



October 21, 2024

Office of Disciplinary Counsel  
District of Columbia Court of Appeals  
515 5th Street, NW  
Building A, Suite 117  
Washington, DC 20001

We represent Mr. Stefan Passantino in submitting this complaint against Elizabeth Lynne Cheney, who became licensed in the District of Columbia on December 7, 1998.<sup>1</sup>

A recent report by Representative Barry Loudermilk, Chairman of the Oversight Subcommittee of the U.S. House of Representatives Committee on House Administration, reveals that former Representative and January 6 Select Committee (“Select Committee”) Vice Chair Elizabeth Cheney intentionally sent Signal™ based communications to Cassidy Hutchinson, a represented witness before the Select Committee.

As shown below, the evidence indicates that former Representative Cheney knew Ms. Hutchinson was represented when communicating with her about the subject of her testimony before the Select Committee, that is, the subject of her representation by Mr. Passantino. Tellingly, Mr. Passantino did not authorize the communication, nor was it otherwise authorized by law. Accordingly, Ms. Cheney appears to have violated Rule 4.2 of the District of Columbia Rules of Professional Conduct.

Mr. Passantino—an experienced attorney with an impeccable record—has suffered tremendous damages because of this apparent violation of Rule 4.2. The fact this violation occurred while Ms. Cheney was serving in the House of Representatives does not, under these circumstances, excuse her conduct or render it beyond the reach of the D.C. Bar.

Accordingly, we ask that the D.C. Bar investigate Ms. Cheney’s conduct.

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<sup>1</sup> *Elizabeth L. Cheney*, MEMBER DIRECTORY, <https://perma.cc/5QZM-JC9C>. Although Rep. Cheney is listed as an “inactive” member of the D.C. Bar, “Pursuant to Rule XI of the D.C. Court of Appeals Rules Governing the Bar, the Office of Disciplinary Counsel serves as the chief prosecutor for attorney disciplinary matters involving active *or inactive* attorneys who are members of the D.C. Bar.” *Office of Disciplinary Counsel: Purpose and Mission*, D.C. BAR, <https://perma.cc/MQ5W-JZYS> (emphasis added).

## I. Rule 4.2’s Prohibition on Communicating with a Represented Person

Rule 4.2 of the D.C. Bar’s Rules of Professional Conduct commands that “a lawyer shall not communicate or cause another to communicate about the subject of the representation with a person known to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the lawyer representing such other person or is authorized by law or a court order to do so.”<sup>2</sup> The commentary to Rule 4.2 states, “This rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this rule”<sup>3</sup>

## II. The Committee on House Administration, Subcommittee on Oversight’s Recent Findings Demonstrate that Representative Cheney Communicated with a Represented Person in Violation of Rule 4.2

According to a recently released report by the Committee on House Administration, Subcommittee on Oversight, “in the months prior to [Cassidy] Hutchinson’s explosive private and public testimony, [Elizabeth] Cheney communicated with Hutchinson, both directly and through an intermediary – Alyssa Farah Griffin – while Hutchinson was represented by her attorney, Stefan Passantino.”<sup>4</sup>

The report further states, “[a]ccording to text messages between Hutchinson and Farah Griffin obtained by the Subcommittee, Cheney agreed to communicate with Hutchinson through Farah Griffin. **However, it appears that Cheney knew communicating with Hutchinson while Hutchinson was represented by an attorney and a subject of the Select Committee’s investigation, without going through Hutchinson’s attorney would be unethical.** This is evident by Farah Griffin’s text to Hutchinson that Cheney’s “one concern was so long as [sic] you have counsel, she can’t really ethically talk to you without him.”<sup>5</sup>

Representative Cheney’s knowledge of the ethical prohibition on her communicating with Ms. Hutchinson is clear per the below Signal™ message included in the report:

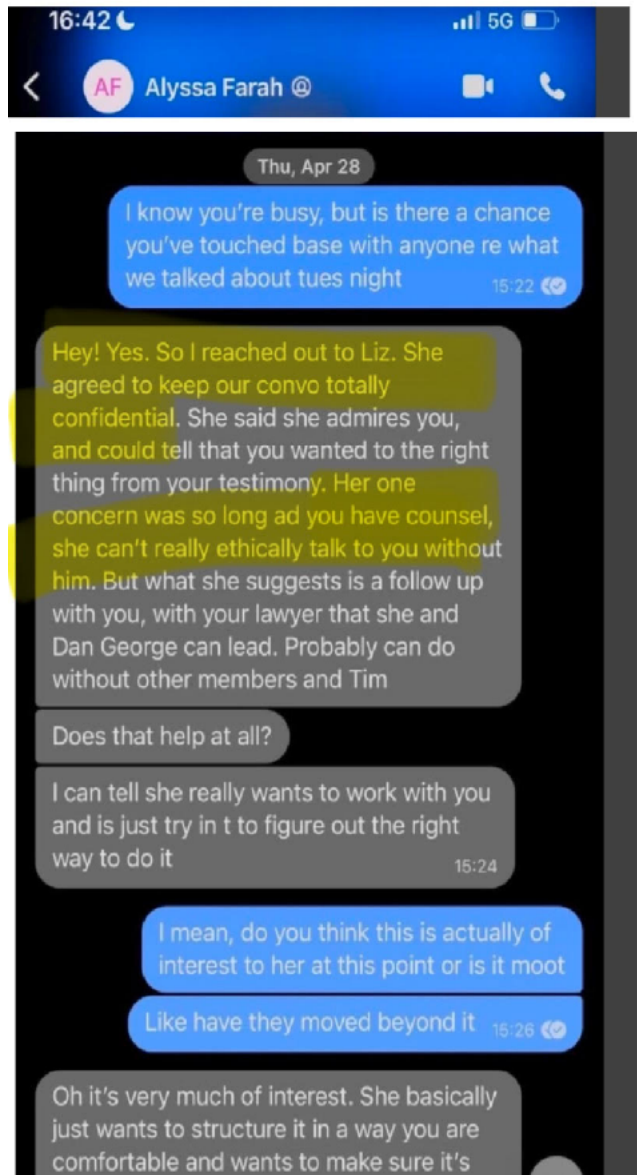
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<sup>2</sup> RULES OF PRO. CONDUCT r. 4.2. (D.C. BAR ASS’N 2022).

<sup>3</sup> *Id.* at cmt. 8.

<sup>4</sup> Press Release, Comm. on H. Admin., Subcomm. on Oversight, *New Texts Reveal Liz Cheney Communicated with Cassidy Hutchinson About Her Select Committee’s Testimony—without Hutchinson’s Attorney’s Knowledge—Despite Cheney Knowing it was Unethical* (Oct. 15, 2024), <https://perma.cc/3LNW-J6UL>.

<sup>5</sup> *Id.* (emphasis in original).

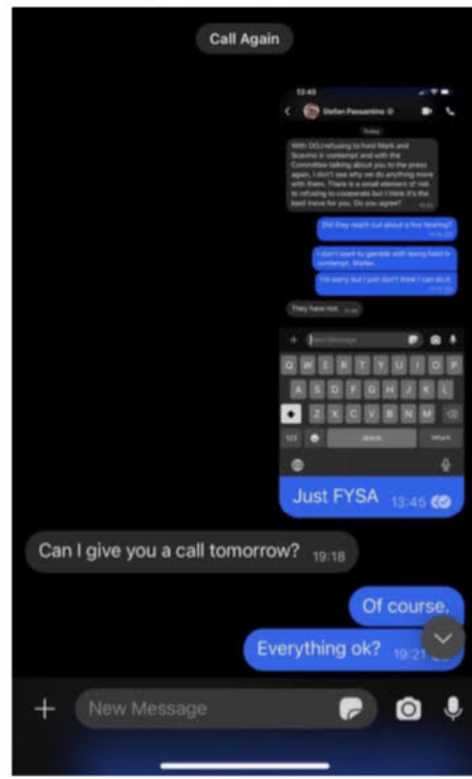
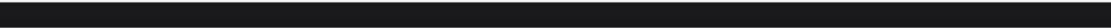
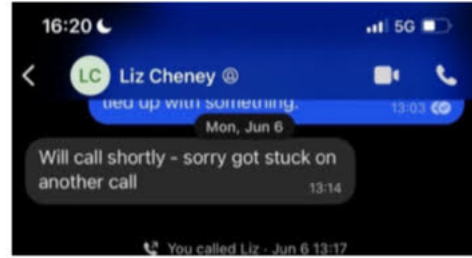


The report further contends that “[a]fter her third transcribed interview Hutchinson reached out to Cheney directly.”<sup>6</sup> “When Hutchinson texted Cheney, she was still represented by Passantino . . . Cheney and Hutchinson communicated directly for days without Passantino’s knowledge.”<sup>7</sup> These facts are revealed by the below images from the Committee’s report:

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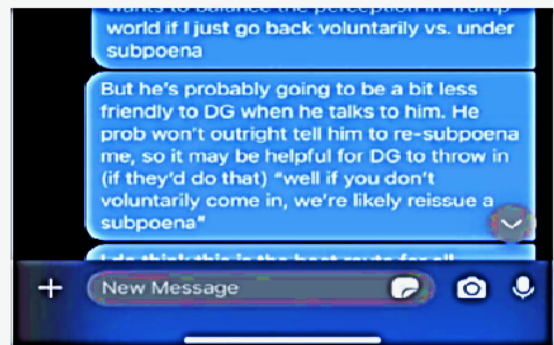
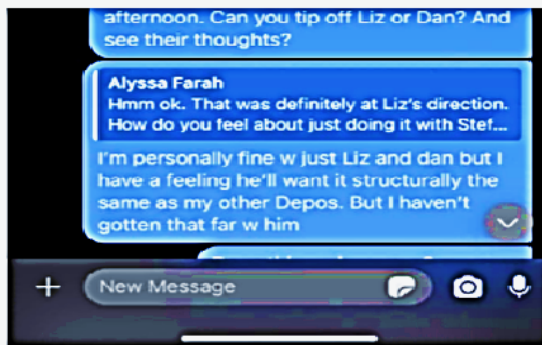
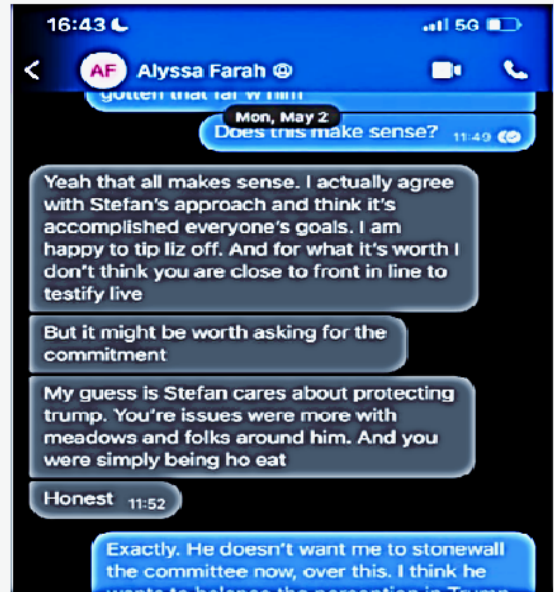
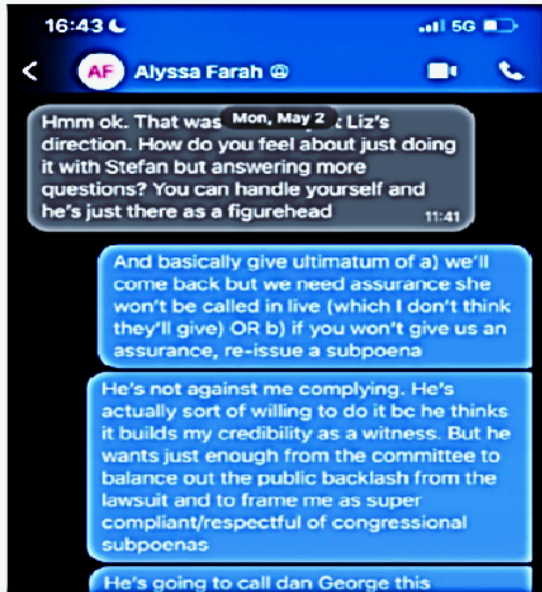
<sup>6</sup> *Id.*

<sup>7</sup> *Id.*



Our client's reputation and credibility were harmed by Ms. Cheney's untoward and unethical conduct. In fact, despite Ms. Cheney's actions stimulating two unfounded bar complaints against Mr. Passantino, actual communications reflect that his conduct was always above board in his representation of Cassidy Hutchinson:

Select Committee's narrative.



Accordingly, the report definitively establishes that Ms. Cheney's conduct violated Rule 4.2: (1) Ms. Cheney clearly knew that she was communicating with a represented party; (2) the communications were directly related to the subject of the representation—the Select Committee's investigation; and, (3) Mr. Passantino did not authorize the communication, nor was it otherwise authorized by law.

### **III. Representative Cheney’s Actions Further Violated Rule 8.4**

Rule 8.4, titled “Misconduct,” states, in relevant part, that it is professional misconduct for a lawyer to: “(a) 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[.]” The text messages between Alyssa Farah Griffin and Cassidy Hutchinson clearly establish that by late April, Cheney knew it was unethical to talk to Hutchinson yet knowingly communicated to Hutchinson both indirectly, through Farah Griffin, and directly, with Hutchinson herself. Therefore, through her own acts and through the acts of another, she violated Rule 8.4.

### **IV. Representative Cheney’s Service in the House of Representatives Does Not Excuse Her Conduct, nor Does it Render It Beyond the Reach of the D.C. Bar**

The D.C. Bar should take appropriate action in this case notwithstanding Ms. Cheney’s service in the House of Representatives when the conduct occurred. First, the Speech or Debate Clause is not a defense to ethical misconduct and the Select Committee was not properly constituted and lacked authority to act.

#### **a. Speech or Debate Is Not a Defense to Ethical Misconduct**

The Speech or Debate privilege does not protect every activity former Representative Elizabeth Cheney engaged in while a public servant. Instead, “[the privilege] protects only acts that are ‘an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.’”<sup>8</sup>

The Speech or Debate privilege protects “only purely legislative activities.”<sup>9</sup> Whenever a legislator acts in a manner only “causally or incidentally related to legislative affairs”<sup>10</sup> or which fall beyond the “legitimate legislative sphere,”<sup>11</sup> such acts are not subject to the protection of the privilege. Nor does the Speech or Debate Clause protection “prohibit inquiry into illegal conduct simply because it has some nexus to legislative functions.”<sup>12</sup>

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<sup>8</sup> *United States v. Menendez*, 831 F.3d 155, 165–66 (3rd Cir. 2016) (citing *Gravel v. United States*, 408 U.S. 606, 625 (1972)). Notably, Ms. Cheney did not disclose her secret communications with the rest of the committee, which manifests a specific intent for her communications not to be part of official House proceedings.

<sup>9</sup> *United States v. Brewster*, 408 U.S. 501, 512 (1972).

<sup>10</sup> *Id.* at 528.

<sup>11</sup> *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 503 (1975) (citation omitted).

<sup>12</sup> *Brewster*, 408 U.S. at 528.

**b. Because the January 6 Committee Lacked Authority, None of Its Acts Are Constitutionally Protected**

The Select Committee’s membership failed to comply with appointment rules. The Committee’s authorizing resolution provided that “the Speaker shall appoint thirteen Members, five of whom shall be appointed after consultation with the minority leader.”<sup>13</sup> The Select Committee had only nine members because the then-Speaker refused to appoint thirteen members.<sup>14</sup> Additionally, House Resolution 503 required vacancies on the Select Committee to be filled consistent with the procedures for selecting members for the committee. However, former Speaker Nancy Pelosi chose not to fill the numerous vacancies on the Select Committee, and it subsequently operated with fewer members than was required by the organization resolution.

The Select Committee also lacked a ranking minority member, inconsistent with its authorizing resolution. Instead, several months after it was constituted and more than a month after its first hearing, the Select Committee named former Representative Cheney “Vice Chair.” The position of vice chair is fundamentally distinct and functionally different from that of a ranking minority member, as clearly understood by House Rules, conference and caucus rules, and precedent.<sup>15</sup>

House Resolution 503 articulated some actions that can only be taken by the Chair of the Select Committee, actions that can be taken with a majority of members of the Committee, and, importantly, actions that can only be taken “in consultation with the ranking minority member.”<sup>16</sup> When Congress drafted and passed House Resolution 503, the Select Committee Chair could have been granted unilateral authority to issue subpoenas and conduct depositions without consulting with the ranking member of the minority party. Yet House Resolution 503 required that the Chairman of the Select Committee consult with the ranking minority member to coordinate the method for conducting depositions. The House Resolution specifically required that the Select Committee Chair must “consult[e] with the ranking minority member.”<sup>17</sup>

Relatedly, section 5(6)(B) of House Resolution 503 stated that the Select Committee’s deposition authority is “governed by the procedures submitted by the chair of the Committee on Rules for printing in the Congressional Record.”<sup>18</sup> Under the House Committee on Rules’ Regulations for the Use of Deposition Authority, the Chairman is required to consult with the ranking minority member before conducting a

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<sup>13</sup> H.R. Res. 503, 117th Cong. § 2(a) (2021) (enacted).

<sup>14</sup> Olivia Beavers, Heather Caygle, and Nicholas Wu, *Pelosi vetoes Banks, Jordan for Jan. 6 Select Committee*, POLITICO (July 21, 2021), <https://perma.cc/95Z6-53RD>.

<sup>15</sup> Rule XI, Rules of the U.S. H. of Reps., 117th Cong. (2021); Rule XIV, Rules of the H. Republican Conf., 118th Cong. (2023); Rule 21, Rules of the Democratic Caucus, 118th Cong. (2023).

<sup>16</sup> H.R. Res. 503, § 2, 117th Cong. (2021) (enacted).

<sup>17</sup> *Id.* at § 5.

<sup>18</sup> *Id.* at § 5(6)(B).

deposition. The Regulations explain that “[c]onsultation with the ranking minority member shall include three days’ notice before any deposition is taken.”<sup>19</sup> Because the Select Committee lacked a ranking minority member and the process of conducting a deposition required consultation with the ranking minority member, the Select Committee itself was flawed in its composition and operations.

Because the Select Committee appointed no ranking minority member, it was impossible for the Select Committee to comply with the House Deposition Regulations. Cheney’s appointment as Republican Vice Chair of the Select Committee did not cure the lack of a ranking minority member. Vice Chair is a common and well-understood term under House Rules that is exclusive of participation by the minority party of the chamber. Rule XI of the Rules of the House for the 117th Congress stated that a “member of the **majority party** on each standing committee or subcommittee shall be designated by the chair of the full committee as the vice chair.”<sup>20</sup>

The reason for the position of vice chair is that if the chair of the committee is not present, then the vice chair—a member of the same party as the chair—shall preside over the proceeding.<sup>21</sup> Additionally, both the Democratic Caucus and Republican Conference use the term vice chair to describe a position junior to the chair to be filled by a Member from the same political party.<sup>22</sup> Chair Bennie Thompson selected the Vice Chair of the Select Committee in the same manner that House Rule XI instructs standing committee chairs to select a Vice Chair. Thompson initially offered the role of Vice Chair to Representative Jamie Raskin, a fellow Democrat, but Raskin declined and instead suggested that Representative Liz Cheney be appointed.<sup>23</sup> As a legal matter, Representative Cheney fulfilled the traditional Vice Chair role and functioned as a member of the majority party on the Select Committee but did not satisfy the requirement for consultation with the ranking minority member.<sup>24</sup>

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<sup>19</sup> Regulation 2, Regulations for the Use of Deposition Authority, 117th Congress (2021).

<sup>20</sup> Rule XI, Rules of the U.S. H. of Reps., 117th Cong. (2021) (emphasis added).

<sup>21</sup> *Id.*

<sup>22</sup> See e.g. Press Release, Rep. Blake Moore, U.S. H. of Reps., *Congressman Blake Moore Elected to Vice Chair of the House Republican Conference* (Nov. 08, 2023), <https://perma.cc/DZE3-BNV7>.

<sup>23</sup> Robert Draper, et al., *Inside the Jan. 6 Committee*, N.Y. TIMES (Dec. 23, 2023), <https://perma.cc/W764-95WM>; Annie Grayer et al., *Liz Cheney Named Vice Chair of the January 6 Select Committee*, CNN (Sept. 2, 2021), <https://perma.cc/XJ22-DLCB>.

<sup>24</sup> The term ranking minority member is clearly understood under House Rules. According to House Rule X Cl. 5, the standing committee members shall be elected “from nomination submitted by the respective party caucus or conference.” Rule X, Rules of the U.S. H. of Reps., 118th Cong. (2023). In the same manner that minority committee members are selected by the respective caucus, respective minority parties also select ranking minority members to serve on standing committees. Both the Democratic Caucus Rules and Republican Conference have procedures for appointing ranking members to committees, with their respective Steering Committees first nominating members for the role and then the conference or caucus voting on those recommendations. Rule 21, Rules of the Democratic Caucus, 118th Cong. (2023); Rule 14, Rules of the H. Republican Conf., 118th Cong. (2023). Both use similar language to select members for chair and ranking member, and neither gives the opposing party’s leadership the power to select their ranking members. *Id.* Based on House Rules and



House Democrats argued that Representative Cheney “by virtue of being the first minority party Member appointment to the Select Committee, is, by definition, the senior ranking minority member of the Select Committee.”<sup>25</sup> House Democrats relied on House Resolution 10 to justify interpreting the term ranking minority member.<sup>26</sup> While ranking minority members are the first minority members appointed to standing committees, ranking minority members must be selected by the minority, according to conference rules, and not blocked by the majority.

**V. The D.C. Bar Should Take Appropriate Action in this Case Because Elizabeth Cheney’s Conduct Contributed to the Unreasonable Impugning of Complainant Passantino’s Reputation**

We ask that the D.C. Bar investigate because Ms. Cheney’s professional misconduct had significant consequences for Mr. Passantino.

In the context of allegations stemming from his representation of a client before the January 6 Select Committee, Complainant Stefan Passantino sued former Special Counsel Mueller prosecutor Andrew Weissmann, alleging defamation and injurious falsehood stemming from a September 2023 social media post by Weissman. In the post, Weissmann referred to Mr. Passantino—a duly licensed attorney and former Deputy Assistant and Deputy Counsel to United States President Donald J. Trump—as someone “who coached [a Congressional witness] to lie.”<sup>27</sup> On September 26, 2024, the U.S. District Court for the District of Columbia denied Defendant Weissman’s motion to dismiss Mr. Passantino’s defamation claim.

The relevant witness was former White House staffer Cassidy Hutchinson, Mr. Passantino’s client. Hutchinson finally testified to the Select Committee, “I want to make this clear to [the Select Committee]: Stefan [Passantino] never told me to lie.”<sup>28</sup> Mr. Passantino alleges that Mr. Weissmann’s post “deeply damaged [his] 30-year reputation and caused him to lose significant business and income.”<sup>29</sup> Prior to the allegations surrounding his representation of Ms. Hutchinson, Mr. Passantino had “never been accused by a client, or anyone else, of unethical or illegal behavior.”<sup>30</sup> The U.S. District Court for the District of Columbia found that Mr. Weissman’s

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precedent, a ranking minority member is understood to be the minority party member selected by the minority party.

<sup>25</sup> *Meadows v. Pelosi*, 1:21-cv-3217-CJN (D.D.C. Dec. 8, 2021), Def.’s Mot. for Summ. J., ECF No. 15 at 36 (Memo in Support at 25).

<sup>26</sup> *Id.*; H.R. Res. 10, 117th Cong. (2021).

<sup>27</sup> *Passantino v. Weissman*, Case No. 1:23-cv-2780 (D.D.C. Sept. 30, 2024), ECF No. 1 ¶ 18, (cited in Memorandum Opinion and Order, ECF. No. 17 at 6.

<sup>28</sup> *Id.* ECF No. 1 ¶ 17; ECF No. 17 at 5.

<sup>29</sup> *Id.* ECF No. 1 at ¶ 21.

<sup>30</sup> *Id.* at ¶ 8.

defamatory statement “was not a subjective opinion” but a statement portrayed as fact.<sup>31</sup>

Sincerely,

Gene Hamilton  
Executive Director and General Counsel  
America First Legal

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<sup>31</sup> Id. ECF No. 17 at 18.