Motion for Sanctions at 25.

²¹ *Id.* at 28-29.

²² *Lake v. Hobbs*, Case No. 2:22-cv-00677-JJT (D. Ariz.) Aug. 26, 2022, Order Granting Motion to Dismiss at 21 n. 17.

1. Mr. Kibort 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

Ample evidence demonstrates that Mr. Kibort knew of the frivolous nature of the litigation he initiated. In *Lake v. Hobbs* the complaint was based on debunked conspiracy theories. Many of these theories had been proven false before he filed complaints. No reasonable person would consider the cited “evidence” a sufficient basis for casting doubt on elections in Arizona.

In fact, the pleadings themselves make clear that when filing the claims, Mr. Kibort did not have a proper basis for bringing them because the Plaintiffs themselves could not support the allegations they promoted. Mr. Kibort claimed that Arizona did not use paper ballots, and yet Kari Lake, his client, votes using a paper ballot.

In imposing sanctions, Judge Tuchi acknowledged the importance of election security, but that “the Court will not condone litigants ignoring the steps that Arizona has already taken toward this end and furthering false narratives that baselessly undermine public trust at a time of increasing disinformation about, and distrust in, the democratic process. It is to send a message to those who might file similarly baseless suits in the future.”

Mr. Kibort knew the claims he was advancing in *Lake v. Hobbs* lacked any basis in law or fact.

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

2. Mr. Kibort 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.”

²³ Rule 1.0(f).

In the interests of his clients, Mr. Kibort sought to harm democracy in Arizona and directly diminish the right to vote of millions of Arizonians. Judge Tuchi highlighted the extraordinary remedy they sought and the effect it would have on millions of Americans, stating that “Plaintiffs requested in this case would have called for a massive, perhaps unprecedented federal judicial intervention to overhaul Arizona’s elections procedures shortly before the election. Plaintiffs bore a substantial burden to demonstrate that such an intervention was constitutionally required and in the public interest. Yet they never had a factual basis or legal theory that came anywhere close to meeting that burden.”

Mr. Kibort disregarded the potential consequences of his proposed remedy – showing no respect for the rights of millions of third persons – and his actions warrant discipline.

3. Mr. Kibort 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. Kibort participated in a purposefully dishonest effort to undermine the 2022 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.

Mr. Kibort misrepresented the availability of expert evidence to support the Complaint’s allegations. He knew that expert testimony did not exist and yet purported to rely on them anyway.

It all amounted to a dishonest attempt to undermine the public confidence in the 2022 election. It is easy – indeed, necessary – to also recognize the direct link between the use of the courts to sow these seeds of doubt and confusion and the events of January 6, 2021, when people believing that the 2020 was stolen stormed the Capitol in a violent insurrection. Judge Tuchi recognized this, finding that “[a]s the court warned in *King v. Whitmer*, unfounded claims about election-related misconduct ‘spread the narrative that our election processes are rigged and our democratic institutions cannot be trusted. Notably, many people have latched on to this narrative, citing as proof counsel’s submissions in this case.’ *King*, 556 F. Supp. 3d at 732. The Court shares this concern.”

His 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.”²⁴ As officers of the court an attorney is “an intimate and trusted and essential part of the machinery of justice” and a

²⁴ *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 465 (1978).

“crucial source of information and opinion.”²⁵ 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 similar 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.²⁶

Mr. Kibort 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 2022 elections.

For the reasons set forth above, we respectfully request that the Lawyers Professional Responsibility Board investigate Mr. Kibort’s conduct and pursue appropriate discipline.

Sincerely,



Managing Director

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On behalf of The 65 Project

²⁵ *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1056, 1072 (1991).

²⁶ *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.