

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

PRESIDENT DONALD J. TRUMP, an
individual, REPRESENTATIVE
MARIANNETTE MILLER-MEEKS, an
individual, and FORMER STATE
SENATOR BRADLEY ZAUN, an
individual,

Plaintiffs,

v.

J. ANN SELZER, SELZER & COMPANY,
DES MOINES REGISTER AND TRIBUNE
COMPANY, and GANNETT CO., INC.,

Defendants.

Case No.: CVCV069420

**PLAINTIFFS' BRIEF IN
RESISTANCE TO DEFENDANTS'
MOTIONS TO DISMISS**

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I. PRELIMINARY STATEMENT

Plaintiffs President Donald J. Trump (“President Trump”), U.S. Representative Mariannette Miller-Meeks (“Representative Miller-Meeks”), and former State Senator Bradley Zaun (“Zaun”) (together, “Plaintiffs”) submit this Brief in Opposition to the Motions to Dismiss the Petition (“Pet.”) pursuant to Iowa R. Civ. P. 1.421(1)(f) (the “Motions”) filed by (1) Defendants Des Moines Register and Tribune Company (“DMR”) and Gannett Co., Inc. (“Gannett”) (together, the “Press Defendants”) and (2) Defendants J. Ann Selzer (“Selzer”) and Selzer & Company (“S&C”; together, the “Selzer Defendants”) (Press Defendants and Selzer Defendants, together, “Defendants”). For the sake of judicial efficiency, Plaintiffs only file one Resistance, which Plaintiffs request should be considered by this Court with respect to each of the Motions.

In summary, Defendants’ First Amendment arguments are meritless and to the well-pled allegations in Plaintiffs’ Petition. Defendants’ Motion suffers from a terminal defect: the bulk of Defendants’ arguments seeking dismissal go to the weight and sufficiency of the evidence supporting the claims in Plaintiffs’ Petition—which can only be determined as this case moves forward—and not to the adequacy of Plaintiffs’ allegations of wrongdoing against Defendants. To survive the Motion, Plaintiffs must simply provide Defendants with notice of their claims. Defendants weakly attempt to reframe and trivialize Plaintiffs’ well-pleaded consumer fraud,

fraudulent misrepresentation, and negligent misrepresentation claims as non-actionable “fake news” grievances, Press Defendants’ Brief in Support of Motion to Dismiss Petition (“Press Def. Br.”) at 22, while trying to hide behind a blanket First Amendment immunity defense created from whole cloth. However, as explained below, no such blanket immunity exists. Because they lack merit, Defendants’ Motions must be denied.

II. BACKGROUND

This action, which arises under the Iowa Consumer Fraud Act, Iowa Code Chapter 714H, including § 714H.3(1) and related provisions, as well as under Iowa common law, including fraudulent misrepresentation and negligent misrepresentation, relates to Defendants’ deliberate publication of multiple manipulated and incorrect polls mere days before Election Day in 2024 (the “Iowa Poll” or “Polls”).

The first poll at issue was conducted by Selzer and S&C, and published online by DMR and Gannett in the *Des Moines Register* and other Gannett-owned outlets, including nationally distributed *USA Today*, on November 2, 2024, and in print on November 3, 2024, relating to the presidential race between President Trump and former Vice President Kamala Harris (“Harris”) (the “Harris Poll”). Pet. ¶ 1. Contrary to reality and tortiously defying credulity, Defendants’ Harris Poll, published three days before Election Day, purported to show Harris leading

President Trump in Iowa by three points (47%-44%). *Id.* ¶ 2. The ensuing election results would reveal that this Poll was merely a sham and intentionally misleading. President Trump won Iowa by *over thirteen* points (56%-42.7%). *Id.* ¶ 2. Before this astonishing *sixteen-point* polling miss, Selzer brazenly claimed: “It’s hard for anybody to say they saw this coming . . . Harris has clearly leaped into a leading position.” *Id.* However, as Selzer knew, there was a perfectly good reason nobody “saw this coming”—because a three-point lead for Harris in deep-red Iowa was not reality; it was election-manipulating fiction. *Id.*

As pled in the Petition, there is overwhelming evidence that the Harris Poll was not a statistical anomaly but was deliberately manipulated, and was plagued by unprecedented and foreseeable process and security breaches. *Id.* ¶¶ 61, 67–68. As Manhattan Institute senior fellow James Piereson wrote, Selzer’s “miss” was *beyond* extreme:

The Selzer Poll, with a margin of error of 3.4, missed the real outcome by 16 points, or by as many as five standard deviations from the true result as revealed on election day. What are the odds of drawing such a sample by legitimate means? Answer: roughly one time in 3.5 million trials. In other words, given these odds, the results in the Iowa poll likely did not come about by “honest error.”

Selzer’s deceptive “miss” caused extensive harm:

It is more likely that someone deliberately manipulated the sample so that it included too many Democrats, or simply made up the numbers as they came in for the purpose of giving confidence to Harris voters and worry for Trump supporters, or to bring national attention to a poll taken in a state not regarded as competitive. The poll did receive

national attention and was widely discussed. Selzer appeared on television interviews to talk about the poll and its implications. If the goal was to promote the poll, then the gambit succeeded—at least until election day, when it was revealed to be ridiculously far off the mark.

Id. ¶¶ 69–70 (quoting James Piereson, *Statistical questions about the Iowa poll*, NEW CRITERION (Nov. 12, 2024), <https://newcriterion.com/dispatch/statistical-questions-about-the-iowa-poll>). Plaintiffs explicitly alleged that Defendants intentionally manipulated and manufactured the results of the Polls. Plaintiffs also identified factual circumstances which either support that conclusion or, at minimum, establish Defendants’ negligence.

First, President Trump won Iowa by over eight points and nearly ten points, respectively, in the 2020 and 2016 Presidential Elections. Pet. ¶ 7. Logically, President Trump could not have trailed Harris by three points in Iowa at any time in the 2024 cycle.

Second, Selzer’s polling in the presidential race was completely disconnected from all other mainstream polling. Although Selzer had polled President Trump leading Joe Biden by eighteen points, after Harris replaced Biden in the race, Selzer suddenly claimed that President Trump’s lead was only four points. *Id.* ¶¶ 47-48. Meanwhile, *every other* mainstream Iowa poll showed President Trump ahead by significantly more than Selzer presented. A poll conducted September 27-28, 2024 by Cygnal showed President Trump ahead by seven points; a poll conducted November 1–2, 2024 by Emerson College showed

President Trump ahead by nine points; a poll conducted November 2–3, 2024 by InsiderAdvantage showed President Trump ahead by seven points; a poll conducted November 2–3, 2024 by SoCal Strategies showed President Trump ahead by seven points; and a second poll conducted November 2-3, 2024 by SoCal Strategies showed President Trump ahead by eight points. *Id.* ¶ 49.

Third, even Harris’s internal polling showed that she never led President Trump. *Id.* ¶ 50.

Fourth, in each of the highest-stakes races—President, Governor, and Senator—from 2016 to 2022, the Republican won in Iowa and did so by a convincing margin. *Id.* ¶ 51. A three-point lead by a Democrat candidate for President would have been remarkably out of line compared to election results in the prior four cycles. *Id.*

Fifth, other pollsters who frequently work in swing states, such as Quinnipiac University, did not even poll Iowa in 2024, assuming, correctly, that it was a lock for President Trump. When major news outlets reported on swing states, Iowa was never included. *Id.* ¶ 52.

Sixth, given that Representative Miller-Meeks defeated Bohannon by nearly seven points in 2022 (53.4%-46.6%), Selzer’s projection that Bohannon led Miller-Meeks by sixteen points in the rematch (the “Congressional Poll”) (Harris Poll and Congressional Poll, together, the “Polls”) constituted a *twenty-*

three-point swing in Bohannon’s favor—a statistical improbability and an absurd inference given the absence of any significant events or developments that might explain such a dramatic change in a race which she ultimately won by under a thousand votes after a costly recount. *Id.* ¶ 78. Even a poll from a few weeks earlier (Sept. 30 to Oct. 1, 2024) by the Democrat Party had Bohannon up only four points (50%-46%); a poll from the end of August by Normington, Petts & Associates *for the Bohannon Campaign* had showed the race tied at 47% each—Selzer’s Congressional Poll was twelve points off from even the Democrats’ own optimistic projection; indeed, Iowa’s 1st District is normally an R+3 seat, according to the Cook Political Report, as confirmed by the fact that President Trump had won it in 2020 by three points, and Iowa Governor Kim Reynolds won it in 2018 by three points. *Id.* ¶¶ 80–82.

Further, to top it all off, Defendants illicitly leaked the Harris Poll to Democrat operatives before publication. *Id.* ¶ 58. Selzer also leaked the Harris Poll to her nephew, an intern at Gallup. *Id.* ¶ 61. This was the only known time that Defendants breached their policy of secrecy with Selzer’s polls. *Id.* ¶ 64.

The Defendants’ fabricated polling had the foreseeable and intended effect of influencing voter behavior, demoralizing Republican supporters, and distorting media narratives in the final stretch before voting. *Id.* ¶¶ 3, 5–6, 42–

44. Defendants, led by Selzer, fanned the flames even further by grabbing national headlines with a carefully orchestrated all-out media blitz. *Id.* ¶ 71.

Plaintiffs, acting in reliance on the Polls, were damaged by the Polls, in multiple respects. President Trump sustained actual damages by having to expend extensive time and resources to mitigate and counteract the harms of the Defendants' conduct. *Id.* ¶ 124. Representative Miller-Meeks was subjected to a costly recount that would not have occurred if not for the combined impact of the Harris Poll and the Congressional Poll on her race. Not only did the Harris Poll and the Congressional Poll substantially contribute to forcing Representative Miller-Meeks into an electoral struggle, but she, like many other consumers who read the *Des Moines Register*, was also deceived by the Harris Poll and the Congressional Poll. Moreover, she sustained actual damages by needing to expend extensive time and resources to mitigate the harms of the Polls. *Id.* ¶¶ 83-85, 125. Similarly, Zaun, a longtime Iowa State Senator, was negatively impacted by the fraudulent polling released by Defendants. *Id.* ¶¶ 6, 100-02, 126. Unlike President Trump and Representative Miller-Meeks, Zaun was defeated in his re-election bid after the Harris Poll gave an artificial boost to Democratic turnout and morale. *Id.* Plaintiff Zaun was also deceived by Defendants' conduct. *Id.* Defendant Selzer ultimately retired in disgrace less than two weeks after the election, an admission of her culpability. *Id.* ¶¶ 9, 72.

III. LEGAL STANDARD

Unlike federal courts, which review motions to dismiss under the plausibility standard established by the well-known Supreme Court precedents of *Iqbal* and *Twombly*, Iowa is a notice-pleading jurisdiction. A petition's purpose is only to "give the defendant fair notice of the claim" so it can "adequately respond to the petition." *Rees v. City of Shenandoah*, 682 N.W.2d 77, 79 (Iowa 2004) (cleaned up) (citing *Schmidt v. Wilkinson*, 340 N.W.2d 282, 283 (Iowa 1983)). The petition does not even need to "identify a specific legal theory." *Terrace Hill Soc'y Found. v. Terrace Hill Comm'n*, 6 N.W.3d 290, 296 (Iowa 2024). Fair notice is accomplished when the petition "informs the defendant of the incident giving rise to the claim and of the claim's general nature." *Rees*, 682 N.W.2d at 79 (citing *Soike v. Evan Matthews & Co.*, 302 N.W.2d 841, 842 (Iowa 1981)).

Because the petition simply puts the defendant on notice, it "need not allege ultimate facts that support each element of the cause of action." *Rees*, 682 N.W.2d at 79 (citing *Smith v. Smith*, 513 N.W.2d 728, 730 (Iowa 1994)). Consequently, under Iowa's liberal "notice pleading requirement[s]" a plaintiff is "not required to make more than a terse statement that he was damaged." *Brunkhorst v. Iowa Pub. Emps. Ret. Sys.*, No. 07-1340, 2008 Iowa App. LEXIS 1137, at *10 (Iowa Ct. App. Oct. 29, 2008).

Thus, “[a] motion to dismiss is properly granted only if a plaintiff’s petition on its face shows no right of recovery under any state of facts.” *Trobaugh v. Sondag*, 668 N.W.2d 577, 580 (Iowa 2003). Only if there is “no conceivable set of facts” that would permit the plaintiffs to recover, may a district court dismiss a case on a pre-answer motion. *Barkema v. Williams Pipeline Co.*, 666 N.W.2d 612, 614 (Iowa 2003). Of course, that is the opposite of the state of litigation here.

Because of Iowa’s lenient notice-pleading standard, “[g]enerally, a motion to dismiss should not be granted.” *Weizberg v. City of Des Moines*, 923 N.W.2d 200, 217 (Iowa 2018). *See also Rees*, 682 N.W.2d at 79 (“Under notice pleading, *nearly every case will survive a motion to dismiss.*”) (emphasis added). The Supreme Court of Iowa has not “been subtle in articulating” its “dim view of an attempt to strike a claim through a motion to dismiss.” *White v. Harkrider*, 990 N.W.2d 647, 657 (Iowa 2023) (McDermott, J., concurring in part and dissenting in part). The Court has explained “we certainly do not recommend the filing of motions to dismiss in litigation, the viability of which is in any way debatable. Neither do we endorse sustaining such motions, even where the ruling is eventually affirmed. **Both the filing and the sustaining are poor ideas.**” *Cutler v. Klass, Whicher & Mishne*, 473 N.W.2d 178, 181 (Iowa 1991) (emphasis added). Defendants’ Motions must be denied.

IV. ARGUMENT

A. Plaintiffs' Claims Are Not Constitutionally Barred

Defendants brazenly and wrongly argue that the “First Amendment disposes of th[is] entire action” because the “First Amendment of the U.S. Constitution and Article I, Section 7 of the Iowa Constitution prohibit Plaintiffs” from asserting their claims as pleaded in the Petition (Press Def. Br. at 17). But, as discussed further below, it is black letter law that misrepresentations in the commercial context are *not* constitutionally protected. Plaintiffs allege that DMR and Gannett published the Selzer manufactured false Polls, which were commoditized to Defendants’ advantage, and to the detriment of Plaintiffs and the consuming public—a classic consumer-protection violation. Defendants cannot immunize this fraud by conveying it through words, nor can they evade the law by peddling this fraud through legacy media.

Defendants allege that “President Trump seeks to punish” them for publishing the Polls, which from their perspective are best categorized as mere “political campaign reporting of a community newspaper,” *id.* at 1 (which Gannett surely is not). However, throughout Defendants’ multi-page effort to reframe the Polls as pure “political campaign reporting [which] is at the zenith of First Amendment protections,” *Id.* at 18, they conveniently gloss over a critical point—that this case has nothing to do with a government attempt to chill private speech. Defendants’

reference to a “general government power to punish alleged political falsehoods” (or lack thereof) is simply not relevant. (Press Def. Br. at 21).

Plaintiffs have brought no claims relating to government suppression of political speech. As the Petition explains, Plaintiffs are private parties who were deceived and subjected to actual harm in material ways by the profit-driven actions of Defendants. Defendants intentionally (or at minimum, negligently) disseminated false polling data for increased profit and readership. As Selzer admitted: “*the polling industry is predicated on getting people to pay money for their products.*” (Pet. ¶ 67) (emphasis added). In other words, by creating and publishing the Polls for public consumption, Defendants were admittedly actively engaged in selling a *product* to consumers, not reporting the news or engaging in political speech.

This is why Plaintiffs’ claims legitimately fall within the purview of statutory consumer fraud, fraudulent misrepresentation, and negligent misrepresentation, rather than constitutionally protected legitimate journalism or political opinion. Defendants’ publication of false material—the for-profit Iowa Poll—for consumption by the masses, does not magically transform this material into “news” or an opinion piece. The Iowa Poll was, on its own, not a news event in any sense of the word “news.” To the contrary, these polls, like any other poll, were for-profit *products* that were *paid for* by DMR and Gannett and created by Selzer and S&C in exchange for payment.

The claim that this case is fueled by a government attempt to engage in suppression of the free press holds no merit and is wrong. It is offered to detract from what Plaintiffs properly allege: the knowing dissemination of falsehoods for commercial purposes by Defendants who knew better (or at minimum, ought to have known better) than to pass off the Defendants' Polls (indicating impossible outcomes) as the products of a thorough and rigorous scientific polling process, which they were clearly not.

1. Defendants' Polls are Commercial Speech Not Warranting any Presumptive First Amendment Protection

Despite Iowa's generous notice-pleading standard, Defendants wrongly frame their Motions as responding to a "frontal assault on the First Amendment" and a threat to "the principle that debate on public issues should be uninhibited, robust, and wide-open." Press Def. Br. at 19 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Defendants' purpose with this misplaced argument is to encourage the Court to apply a strict scrutiny analysis rather than determine whether the Petition puts the Defendants on notice of the claims, which it, of course, does. But, as discussed above, under Iowa's notice-pleading standard, "[a] motion to dismiss is properly granted only if a plaintiff's petition on its face shows no right of recovery under any state of facts." *Trobaugh*, 668 N.W.2d at 580.

Plaintiffs' Petition alleges extensive factual content which, at a very minimum, puts Defendants on notice that the Polls amount to harmful false

commercial speech which has caused Plaintiffs actual damages, and which Plaintiffs are entitled to recover for. In other words, the question before the Court is not whether the Polls *were* false, but whether Plaintiffs' Petition gives Defendants "fair notice of the claim" that the Polls were falsified so they can "adequately respond to the petition." *Rees*, 682 N.W.2d at 79 (citations omitted). The Petition definitely does so.

It is well-settled that "commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.'" *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989) (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978)); see also *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 620 (1995). Although "[t]here is no longer any room to doubt that what has come to be known as 'commercial speech' is entitled to the protection of the First Amendment...[this] protection [is] somewhat less extensive than that afforded to 'noncommercial speech.'" *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 637 (1985). While Defendants' attempt to wrongly recast their publication of the Polls as "truthfully reporting poll results and information of unquestioned news value on a matter of political concern to all Americans," Def. Memo at 21, this distortion fails to bolster their position; the mere dissemination of

the false Polls via traditional reporting channels does not mean they are automatically afforded “Presumptive First Amendment Protection.” *Id.* Indeed, the Supreme Court has recognized that “much of the material in ordinary newspapers is commercial speech,” *Cincinnati v. Discovery Network*, 507 U.S. 410, 423 (1993), and as discussed *supra*, the Polls firmly belong in this category. While Defendants correctly identify that “there is no general government power to punish alleged political falsehoods,” Def. Memo at 21, in cases of *commercial speech*—like the Polls—the government “may in appropriate circumstances regulate both inherently misleading speech and even *potentially* misleading speech.” *Peel v. Att’y Registration & Disciplinary Comm’n*, 496 U.S. 91, 110 (1990) (emphasis added). Of course, there is no government action involved here at all, as the litigation is brought by Plaintiffs who are private parties.

As discussed above, Defendants were not engaged in political news reporting, despite their insistence to the contrary. Rather, Defendants *created* and *promoted* the Polls in an identical manner to one employed for the promotion of any other commercial product. Selzer’s media blitz across numerous mainstream media outlets in the aftermath of the release of the Harris Poll, all with the blessing and help of DMR and Gannett, is emblematic of these commercial promotional efforts. Pet. ¶ 71. In one example, during her appearance on Rachel Maddow’s MSNBC television program, Selzer breathlessly declared of the Harris Poll: “I don’t see how anybody

would look at those numbers and the history in Iowa in the past eight to twelve years and think that these numbers could have been foretold.” *Id.* ¶ 74. Selzer’s numerous television and other media appearances were in the service of promoting not only her polling and her polling business, but also her benefactors: DMR and Gannett, as well as Democrats, both in Iowa and across the country. In sum, the mere fact that the Polls *garnered* news coverage does not mean the Polls *themselves* were news; the Polls were created for DMR and Gannett, with their full consent and knowledge, by Selzer’s for-profit polling business, S&C, which, as Selzer herself admits “is *predicated on getting people to pay money for their products.*” *Id.* ¶ 67 (emphasis added).

If Plaintiffs had sued other news outlets for simply reporting on the Defendants’ pre-election consumer frauds, those other outlets would surely be entitled to raise First Amendment claims early in the litigation. But that is not our case. These Defendants are being sued for concocting a consumer fraud to sell their products, not for merely engaging in newsgathering.

2. The Polls were False Speech Not Immunized by the First Amendment

Beyond their failure to discredit the sufficiency of Plaintiffs' pleadings¹ due to improperly applying a strict scrutiny analysis, Defendants' attempt to usurp the First Amendment for use as a shield over the dissemination of false information in commerce also fails. The Supreme Court has articulated the guiding principle underpinning false speech: that "[t]here is 'no constitutional value in false statements of fact.'" *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 776 (1984) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)). Ultimately, "false statements are not immunized by the First Amendment right to freedom of speech." *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 743 (1983). Put another way, "untruthful speech" is not "protected for its own sake." *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976); see also *Herbert v. Lando*, 441 U.S. 153, 171 (1979) ("Spreading false information in and of itself carries no First Amendment credentials."). Moreover, the First Amendment equally fails to protect aiding, abetting, or committing a tort or other civil violation. *IBEW v. NLRB*, 341 U.S. 694, 705 (1951); *Rice v. Paladin Enters.*, 128 F.3d 233, 267 (4th Cir. 1997). Finally, the First Amendment does not protect the myriad conduct associated with fraudulent

¹ As discussed at length *supra*, the sufficiency of Plaintiffs' allegations as pleaded in their Petition can be easily established under the correct notice pleading standard.

commercial speech such as the Polls, as “the First Amendment does not shield fraud.” *Ill. ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 612 (2003).

Defendants’ reliance on *United States v. Alvarez* (Press Def. Br. at 23) to support invoking the First Amendment as a blanket shield for disseminating the fraudulent Polls is misplaced. There, the Supreme Court found that “respondent’s statements [regarding his military record] were but a pathetic attempt to gain respect that eluded him. The statements do not seem to have been made to secure employment or *financial benefits* or admission to privileges.” 567 U.S. 709, 714 (2012) (emphasis added). In other words, there was no “legally cognizable harm associated with [the] false statement.” *Alvarez*, 567 U.S. at 719. In contrast, as Plaintiffs allege, “[b]ecause of Defendants’ false, misleading, and deceptive conduct,” Plaintiffs have “sustained actual damages by having to expend extensive time and resources (“including direct federal campaign expenditures” in the case of President Trump) to mitigate and counteract the harms of the Defendants’ conduct.” Pet. ¶¶ 124-126.

Applying the correct notice-pleading standard to Defendants’ Motion, Plaintiffs have, without a doubt, sufficiently alleged their claims. As alleged in detail in the Petition, Defendants disseminated the Polls to their numerous consumers—including Plaintiffs—with such Polls being so utterly divorced from reality, so statistically unsupportable, so inconsistent with any objective data, and even

compromised by known data security breaches, that it can reasonably be inferred that Defendants knew, or at minimum should have known, that the content of the polls was false. (Pet. ¶¶ 2-5, 45-53, 58, 60-61, 65, 78, 92), causing “actual damages,” *id.* ¶¶ 124–26, to Plaintiffs. For this reason alone, Plaintiffs have carried the necessary burden to survive Defendants’ Motions, and the Motions must therefore be denied.

3. Plaintiffs’ Claims Cannot be Dismissed on “Other” First Amendment Principles

a) Actual Malice is Alleged in Plaintiffs’ Petition

Defendants’ argument that the “actual malice” standard articulated in *Sullivan*, 376 U.S. at 279–80, somehow “forecloses the Petition’s claims,” Press Def. Br. at 25, fails, as it conflates pleading standards with requirements for proof at the later stages of a lawsuit.

In particular, Defendants’ assertion that actual malice “is provable only by evidence that the defendant ‘realized that his statement was false,’” Press Def. Br. at 25 (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 511 n.30 (1984)), and that “therefore [it] requires clear and convincing proof of Press Defendants’ state of mind at the time the poll results were published,” *id.* (citing *Blessum v. Howard Cnty. Bd. of Supervisors*, 295 N.W.2d 836, 843 (Iowa 1980); *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)), represents a total distortion of the

standard courts apply when considering motions to dismiss false statement claims in Iowa, and other notice-pleading jurisdictions.

Iowa's generous notice-pleading standard applies even to claims that have heightened proof requirements. In *Mehmedovic v. Tyson Foods, Inc.*, 21 N.W.3d 412 (Iowa 2025), the Court rejected the argument that there was a higher pleading standard to show liability beyond the scope of workers' compensation laws in claims brought against coworkers. Such claims, to not be exclusively within the jurisdiction of the workers' compensation commissioner, must demonstrate the co-employee's acts constituted gross negligence. See Iowa Code § 85.20(2).

But this issue posed no special burden for the plaintiffs' petition. "The defendants assert that the pleading standard to meet this exception is high, and that the plaintiffs failed to meet it." *Mehmedovic*, 21 N.W.3d at 424. "Although gross negligence under § 85.20(2) presents a high *evidentiary* burden for plaintiffs to meet, the sufficiency of a pleading alleging gross negligence is still subject to our ordinary notice pleading standard." *Id.* (emphasis original). The Court found the plaintiffs had easily met this burden. Because the petition explained how certain employees had failed to protect meatpacking workers from the COVID-19 virus despite their conscious awareness of the dangers, the petition was adequate. "[W]e assume the truth of the factual allegations in the petitions and make no determination about the strength of the estates' evidence to support those allegations." *Id.* at 426.

Iowa's rule is consistent with other states with similar pleading standards. A plaintiff is "not required to prove malice in order to survive a motion to dismiss for failure to state a claim for which relief may be granted." *Infinite Energy, Inc. v. Pardue*, 713 S.E.2d 456, 463 (Ga. Ct. App. 2011). Rather, "[i]n accordance with rules of notice pleading, [plaintiffs are] simply required to aver that the defendants acted with malice." *Id.* Thus, a defendant seeking dismissal based on an "assertion that the allegations were not specific enough to sufficiently allege malice" cannot succeed, because "under notice pleading, a plaintiff is not required to prove his or her case at the pleading stage." *Parra v. Jackson*, 171 N.E.3d 452, 460 (Ohio Ct. App. 2021). The practical application of this correct standard is perhaps best articulated by the Ohio Supreme Court:

Very often, the evidence necessary for a plaintiff to prevail is not obtained until the plaintiff is able to discover materials in the defendant's possession. If the plaintiff were required to prove his or her case in the complaint, many valid claims would be dismissed because of the plaintiff's lack of access to relevant evidence. Consequently, as long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court [in notice pleading jurisdictions] may not grant a defendant's motion to dismiss.

York v. Ohio State Hwy. Patrol, 60 Ohio St. 3d 143, 145 (1991).

Ultimately, contrary to the ill-formed position Defendants stake out in their Motion, the law is clear: when courts in notice-pleading jurisdictions, such as Iowa, rule on motions to dismiss, "[w]hether or not [Plaintiff] can substantiate her allegations of malice in order to survive a motion for summary judgment is not"

dispositive. When applying the correct notice-pleading standard here, Plaintiffs' Petition sufficiently alleges that Defendants acted with malice to survive Defendants' Motion. As alleged in Plaintiffs' Petition, and explained throughout this opposition, the Defendants' Polls were so utterly divorced from reality, so statistically unsupportable, so inconsistent with any objective data, and even compromised by known data security breaches, the odds of Selzer's poll being accurate "by legitimate means," Pet. ¶¶ 69, 92, were virtually zero. Accordingly, as Plaintiffs' Petition properly and sufficiently alleges, "[i]t is more likely that someone deliberately manipulated the sample so that it included too many Democrats, or simply made up the numbers as they came in," *id.* ¶ 70, and thus, Defendants' contention that Plaintiffs' Petition suffers from an "abject failure to demonstrate any possible set of facts demonstrating actual malice in the substance of the reporting," Press Def. Br. at 27, is easily disposed of. Defendants' Motions must be denied.

b) The Veracity of the Polls is Irrelevant to the Sufficiency of the Allegations Plaintiffs' Petition

For the reasons presented in the preceding section, Defendants' argument that Plaintiffs' Petition must be dismissed because it "challenges statements that could not be verified as true or false at the time of publication," Press Def. Br. at 28, is equally ineffective.

As detailed herein, under the notice pleading standard employed by Iowa courts to assess the sufficiency of a petition's allegations at the motion to dismiss

stage, the Polls’ objective veracity—or in this case, lack thereof—is ultimately inconsequential. The only burden which Plaintiffs must carry under this correct standard—which they do with ease—is not to prove that the Polls were false, but simply to give Defendants “fair notice of the claim” that they are false so Defendants can “adequately respond to the petition.” *Rees*, 682 N.W.2d at 79 (citations omitted). In this instance, it is uncontroverted that Plaintiffs have provided Defendants with more than ample “fair notice” of their claims, which, as stated in numerous instances throughout the Petition, are rooted in Defendants’ production and publication of the false Defendants’ Polls. In sum, whether Defendants are correct (which they are not) in their assertion that “[p]olling results do not and cannot qualify as false statements of fact for First Amendment purposes,” Press Def. Br. at 29, is immaterial. The fact that Plaintiffs put Defendants on notice of the well-pleaded allegations regarding the falsity of the Polls in their Petition is ultimately dispositive here. Accordingly, Defendants’ Motion must be denied.

c) Plaintiffs’ Demand for Injunctive Relief is Constitutional

Finally, Defendants’ contention that Plaintiffs’ demand for injunctive relief amounts to an unconstitutional prior restraint on protected speech is baseless because, as explored above, the Polls fall squarely within the ambit of false commercial speech. *See supra*, section 1. For this reason, in addition to all others explained here, Defendants’ Motion must be denied.

B. Plaintiffs Have Adequately Pleaded Standing

The Selzer Defendants incorrectly argue that Plaintiffs have only alleged “injuries that are *not* personal to the three Plaintiffs.” Selzer Br. at 22. However, in that same paragraph, the Selzer Defendants undermine their own argument. They note that Plaintiffs allege that “they ‘expended time and resources,’ including ‘campaign expenditures’ to ‘counteract the harms’ of the Iowa Poll.” *Id.* (quoting Pet. ¶¶ 124–25) (emphasis added). Of course, Plaintiffs did not intend to exhaustively list the damages they suffered as a result of the Polls; that was made clear by Plaintiffs’ usage of the word “including” after identifying the fact that President Trump was damaged by having to expend extensive time and resources. Pet. ¶ 124. The word “include” “typically indicates a partial list.” INCLUDE, Black’s Law Dictionary (12th ed. 2024); *see also Fed. Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) (“[T]he term ‘including’ is not one of all-embracing definition, but connotes simply an illustrative application of the general principle.”). Moreover, Congresswoman Miller-Meeks and Senator Zaun’s statement of damages in the same section of the Petition did not mention campaign expenditures. Thus, it was never alleged that the totality of Plaintiffs’ damages were damages suffered by their campaigns. To the contrary, the reference to campaign expenditures in Plaintiffs’ allegations regarding their damages makes explicit that other damages were suffered in addition to those suffered by President Trump’s campaign. The fact

that President Trump was personally injured by damages to his campaign exists separately from the fact that he suffered personal damages as the candidate.²

Further, while wrongly arguing that President Trump and Congresswoman Miller-Meeks have not alleged damages, the Selzer Defendants note that President Trump and Congresswoman Miller-Meeks “won their elections,” and claim that they have not “plead[ed] a colorable claim for damages.” Selzer Def. Br. at 23. But this ignores the fact that the Petition is clear that President Trump and Congresswoman Miller-Meeks had to “expend extensive time and resources” in counteracting the harms of the Polls. Pet. ¶¶ 124–25. At this early stage of the litigation, this is all that is necessary to adequately plead damages because under Iowa’s “notice pleading requirement[s]” a plaintiff is “not required to make more than a terse statement that he was damaged.” *Brunkhorst*, 2008 Iowa App. LEXIS 1137, at *10. It is only in resisting a motion for summary judgment that a plaintiff must come forth with more than a conclusory statement regarding damages. *See, e.g., Rains v. Grieve*, 2011 WL 5396270, at *3 (Iowa Ct. App. 2011) (“Grieve’s claim he was damaged was nothing more than a mere conclusory statement or speculation, which is insufficient to resist

² Even if *arguendo*, the Selzer Defendants *were* correct that damages to Plaintiffs’ campaigns cannot be redressed by claims brought by Plaintiffs in their individual capacities, it does not follow that the same is a basis upon which to dismiss the Petition in its entirety. Rather, in addition to Plaintiffs’ claims that, as discussed here, have alleged specifically personal damages, this would be a basis to potentially add Plaintiffs’ campaigns as **additional** plaintiffs on Plaintiffs’ common-law claims.

RBC’s motion for summary judgment.”). Moreover, the Selzer Defendants’ inability to conjure up a scenario where a winning candidate could suffer injury ignores the fact that the Supreme Court has recognized that such a winning individual plaintiff (not just a campaign) can have standing based on “financial or reputational injury.” *Bost v. Ill. State Bd. of Elections*, 607 U.S. 71, 95 (2026); *FEC v. Ted Cruz for Senate*, 596 U.S. 289, 296 (2022) (recognizing that winning candidate “Cruz, of course, suffers a \$10,000 pocketbook harm”).

The Selzer Defendants’ arguments about Plaintiffs’ allegations regarding damages both fail to appreciate the scope of those allegations and otherwise hold Plaintiffs to a standard not applicable in this Court. Plaintiffs’ allegations regarding damages are sufficient at this stage of the litigation.

C. Plaintiffs Assert a Viable Claim for Relief under ICFA

Defendants wrongly argue that Plaintiffs fail to state a claim under the Iowa Consumer Fraud Act (“ICFA”). *See* Press Def. Br. at 33–47; Selzer Br. at 25–28. These arguments broadly misrepresent Plaintiffs’ arguments, the statutory language of the ICFA, and the low hurdle to adequately alleging Defendants’ violations under a notice-pleading standard. Dismissal is not warranted at this early stage of the litigation, and must be denied.

1. ICFA Standing Was Properly Alleged

The Press Defendants broadly challenge Plaintiffs’ standing to sue under the ICFA.³ They incorrectly argue that Plaintiffs fail to properly allege that their claim relates to a consumer transaction. Press Def. Br. at 34–35. The Press Defendants’ “gotcha” argument is to point out that Plaintiffs quote the ICFA’s definitions for “consumer” and “merchandise” in their Petition, but not “consumer merchandise.” And yet the Press Defendants do not articulate how this purported oversight affects the contours of Plaintiffs’ ICFA claim, or changes the nature of what Plaintiffs must allege to adequately allege those claims.

The Press Defendants wrongly argue that Plaintiffs have not alleged their status of a purchaser or subscriber to a publication that published the Iowa Poll results. Press Def. Br. at 35. This argument is misguided as it fails to engage with Plaintiffs’ explicit allegations in their Petition. The Petition repeatedly includes Plaintiffs among the class of consumers who purchased the Press Defendants’ publications. See, e.g., Pet. ¶ 110 (“Consumers within and without Iowa who paid for subscriptions to the *Des Moines Register*, *USA Today*, and other Gannett-owned publications, or who otherwise purchased the publication, **including Plaintiffs**, were

³ They also make, in passing, a similar argument as the Selzer Defendants regarding standing based on claiming that Plaintiffs specifically seek damages to President Trump’s campaign, see Press Def. Br. at 35–36. That issue is addressed above at Section IV(B).

also badly deceived.”) (emphasis added). Such an allegation is sufficiently particular that it would suffice in any jurisdiction to establish Plaintiffs’ standing to sue under a statute such as the ICFA, but particularly here, in Iowa, which is a notice-pleading jurisdiction.

The Press Defendants misrepresent Plaintiffs’ claims, arguing that they sound in “election interference.” Press Def. Br. at 34. To be sure, while Defendants’ acts had the result of causing interference with elections, “election interference” is not one of the enumerated counts in the Petition. That the damages suffered by Plaintiffs flowed from election interference which naturally flowed from the prohibited acts of Defendants does not alter the nature of Plaintiffs’ claims in this action.

2. The Creation and Publication of a Maliciously Manipulated or Manufactured Poll is Actionable Conduct Under the ICFA

Both sets of Defendants incorrectly claim that the conduct complained of by Plaintiffs is not actionable conduct under the ICFA. But they both misrepresent the scope of the alleged wrongdoing which forms the basis of Plaintiffs’ claims. The Selzer Defendants, citing to *Donnelly v. Des Moines Reg. & Trib. Co.*, 2025 U.S. Dist. LEXIS 276064, at *8 (S.D. Iowa Nov. 6, 2025), incorrectly argue that Plaintiffs’ claims are somehow based on the “publishing the results of a political opinion poll that matches the co-published methodology.” Selzer Def. Br. at 25. Likewise, the Press Defendants wrongly argue that the purported “deceptive conduct” was nothing more than “publishing the Iowa Poll results.” Press Def. Br.

at 37. They erroneously conclude, then that “the Iowa Poll . . . cannot be[] a guarantee of a future election performance,” constituting non-actionable opinion. Thus, Defendants would have this Court believe that the only issue Plaintiffs take with the Polls was that they ended up not accurately predicting the results of elections. That is wrong. Indeed, the Press Defendants apparently recognize that the falsification of the underlying data *would* constitute a deceptive practice under the ICFA, as the Press Defendants claim to this Court that “Plaintiffs do not allege that any of the underlying polling data was incorrect or falsified, that the published methodology was not implemented as described, or that Press Defendants misstated or lied about the results.” Press Def. Br. at 39.

This, of course, ignores Plaintiffs’ actual allegations in the Petition. Plaintiffs **do** take issue with what they have alleged to be the ***falsified*** results of the Iowa Poll—that the fact that the Poll was so wrong was not a bug, but a feature, procured either by purposely overrepresenting Democrats in the population polled⁴ or by outright making up the numbers which underlay the Iowa Poll. *See, e.g.*, Pet. ¶¶ 69, 70, 92. These allegations, in turn, undermine the Press Defendants’ next argument, that the Iowa Poll “included detailed descriptions about how the Iowa Poll was

⁴ Oddly, the Press Defendants explicitly reference this theory of deception in their papers, noting President Trump’s speculation that this was the case, but nonetheless refuse to reckon with it in their papers. *See* Press Defs.’ Br. at 47 n.12 (quoting President Trump’s suggestion that the Iowa Poll was “a fake poll” as the pollster, “a Trump hater,” had “oversampled, by a lot, Democrats”).

performed.” Press Def. Br. at 39. Again, such an argument puts the cart before the horse. Defendants’ description of their methodology cannot insulate their deception if, as alleged, either their methodology was not followed, or the data which was analyzed was manufactured. Either way, the Press Defendants themselves have implicitly recognized that these allegations as to the manufacture or manipulation of the data utilized in connection with the Iowa Poll suffice to allege actionable conduct under the ICFA.

Importantly, the Petition need not even go into as much detail as it did. As discussed above, under Iowa’s notice-pleading standard, Plaintiffs “need not allege ultimate facts that support each element of the cause of action.” *Rees*, 682 N.W.2d at 79. The Iowa Poll was the front-page news of, among others, the *Des Moines Sunday Register*. See, e.g., Pet. ¶ 13. Yet, the Press Defendants attempt to question whether the Iowa Poll was material to any decision of Plaintiffs as to “their ‘choice of, or conduct regarding’ *The Register* or any other consumer product or merchandise.”⁵ Press Def. Br. at 38. These may be valid questions, but not in connection with a motion to dismiss. Defendants can raise these arguments later in a motion for summary judgment.

⁵ With the pedigree the Iowa Poll has, as alleged in the Petition, it is a reasonable conclusion—at this early stage of the litigation—that it did.

3. Defendants' Conduct Was in Connection with the Sale of Consumer Merchandise

The Press Defendants make a contrived argument that, in sum and substance, attempts to claim that the sale of a newspaper does not fit the definition of consumer merchandise under the ICFA, because of the nature of the harms that flowed from the Iowa Poll. *See* Press Def. Br. at 42–45; Selzer Def. Br. at 25–28. As is a running theme in the Defendants' motions, much of their issue appears to be premised on conflating federal standards for pleading with notice-pleading in our state. Their arguments attack whether Plaintiffs pleaded specific facts, such as whether Plaintiffs “plead[ed] that the publication of the Iowa Poll had any nexus whatsoever to their purchase of *The Register*.”⁶ Press Def. Br. at 44. Notwithstanding that such facts *were* pleaded, there was no obligation on Plaintiffs to do so where Defendants' arguments make clear that they understand “the incident giving rise to the claim and of the claim's general nature.” *Rees*, 682 N.W.2d at 79.

Defendants also try to improperly reframe the definitions legislated in Iowa Code § 714H.2. Although the Press Defendants break down each of the relevant definitions, *see* Press Def. Br. at 42–43, they then put forth an argument “that the allegedly violative conduct was *politically*—not commercially—motivated.”

⁶ The Press Defendants, as they do elsewhere, question whether all of the Plaintiffs were consumers under the ICFA, despite numerous allegations in the Petition which identified them as such. *See, e.g.*, Pet. ¶¶ 108, 110, 111.

Id. at 44. (emphasis in original). But nowhere is the motivation or animus behind an unfair practice addressed in the ICFA; all that the statute requires is that the violator “inten[d] that others rely upon the unfair practice...” Iowa Code § 714H.3(1). Indeed, the Press Defendants *concede* that Plaintiffs’ merely pleading their harms were caused by “prohibited conduct that was *related to the sale or advertisement of The Register’s newspaper*” would state a valid claim under the ICFA. Press Def. Br. at 43. (emphasis in original). They only, bafflingly, walk back that concession because of their wrongful arguments regarding the motivations behind the violative conduct. *Id.* at 43–44. But there is no support in the language of the ICFA for that distinction.

The Selzer Defendants also attempt to improperly curtail the scope of the ICFA. The *actual* scope of the practices and acts prohibited by the ICFA is broad—such unfair or deceptive practices and acts must merely be “in connection” with the “sale . . . of consumer merchandise[.]” Iowa Code § 714H.3(1). But the Selzer Defendants wrongly argue that “[a] comprehensive opinion poll of the Iowa electorate *commissioned by a newspaper of general circulation* is not ‘merchandise’ ‘primarily for personal, family, or household purposes.’” Selzer Def. Br. at 26–27 (emphasis added). This argument, also, concedes the point—the Iowa Poll was commissioned by, intended for publication in, and was a longstanding tradition of, a newspaper—in fact, a newspaper which plastered the purposefully and knowingly

doctored results across its front page to induce consumers to purchase it, thereby rallying the Democratic base and leading to the harms suffered by the Plaintiffs, as alleged in the Petition. *See* Pet. ¶¶ 13, 42, 124, 125. Where the unfair practice merely needs to be “in connection” with the sale of consumer merchandise, as here, the Selzer Defendants cannot pretend that their role in manufacturing the Iowa Poll was not conduct within the ambit of the ICFA. Indeed, their codefendants, the Press Defendants, concede as much. *See* Press Def. Br. at 43.

4. Plaintiffs’ Reliance is Not an Element of a Claim Under the ICFA

The Press Defendants, again wrongly, argue that Plaintiffs’ ICFA claim is somehow deficient because they do not allege they relied on the Polls. Even assuming this argument is cognizable on a motion to dismiss—and as discussed above, it is not, based on Iowa’s notice-pleading standard—this argument ignores that it is not *Plaintiffs’* reliance which is a component of an ICFA claim, but Defendants’ intent to *induce* reliance.

The text of the ICFA is clear: conduct is actionable where it is the violator’s “intent that others rely upon the unfair practice.” Iowa Code § 714H.3(1). In fact, the Press Defendants admit that this section of the Iowa Code specifically addresses the *mens rea* that a **defendant** has, not a plaintiff. Press Def. Br. at 46 (noting the statute “requir[es] that a defendant have the” requisite intent). The Press Defendants repeatedly suggest that questions related to proximate cause limit the scope of

liability. However, the ICFA gives a clear statement as to the attendant scope of liability: a private right of action accrues where the plaintiff “suffers an ascertainable loss of money or property as the result of a prohibited practice or act.” Iowa Code § 714H.5(1).

All of the foregoing is pled in Plaintiffs’ Petition. The Petition explains how polling itself can impact elections, *see* Pet. ¶¶ 35–44, such as noting “that polling data on a race affects voter choices and turnout,” *id.* ¶ 42. The Petition is replete with allegations that Defendants—both the Selzer Defendants and the Press Defendants—intended the manipulated poll to be relied upon in drumming up support for Harris and other Democratic candidates. *See, e.g., id.* ¶¶ 6, 54, 63. The Petition also alleges that Plaintiffs suffered damages in their efforts “to mitigate and counteract the harms of the Defendants’ conduct.” *Id.* ¶¶ 124–25.

Thus, Defendants are incorrect that the ICFA requires Plaintiffs to show any reliance on their deception or unfair practices. It merely must be shown that *Defendants intended to induce reliance* on those prohibited acts, and that Plaintiffs had suffered damages because of those acts. The Petition pleads these elements, and as such the Motions must be denied.

D. Plaintiffs Assert an Actionable Claim for Fraudulent Misrepresentation

Defendants each take aim, and fail, at Plaintiffs’ claim for fraudulent misrepresentation, albeit on different bases.

1. Plaintiffs Need Not Prove Their Case at the Motion to Dismiss Stage

The Selzer Defendants caption their argument that “Plaintiffs Fail to State a Fraudulent Misrepresentation Claim.” Selzer Def. Br. at 28. However, in the actual body of their argument, they instead note that the case they rely on, *Gibson v. ITT Hartford Ins. Co.*, addresses what elements a “plaintiff must **prove**” to establish a claim for fraudulent misrepresentation. 621 N.W.2d 388, 400 (Iowa 2001). That makes sense—*Gibson* was decided post-trial. That issue is not applicable here.

Gibson was not the only case the Selzer Defendants cited in their section attacking Plaintiffs’ claim for fraudulent misrepresentation. The other two Iowa state court cases are *Spreitzer v. Hawkeye State Bank*, 779 N.W.2d 726 (Iowa 2009), also a decision arising post-trial, and *Young v. Rally Appraisal, L.L.C.*, 928 N.W.2d 660 (Iowa Ct. App. 2019), where a decision granted a motion for summary judgment. Pointedly *lacking*, however are any Iowa cases addressing the viability of a motion to dismiss aimed at a claim of fraudulent misrepresentation based on the pleading of the elements for such a claim. There is a good reason no such cases were cited by the Selzer Defendants: there are none. As things stand, the Selzer Defendants have not argued to this Court—and thus, Plaintiffs cannot file a resistance to an argument not made—that Plaintiffs’ claim for fraudulent misrepresentation does not meet the low threshold of notice pleading.

Regardless, as discussed throughout this Resistance, the Selzer Defendants' mischaracterizations of the Petition as not pleading certain elements of a claim for fraudulent misrepresentation are inaccurate. Plaintiffs have alleged that the intentionally manipulated and manufactured Iowa Poll was a false representation, that the Iowa Poll (prominently presented as the headline feature of the *Register's* issue) was intended to induce consumers (including Plaintiffs) into wrongly believing that Harris and the other Democratic candidates were outperforming Republicans at the polls, and Plaintiffs took action to counteract that "fact." Although these allegations are made in the Petition, Plaintiffs did not even need to allege their claims in such detail. Properly, the details surrounding each of Plaintiffs' claims will be further fleshed out in discovery.

2. Plaintiffs' Injuries Are Redressable by a Claim for Fraudulent Misrepresentation

The Press Defendants do not join in the Selzer Defendants' scattershot, incorrect argument that Plaintiffs' claim is inadequately pleaded in general. Rather, the Press Defendants claim is much more targeted, and also simply rebutted. The Press Defendants attempt to allege that Plaintiffs' claim is not redressable by a cognizable form of damages because "Plaintiffs did not incur any out-of-pocket expenses as a result of the publication." Press Def. Br. at 53. But that is not so. This argument ignores the explicit allegation in Plaintiffs' Petition to the contrary, stating

that Plaintiffs expended resources to mitigate the harms of the Iowa Poll. *See* Pet. ¶¶ 124, 125.

Even if Plaintiffs had not explicitly alleged such damages, which they did, Plaintiffs cite no case stating that such an element must be affirmatively pleaded in a notice-pleading jurisdiction. Like the cases cited by the Selzer Defendants attacking Plaintiffs' fraudulent misrepresentation claim, the Press Defendants' cases discussing out-of-pocket damages are not cases involving a motion to dismiss. *See Midwest Home Distrib. v. Domco Indus.*, 585 N.W.2d 735 (Iowa 1998) (jury trial); *Putman v. Walther*, 973 N.W.2d 857 (Iowa 2022) (summary judgment); *Cornell v. Wunschel*, 408 N.W.2d 369 (Iowa 1987) (jury trial). The Press Defendants are entitled to take discovery on Plaintiffs' damages and, should they still find them lacking at that point, they can seek summary judgment at that point. But, like with the Selzer Defendants, the Press Defendants' arguments do not warrant dismissal at this early stage of the litigation in a notice-pleading jurisdiction.

E. The Petition States a Viable Claim for Negligent Misrepresentation

While the breakdown of the elements differs, much of the analysis with respect to Plaintiffs having properly pleaded a claim for fraudulent misrepresentation based on the low notice-pleading standard, as well as specific allegations made by Plaintiffs which speak to certain elements attacked by Defendants, similarly applies

to Plaintiffs' claim for negligent misrepresentation, and for the sake of brevity those arguments are specifically restated, will not be repeated.

"Iowa has adopted the definition of the tort of negligent misrepresentation found in the Restatement (Second) of Torts." *Bagelmann v. First Nat'l Bank*, 823 N.W.2d 18, 30 (Iowa 2012) (citing *Pitts v. Farm Bureau Life Ins. Co.*, 818 N.W.2d 91, 111 (Iowa 2012)). The elements include:

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

Id. The Supreme Court of Iowa has explicitly held that when it comes to negligent misrepresentation, "those liable are only those who supply information in an advisory capacity and are manifestly aware of how the information will be used and intend to supply it for that purpose." *Van Sickel Constr. Co. v. Wachovia Com. Mortg.*, 783 N.W.2d 684, 691 (Iowa 2010) (cleaned up).

In addition, Plaintiffs note that Defendants were acting in their professional capacity when they prepared and published the Iowa Poll, and there can be no dispute that the facts as pled support the fact that Defendants each had a pecuniary interest in the Polls. Specifically, the Selzer Defendants prepared the Polls for the Press Defendants, who broadly advertised the Poll on the front page and in a marketing blitz to sell newspapers and digital subscriptions, all with the underlying goal of making money on the polling enterprise. Pet. ¶¶ 23–26, 67, 151. Selzer has even admitted the financial incentive behind her work—“*[a]nd the polling industry is predicated on getting people to pay money for their products.*” *Id.* ¶ 67. Defendants intended, and succeeded in generating enormous buzz from their publication of the false poll data across the nation and around the world just days before a presidential election. *Id.* ¶¶ 62, 71–74. Under the circumstances, Defendants were exactly the type of entities that “supply information in an advisory capacity . . . [and] are in a position to weigh the use for the information against the magnitude and probability of the loss that might attend the use of the information if it is incorrect.” *Van Sickle*, 783 N.W.2d at 691.

The facts pleaded in Plaintiffs’ Petition also establish that, even assuming *arguendo* that Defendants can establish there was no intentional misconduct, which they cannot, there can be no doubt that their conduct was grossly negligent and breached a duty owed to Plaintiffs.

First, the results of the Polls were so absurdly inaccurate that—while best explained by intentional misconduct—are impossible to explain without at least negligent conduct in designing, executing, and analyzing the data from the Polls. Pet. ¶¶ 2–3, 66, 68, 75. Selzer herself was unable to explain the inaccuracy of the Harris Poll or otherwise provide an explanation to the public—leaving no explanation other than intentional misconduct or negligence. *Id.* ¶ 67. Thus, the facts as pleaded establish that Defendants were at least negligent in preparing the Polls. *See, e.g. Burbach v. Radon Analytical Lab 'ys*, 652 N.W.2d 135, 138 (Iowa 2002), *as amended on denial of reh'g* (Oct. 25, 2002) (explaining that the lower court erred in dismissing a negligent misrepresentation case where the Defendants had “knowledge that its report would be reviewed and potentially relied upon by a limited but foreseeable class of persons.”).

Second, there are ample facts pled supporting Defendants’ negligence in protecting the poll from leaking. First, as pleaded by Plaintiffs, DMR had a “longstanding policy of secrecy,” and there were likewise industry standards for protection of polling information, a policy Defendants didn’t adhere to in this case. Pet. ¶¶ 54, 58. Selzer admitted that she showed the poll to her nephew. *Id.* ¶ 61. She did this despite knowing that her nephew worked at a competing polling company, and that the information was highly valuable and sensitive. *Id.* Such conduct is a clear breach of even the lowest standards of care for protecting sensitive information.

Id. See, e.g. *Davidson & Jones, Inc. v. New Hanover Cnty.*, 41 N.C. App. 661, 667 (1979) (explaining that “a complete binding contract between the parties is not a prerequisite to a duty to use due care in one's actions . . . [and an] architect, in the performance of his contract with his employer, is required to exercise the ability, skill, and care customarily used by architects upon such projects.”); see also *Mohsen v. Veridian Credit Union*, 733 F. Supp. 3d 754, 763 (N.D. Iowa 2024) (“[A] party collecting private data from its customers has a duty to take reasonable measures to safeguard that data.”).

Moreover, both the results of the Polls and the subsequent leak of the Harris Poll are the types of events that would not have occurred absent a failure to exercise ordinary care, and so the doctrine of *res ipsa loquitur* applies here to both forms of negligence. A *res ipsa* inference is appropriate where “(1) the injury is caused by an instrumentality under the exclusive control of the defendant, and (2) the occurrence is such as in the ordinary course of things would not happen if reasonable care had been used.” *Brewster v. United States*, 542 N.W.2d 524, 529 (Iowa 1996). Here, Defendants alone possessed the polling data since they themselves collected, analyzed, and published this information. Pet. ¶¶ 1, 17. In addition, the statistical odds of the error, 1 in 3.5 million, make the results of the Polls something that cannot be explained absent intentional misconduct or negligence. *Id.* ¶ 69. Likewise, despite a supposedly “thorough” investigation into the matter after the fact, Defendants have

not publicly suggested that there was any hack or other interference by third parties that could explain the leak of the Harris Poll absent intentional misconduct, or, at the very least, negligence. *Id.* ¶¶ 58, 66.

Thus, Plaintiffs have adequately pleaded Defendants’ negligent conduct, and in general, properly pleaded a claim for negligent misrepresentation.

F. Issue Preclusion is Not Properly Applied Against Plaintiffs Based on a Federal Court’s Ruling in a Case Brought by Non-Parties Against Defendants

Finally, the Press Defendants wrongly and desperately argue that this Court should not even entertain the merits of Plaintiffs’ case because this case in its entirety is barred by the doctrine of issue preclusion. That is wrong. According to the Press Defendants, the order issued in *Donnelly v. Des Moines Reg. & Trib. Co.*, 2025 U.S. Dist. LEXIS 276064 (S.D. Iowa Nov. 6, 2025), by the United States District Court for the Southern District of Iowa (the “Federal Court”) granting Defendants’ motions to dismiss claims brought by consumers of the Des Moines Register—but otherwise not identified by the subject polls—requires this Court to dismiss Plaintiffs’ claims. But issue preclusion is not appropriately invoked as against Plaintiffs generally, and regardless, the Press Defendants have distorted the Petition’s allegations to improperly reach the conclusion that they have established the elements necessary for a finding that issue preclusion applies, when it clearly does not.

1. The Doctrine of Non-Mutual Defensive Issue Preclusion is Inapplicable, Because Plaintiffs are Not Connected in Interest with the *Donnelly* Plaintiffs

Before even addressing the actual elements necessary for invoking issue preclusion, the Press Defendants’ arguments fail because issue preclusion is not properly asserted against Plaintiffs. The rule had been that *both* litigants needed to be parties to a prior action, or a direct privity, for issue preclusion to apply. *Goolsby v. Derby*, 189 N.W.2d 909, 913 (Iowa 1971) (“Traditionally, before collateral estoppel is applied, the court looks for three prerequisites: . . . (3) identity of the parties or privity, often referred to as ‘mutuality of estoppel.’”). Although Iowa “no longer require[s] **mutuality** between the parties,” to apply issue preclusion, the courts “generally restrict its use only **against a party**, or one in privity with a party, to the prior suit.” *Clark v. State*, 955 N.W.2d 459 (Iowa 2021) (emphasis added). To invoke the doctrine of defensive issue preclusion against a non-party or privity, it must be the case that “the party against whom the doctrine is invoked defensively ‘was so connected in interest with one of the parties in the former action as to have had a full and fair opportunity to litigate the relevant claim or issue and be properly bound by its resolution.’” *Hunter v. Des Moines*, 300 N.W.2d 121, 123 (Iowa 1981) (quoting *Bertran v. Glens Falls Ins. Co.*, 232 N.W.2d 527, 533 (Iowa 1975)).

As the Supreme Court of Iowa has explained, “[d]efensive use of issue preclusion occurs when **a stranger to the judgment in the former action**, ordinarily

the defendant in the second action, relies upon the prior judgment as conclusively establishing in that party's favor, an issue which the party must prove as an element of the defense." *Dettman v. Kruckenberg*, 613 N.W.2d 238, 244 (Iowa 2000) (emphasis added). But that is not what Defendants improperly ask for here. They were not a stranger to the first action. Defensive issue preclusion would involve using a determination from a prior lawsuit *involving the Donnelly plaintiffs*. That is not the case here.

Further, even assuming defensive issue preclusion *could* apply to Plaintiffs, which it cannot, the Press Defendants have failed to establish that Plaintiffs were "so connected in interest with" the *Donnelly* plaintiffs "as to have had a full and fair opportunity to litigate the relevant claim or issue and be properly bound by its resolution." *Hunter v. Des Moines*, 300 N.W.2d at 123. The Press Defendants attempt to make this showing by arguing, unsuccessfully, the similarities between the two cases.⁷ See Press Defendants' Br. at 63–64. But merely showing some general similarity between two parties' cases is not sufficient to show that the parties *themselves* are connected in interest. It is a connection between the *parties* which the Press Defendants needed to evince if they were to establish the applicability of issue preclusion, and they cannot do so. *Basel v. City of Ankeny*, 2012 WL 299643, at *2

⁷ To be sure, Plaintiffs' relationship to the polls—as the subjects of those polls—creates significant differences between this action and *Donnelly*.

(Iowa Ct. App. 2012) (“Even assuming both sets of plaintiffs raised the same issues and attempted to show the City was negligent, **the Plaintiffs must have some additional connection to the plaintiffs in the *Egli* suit in order to be bound by that suit.**”) (emphasis added).

The court in *Basel* identified the obvious policy rationale as to why a connection between the parties is important to the application of issue preclusion: “While the City argues the Plaintiffs do not complain of the prior representation in the *Egli* case, because the Plaintiffs had no connection to the case, they did not have any control over the prosecution of it.” *Id.* “[I]t is a due process violation for a litigant to be bound by a judgment when the litigant was not a party or a privy in the first action and therefore never had an opportunity to be heard.” *Harris v. Jones*, 471 N.W.2d 818, 820 (Iowa 1991) (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 (1979)). Plaintiffs are not connected in interest with the *Donnelly* plaintiffs, and as such there was no opportunity for Plaintiffs to be heard in that case. Refusing Plaintiffs the opportunity to litigate their case would be fundamentally unfair and would violate of Due Process.

A comparison to cases where courts *have* found parties “so connected in interest” as to apply non-mutual issue preclusion is instructive in showing why Plaintiffs and the *Donnelly* plaintiffs are not connected in the same way.

In *Dettman*, a wrongful death case, a teenager was previously convicted of vehicular homicide. 613 N.W.2d at 242. In a later civil lawsuit, the teenager and his father (the owner of the car) were sued by the decedent's estate. *Id.* at 243. The teenager and father sought to prove that the friend was the actual driver when the fatal collision occurred. The trial court held the criminal conviction was preclusive, even to the father who was not a defendant in the criminal case. It did so for three reasons. First, the father "testified in the criminal case and therefore had the opportunity to present any relevant evidence concerning the driver issue." *Id.* at 249. Second, the father had a close family relationship with the son and as the vehicle owner "had a great personal interest in seeing that all evidence relevant to [teenager's] defense was presented in the criminal trial." *Id.* Lastly, the father was on notice that he was subject to liability as the vehicle owner. *Id.* The Court concluded that these facts supported the district court's refusal to allow the proposed different-driver theory to be presented.

In another case, the Iowa Court of Appeals affirmed a finding that issue preclusion applied, even though the parties at issue were not identical, where the stranger to the prior proceeding was a corporate entity of one of the two individual plaintiffs who had filed the original petition. See *J.D. Francis, Inc. v. Bremer Cnty. Bd. of Supervisors*, 2013 WL 104541, at *5 (Iowa Ct. App. 2013) ("We find that requirement is met here, where J.D. Francis, Inc. is challenging the board's denial

of the rezoning requests made by Francis and Anhalt.”). That corporation was the successor-in-interest of the property owner, the other individual who had filed the original petition. Thus, the corporate alter ego of one original plaintiff, which was also the successor-in-interest of the other original plaintiff, was “so connected in interest” to those original plaintiffs.

In *United Fire & Cas. Co. v. Shelly Funeral Home, Inc.*, an insurer sought a declaratory judgment regarding its duties and obligations regarding an action it had defended under protest and a reservation of its rights as to the disputed coverage. 642 N.W.2d 648 (Iowa 2002). The insurer attempted to relitigate an issue determined in the underlying action, but the Supreme Court of Iowa upheld the application of issue preclusion because the insurer had a full opportunity to litigate the issues when it defended its insured. *Id.* at 655–56.

Dettman involved a father who was statutorily liable as the owner of a vehicle used by his son to commit vehicular homicide, and who actually was involved in that litigation as a witness. *J.D. Francis, Inc.* involved a corporate entity that was owned by one former plaintiff and in privity with the other. *United Fire* involved an insurance company that was directly involved in the underlying lawsuit that gave rise to the bad faith claim against the company.

In all of these cases, there is a clear connection ***between the parties*** underscoring the imposition of issue preclusion. That is markedly different from the

nonexistent relationship between the plaintiffs in *Donnelly* and the Plaintiffs here. There is no connection or relationship in this case between the Plaintiffs—the actual subjects of the fraudulent polls at issue in both actions—and individuals who brought a similar lawsuit as a class action by consumers, whose relationship to the subject polls was much further removed than that of Plaintiffs’ direct stake in the polls. Even if Plaintiffs’ claims are premised on their status as consumers, that similarity is insufficient to establish a connection between the parties; the similarity of legal position is exactly what the court in *Basel* (addressing separate cases brought by neighbors against the municipality regarding the same defect) found was insufficient to establish the necessary connection in interest to invoke issue preclusion. *See id.*, 2012 WL 299643, at *2.

Contrary to the Press Defendants’ position, Plaintiffs were not connected in interest with the *Donnelly* plaintiffs. Arguing repeatedly that the “two cases were ‘related,’” Press Def. Br. at 64, is inaccurate, and what the Press Defendants *actually* mean—that there are similarities in the legal arguments presented—is irrelevant. That is not the proper analysis for finding parties to be connected in interest. Consequently, issue preclusion is not available against Plaintiffs, and this Court need not even address the four-step analysis for when issue preclusion is properly applied.

2. The Federal Court's Ruling Does Not Address the Core Arguments in Favor of Dismissal

As the Press Defendants note, the first element of the test to determine when issue preclusion applies is that “the issue concluded must be identical.” Press Def. Br. at 59 (quoting *Hunter*, 300 N.W.2d at 123). Even ignoring, as noted *supra*, that Plaintiffs—as the subjects of the Polls—have different claims and damages than the *Donnelly* plaintiffs, it is notable that the Federal Court purposely sidestepped determining the core factual contention that underlies Plaintiffs’ Petition in this action.

The Press Defendants attempt to pinpoint exactly how they believe, incorrectly, the Federal Court’s ruling precludes Plaintiffs’ claims. Citing this decision, they argue that, *among others*, “(1) ‘publishing the results of a political opinion poll that matches the co-published methodology is not an unfair or deceptive practice’; and (2) ‘[p]ublication of the Iowa Poll cannot have been deceptive because readers knew exactly how the poll was conducted and what results it yielded—readers were therefore informed of all material facts needed to judge the reliability of the poll.’” Press Def. Br. at 62 (internal citations omitted). However, these and other determinations made by the Federal Court take for granted facts which Plaintiffs dispute as the foundation of their Petition: that Selzer accurately reported the results or methodology of her poll. Plaintiffs identified the astronomical—virtually impossible—odds of Selzer’s poll being accurate “by legitimate means,”

see, e.g., Pet. ¶¶ 69, 92, and instead alleged that “someone deliberately manipulated the sample so that it included too many Democrats, or simply made up the numbers as they came in,” *id.* ¶ 70.

“One of the primary requirements for application of issue preclusion is an identity of the issue decided in the prior litigation with the issue presented in the current lawsuit. **Similarity of issues is not sufficient; the issue must be ‘precisely the same.’**” *Est. of Leonard v. Swift*, 656 N.W.2d 132, 147 (Iowa 2003) (quoting *Westegard v. Davis Cnty. Cmty. Sch. Dist.*, 580 N.W.2d 726, 728 (Iowa 1998)) (emphasis added) (internal citation and quotation marks omitted); *Emplrs. Mut. Cas. Co. v. Smith*, 2019 WL 2872325, at *3 (Iowa Ct. App. 2019) (same); *State v. Doe*, 2023 WL 8448474, at *2 (Iowa Ct. App. 2023) (“To satisfy this first prerequisite, it is not enough for the issues to be similar—they must be ‘precisely the same.’”) (quoting *Estate of Leonard*, 656 N.W.2d at 147).

As this authority makes clear, that first prerequisite to the imposition of issue preclusion—an identity of issues—is fully lacking between this action and *Donnelly*. The Federal Court failed to assess the viability of the claims at issue when combined with the allegation that the data underlying the poll was purposely manipulated or manufactured. Thus, the issues concluded in *Donnelly* are not identical to the issues at bar in this action.

Similarly, the Federal Court applied standards in analyzing *Donnelly* which are not applicable to litigation before this Court. Iowa is a notice-pleading state. But the Federal Court disregarded some of *Donnelly*'s allegations because it ruled that they did not meet the higher pleading standards imposed by the Federal Rules of Civil Procedure. *See, e.g., Donnelly*, 2025 U.S. Dist. LEXIS 276064, at *16 (“Donnelly’s conclusory statements that the magnitude of the polling miss demonstrates actual malice therefore similarly fails to meet the plausibility standard of *Iqbal* and *Twombly*.”). The Federal Court relied on pleading standards which are inapplicable to this case, as the Supreme Court of Iowa has explicitly rejected adoption of the heightened pleading standards under *Iqbal* and *Twombly*. *See, e.g., Hawkeye Foodservice Distribution v. Iowa Educators Corp.*, 812 N.W.2d 600, 608 (Iowa 2012) (“For the most part, state high courts have declined to adopt the new standard announced in *Twombly* and *Iqbal*...Accordingly, we decline to depart from our well-established standard for reviewing a motion to dismiss.”).

Where the Federal Court’s analysis shows that its conclusions in *Donnelly* are not aimed at the same claims that are being advanced in this action, and the Federal Court ignored allegations which would be appropriately considered by this Court under Iowa’s pleading standard, the issues which the Federal Court ruled on were not identical to those which would be considered by this Court. As such, the Press

Defendants have failed to establish that issue preclusion based on *Donnelly* bars Plaintiffs' litigation of this action.

V. CONCLUSION

For the foregoing reasons, the Court should deny Defendants' Motions in their entirety.

Date: June 4, 2026

Respectfully Submitted,

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