IN THE CIRCUIT COURT OF THE CITY OF SAINT LOUIS
STATE OF MISSOURI

Ruby Freeman and Wandrea Moss, Plaintiff(s), v. James Hoft, Joseph Hoft, and TGP Communications LLC d/b/a *The Gateway Pundit,* Defendant(s).	Case No. 2122-CC09815

MEMORANDUM IN SUPPORT OF MOTION TO STRIKE UNDER GA CODE § 9-11-11.1

In Atlanta, on November 8, 2020, things certainly *looked* strange. First, poll watchers were sent home for a "major water main break" that ultimately turned out to be noting more than a urinal malfunction. Then, when all poll workers had supposedly left, Ruby Freeman and Wandrea Moss strangely remained at their posts. While they remained behind, it sure *appears* that they were pulling out suitcases of ballots and improperly scanning them repeatedly. Of course, this case is not about whether Freeman and Moss actually *did* anything wrong, so much as it is about the fact that a reasonable person could look at these events and come to the conclusion that something was not as it should be on November 8, 2022, in that ballot counting location.

Freeman and Moss deny doing anything wrong, and Georgia government officials back their story. What they did *looked* bad, and no one is required to believe the explanations of these public figures or of politicians. The Miami Herald won a Pulitzer in 1999 for a series of articles exposing election fraud in Florida. *See* "The 1999 Pulitzer Prize Winner in Investigative Reporting," Pulitzer Prizes. **Exhibit 1**.[1] That series of articles is replete with government

[1] Available at: https://www.pulitzer.org/winners/staff-44.

wrongdoers denying the accusations of fraud, claiming they were telling the truth. In the early articles in that series, the official position was "We run it as straight as anyone can run it." Joseph Tanfani and Karen Branch, "$10 Buys One Vote: Dozens Cast Votes in Miami Mayoral Race – For $10 Each," THE MIAMI HERALD (Jan. 11, 1998).[2] The Herald declined to take the government's word for it, and its persistent reporting led to the Miami mayoral election being overturned. How convenient it would have been for Mayor Suarez to have been able to simply say "if you question me, you'll be subject to a lawsuit funded by my political supporters." The activist organizations running this litigation seek that convenience – the convenience of their political allies to avoid being questioned.[3]

A robust free press requires that America, and this Court, tolerate statements about the functioning of government, even if some, or even most, people disagree with those statements. On account of the very nature of the secret ballot, because a true audit of an election is impossible, a free press must subject those trusted with those untraceable ballots to scrutiny. Even if that scrutiny is inaccurate (not something defendants concede), the First Amendment requires breathing room – as enshrined in *New York Times v. Sullivan*.

Freeman and Moss are permitted (and certainly able) to rehabilitate their image through p.r. campaigns. They are free to receive Congressional accolades, Presidential Citizens Medals, and "Profile in Courage" awards. Since the election, they have been fawned over more than

[2] Available at https://www.miamiherald.com/latest-news/article1929052.html. **Exhibit 18**.
[3] The fact that one of these organizations bears the name of Floyd Abrams, the lawyer who *New York Times v. United States*, 403 U.S. 713 (1971) is utterly ironic – as is the fact that lawyers who belong to the Media Law Resource Center, an organization that requires members to pledge that they will "not represent plaintiffs in defamation…lawsuits…against the media" in accordance with its bylaws. *See* MLRC, *Membership Application,* available at https://medialaw.org/wp-content/uploads/2023/03/DCS-membership-form.pdf. Apparently, some media is more equal than others.

wounded military veterans. But, the First Amendment should not tolerate abusive litigation meant to chill the speech of those who dare question whether government functionaries are performing their jobs properly. Defendants James Hoft, Joseph Hoft, and TGP Communications LLC d/b/a *The Gateway Pundit*) ("Defendants") therefore move for summary judgment under Missouri R. Civ. P. 74.04(b), invoking GA Code § 9-11-11.1 (2020) (Georgia's Anti-SLAPP statute).

1.0 FACTUAL BACKGROUND

1.1 The Gateway Pundit

TGP Communications, LLC, d/b/a The Gateway Pundit ("TGP") publishes news, commentary, punditry, and analysis. *See* Gateway Pundit "About" page, attached as **Exhibit 2**.[4] Its sole owner, who exercises editorial control and is himself a significant contributing author, is Jim Hoft. *See* Affidavit of Jim Hoft ("Jim Hoft Aff.") attached as **Exhibit 3**, at ¶ 3. His twin brother, Joseph (Joe) Hoft, is also a contributing author. *See* Affidavit of Joe Hoft ("Joe Hoft Aff.") attached as **Exhibit 4**, at ¶ 3. With the exception of Jim Hoft, all authors for TGP are independent contractors; it is a small company with one employee. *See* Jim Hoft Aff. at ¶ 4. Despite its small size, TGP has grown since its founding in 2004 into one of the largest and most highly read political blogs in the nation. Jim Hoft Aff. at ¶ 5. It is ranked as one of the top 150 websites in the US, with an average of 2.5 million daily readers. *Id*.

As many Americans continue to lose trust in the purportedly unbiased nature of legacy newspapers and networks, TGP highlights that it is addressing this gap as a trusted news source for the stories and views that are largely untold or ignored by traditional news outlets. **Exhibit 2**. One of its core values is that it "must have courage in order expose the truth about powerful interests that may be angered by our coverage." *Id*. Part of TGP's mission is conducting

[4] Available at https://www.thegatewaypundit.com/about/.

investigative journalism in pursuit of an open government; this includes coverage of election returns and challenges. *See* Jim Hoft Aff. at 6. This reporting is national in scope, and TGP has broken stories regarding the conduct of elections officials. For example, TGP covered the 2020 and 2022 elections in Maricopa County, Arizona, and as part of their reporting exposed County Supervisor Steve Chucri as an "election denier," leading to his resignation. *See, e.g.,* Jordan Conradson, "EXCLUSIVE… Maricopa County Supervisor Steve Chucri Caught in Leaked Recording: The Maricopa County Voting Machine Company Audit and Recount – 'Was Pretty BULLSH*T By The Way' (AUDIO)," THE GATEWAY PUNDIT (Sept. 20, 2021), attached as **Exhibit 5**;[5] Jordan Conradson, "BREAKING: Maricopa County Supervisor Steve Chucri RESIGNS From Office After TGP Exposé: 'There Was No Cover-Up, The Election Was Not Stolen. Biden Won," THE GATEWAY PUNDIT (Sept. 21, 2021), attached as **Exhibit 6**.[6]

1.2 The Election Worker Plaintiffs

Ruby Freeman and her daughter, Wandrea ArShaye "Shaye" Moss, worked for the State of Georgia, counting ballots during the 2020 Presidential Election at the State Farm Arena in Fulton County. *See* Testimony of Wandrea Moss at Select Committee to Investigate the January 6th Attack on the United States Capitol (June 21, 2022), attached as **Exhibit 7**.[7] Moss worked for the Fulton County, Georgia, Department of Registration & Elections for over ten years, and she had previously counted ballots during the 2016 and 2018 elections. *Id.* Freeman became an election worker during the 2020 Presidential Election. *Id.* Prior to that, she was well-known in

[5] Available at: https://www.thegatewaypundit.com/2021/09/exclusive-maricopa-county-supervisor-steve-chucri-caught-leaked-recording-maricopa-county-voting-machine-company-audit-recount-pretty-bullsht-way-audio/

[6] Available at: https://www.thegatewaypundit.com/2021/09/maricopa-county-supervisor-steve-chucri-resigns-office-tgp-expose-no-cover-election-not-stolen-biden-won/

[7] Available at: https://docs.house.gov/meetings/IJ/IJ00/20220621/114923/HHRG-117-IJ00-Bio-MossW-20220621.pdf.

her community as a business owner, under the "Lady Ruby" moniker. *See* Bess Levin, "Jan. 6 Committee Witnsses Detail the Vile Trump Lies That Ruined Their Lives," VANITY FAIR (June 21, 2022), attached as **Exhibit 8**.[8]

Following the 2020 election, former New York City Mayor, Time Man of the Year, and attorney for President Trump, Rudolph Giuliani, publicly accused Moss and Freeman of passing a USB drive to each other. *See id*. The plaintffs claim that Giuliani's statement caused them to allegedly receive "hateful" and "racist" threats through Facebook. *Id.* President Trump specifically referenced Freeman 18 times in his call to the Georgia Secretary of State, referring to her as a "professional vote scammer" who "stuffed the ballot boxes." *See* Jason Szep and Linda So, "Trump campaign demonized two Georgia election workers – and death threats followed," REUTERS (Dec. 1, 2021), attached as **Exhibit 9**.[9] On December 3, 2020, Trump campaign attorney Jacki Pick, a respected attormney in good standing, told a legislative hearing that Plaintiffs pulled out "suitcases" of ballots and illegally counted them. *Id.* After President Trump's campaign publicly identified her, she allegedly received "threats and phone calls and racial slurs." *See id.*

1.3 The Statements at Issue

On November 3, 2020, as vote tabulation came through, President Trump was leading, in Georgia, by over 350,000 votes. "The Immaculate Deception: Six Key Dimensions of Election Irregularities," THE NAVARRO REPORT, attached as **Exhibit 10**, at 4.[10] At approximately 10:30 p.m., counting of absentee ballots was stopped at the State Farm Arena in Fulton County, supposedly to be resumed in the morning. Ben Brasch, "Fulton County election results delayed

[8] Available at: https://www.vanityfair.com/news/2022/06/donald-trump-ruby-freeman-wandrea-moss-january-6-hearings
[9] Available at: https://www.reuters.com/investigates/special-report/usa-election-threats-georgia/.
[10] Available at: https://bannonswarroom.com/wp-content/uploads/2020/12/The-Immaculate-Deception-12.15.20-1.pdf.

after pipe bursts in room with ballots," THE ATLANTA JOURNAL-CONSTITUTION (Nov. 3, 2020), attached as **Exhibit 11**.[11] Part of the reporting on the stoppage of counting involved an issue relating to a broken water pipe. *Id.; see also* Jacqueline Feldscher, "Burst pipe delays Atlanta absentee vote counting," Politico (Nov. 3, 2020), attached as **Exhibit 12**.[12] "Partisan observers and some poll workers claimed they were told to leave the Fulton County tally site but that four election workers stayed behind, pulled suitcases full of ballots hidden underneath a table, and then scanned them without any supervision, all, presumably, in Joe Biden's favor." Barnini Chakraborty, "Were Georgia monitors sent home? State officials clash with Trump team over chain of events," WASHINGTON EXAMINER (Dec. 7, 2020), attached as **Exhibit 13**.[13] Plaintiffs were two of those four election workers.[14] The government denies wrongdoing; Georgia's secretary of state reported there was no voter fraud. Alison Durkee, "Georgia Recertifies Biden's Win After Trump-Ordered Recount Fails Again," FORBES (Dec. 7, 2020), attached as **Exhibit 14**.[15]

On December 3, 2020, TGP published an article containing the following allegedly false statements: "It was all a lie in order to kick out poll watchers while a few crooks stayed behind to count illegal ballots for Joe Biden." Second Amended Petition ("SAP") at ¶ 197(a). From December 3, 2020 to May 4, 2022, TGP published that "[a] few 'workers' stayed behind and were

[11] Available at: https://www.ajc.com/news/atlanta-news/fulton-election-results-delayed-after-pipe-bursts-in-room-with-ballots/4T3KPQV7PBEX3JVAIGJBNBSVJY/.
[12] Available at: https://www.politico.com/news/2020/11/03/burst-pipe-delays-atlanta-absentee-vote-433988.
[13] Available at: https://www.washingtonexaminer.com/politics/were-georgia-monitors-sent-home-state-officials-clash-with-trump-team-over-chain-of-events.
[14] One America News Network, "Poll Worker in Fulton County, Ga. Caught on Camera Scanning Same Stack of Ballots Multiple Times," Rumble (Dec. 23, 2020), available at: https://rumble.com/vc4lnz-poll-worker-in-fultoncounty-ga.-caught-on-camera-scanning-same-stack-of-ba.html.
[15] Available at: https://www.forbes.com/sites/alisondurkee/2020/12/07/georgia-to-recertify-biden-win-election-results-after-trump-ordered-recount-fails-again/?sh=37220dab679a.

seen pulling suitcases full of ballots out from under tables to be tabulated!," that "They were caught cheating!" and "A few liberal election 'workers' stayed behind and were seen pulling suitcases full of ballots out from under tables to be tabulated." *Id*. at ¶ 197(b). In an effort to muddy the waters in this case, Plaintiffs plead dozens of statements across various articles and tweets. However, they are all flavors of this same issue—that Plaintiffs took part in pulling out these suitcases and improperly tabulated ballots, contributing to Joe Biden's 2020 victory.

TGP maintains their firm belief that these statements were true. However, even if one could definitively prove them false (which is Plaintiffs' burden here), they were not even published with negligence, much less actual malice. The case must be dismissed, and the Georgian plaintiffs can not escape the mandates of their home state's Anti-SLAPP law.

2.0 LEGAL STANDARD

Georgia's Anti-SLAPP[16] law, GA Code § 9-11-11.1(b)(1), provides that:

> [a] claim for relief against a person or entity arising from any act of such person or entity which could reasonably be construed as an act in furtherance of the person's or entity's right of petition or free speech under the Constitution of the United States or the Constitution of the State of Georgia in connection with an issue of public interest or concern shall be subject to a motion to strike unless the court determies that the nonmoving party has established that there is a probability that the nonmoving party will prevail on the claim.

Georgia's Anti-SLAPP statute is properly invoked on a motion for summary judgment. *See, e.g., Annamalai v. Capital One Fin. Corp*., 319 Ga. App. 831, 832, 738 S.E.2d 664, 665-66 (2013). Summary judgment is proper "if the moving party establishes that there is no genuine issue as to the material facts and that the movant is entitled to judgment as a matter of law. The facts contained

[16] "SLAPP" is an acronym for "Strategic Lawsuit Against Public Participation." There are "meritless lawsuits brought not to vindicate legally cognizable rights, but instead to deter or punish the exercise of constitutional rights of petition and free speech by tying up their target's resources and driving up the costs of litigation." *Wilkes & McHugh, P.A. v. LTC Consulting, L.P.*, 830 S.E.2d 119, 124 (Ga. 2019).

in affidavits or otherwise in support of a party's motion are accepted as true unless contradicted by the non-moving party's response to the summary judgment motion." *Goerlitz v. City of Maryville*, 333 S.W.3d 450, 452-53 (Mo. 2011) (cleaned up).

The current version of Georgia's law is modeled after California's Anti-SLAPP statute, Cal. Code Civ. Proc. § 425.16, and Georgia courts look to the vast body of California Anti-SLAPP case law in interpreting their own statute. *LTC Consulting*, 830 S.E.2d at 124-26. This statutory scheme, like California's Anti-SLAPP law, creates a two-pronged analysis. First, the defendant has the burden of showing that the plaintiff's claims arise from protected conduct. Once that is done, the burden shifts to the plaintiff to show a probability of prevailing on their claims. *LTC Consulting*, 830 S.E.2d at 127. In deciding such a motion, the Court *must* consider extrinsic evidence provided by the parties; this is not a simple motion to dismiss for failure to state a claim under Mo. R. Civ. P. 55.27(a)(6) or a motion to strike under Rule 55.27(e). GA Code § 9-11-11.1(b)(2). As California courts have regularly held, this is a "summary judgment-like procedure." *See, e.g., Baral v. Schnitt*, 376 P.3d 604, 608 (Cal. 2016); *ACLU, Inc v. Zeh*, 864 S.E.2d 422, 429 (Ga. 2021) (finding summary judgment-like procedure applies in second prong of Anti-SLAPP analysis). "Only evidence that is admissible at trial can be used to sustain or avoid summary judgment." *United Petroleum Serv., Inc. v. Piatchek*, 218 S.W.3d 477, 481 (Mo. App. 2007).

Conduct protected by Georgia's Anti-SLAPP law includes, *inter alia*, "[a]ny written or oral statement or writing or petition made in a place open to the public or a public forum in connection with an issue of public interest or concern" and "[a]ny other conduct in furtherance of the exercise of the constitutional right of petition or free speech in connection with a public issue or an issue of public concern." GA Code § 9-11-11.1(c)(3)-(4). In meeting their burden under the secod prong of this analysis, '"the plaintiff must demonstrate that the complaint is both legally

sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited."' *LTC Consulting*, 830 S.E.2d at 127 (quoting *Soukup v. Law Offices of Herbert Hafif*, 139 P.3d 30, 51 (Cal. 2006)). To withstand an Anti-SLAPP motion, the plaintiff '"must state **and substantiate** a legally sufficient claim."' *RCO Legal, P.S., Inc. v. Johnson*, 820 S.E.2d 491, 498 n.10 (2018) (quoting *Oasis West Realty, LLC v. Goldman*, 250 P.3d 1115, 1120 (Cal. 2011)) (emphasis added). Defendants are entitled to summary judgment and should be awarded their fees under the Georgia Anti-SLAPP statute.

3.0 LEGAL ARGUMENT

3.1 Georgia Law Governs Plaintiffs' Claims

Plaintiffs are Georgia citizens. The defendants are a Missouri corporation, a Missouri citizen, and a Florida citizen. Of the three states' law that we could choose from, the most significant relationship test makes it clear that Plaintiffs' state's law, including its anti-SLAPP law, follows them. This Court must apply Georgia law under Missouri's choice of law doctrine.[17]

Missouri courts use the "most significant relationship test" to analyze choice of law. *Kennedy v. Dixon*, 439 S.W.2d 173, 181 (Mo. 1969); *see also Thompson by Thompson v. Crawford*, 833 S.W.2d 868, 870 (Mo. 1992) citing Restatement (Second) of Conflicts of Laws § 145. The Missouri Supreme Court has determined "that in a defamation case where there is widespread dissemination of the allegedly defamatory matter . . . the most important consideration

[17] This substantive protection from Plaintiffs' suit would be unavailable to Defendants under Missouri law because Missouri's Anti-SLAPP statute does not apply. *See* Mo. Stat. § 537.528)(1) (explaining that the statute applies only to "speech undertaken or made in connection with a public hearing or public meeting [or] in a quasi-judicial proceeding"). There is thus an outcome-determinative conflict between the laws of the forum, Missouri, and Plaintiffs' state of residence, Georgia, that the Court must resolve with a choice-of-law analysis. *See Consul Gen. of Republic of Indonesia v. Bill's Rentals, Inc.*, 330 F.3d 1041, 1046 (8th Cir. 2003) (explaining that choice-of-law analysis is required when "there actually is a difference between the relevant laws of the different states").

in choosing the applicable law is the residence of the party allegedly defamed." *Fuqua Homes, Inc. v. Beattie*, 388 F.3d 618, 622 (8th Cir. 2004) (citing *Elmore v. Owens-Illinois, Inc.*, 673 S.W.2d 434 (Mo. 1984)). "This is because 'defamation produces a special kind of injury that has its principal effect among one's friends, acquaintances, neighbors and business associates in the place of one's residence.'" *Id*. The Restatement (second) of Conflict of Laws has a specific section devoted to cases just like this one – multistate defamation. "When a natural person claims that he has been defamed by an aggregate communication, the state of most significant relationship will usually be the state where the person was domiciled at the time, if the matter complained of was published in that state." Restatement (Second) of Conflict of Laws, § 150 (2nd 1988).

Plaintiffs live in Georgia and Moss worked with the Fulton County Registration and Elections Department. SAP at ¶¶ 9-10. Freeman claims she had to flee her home in Georgia because of Defendants' actions, that third parties surrounded her home in Georgia, and that she fears going to the grocery store in Georgia. SAP at ¶¶ 6-7. Moss claims she suffered "personal and professional consequences in her work on Fulton County [Georgia] elections." SAP at ¶ 6. All of these effects could only have been felt in Georgia. Plaintiffs do not allege any connection with Missouri, that any Missouri residents read Defendants' statements, that any statements were targeted at Missouri, or that Missouri has any relationship to this suit at all other than being where Defendants are. Similarly, they do not address Florida either – where Defendant Joseph Hoft lives. No facts rebut the presumption that the plaintiff's place of residence has the most significant relationship to this case. Thus, Georgia law applies, including its Anti-SLAPP statute.

Plaintiffs are unlikely to credibly claim that this comes as a surprise to them. Their own state would reach the same conclusion. While Georgia's choice of law rules have no control here, and Missouri's choice of law rules apply, Georgia would come to the same conclusion that Georgia

law applies, but for a different reason. Georgia law holds "that the place of wrong, the *locus delicti*, is the place where the injury sustained was suffered rather than the place where the act was committed." *Risdon Enters., Inc. v. Colemill Enters., Inc.*, 324 S.E.2d 738, 740 (Ga. Ct. App. 1984); *see also Donald J. Trump for President, Inc. v. CNN Broad., Inc.*, 500 F. Supp. 3d 1349, 1354 (N.D. Ga. 2020) ("The place of the wrong is not where the allegedly defamatory statement was issued but rather where Plaintiff was injured, that is, its domicile").

In fact, this is a seemingly universal legal truth – that in a case where an allegely defamatory statement is published on the internet, or in some other way to multiple jurisdictions, the law of the plaintiff's residence controls. *See, e.g., Tobinick v. Novella*, 108 F. Supp. 3d 1299, 1303 (S.D. Fla. 2015) (CA plaintiff sued in Florida to try to evade the CA Anti-SLAPP law, and given that the plaintiff's forum state had the most significant relationship to the dispute, the Anti-SLAPP law came along with him to the forum state, based on Section 150 of the Restatement (Second) of Conflict of Laws); *McKee v. Cosby*, 236 F.Supp.3d 427, 436-37 (D. Mass. 2017) (plaintiff being in Michigan at time of publication required application of Michigan law); *Adelson v. Harris*, 973 F.Supp.2d 467, 475-81 (S.D.N.Y. 2013) (same with a Nevada plaintiff, applying Nevada Anti-SLAPP law against the plaintiff); *Hanley v. The Tribune Publishing Company*, 527 F.2d 68 (9th Cir. 1975) (Nevada law governed a Nevada resident's suit against a Calif. Publisher); *De Roburt v. Gannett Co.*, 83 F.R.D. 574, 580 (D. Haw. 1979) (agreeing with *Hanley*).

Georgia also bears the most significant relationship to Plaintiffs' intentional infliction of emotional distress claim because, just like defamation cases, courts using this test give the most weight to the plaintiff's residence as the place where the injury occurred. *See, e.g., Inst. Food Mktg. Assocs., Ltd. v. Golden State Strawberries, Inc.*, 747 F.2d 448, 454 n.5 (8th Cir. 1984) (determining under Missouri choice-of-law rules that Missouri substantive law applied to a tortious

interference claim brought by a plaintiff residing in Missouri, where the other parties involved were in Missouri and California and the alleged interference was conducted over telephone and mail) (citing *Kennedy v. Dixon*, 439 S.W.2d 173, 181 (Mo. 1969) (*en banc*)). Georgia's Anti-SLAPP law thus applies to the IIED claim, as well.

3.2 Prong One: Plaintiffs' Claims Arise from Protected Conduct

Each and every one of the statements at issue, attributed to Defendants and against whom liability is sought, was on a matter of public interest and public concern, namely a national election. *See, e.g., Schmitz v. Barron*, 312 Ga. 523, 524, 863 S.E.2d 121, 123 (2021) (discussing the "clear public interest in the prompt handling of election contests"); *State ex rel. Catron v. Brown*, 350 Mo. 864, 867, 171 S.W.2d 696, 698 (1943) (election of delegates "is a matter of public concern"). A controversy is one "of legitimate public concern" where it "will affect people who do not directly participate in it." *Riddle v. Golden Isles Broad.*, LLC, 275 Ga. App. 701, 705, 621 S.E.2d 822, 826 (2005) quoting *Silvester v. Am. Broad. Cos.*, 839 F.2d 1491, 1494-95 (11th Cir. 1988). The 2020 Presidential election outcome affected millions of Americans and billions of people worldwide. Plaintiffs may not like these statements, but no reasonable person could claim there is a private controversy at play—the only reason to make any statement about Plaintiffs is because of their role in the election. Furthermore, there was a public controversy about Plaintiffs' role in this election specifically prior to Defendants publishing any of the complained-of statements. Plaintiffs even admit that Trump and his legal team, not Defendants, put Plaintiffs at the center of this controversy. SAP at ¶¶ 35-39. The first prong of the Anti-SLAPP statute is satisfied.

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3.3 Prong Two: Plaintiffs Cannot Show a Probability of Prevailing

3.3.1 Plaintiffs' Defamation Claims Fail

Plaintiffs make a claim for defamation of Ms. Freeman (count 1) and a claim for defamation of Ms. Moss (count 2). Each references dozens of articles,[18] with numerous statements, the general tenor of which are that Ms. Freeman and Ms. Moss were engaged in election misconduct, having pulled out hidden suitcases of ballots in secret, without election monitors (who had been removed by Ms. Moss ostensibly due to a plumbing problem), with Ms. Freeman tabulating some ballots more than once, and then passing a USB stick between them, which may have had tabulation data on it. Plaintiffs ask the court to re-draft these articles to serve their case theory as stating a) Plaintiffs planned and carried out a plot to steal the election and flip Georgia for Joe Biden; b) Plaintiffs helped fake a water main break as a cover story; c) Plaintiffs consipired to exclude observers so election fraud could be committed; d) Plaintiffs criminally brought out hidden, illegal ballots in the absence of observes; e) Ms. Moss fraudulently triple counted ballots; and f) Plaintiffs committed crimes, including election fraud, for which they are subject to prosecution. SAP at ¶¶ 199 & 217.

Under Georgia law, there are four elements to a defamation claim: "(1) a false and defamatory statement concerning the plaintiff; (2) an unprivileged communication to a third party; (3) fault by the defendant amounting at least to negligence; and (4) special harm or the actionability of the statement irrespective of special harm." *Mathis v. Cannon*, 573 S.E.2d 376, 380 (Ga. 2002).[19] "When, as here, a libel action involves a speech of public concern, a plaintiff must show

[18] Although the Second Amd. Pet. references numerous tweets allegedly amplifying these articles, the tweets themselves are not identified in the first or second counts as being defamatory.

[19] These elements are substantially similar to defamation claims in Missouri. *See Castle Rock Remodeling, LLC v. Better Bus. Bureau of Greater St. Louis, Inc.*, 354 S.W.3d 234, 239 (Mo. App. 2011). Under Missouri law, whether a statement is actionable is a question of law. *Id*.

that the defendant published a defamatory statement about the plaintiff, the defamatory statement was false, the defendant was at fault in publishing it, and the plaintiff suffered actual injury from the statements." *Lake Park Post, Inc. v. Farmer*, 264 Ga. App. 299, 300, 590 S.E.2d 254, 257 (2003). The applicable level of fault depends on whether the plaintiff is a public official or a public figure. If they are, then they must show the defendant published with actual malice, *i.e.*, either actual knowledge the statements were false or reckless disregard for their truth or falsity. *New York Times Co. v. Sullivan*, 376 U.S. 254, 278-80 (1964); *Gertz v. Robert Welch*, 418 U.S. 323, 342 (1974). This showing must be made by "clear and convincing evidence." *Davis v. Shavers*, 269 Ga. 75, 76, 495 S.E.2d 23 (1998).[20] "[W]here the factual dispute concerns actual malice, clearly a material issue in a *New York Times* case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255-256 (1986). Plaintiffs cannot meet this standard.

3.3.1.1 Defendants' Statements are Not Actionable

Plaintiffs claim they did nothing wrong, that the item identified as a USB stick was not a USB stick, that there really was a water leak earlier that day, that observers were not unlawfully barred from observing the count, that the "suitcases" were proper storage boxes that were properly placed, and that ballots were not counted twice, even if some required multiple scanning attempts before they were properly counted. For purposes of this motion, Plaintiffs' claims here will be treated as true. However, that does not make Defendants' alleged statements to the contrary actionable. At most, it satisfies the elements of falsity and being of-and-concerning Plaintiffs. The

[20] There is no conflict of law; the elements under Minnesota law are the same. *See Larson v. Gannett Co*., 940 N.W.2d 120, 130 (Minn. 2020) and *Connelly v. Nw. Publ'ns, Inc*., 448 N.W.2d 901, 903 (Minn. Ct. App. 1989).

inquiry does not end there. Defendants are entitled to believe what they saw with their own eyes and which is undisputed—a video of Plaintiffs pulling out boxes of ballots in the absence of election observers, some of which were scanned multiple times, with a small object that could look like a USB drive passed between them, on the night when President Trump's lead disappeared—and draw the conclusion that what happened was improper. "If an opinion is based upon facts already disclosed in the communication, the expression of the opinion implies nothing other than the speaker's subjective interpretation of the facts. Thus, the Restatement notes that 'a statement of [opinion] is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.'" *Jaillett v. Ga. Tv Co.*, 238 Ga. App. 885, 890 (1999) (quoting Restatement (Second) of Torts, § 566, p. 170). Defendants' statements are based solely on disclosed facts, namely Trump's legal team's claims and the security footage they played during a legislative hearing. Plaintiffs will doubtless claim that this opinion is unreasonable, but that is irrelevant; even a patently unreasonable opinion is fully protected so long as the facts on which it is premised are disclosed. "A writer cannot be sued for simply expression his opinion of another person, however unreasonable the opinion or vituperous the expressing of it may be." *Bergen v. Martindale-Hubbell, Inc.*, 337 S.E.2d 770, 771 (1985). Plaintiffs and other public officials may disagree on what conclusions should be drawn from the available facts, but reaching a different opinion is not sufficient to show negligence, much less actual malice.

Further, as set forth below, Plaintiffs cannot show the statements were unprivileged—Georgia law protects speech regarding public officials conducting their business. Neither can Plaintiffs show the requisite degree of fault—they are public figures and/or officials and this is speech on a matter of grave public concerns. Plaintiffs cannot show the statements were made with

knowing falsity or reckless disregard of the truth, thereby failing to meet the requisite finding of fault.

Additionally, as this is a matter of public concern, Plaintiffs fail to show, let alone allege, actual damage. Every harm they claim was caused by Defendants they blamed on President Trump and his team first. SAP at ¶¶ 35-39, 43-44. In fact, Plaintiffs have an ongoing suit against Rudolf Giuliani over identical claims. *See Freeman v. Giuliani*, No. 21-3354 (BAH), District for the District of Columbia. They also blame unknown third parties who are not known to have any connection to Defendants. Whatever injuries they claim to have suffered were caused by others, not by Defendants. Thus, they cannot meet the element of "actual injury."

3.3.1.2 Defendants' Statements are Privileged

Under Georgia law, which Plaintiffs should well know, the statements Plaintiffs attribute to Defendants, no matter how erroneous they believe them to be, are privileged and Defendants cannot be held liable for them. O.C.G.A. § 51-5-7 enumerates several categories of privileged communications, including, *inter alia*:

> (4) Statements made in good faith as an act in furtherance of the person's or entity's right of petition or free speech under the Constitution of the United States or the Constitution of the State of Georgia in connection with an issue of public interest or concern, as defined in subsection (c) of Code Section 9-11-11.1;
>
> (5) Fair and honest reports of the proceedings of legislative or judicial bodies;
>
> (6) Fair and honest reports of court proceedings; [and]
>
> . . .
>
> (9) Comments upon the acts of public men or public women in their public capacity and with reference thereto.

Where a privilege applies, proof of lack of malice shall bar recovery. O.C.G.A. § 51-5-5. Those four privileges apply here. First, as discussed above with respect to the applicability of the Anti-SLAPP statute, these statements were made in furtherance of Defendants' right to free speech in connection with an issue of public interest or concern—namely the validity of the outcome of an

election. Second, Defendants' articles fairly and accurately reported on the claims made by third parties, such as Trump's legal team, in legal and legislative hearings. Third, the comments were on two public agents of the state—in their public capacity—counting ballots—with direct reference to the vote-counting function.

Because those statements were privileged, Plaintiffs are required to show common-law malice, *i.e.,* ill will. *See, e.g., Dominy v. Shumpert*, 235 Ga. App. 500, 506, 510 S.E.2d 81, 86 (1998). In *Dominy*, the plaintiff could not show that statements made regarding the fitness of another physician were made with ill will and there was no evidence of animus. *Id.* Here, Defendants have no extrinsic animus regarding Plaintiffs. *See* Jim Hoft Aff. at ¶ 7; Joe Hoft Aff. at ¶ 4. While they disapprove of what they believe to be improper acts committed by Plaintiffs, this is not personal—all statements have been confined to the ballot counting issue. While Defendants are alleged to have used vituperative language, it is no more evidence of malice than Dr. Shumpert's critique of the fitness of Dr. Dominy. 235 Ga. App. at 501-04. If Plaintiffs are able to satisfactorily convince Defendants that they did nothing wrong, then Defendants will happily tell their audience. *See* Jim Hoft Aff. at ¶ 8; Joe Hoft Aff. at ¶ 5. The statements are not about Plaintiffs, *per se,* but of what Defendants perceive Plaintiffs to have done on election night 2020. As Plaintiffs have no evidence of ill-will, they cannot succeed in their claims.

3.3.1.3 Plaintiffs are Public Figures

Assuming, *arguendo*, Defendants made any otherwise actionable statements, Plaintiffs' defamation claim fails because they are both public officials and public figures, and cannot show Defendants published with actual malice. This is a constitutional requirement under long-standing First Amendment jurisprudence. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). Simply put, none of the alleged statements were made with the requisite degree of fault.

3.3.1.3.1 Plaintiffs are Public Officials

Plaintiffs were ballot counters for the 2020 presidential election; as such, they are public officials. "[T]he 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to have, substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966). "The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occassioned by the particular charges in controversy." *Id*. at 86 n.13. "The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character." *Garrison v. La*., 379 U.S. 64, 77 (1964). Courts use three criteria in evaluating whether an individual's position makes them a public official: first, "performing governmental duties directly related to the public interest," second, "holding a position to influence significantly the resolution of public issues," and third, "government employees having, or appearing to the public to have, substantial responsibility for or control over the conduct of government affairs." *Britton v. Koep*, 470 N.W.2d 518, 522 (Minn. 1991) (finding that police officers are public officials). The Missouri appellate court in *Richardson v. Sherwood*, 337 S.W.3d 58, 64 (Mo. App. 2011) used these *Koep* criteria in finding that a probation officer was a public official.

Public official status is "a mixed question of law and fact for a court to determine 'on a case-by-case basis.'" *ACLU, Inc. v. Zeh*, 864 S.E.2d at 437 (quoting *Purvis v. Ballantine*, 487 S.E.2d 14, 17 (Ga. App. 1997)). The court in *Lovingood v. Discovery Communs., Inc.*, 275 F. Supp. 3d 1301, 1309 (N.D. Ala. 2017), *aff'd* 800 Fed. Appx. 840 (11th Cir. 2020), held that a NASA

employee who was "partially responsible for overseeing the development and operation of the propulsion systems for the Challenger shuttle" was a public figure. In doing so, it cited with approval Prof. Lawrence Tribe, who wrote that '"*the term 'public official' now embraces virtually all persons affiliated with the government, such as most ordinary civil servants, including public school teachers and policemen*.'" *Id*. (quoting L. Tribe, *American Constitutional Law* 866 (2d ed. 1988)); *see also Stewart v. Town of Zolfo Springs*, No. 96-1142-CIV-T-25A, 1997 U.S. Dist. LEXIS 24857, *6 (M.D. Fla. Aug. 26, 1997) (A municipal police officer is a public official for purposes of the actual malice standard.); *Mercer v. City of Cedar Rapids*, 308 F.3d 840, 848 (8th Cir. 2002) (finding that a probationary police officer was a public official); *see Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1069 (5th Cir. 1987) (finding that county law enforcement officers were public officials); *Price v. Viking Penguin, Inc.*, 676 F. Supp. 1501, 1512 (D. Minn. 1988) (finding that FBI agent was a public official); *Kelley v. Bonney*, 221 Conn. 549, 581-582 (1992)(finding teachers to be "public officials").

Here, Plaintiffs' job performance invited public scrutiny and discussion. As a matter of law, GA Code § 21-2-408 expressly provides for political parties to designate poll watchers to observe the casting and counting of ballots. There are few government functions that invite more public scrutiny. Under *Britton,* Plaintiffs meet the first criterion; they were performing governmental duties related to the public interst. Second, as ballot counters, they held positions to influence the resolution of public issues, namely, who would be President of the United States. And, third, they had (or appeared to have) substantial responsibility for and control over the conduct of government affairs, regulating poll watchers, and actually counting ballots—if they lacked control, there would be no need for poll watchers. Poll watchers are supposed to keep government officials like Plaintiffs honest. A significant part of the controversy surrounding

Plaintiffs was specifically because of the apparent or actual authority of poll workers to order poll watchers to leave the room during tabulation. SAP at ¶ 38. All three factors are met -- Plaintiffs are public officials.

3.3.1.3.2 Plaintiffs are Limited-Purpose Public Figures

Even if Plaintiffs were not public *officials*, the statements would still fall under *Sullivan* because Plaintiffs are limited purpose (or involuntary) public figures. *See Gertz v. Welch,* 418 U.S. 323, 351 (1974) ("More commonly, an individual injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues"). While a public figure normally attains this status through deliberate efforts, a person can become an involuntary public figure. This happens when '"someone is caught up in the controversy involuntarily and, against his will, assumes a prominent position in its outcome. Unless he rejects any role in the debate, he too has 'invited comment' relating to the issue at hand."' *Atlanta Journal-Constitution v. Jewell*, 555 S.E.2d 175, 186 (Ga. App. 2001) (quoting *Waldbaum v. Fairchild Publications*, 627 F.2d 1287, 1298 (D.C. Cir. 1980)). A plaintiff's public figure status is a question of law, which the Court cannot delegate to a jury. Courts use a three-part test for this determination. They "must isolate the public controversy, examine the plaintiff's involvement in the controversy, and determine whether the alleged defamation was germane to the plaintiff's partcipation in the controversy." *Jewell*, 555 S.E.2d at 183. Thus, for example, an air traffic controller who had a crash occur on his watch became an involuntary public figure. *Dameron v. Washington Magazine*, 779 F.2d 736, 741 (D.C. Cir. 1985). So, too, are Plaintiffs otherwise involuntary public figures for having the Georgia ballot counting, which happened to have a plumbing problem, absent observers, and ballots pulled out from under a table, occur on their watch.

As Plaintiffs admit in their Second Amended Petition, TGP was not the first to make a statement about Plaintiffs' involvement in alleged election fraud. Not even the second. There was

already a national controversy over Defendants' actions and their roles in the election. While TGP would have been delighted to be the first ones to break the story, this time they were late to the party, so to speak. In a defamation case, once this "party" has begun, the subjects of the national controversy (Plaintiffs in this case) are already public figures.

As Plaintiffs allege, before TGP published a word, the President of the United States' legal team testified before the Georgia State Senate on this issue on December 3, 2020. SAP at ¶ 35. As part of this presentation, attorney Jacki Pick played an excerpt of suveillance video of the absentee and military vote count at the State Farm Arena. *Id*. at ¶ 36. Ms. Pick noted four female election workers who were part of this alleged scheme and stated that "one of them had the name Ruby across her shirt somewhere." *Id*. at ¶ 39. Immediately thereafter, the Trump campaign circulated the Trump legal team's claims and the surveillance video to various media outlets. *Id*. at ¶¶ 43-44. One America News Network quickly rebroadcast the surveillance video Trump's legal team showed. SAP at ¶ 43.[21] As shown by Jim Hoft's Twitter feed, numerous other individuals and entities (including Sebastian Gorka, Mike Cernovich, Michael Flynn, Lin Wood, and Rudy Giuliani) were writing about this surveillance footage at the same time and were also stating it was evidence of election fraud. *See* archived version of @gatewaypundit Twitter feed on December 7, 2020, attached as **Exhibit 15**.[22] Per *Gertz,* Plaintiffs, by virtue of taking positions as ballot counters, voluntarily injected themselves into any controversy that may have arisen related to the ballot counting or, at a minimum, their positions drew them into the controversy. And, under *Jewell,* there was a public controversy over the ballot counting in the 2020 election and Plaintiffs

[21] One America News Network, "Giuliani, TRUMP Legal Team Testify in GA.FULL 12/3/20," Youtube (Dec. 4, 2020), available at: https://www.youtube.com/watch?v=3wObE1JCQMg

[22] Available at: https://web.archive.org/web/20201207070649/https://twitter.com/gatewaypundit.

were heavily involved as ballot counters. Once the controvery spilled out into a national story, Plaintiffs were public figures. TGP did not make them so. TGP found them that way.

There can be no doubt the statements were germane to Plaintiffs' ballot counting. Jim Hoft published on his Twitter account on December 3: "What's Up, Ruby?... BREAKING: Crooked Democrat Filmed Pulling Out Suitcase of Ballots is IDENTIFIED."[23] This tweet linked to a TGP article with the same title.[24] This article identified Ruby Freeman by her full name, and showed video footage of her (this same footage was also reported on by other media outlets). The article also linked to Freeman's LinkedIn page and her business, "LaRuby's Unique Treasures," the name of which was shown in the video footage because the purse she carried had this name on it. One of the allegedly defamatory statements from December 3 is calling Plaintiffs "dirty Crooks!!" This appears in a Dec. 3 tweet that reads "Thanks @TheDemocrats for turning America into a Banana Republic! Yeah, F**k You for Doing this to US. SUITCASES OF FRAUDULENT BALLOTS! Nice work you dirty Crooks!!"[25] It links to a TGP article.[26] Every single one of the statements at issue thereafter related to Plaintiffs' role as ballot counters.

Plaintiffs emphasize that TGP was the first entity to publicize their names in connection with this story. So what? There was a national controversy over the election. Plaintiffs were the people involved in it; the press was under no obligation to then simply identify them as "Jane Doe 1 and Jane Doe 2." The Floyd Abrams Center for the Freedom of Expression ought to know this.

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[23] Available at: https://web.archive.org/web/20201207070649/https://twitter.com/gatewaypundit/status/1334692215612985344.

[24] Available at: https://www.thegatewaypundit.com/2020/12/ruby-breaking-crooked-democrat-filmed-pulling-suitcases-ballots-georgia-identified/.

[25] Available at: https://web.archive.org/web/20201207070649/https://twitter.com/gatewaypundit/status/1334596380376051713.

[26] Available at: https://www.thegatewaypundit.com/2020/12/bill-barr-got-voter-fraud-ag-barr-video-attempted-steal-georgia-arrests/. (SAP Exhibit 2).

The Trump legal team first alleged that this voter fraud took place and played surveillance video showing Plaintiffs engaged in suspicious ballot-counting activity during a nationally televised hearing. A person can be a public figure without being identified by name. D.B. Cooper is a public figure despite still being anonymous. As is the Zodiac Killer, Jack the Ripper, Banksy, Tiananmen Square's Tank Man, and, retaining anonymity for 31 years—Deep Throat. Few people know the name Phan Thi Kim Phuc, but most Americans know who Napalm Girl is. Whenever there is a mass shooting or other high profile event that receives media coverage, the people involved become public figures before being officially identified; names do not make one a public figure—acts do. Plaintiffs became public figures the moment the Trump legal team showed the video of Plaintiffs counting ballots; TGP merely did some follow-up investigation to determine their identities. And notably, TGP identified them correctly.

3.3.1.4 Defendants Did Not Publish with Actual Malice

As public officials *and* public figures, Plaintiffs must show that Defendants published their statements with actual malice. *Sullivan*, 376 U.S. at 279-80. Plaintiffs cannot establish a dispute of material fact on this issue, as Defendants did not know that any of their statements were false at the time of publication, and they did not publish with any significant doubt as to the truth of their statements. To this day, they believe the alleged statements are accurate. Plaintiffs "must show actual malice with '*convincing clarity*,' even on [a] motion for summary judgment." *Terrell v. Ga. TV Co.*, 449 S.E.2d 897, 899 (Ga. App. 1994); *see Zeh*, 864 S.E.2d at 428 (noting that actual malice must be shown by "clear and convincing evidence") (emphasis added). The evidence of actual malice must "instantly tilt[] the evidentiary scales in the affirmative when weighed against the evidence [the defendant] offered in opposition." *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984). "The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for

the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'" *Bose Corp. v. Consumers Union*, 466 U.S. 485, 511 (1984). This high standard of proof is required because "the stake of people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies . . . [T]o insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones." *Thompson*, 390 U.S. at 731-32. Whether there is sufficient evidence to to support a finding of actual malice is a question of law. *Zeh*, 864 S.E.2d at 440. This is not a question for a jury.

Plaintiffs have no evidence that the statements were published with knowing falsity. A defendant's lack of objectivity, the adoption of a sarcastic tone, the reliance on a single source, or the misinterpretation of available data will not, by themselves, be enough to establish actual malice. *Time, Inc. v. Pape*, 401 U.S. 279 (1971). In fact, the Supreme Court has said that actual malice cannot be shown by proof of even "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Curtis Publ'g Co. v. Butts,* 388 U.S. 130, 155 (1967). There is no smoking gun e-mail or witness who can say "the Hoft brothers said to each other 'we know Freeman and Moss did nothing wrong and the exculpation by Georgia politicians shows it.'" Defendants were not required to accept the exhortations of government agents as true—they did not "know" of any falsity. Distrust and disbelief in the government is enshrined in the Constitution. What a strange constitutional turn we would take if this Court were the first to rule that the press must take the

government's word for it, when the government denies wrongdoing. That is how it works in Cuba, China, and other totalitarian regimes. The "Floyd Abrams Institute For Freedom Of Expression" and "United to Protect Democracy" certainly are names that take on an Orwellian newspeak tone when we consider what they are advocating for here – that when the government denies it did anything wrong, you better take their word for it. They would not be the only ones nowadays who seek to curtail or overturn *New York Times v. Sullivan*. They may seek to advocate for a change in the law on appeal, and how ironic that would be if they succeeded. But, this Court is bound by the law as it stands today: "[T]he First Amendment forbids penalizing the press for encouraging its reporters to expose wrongdoing by public corporations and public figures." *Tavoulareas v. Piro*, 817 F.2d 762, 796 (D.C. Cir. 1987). If one were required to believe what the government said, then every prosecution would have to lead to a conviction—an idea that is repugnant to all. "[T]he mere assertion of any witness need not be believed, *even though he is unimpeached*[.]" *State v. Willis*, 662 S.W.2d 252, 256 (Mo. banc 1983) (quoting VII Wignore on Evidence, § 2034(3) (Chadbourn Rev. 1978) (emphasis in original)). In fact, the government lies all the time—from routine lies like undercover agents on sting operations and military misdirection to lies that drive the country to war (*e.g.,* the Gulf of Tonkin and Saddam's WMDs). And, beyond lying, the government is sometimes just wrong, whether it's "two weeks to flatten the curve" or convictions reversed by new evidence. Thus, Plaintiffs cannot rely on the "official" pronouncements of Georgia to impart *actual knowledge*. At best, a government agency with a vested interest in saying "nothing untoward happened" shared its opinion that "nothing untoward happened." This is no more inherently reliable than the LAPD finding that one of its officers did not use excessive force. The public has eyes and is entitled to rely on them, regardless of what the government says.

Neither were the statements made in reckless disregard for their truth or falsity. "Reckless disregard" under the actual malice standard means that the defendant "entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Whether a defendant published with reckless disregard "is not based on what a reasonably prudent publisher would have done, rather, there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Terrell*, 449 S.E.2d at 899; *accord St. Amant,* 390 U.S. at 731. This is a subjective standard; the defendant must have *actually* possessed a high degree of awareness of probable falsity, regardless of whether a reasonable person would have. *Harte-Hanks*, 491 U.S 657, 688 (1989). A failure to investigate does not amount to actual malice. *See Terrell*, 449 S.E.2d at 899 (finding that reporter relying solely on mayor's false statement about mayor's political enemy did not constitute actual malice). A self-serving denial, such as those by the government cited in the Second Amended Petition, cannot show actual malice because "denials are so commonplace in the world of polemical charge and coutercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error." *Harte-Hankes*, 491 U.S. at 691 n.37. And to the extent Plaintiffs may criticize Defendants' journalistic practices, actual malice requires "more than an extreme departure from professional standards." *Id*. at 665. Because this is a subjective standard, '"courts must be careful not to place too much reliance on [circumstantial evidence of the defendant's state of mind]."' *Zeh*, 864 S.E.2d at 440 (quoting *Harte-Hanks*, 491 U.S. at 668).

Some of the most well-known actual malice cases show that reckless disregard is extremely difficult to establish. *Sullivan* dealt with statements in an advertisement the New York Times. Had the Times checked the advertisement against their very own files, it would have known the statements were false, yet the Supreme Court found that this only established negligence. 376 U.S.

at 287-88. In *St. Amant*, a political candidate did not act with actual malice when he repeated an allegation made by a union member regarding alleged misconduct by a deputy sheriff, despite relying only on the allegation and with a record that contained no evidence of the union member's reputation for veracity. 390 U.S. at 728-33.

As Plaintiffs allege, this situation began when President Trump's legal team made statements during a televised hearing before the Georgia Senate that Georgia elections officials were committing election fraud, including by showing surveillance footage of Plaintffs apparently pulling out cases of ballots and counting them after Republican observers had been asked to leave. SAP at ¶¶ 35-39. According to Plaintiffs, Trump's attorney testified at the hearing that she had personally heard from election observers that election workers told observers that they were going to stop counting ballots for the day before removing them and resuming the count. SAP at ¶ 38. During her presentation, Ms. Pick mentioned that she had sworn affidavits from her witnesses.[27] She mentioned earlier press reports that there was a water pipe break that was an excuse for forcing Republication observers to leave the room before ballot tabulations were finished.[28] Plaintiffs also admit that initial reporting on the reason for delaying the count of absentee ballots at the State Farm Arena erroneously claimed that there was a pipe break causing a water leak, when in reality it was an overflowing urinal. SAP at ¶ 30.

Plaintiffs thus admit that third parties, including the then-President's legal team, provided the factual bases for Defendants' statements. Trump's attorneys made these representations during Senate hearings and relied on sworn affidavits from witnesses. As a matter of law, it was reasonable for Defendants to rely on these representations. *See Zeh*, 864 S.E.2d at 443 (finding

[27] *See* 11Alive, "Second Georgia Senate election hearing," Youtube (Dec. 3, 2020), available at https://www.youtube.com/watch?v=hRCXUNOwOjw, at 34:08-34:12.
[28] *Id*. at 48:48-49:13.

that ACLU did not publish with actual malice when it relied on pleadings and declarations filed in a federal court case and had no obvious reason to doubt allegations on which it was reporting). Strangely, the Defendants seem to wish for this Court to rule that TGP was required to take the word of the Georgia government agency that denied wrongdoing. Why? Because they're the government? But, there is no such requirement at all. Meanwhile, TGP was not required to believe the sitting President of the United States. But, just as *Vanity Fair* took Georgia at its word, and called Trump a liar, TGP has the right to believe the President and take the opposite view. The press is allowed to believe the President of the United States and sworn statements – even if that information could later be proven to be erroneous.

Despite President Trump's legal team making apparently supported allegations of election fraud during a Senate hearing, Plaintiffs claim that relying on these allegations was so unreasonable it constitutes significant subjective doubt as to the truth of these allegations. Why? Because they don't like Trump? This is incompatible with *St. Amant, supra* – even if Plaintiffs or the Court think it reasonable, Defendants were not *required* to disbelieve the President. Why was TGP required to believe officials from Fulton County, but simultaneously required to discount what a sitting president said?

Plaintiffs refer to multiple purported refutations of President Trump and others' arguments that the election in Fulton County was fraudulent, but that is not what actual malice means. First, they cite a "fact check" published on the website <leadstories.com> on December 4, 2020 and cited by Georgia's Voting Implementation Manager, Gabriel Sterling.[29] SAP at ¶¶ 55-56. Had TGP relied on a previously unknown nothing website like "leadstories.com," Plaintiffs might very

[29] https://leadstories.com/hoax-alert/2020/12/fact-check-video-from-ga-does-not-show-suitcases-filled-with-ballots-pulled-from-under-a-table-after-poll-workers-dismissed.html

well claim that this was at least negligent. Further, even if this nobody website were credible in general, its "fact check" did no more than contain assurances by "[t]wo high-level officials with the Georgia secretary of state's office and a state elections board monitor" that "their investigations revealed nothing suspicious in the video" cited by Trump. SUF ¶ 36. Obviously, the government entities accused of wrongdoing will deny wrongdoing. This is a tale as old as time, and their denials do not affect the credibility of Trump's allegations in any way. The same goes for the December 4 "fact check" by Georgia Public Broadcasting[30] that Plaintiffs cite, which again relies almost entirely on representations by the very same government officials accused of misconduct. SAP at ¶ 61. When he appeared on Newsmax, Gabriel Sterling did not "straightforwardly debunk" Trump's claims, but rather was a government official once again denying wrongdoing. SAP at ¶ 65.[31] The "fact checks" by Politifact that Plaintiffs cite was no more credible, either, as it relied on statements from Fulton County officials assuring people that what they saw on the surveillance video was perfectly normal. SAP at ¶¶ 75 & 109.[32] Plaintiffs cite a December 6 affidavit from the Georgia Secretary of State's chief investigator Frances Watson denying allegations of election fraud, but this is again an example of the government attempting to exonerate itself. SAP at ¶ 80.[33] The same goes for the December 7 statement by Sterling. SAP at ¶ 86.[34] Neither is there any difference with respect to the January 6, 2021, letter from Georgia Secretary of State Brad

[30] https://www.gpb.org/news/2020/12/04/fact-checking-rudy-giulianis-grandiose-georgia-election-fraud-claim

[31] *See* Monkey Savant, "Gabriel Sterling and Chad Robichaux On Newsmax Discuss The GA Ballot Fraud Situation 12/04/20," Youtube (Dec. 4, 2020), available at: https://www.youtube.com/watch?v=o6k2zRRPx4I

[32] https://www.politifact.com/factchecks/2020/dec/04/facebook-posts/no-georgia-election-workers-didnt-kick-out-observe/ and https://www.politifact.com/factchecks/2021/jan/04/donald-trump/trump-rehashes-debunked-claim-about-suitcases-ball/.

[33] https://s3.documentcloud.org/documents/20420664/frances-watson-affidavit.pdf

[34] https://www.nytimes.com/2020/12/07/technology/suitcases-ballots-georgia-election.html

Raffensperger purporting to refute allegations of election fraud—if election fraud occurred, why couldn't it come from the top?[35]

Plaintiffs allege that TGP had a "predeterminated story" of voter fraud in 2020, as evidenced by a story it published on September 23, 2020, reporting that absentee ballots were found as part of abandoned mail in Wisconsin. SAP at ¶ 144, citing Jim Hoft, "BREAKING: US Mail Found in Ditch in Rural Wisconsin – Included Absentee Ballots," THE GATEWAY PUNDIT (Sept. 23, 2020), attached as **Exhibit 16**.[36] As the article notes, FOX News broke this story.[37] Interpreting this story as a sign of coordinated Democratic electoral fraud does not show predetermined narrative. Rather, it shows TGP connecting the dots. The abandoned ballots had been carried by a USPS truck, the USPS unions supported Biden over Trump,[38] and the ballots were abandoned in a rural county, which statistically favored Trump over Biden. While not conclusive, this conduct is suspicious and suggests specific efforts by the Democratic party and/or Biden supporters to commit voter or electoral fraud. Plaintiffs do not claim or suggest that any aspect of this story is false. Plaintiffs also refer to several other TGP articles "focusing on baseless claims of election fraud in several states," without any specific allegation that any of these articles were false. SAP at ¶ 144. Even if Defendants may have preferred that President Trump win the

[35] https://sos.ga.gov/sites/default/files/2022-02/Letter_to_Congress_from_Secretary_Raffensperger_%281-6-21%29.pdf. Plaintiffs also refer to statements by the Georgia Secretary of State and the Georgia Bureau of Investigations purported to refute these allegations. SAP at ¶ 41 (https://www.gpb.org/news/2021/10/12/election-investigators-havent-found-evidence-of-counterfeit-ballots-in-georgia).

[36] Available at: https://www.thegatewaypundit.com/2020/09/breaking-us-mail-found-ditch-greenville-wisconsin-included-absentee-ballots/.

[37] Available at: https://fox11online.com/news/local/mail-found-in-ditch-in-greenville.

[38] The USPS postal carriers union publicly announced its support for Biden ahead of the 2020 election. *See* Sahil Kapur, "Postal carriers union endorses Biden, warns, that 'survival' of USPS is at stake," NBC NEWS (Aug. 14, 2020), available at: https://www.nbcnews.com/politics/2020-election/postal-workers-union-endorses-biden-warns-survival-usps-stake-n1236768. **Exhibit 17**.

election, the notion that Defendants would not believe he could lose at worst shows that Defendants suffered from confirmation bias. And, confirmation bias, which is unconconscious, directly conflicts with the actual malice standard. *See Biro v. Condé Nast*, 807 F.3d 541, 545-46 (2d Cir. 2015). This is not evidence of a predetermined narrative; to the contrary, it only arose after President Biden was declared the victor and the Trump campaign used the State Farm Arena video as evidence of malfeasance.

Finally, Plaintiffs allege that Defendants' refusal to issue a retraction of their articles shows actual malice. SAP at ¶¶ 148-164. That isn't what actual malice is;[39] a failure to retract an allegedly defamatory statement is not actual malice. *Zeh*, 864 S.E.2d at 442; *Purvis v. Ballantine*, 487 S.E.2d 14, 19 (1997). And, to this day, Defendants believe that Plaintiffs committed election fraud. *See* Jim Hoft Aff. at ¶¶ 9-10; Joe Hoft Aff. at ¶¶ 6-7. Defendants lacked subjective doubt then, and Plaintiffs' assertions of lawfulness have not altered Defendants' absence of subjective doubt—juries routinely convict defendants who testify they didn't do it and have no reasonable doubt about it. Thus, Plaintiffs cannot show actual malice by clear and convincing evidence, and their defamation claims must fail.

3.3.2 Plaintiffs' IIED Claim Fails

For their third claim, Plaintiffs jointly claim intentional infliction of emotional distress, making bare-bones, conclusory allegations. Under Georgia law, to prevail on a claim for intentional infliction of emotional distress, "a plaintiff must show evidence that: (1) defendants' conduct was intentional or reckless; (2) defendants' conduct was extreme and outrageous; (3) a

[39] In fact, that is such a bizarre statement that it seems surprising that the Plaintiff's legal team includes a lawyer from Ballard Spahr, a leading media law firm and a member of the Media Law Resource Center, and others from the Floyd Abrams Institue for the Freedom of the Press. Simply put, there is no way they can't know this. This is a sad day for the notion that defenders of the First Amendment should view it as a neutral principle, no matter which "team" benefits from it.

causal connection existed between the wrongful conduct and the emotional distress; and (4) the emotional harm was severe." *Abdul-Malik v. AirTran Airways*, 678 S.E.2d 555, 558-59 (Ga. App. 2009).[40] To be actionable, the conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Biven Software v. Newman*, 473 S.E.2d 527, 529 (Ga. App. 1996). Such conduct '"does not include mere insults, indignities, threats, annoyances, petty oppressions, or other vicissitudes of daily living. Plaintiffs are expected to be hardened to a certain amount of rough language to occasional acts that are definitionly inconsiderate and unkind."' *Ghodrati v. Stearnes*, 723 S.E.2d 721, 723 (Ga. App. 2012) (finding that repeatedly calling plaintiff "racist and derogatory names, post[ing] inappropriate signs about [plaintiff] on the employee restroom door as well as in the middle of the shop" was, as a matter of law, insufficient to support an IIED claim) (quoting *Wilcher v. Confederate Packaging*, 651 S.E.2d 790, 792 (Ga. App. 2007)). "The distress must be reasonable and justified under the circumstances, and there is no liability where the plaintiff has suffered exaggerated and unreasonable emotional distress." *Sevcech v. Ingles Markets*, 474 S.E.2d 4, 7 (Ga. App. 1996). Whether conduct rises to this level is generally a question of law. *Yarbray v. Southern Bell Tel. & Co.*, 409 S.E.3d 835, 837 (Ga. App. 1991).

The IIED claim fails as a matter of law. First, as this is based on the reporting of a newsworthy event, Plaintiffs' sole remedy lies in defamation. *Tucker v. News Publishing Co.*, 197 Ga. App. 85, 87 (2), 397 S.E.2d 499 (1990). Second, as the statements were not directed toward Plaintiffs, but rather the readership, "even malicious, wilful or wanton conduct will not support a

[40] The elements of this tort under Missouri law are substantially similar. *See Boes v. Deschu*, 768 S.W.2d 205, 207 (Mo. App. 1989). However, Missouri adds that the alleged conduct must result in bodily harm. *Gibson v. Brewer*, 952 S.W.2d 239, 249 (Mo. banc 1997).

claim of intentioanl infliction of emotional distress[.]" *Munoz v. Am. Lawyer Media, L.P.*, 236 Ga. App. 462, 465 (1999) citing *Ryckeley v. Callaway*, 261 Ga. 828, 829 (412 S.E.2d 826) (1992).

Further, just as the defamation claims are barred for lack of actual malice, so too is the IIED claim. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (holding that public figures "may not recover for the tort of intentional infliction of emotional distress" without establishing the required elements of a defamation claim, including actual malice); *Nichols v. Ga. Tv Co.*, 250 Ga. App. 789, 791 n.1 (2001).

Fatal Constitutional deficiencies aside, Plaintiffs' claims fail as the alleged conduct is neither extreme nor outrageous. At worst, they are mere insults, indignities, annoyances, petty oppressions, or other vicissitudes of daily living. An accusation of criminal conduct may hurt one's feelings, but it is not extreme and outrageous. Compare *Fisher v. Frontline Nat'l*, No. 1:18-cv-00193-MOC-WCM, 2019 U.S. Dist. LEXIS 34948, *14-15 (W.D.N.C. Mar. 5, 2019) (accusation of being a thief/criminal and drug addiction was not extreme and outrageous); *De Sousa v. Embassy of Angl.*, 267 F. Supp. 3d 163, 173 (D.D.C. 2017) ("Calling the plaintiff names and even threatening the plaintiff may have indeed upset him, but inflicting some worry and concern does not bring the conduct to the level of extreme and outrageous, and these insults, indignities, and threats, even if the meetings did in fact occur as the plaintiff alleges, are simply not sufficient to support the plaintiff's claim") (Internal citations and quotation marks omitted).

Nor is there a causal connection. Defendants did not direct anyone to contact Plaintiffs or place them in any fear. There is no evidence that any of these third parties did so at the direction of or but for Defendants. Thus, Plaintiffs cannot prevail on their IIED claim.

4.0 Conclusion

Plaintiffs are upset that they have been publicly accused of wrongdoing. It is entirely possible that they did nothing wrong. Nevertheless, prior to publication of the allegedly

defamatory articles, there was a tidal wave of information suggesting that they did – including a very persuasive video that remains online to this day.[41] The fact that TGP sees it differently than those accused of wrongdoing simply makes TGP a member of the press. TGP has no obligation to believe the government or its officials when they claim innocence.

Those who assume the mantle of responsibility for our democracy come under exacting scrutiny—democracy requires transparency and avoidance of even the smallest inkling of impropriety. Unfortunately, what Plaintiffs did that night—rightly or wrongly—was a failure.

Neither of them stood up to say "Where are the Observers? I should not be counting ballots in their absence!" Does that mean they were involved in election fraud? Maybe, maybe not. But, had they done their jobs with diligence and ethics, they wouldn't have even *appeared* to be engaged in impropriety.

Neither of them stood up to say "Why are we storing boxes of ballots out of sight?" Again, whether there was impropriety or merely the appearance of impropriety, the best way to insulate against criticism is to remove the appearance of impropriety. The Plaintiffs made a conscious effort to forego removing the appearance of impropriety.

Neither of them took care to ensure that those watching the surveillance footage, in the absence of observers, that it would be clear that ballots scanned multiple times were counted only once. Yet again, arrogance toward the appearance of impropriety. Even if they did nothing wrong, they certainly did not do everything *right*.

Had they done so, the Trump campaign would have had no reason to shine a light on what Plaintiffs did. Even if everything they did was lawful, our democracy and freedom of speech and

[41] *See* 11Alive, "Second Georgia Senate election hearing," YouTube (Dec. 3, 2020), available at https://www.youtube.com/watch?v=hRCXUNOwOjw, at 34:06-50:40 & 57:00-57:35.

freedom of the press mean that Defendants are entitled to question what Plaintiffs did and, more important, Defendants are not forced to find biased answers to that question credible.

This is not a case about rehabilitating Plaintiffs' reputation. They have been more than rehabilitated – Plaintiffs have accepted some of the most respected awards for their conduct. This is, instead, a case about shutting down a media outlet that did what outlets like the St. Louis Post Dispatch and Atlanta Journal Constitution were supposed to do—question authority, not simply heed one "official" explanation. This case is what the Georgia legislature wished to prevent its citizens, including Plaintiffs, from doing when it passed its Anti-SLAPP statute. Defendants' statements were on matters of public interest, they were made without negligence, nor actual malice, and neither the defamation nor IIED claims have merit. Judgment must be awarded to Defendants, who are entitled to recover their fees for this politically-motivated SLAPP suit.

Dated: April 24, 2023.

Respectfully Submitted,

/s/ John C. Burns

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I hereby certify that on April 24, 2023, the foregoing document was served on all parties or their counsel of record through this Court's e-filing system as follows:

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