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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

MICHAEL BOREN, an individual, Plaintiff-Appellant-Cross-Respondent, v. GARY GADWA, an individual, Defendant-Respondent, and SARAH C. MICHAEL, an individual, Defendant-Respondent-Cross Appellant, and JON CONTI, an individual; RICHARD DOUGLAS FOSBURY, an individual; DOES 1–20, Defendants.	Supreme Court Case No. 50604-2023 District Court No. CV19-22-0051

JOINT BRIEF OF DEFENDANTS-RESPONDENTS GARY GADWA AND SARAH MICHAEL

Appeal from the District Court of the Seventh Judicial District for Custer County
Honorable Stevan H. Thompson, District Judge, Presiding

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INTRODUCTION

Michael Boren asked Custer County to grant him a conditional use permit (CUP) for a designated airstrip on his ranch in the Sawtooth National Recreation Area. He wanted an "easy, unopposed" CUP process. But many who revere the SNRA vocally opposed Boren's request. Still, the County granted Boren a CUP. Then Boren turned around and sued the CUP's opponents, including Gary Gadwa and Sarah Michael, for defamation and civil conspiracy.

At its core, Boren's lawsuit attacked Gadwa's and Michael's exercise of the expressive freedoms that empower the public's voice on public issues—freedoms enshrined in the federal and Idaho Constitutions. Every day, from school board meetings to county commission hearings, Idahoans rely on the freedom of speech and right to petition the government guaranteed by the First Amendment and the Idaho Constitution when they speak out on important public matters. And when those on the other side of an issue use lawsuits to try to silence disagreement and criticism, they threaten those vital expressive freedoms. It is up to the courts to ensure baseless lawsuits do not infringe on the constitutional and common-law protections for public debate.

The district court fulfilled that gatekeeper role in dismissing Boren's lawsuit against Gadwa and Michael under I.R.C.P. 12(b)(6). Boren was not shy about the single-mindedness of his lawsuit: "This case arises out of the circumstances surrounding BOREN's application to the Custer County Planning and Zoning Commission ('CCP&Z') for a Conditional Use Permit." (R. pp. 16, 36–37). Indeed, Boren's allegations left one conclusion: He sued Gadwa and Michael for what they said during and in the course of the CUP proceedings.

On that basis, the district court rightly dismissed Boren's lawsuit under Idaho's absolute

and qualified privileges for quasi-judicial proceedings like the one considering Boren's CUP, along with the constitutionally protected right to petition. The face of Boren's First Amended Complaint established those defenses, and Boren's mostly conclusory allegations cast no doubt otherwise. The Court should affirm dismissal under both privileges and the right to petition.

The Court may also affirm because Boren failed to state claims for defamation or for civil conspiracy based on defamation. Above all, Boren failed to give fair notice of his defamation claim, as Idaho law requires. He refused to allege which Defendant said what and obscured the nature of the statements he alleged as defamatory. Even if the Court considers the statements incorporated by reference into Boren's complaint, they reveal that Boren sued Gadwa and Michael for voicing constitutionally protected opinions and failed to allege facts showing actual malice or harm, all fatal to his claims. The Court should also refuse to open the door to advisory opinions on defamation and affirm dismissal of Boren's declaratory judgment claim.

The district court did not abuse its discretion in denying Boren leave to file a second amended complaint *after* dismissal, and the Court should affirm that denial. At bottom, Boren's amendments were futile: He offered no new claims or allegations that could surmount the constitutional and common law protections requiring dismissal. Courts do not operate on the rule of "if at first you don't succeed, try, try again"—especially when expressive freedoms are at risk.

Insisting that the district court was biased against him, Boren argues the court "butchered the law on the constitutional protections afforded" Gadwa's and Michael's speech. (Appellant's Br. 58). He is wrong. The district court did what all courts should do when presiding over a lawsuit targeting expressive rights: It scrutinized the complaint for whether it alleged enough to overcome

constitutional and common-law protections, and then dismissed it because it failed to do so.

Lawsuits that target lawful speech on matters of public concern—often called "Strategic Lawsuits Against Public Participation," or "SLAPPs"—require swift dismissal. Otherwise, they become a dangerous tool for litigants like Boren to silence protected speech they dislike, forcing speakers to either self-censor or lose their savings defending their expressive freedoms in court. But the First Amendment and the Idaho Constitution protect speakers from this impossible choice. Gadwa and Michael urge the Court to affirm that Idaho courts should serve as gatekeepers on lawsuits designed to punish Idahoans simply for speaking their minds, consistent with Idaho's pleading standards and I.R.C.P. 12(b)(6).

STATEMENT OF THE CASE

Nature of the Case

This case centers on Boren suing Gary Gadwa, Sarah Michael, and others for defamation and civil conspiracy because of their opposition to Boren's application asking Custer County to grant him a conditional use permit for an airstrip within the Sawtooth National Recreation Area.

Course of Proceedings Below

In May 2022, Boren sued Gadwa, Richard Fosbury, Does 1-20, and Jon Conti for defamation and civil conspiracy. (R. pp. 13–22). Boren soon added Sarah Michael as a defendant. (R. pp. 33-53). In response, Michael and Fosbury moved to dismiss under I.R.C.P. 12(b)(6), based on common-law privileges and constitutional protections for the freedom of speech and the right to petition. (R. pp. 143–93). Michael joined Fosbury's motion to dismiss and asked the district court to take judicial notice of records from the CUP proceedings. (R. pp. 194–96, 367).

Michael and Fosbury also asked the district court to stay discovery pending the motions to dismiss. Gadwa, proceeding *pro se* after his attorney fell ill, joined both motions to dismiss and the motion to stay.[1] (R. pp. 763–64). The district court granted the motion to stay discovery out of "great caution . . . to avoid even a potential chilling effect of" First Amendment rights until it could decide the motions to dismiss. (R. pp. 766–67).

Three months later, the district court granted the motions to dismiss under Idaho's absolute and qualified privileges and the First Amendment right to petition. (R. pp. 939–45). After dismissal, Boren sought leave to amend his complaint a second time. (R. pp. 1006–1087). Viewing the motion as one for reconsideration, the district court denied it, and also held that the amendments would be futile because absolute privilege would still bar Boren's claims. (Tr. 110:20–25; R. pp. 1193–94). At Boren's request, the district court certified final judgment of dismissal. (R. pp. 1242-46).

Statement of the Facts

Boren seeks a conditional use permit for a "designated county airstrip" in the Sawtooth NRA.

Michael Boren owns the 480-acre "Hell Roaring Ranch" on the banks of the Salmon River near Stanley. (R. p. 33). For Boren, "agriculture is not his primary business, but it has always been a fascination to him" (R. p. 260) and he also has other Idaho hobby ranches. (R. p. 207). Boren's ranch includes a large pasture, which Boren has used to take off and land his personal aircraft. *Id.*

In February 2021, Boren applied for "a conditional use permit for the grass area

[1] Neither Boren's notice of appeal nor his merits brief challenges Gadwa's joinder.

occasionally used as a runway on [Hell Roaring Ranch] to be offic[i]ally recognized by Custer County as a designated county airstrip." (R. p. 207). Boren also asserted that "[o]fficial recognition also allows for potential future use for search and rescue, life flight and emergency landings." *Id.*

Boren's ranch sits within the SNRA and is subject to a federal scenic easement. (R. pp. 211–217, 224–27). That easement bars "any development that would tend to mar or detract from [the] natural, scenic, historical, and fish and wildlife and recreation values" associated with the SNRA. (R. p. 224). Likewise, Forest Service regulations require landowners in the SNRA to follow "Federal, State, and Local laws, regulations, and ordinances." (R. p. 316).

Boren thought his CUP application "was public minded." (R. p. 37 ¶ 15). At the same time, Boren wanted the CUP process to be "uncontroversial," "easy," and "unopposed." (R. pp. 39 ¶ 23, 50 ¶ 56). To his dismay, his CUP application set off an intense public debate.

Sarah Michael and hundreds more participate in a public debate over Boren's CUP application.

In April 2021, the Custer County Planning and Zoning Commission held a lengthy public hearing on Boren's CUP application. (R. pp. 259–272). The application attracted significant interest: The Commission received 639 letters and comments from the public, in a comment period that lasted seven days. (R. p. 263).

Boren spoke at the hearing. He detailed his aviation pursuits, told the Commission that he landed his aircraft at the ranch in an "irrigated pasture," and argued that the airstrip would benefit emergency services. (R. p. 260). Others spoke in support of Boren's application. (R. pp. 264–66).

Even so, Boren expressed "surprise[ ]" at hearing "quite a few public responses in opposition of this airstrip." (R. p. 26). Indeed, many Sawtooth Valley residents, recreationists, and

property owners expressed concerns that the airstrip would harm the SNRA's scenic values, affect wildlife, and encourage more airstrips. (R. p. 270).

Respondent Sarah Michael, a former Blaine County commissioner, was one of them. She detailed her connection to the Sawtooth Valley and Custer County, expressing her desire "that the commission will take into consideration the Sawtooth National Recreation Area and its values, the people that own property and have followed the rules that don't want to see an airport put in next to them." (R. p. 270). She explained how the CUP application and the airstrip might impact the property rights and quality of life of landowners in the SNRA. *Id.* And she shared her belief that because "[a]irports in Custer County in all areas require a conditional use permit, she would argue that Mr. Boren's airstrip has been in violation of Custer County's ordinances." *Id.*

A ranger for the SNRA, Kirk Flanigan, testified as neutral. (R. p. 267). Flanigan shared that to comply with the SNRA scenic easement, an airstrip must comply with all laws and cannot materially detract from the SNRA's scenic values. *Id.* While the Forest Service had not yet determined whether the airstrip materially detracted from those scenic values, Flanigan confirmed that the "materially detracts" standard defies "a black and white" answer. (R. p. 268).

A month after the hearing, the Commission approved Boren's CUP permit (R. pp. 279).

Concerned citizens appeal the CUP approval, and Gary Gadwa voices his opposition.

Soon, a group of concerned citizens called "Friends of the SNRA" (later called "Advocates for the SNRA") appealed the CUP approval. (R. pp. 279–83). The group laid out several facts supporting its argument that Boren's airstrip did not comply with laws like FAA regulations and Custer County zoning codes. (R. pp. 280–84). Likewise, the group offered evidence on whether

the Forest Service had ever approved Boren's airstrip, given the scenic easement restrictions and Boren's representations to various agencies. (R. pp. 281, 304–311). And it presented evidence on its belief that Boren was building a larger airstrip than the one he asked to permit. (R. pp. 285–88).

Just before the appeal hearing, Sarah Michael reiterated her concerns in a letter to the Custer County Commission, complete with references to various regulations and SNRA easements. (R. pp. 339–40). Like others, Michael shared her belief that the airstrip did not comply with the scenic easement and that other airstrips already served emergency needs. *Id.* Michael also reiterated her view that the CUP application impacted everyone's property rights around the SNRA. *Id.*

In August 2022, the Commission heard the appeal. After Advocates of the SNRA presented their arguments, dozens testified, including Boren, Michael, and Ranger Flanigan. (R. pp. 341-55).

Gary Gadwa also spoke up. A longtime resident of Custer County, he has served the Sawtooth Valley as a conservation officer, volunteer EMT and firefighter, and a volunteer search and rescue commander. (Tr. 152:9–18). Drawing on his experience, Gadwa voiced his concerns:

> I have lived and worked in the Sawtooth Valley for 42 years. I have grave concerns about the approval of the conditional use permit for Mr. Boren's private airstrip. The Obsidian airstrip was shut down and closed in late 1970's and declared incompatible with SNRA values. I worry about the possible effects it could have on local fish and wildlife, and feel[] that no EMS, or S&R operations will be based on such an airstrip, but will use Stanley airport or the Smiley Cr. Airstrip. [I feel] this would be a dangerous precedent set by P&Z and asked it be denied. (R. p. 348).

After Boren secures his permit, he sues the permit's critics.

The Commission affirmed the CUP grant. (R. pp. 357–64). Yet Boren was not satisfied.

He sued Michael, Gadwa, Richard Fosbury (another participant in the CUP debate), Jon Conti, and 20 Doe Defendants for defamation and civil conspiracy. (R. pp. 13–32, 33–53).

From the start, Boren's allegations made clear he was suing over the public debate about his CUP application and his airstrip's impact on the SNRA. Indeed, Boren acknowledged "[t]his case arises out of the circumstances surrounding BOREN's application to the Custer County Planning and Zoning Commission ("CCP&Z") for a Conditional Use Permit ("CUP")." (R. pp. 16, 36-37). He alleged that Respondents (including an undefined "Opposition Group," to which Boren alleged Gadwa belongs) "disparaged Boren" as "part of a strategy developed by Fosbury and the Opposition Group to oppose Boren's use of his ranch pasture as a landing area for the aircraft Boren uses in connection with his ranching operations." And while Boren alleged that Respondents "saw Boren's CUP application as an opportunity to retroactively prohibit BOREN's use of his pasture of landing his own aircraft" (R. pp. 17, 37), he offered nothing to explaining why that was unrelated to "the circumstances" surrounding his CUP application.

In fact, Boren clarified even further that the statements he accused as defamatory were made during the CUP proceedings, alleging "[t]he defamatory statements of FOSBURY and the Opposition Group were restated and repeated throughout the CUP application process[,]" and arguing that "this desperate campaign of reckless defamation is illustrated in the filings submitted by MICHAEL and the Opposition Group during the CUP process." (R. pp. 23, 43). Boren also complained that the Friends of the Sawtooth NRA's appeal defamed him, claiming that Michael and the "Opposition Group" provided information for the appeal. (R. pp. 23-24, 43-44). And while Boren alleged online comments made after the appeal defamed him, his allegations painted those

comments as directed toward the CUP process and decision. (R. pp. 25-26, 44-45).

Boren's lawsuit obscures what the CUP's opponents really said.

Although Boren's lawsuit was based on the public debate over his CUP application and airstrip, it failed to make clear what statements Michael and Gadwa made during the public debate that he believed to be defamatory. For instance, Boren's First Amended Complaint lumped together Gadwa and Michael with Fosbury and the 20 Doe Defendants—often as part of an ill-defined "Opposition Group"—failing to allege which Defendant said what, if anything. (*E.g.,* R. pp. 14 ¶¶ 2–3, 16 ¶ 10, 18 ¶¶ 18–19).

What's more, Boren offered only generalized and conclusory allegations about the "statements made by Defendants." (R. p. 48 ¶ 51; *see also* R. p. 37 ¶ 19; R. p. 43 ¶ 36). Boren had access to the CUP proceeding records. His counsel claimed to have many emails with defamatory statements (*see* Tr. 53:5-6, 186:4-14). And presumably, Boren had the articles and online posts he vaguely alleged as defamatory. (R. p. 18 ¶ 21, p. 25 ¶ 40, p. 39 ¶ 21, p. 45 ¶ 40). Yet he failed to attach any to his lawsuit. Nor did he quote complete language attributable to Gadwa or to Michael.

Boren concedes that "only one" of the allegedly defamatory statements "was quoted in Boren's [First Amended Complaint]." (Appellant's Br. 35). Boren did quote a handful of words from an *Idaho Falls Post-Register* op-ed listing Gadwa on the byline—but omitted key context. Consider first what Boren alleges about the op-ed: "For example, in an opinion piece published in the Post Register, GADWA accused BOREN of lying to 'regulators' about 'fixing irrigation' on his pasture 'when it was obvious that he had graded an airstrip.'" (R. p. 23 ¶ 34, p. 43 ¶ 34).

Then consider what the op-ed actually stated: "In 2016 and 2017, when it was obvious that

he had graded an airstrip, Boren told regulators he was fixing irrigation and gopher holes."[2] That statement was *not* the lone remark attributed to Gadwa in the op-ed. More to the point, the statement echoed an Army Corps of Engineers email included in the CUP appeal: "All: Mr. Boren and I just spoke. He advised me it is not an airstrip, but rather pasture improvement to eliminate gopher holes and weeds. He intends to reseed for pasture improvement." (R. p. 307; *see also* R. pp. 285-86, 304-05). Indeed, the op-ed recounted much of what the appeal had revealed. And Boren also omitted the op-ed's call to petition local officials: "Tell Custer County Commissioners to end the operation of Boren's illegal airport and to protect Sawtooth National Recreation Area. Email your comments by Wednesday to lbaker@co.custer.id.us." (Boren Decl. Ex. 10).

The District Court dismisses Boren's lawsuit, pointing out the lawsuit's chilling effects.

In October 2022, the district court granted Fosbury, Michael, and Gadwa's Rule 12(b)(6) motion to dismiss Boren's lawsuit. First, the district court held that because "the documents and the CUP process were repeatedly discussed in detail throughout the [First Amended Complaint]," the public records of the CUP proceedings that Michael offered in her motion for judicial notice were incorporated by reference in Boren's First Amended Complaint. (R. pp. 940–41). The district court further concluded that the absolute litigation privilege barred Boren's claims, explaining that "Boren's FAC leaves open no set of facts where a court or jury could determine the alleged

[2] The op-ed is Exhibit 10 to Michael Boren's Declaration in Support of Appellant's Motion for Expedited Appeal. ("Boren Decl. Ex. 10") While a copy of the op-ed is not part of the Clerk's Record, Boren entered it into the record here. Boren's lawsuit selectively quoted the op-ed and alleged it was defamatory. So at the very least, it is incorporated by reference. Thus, as Respondents explain more below, the Court may consider the op-ed here. *See* Section II.B *infra*; *see also Bennett v. Bank of E. Or.,* 167 Idaho 481, 485–86, 472 P.3d 1125, 1129–30 (2020).

statements had no relation to the CUP process or that they were not in the course of the CUP process." (R. pp. 942-43). And the district also concluded the qualified privilege barred Boren's claims, because "Boren has failed to even allege any malice. . . ." (R. p. 943).

The district court also provided a constitutional basis for granting the motions to dismiss: "[A]ll the activity alleged to have been taken by Michael, Fosbury, and Gadwa in Boren's FAC is protected petitioning activity under the First Amendment." (R. p. 944). As it did when staying discovery, the district court identified "the potential for a great chilling effect on constitutional rights not just for these named defendants but for all the members of the public who spoke on this issue which was undoubtedly a matter of public concern in which they were entitled to involvement." *Id.* And the district court also concluded that Boren's "suit has many of the key characteristics of a "Strategic Lawsuit Against Public Participation (SLAPP)," incorporating into its decision Michael's briefing defining SLAPPs. (R. p. 943; *see also* R. pp. 183–87). To that end, it pointed out how courts should "act as a gatekeeper in order to prevent any unwarranted chilling effect on closely held constitutional rights involved in public participation." *Id.*

After dismissal, Boren tries to prolong his lawsuit—and its chill on free expression.

After the district court dismissed his lawsuit against Gadwa and Michael, Boren asked to file *another* amended complaint, adding allegations about his ranch and the scenic easement. (*See* R. pp. 1015–19). Boren also added that "Defendants and their co-conspirators appear to hate Boren due, at least in part, to his success and his political and religious beliefs." (R. p. 1025 ¶ 54).

But Boren did not change the type or nature of his claims. Rather, his allegations still concentrated on the public debate over the CUP application and Boren's airstrip. As before, Boren

alleged Gadwa and Michael spoke out "as part of a strategy developed by Fosbury and the Opposition Group to oppose Boren's use of his ranch pasture as a landing area for the aircraft Boren uses in connection with his ranching operations." (R. p. 1012 ¶ 2). And although Boren recast the alleged defamation as "outside the CUP proceeding" (R. p. 1023 ¶ 51), he offered only conclusory alleged statements, echoing those alleged in his first two complaints. (*Compare* R. pp. 1023 ¶ 51 and 1031 ¶ 74 *with* R. pp. 37 ¶19, 43 ¶ 36, and 48 ¶ 51). The district court decided the amendments were futile and denied Boren leave to amend. (Tr. 110:20–25; R. pp. 1193–94).

ADDITIONAL ISSUES PRESENTED ON APPEAL

Meritless lawsuits that target critics and opponents on matters of public concern so threaten free speech that over half the states have passed statutes to counter them. On its face, Boren's lawsuit has all the hallmarks of a speech-chilling lawsuit. Should the Court affirm that Idaho courts should swiftly dismiss such lawsuits under I.R.C.P. 12(b)(6) to protect vital expressive freedoms?

ATTORNEY'S FEES ON APPEAL

Respondent Sarah Michael has cross-appealed on her request for attorney's fees at the district court. Respondents seek fees and costs on appeal under Idaho Code § 12-121 and Idaho Admin. Code r. 40 and 41, as the appeal was brought and pursued frivolously, unreasonably or without foundation.

ARGUMENT

I. The District Court Rightly Viewed Boren's Lawsuit as One Targeting the Constitutional Rights That Empower Public Participation.

The district court explained why Boren's lawsuit threatened expressive liberties: "In this case, there is the potential for a great chilling effect on constitutional rights not just for these named

defendants but for all the members of the public who spoke on this issue which was undoubtedly a matter of public concern in which they were entitled to involvement." (R. p. 944). The district court was right. The freedoms to speak on public issues and to urge public officials to act are essential for effective self-government. That is why the First Amendment and the Idaho Constitution guarantee freedom of speech and the right to petition. And to uphold those guarantees, courts serve as gatekeepers when lawsuits like Boren's threaten free expression on public matters.

A. Public participation is a cherished freedom—and duty—for all Americans.

From the founding, American self-government has stood on two key principles. First, that "public discussion is a political duty." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). And second, to meet that duty, Americans must be free to share their views on public matters and urge public officials to act.

Founders like James Madison emphasized the important role free expression plays in self-governance, extolling the "right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right." 4 Elliot's Debates on the Constitution 553–54 (1876). Likewise, Madison also stressed protecting the people's ability to "communicate their will" through direct petitions to public officials. 1 Annals of Cong. 738 (1789). Nearly two centuries later, the U.S. Supreme Court reminded us that "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964).

Since the Founding, participating in public matters has been a prized freedom. But that freedom is not limited to public discussion that is "easy" or "uncontroversial," as Boren might like.

(R. pp. 39 ¶ 23, 49–50 ¶ 56). Rather, that freedom rests on "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open[.]" *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

B. Both the First Amendment and the Idaho Constitution secure the freedoms essential to public participation.

"The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means . . . is a fundamental principle of our constitutional system." *Stromberg v. California*, 283 U.S. 359, 369 (1931). That fundamental principle is enshrined in the First Amendment, starting with freedom of speech. "[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v. Phelps*, 562 U.S. 443, 451–52 (2011) (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)).

The right to petition also belongs to that "fundamental principle of our constitutional system." *Stromberg*, 283 U.S. at 369. Indeed, "[t]he Petition Clause . . . was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble." *McDonald v. Smith*, 472 U.S. 479, 485 (1985) (citation omitted). And the First Amendment does not limit protections for speech and petitioning to individuals. It guards the freedom to associate and exercise those rights with others of like mind. *Nat'l Ass'n for Advancement of Colored People v. Ala. ex rel. Patterson,* 357 U.S. 449, 460–61 (1958).

To secure these protections for public participation, the First Amendment constrains tort claims like defamation when they target expression on matters of public concern. *E.g., Snyder,*

562 U.S. at 451; *Sullivan*, 376 U.S. at 280–81; *Gertz v. Robert Welch, Inc*., 418 U.S. 323, 349 (1974). For example, in *Snyder*, the U.S. Supreme Court affirmed that the father of a fallen Marine could not recover on state tort claims against anti-gay protestors who demonstrated near his son's funeral. Because the protest focused on a matter of public concern, it was "entitled to special protection" under the First Amendment. 562 U.S. at 454, 458–59. The content of the demonstrators' speech was irrelevant. What carried the day was the First Amendment's requirement that courts extend "breathing space" to expression on matters of public concern, guarding against lawsuits that chill criticism and commentary on those matters. *Id.* at 459 (quoting *Boos v. Barry*, 485 U.S. 312, 322 (1988)).

None of this is to say that these constitutional guarantees are an absolute bar to speech-based torts like defamation. They are not. *E.g., Gertz*, 418 U.S. at 347–48. And like all states, Idaho has an interest in protecting its citizens from reputational harm. *Id.* at 341. But at the same time, that interest must not eclipse the "breathing space" vital to protecting the public debate and self-government, unless a tort plaintiff clears the constitutional checks on tort liability. *E.g, Snyder*, 562 U.S. at 451; *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50–51 (1988).

Securing that "breathing space" harmonizes with Idaho law. Just as the First Amendment protects expressive freedom, the Idaho Constitution promises that "[e]very person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty." Idaho Const. art. I, § 9. Likewise, the Idaho Constitution guarantees that "[t]he people shall have the right to assemble in a peaceable manner, to consult for their common good; to instruct their representatives, and to petition the legislature for the redress of grievances." Idaho Const. art. I,

§ 10. And as explained more below, Idaho's absolute and qualified privileges for statements made over certain public proceedings also safeguard public participation. *See* Section II.C, *infra*.

Plaintiffs must overcome these constitutional and common-law safeguards before imposing liability on another for joining the public debate. That is exactly what Boren failed to do.

C. Boren's allegations left no doubt that his lawsuit was based on Gadwa's and Michael's protected petitioning activity and speech about a public issue.

Boren's CUP application centered on government proceedings and matters of public concern over the SNRA. The County Commission held two spirited public hearings on the application. (R. pp. 259–72, 341–56). Federal and local officials chimed in. *Id*. Over 600 citizens submitted written comments and live testimony over the CUP. (R. p. 263). And even according to Boren's lawsuit, the press deemed the proceedings newsworthy. (R. p. 39 ¶ 21).

Just as Boren's CUP application centered on a heated public issue, his lawsuit centered on Gadwa, Michael, and others voicing their opposing views on that issue. In his brief, Boren again concedes that his lawsuit "arose out of the circumstances surrounding" the CUP application. (Appellant's Br. 34). Boren painted Respondents as "vociferously opposing" his CUP application and using land within the SNRA as an airstrip. (*E.g.,* R. pp. 34 ¶ 2, 37 ¶ 17–19, p. 43 ¶¶ 35–39). And he alleged that "Michael and the Opposition Group" were trying "to persuade the USFS to intercede into, and interfere with, the Custer County proceedings." (R. p. 44 ¶ 37). Thus, the district court rightly held "Boren's FAC makes clear that each and every alleged statement of Michael, Fosbury, and Gadwa were related to and in the course of the CUP process." (R. p. 942).

Boren tries now—like he did below—to dodge the foundational legal protections for public

participation by insisting that his lawsuit targeted Gadwa's and Michael's statements made "outside of the CUP proceeding." (Appellant's Br. 3, 6; R. p. 811–12). But his allegations prove otherwise. For instance, Boren alleged Gadwa and Michael were part of a "desperate campaign of reckless defamation . . . illustrated in the filings submitted by MICHAEL and the Opposition Group *during the CUP process*." (R. p. 43, ¶ 36) (emphasis added).

Even if Boren's lawsuit targeted statements made outside the CUP proceeding, it would still fail. Speech on a matter of public concern is no less protected because it is uttered outside of a public proceeding. Whether made in a public hearing, during a sidewalk protest, or in an op-ed like the one Boren complained about, speech about matters of public concern requires "special protection." *Snyder*, 562 U.S. at 451; *see also Sullivan*, 376 U.S. at 256–58, 280–81 (First Amendment protected against defamation claim over a newspaper advertisement criticizing local police in Jim Crow Alabama); *Hustler Magazine*, 485 U.S. at 50–51 (First Amendment protected a magazine parody about a public figure).

Boren also suggests that the alleged defamatory statements lack protection because they "were irrelevant to the CUP Proceeding," claiming Respondents "retroactively" opposed Boren using his land for aviation altogether, not just for emergencies. (Appellant's Br. 13, 42; R. p. 1167). Again, Boren's prior statements paint a different picture. In his CUP application, Boren told Custer County he wanted "a conditional use permit for the grass area occasionally used as a runway on [Hell Roaring Ranch] to be offic[i]ally recognized by Custer County as a designated county airstrip." (R. p. 207). That spawned a broader public dispute over Boren's use of aircraft in and around the SNRA. In any case, protection for speech on public issues does not diminish because

it is "retroactive." It can take time to speak out. The Constitution protects both reticent speakers and those who disagree with a government decision they learned about after the fact.

Boren cannot overcome the strong protections Gadwa and Michael enjoy for their speech on a public issue just by trotting out the truism that defamation is not protected under the First Amendment. (Appellant's Br. 27). Rather, Boren must have alleged enough to pierce both the state law privileges and the constitutional limits on defamation liability. But he did not.

II. The District Court Was Right to Dismiss Boren's First Amended Complaint.

The district court correctly dismissed Boren's complaint under I.R.C.P. 12(b)(6). Boren's First Amended Complaint reveals he sued Gadwa and Michael for disagreeing with him on a hotly contested public issue—expression that is both privileged under state law and constitutionally protected. What's more, Boren's allegations failed to state a claim for defamation, as they obscured who said what, rested on conclusions, and attacked Gadwa and Michael for opinions that the First Amendment protects while failing to allege facts on actual malice or harm. For the same reasons, Boren's declaratory judgment and civil conspiracy claims fared no better. The Court should affirm.

A. Standard of review

Boren's recitation of the *de novo* standard of review for appeals on Rule 12(b)(6) motions and the standards for 12(b)(6) motions neglects to state three key rules. (Appellant's Br. at 25). First, while a court takes alleged facts and reasonable inferences in the plaintiff's favor, it should not accept conclusory allegations or assume that legal conclusions or arguments are true. *CMJ Properties, LLC v. JP Morgan Chase Bank, N.A.*, 162 Idaho 861, 863, 406 P.3d 873, 875 (2017) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, (2007)). Second, courts should consider the

entire complaint on a Rule 12(b)(6) motion, including documents incorporated by reference. *Bennett*, 167 Idaho at 486, 472 P.3d at 1130. And third, "[a] complaint is subject to dismissal under Rule 12(b)(6) when an affirmative defense appears on the face of the complaint itself." *Gardner v. Hollifield*, 96 Idaho 609, 611, 533 P.2d 730, 732 (1975).

With that in mind, courts regularly dismiss defamation lawsuits when the allegations fail to state a claim. For example, courts have dismissed defamation claims when the complaint shows that the litigation privilege bars the claim. *See, e.g.*, *Dickinson Frozen Foods, Inc. v. J.R. Simplot Co*., 164 Idaho 669, 680, 434 P.3d 1275, 1286 (2019), *as amended* (Apr. 22, 2019); *Scofield v. Guillard,* No. 3:22-CV-00521-REP, 2023 WL 5045274, at *5 (D. Idaho Aug. 8, 2023). Likewise, where the alleged statements are protected opinion, or otherwise not verifiable statements of fact, courts have little trouble tossing libel claims out. *See, e.g.*, *Weeks v. M-P Pub'ns*, 95 Idaho 634, 639, 516 P.2d 193, 198 (1973); *Neumann v. Liles*, 358 Or. 706, 722, 369 P.3d 1117, 1126 (2016); *Harris v. Warner in & for Cnty. of Maricopa*, 527 P.3d 314, 319–22 (Ariz. 2023).

B. The district court correctly held that the records of the CUP proceedings were incorporated by reference into the First Amended Complaint.

Boren complains that the district court erred by considering Michael's "extraneous documents." (Appellant's Br. 4-5, 53). It did not. As the district court observed, those records from the CUP proceeding—minutes of public hearings, statements from citizens, and similar material—"were repeatedly discussed in detail throughout" Boren's First Amended Complaint. (R. p. 941). For that reason, the district court correctly held those documents were incorporated by reference into Boren's complaint. *Id.* (citing *Bennett*, 167 Idaho at 486, 472 P.3d at 1130).

The incorporation by reference rule is especially apt in defamation cases. If a public record, article, or other publication is the basis of a defamation claim, it is "central to" the claim and a trial or appeals court should consider it. *Fudge v. Penthouse Int'l, Ltd*., 840 F.2d 1012, 1015 (1st Cir. 1988). It contravenes that principle to allow a defamation plaintiff to survive a motion to dismiss simply by obscuring the publications central to his claim. *Comtech Telecomms. Corp. v. Charles*, No. 6:07-CV-250-ORL-22JGG, 2007 WL 9720811, at *3 (M.D. Fla. July 11, 2007).

Thus, the Court should affirm that Boren's First Amended Complaint incorporated the CUP records documents by reference. Likewise, the Court should consider the full statement from the *Post-Register* op-ed Boren complained about and later presented to the Court in his motion to expedite. *See Fudge*, 840 F.2d at 1015.

C. The district court correctly held the absolute and qualified privileges shielded Gadwa and Michael from Boren's lawsuit.

For all of Boren's arguments against the district court's holding that the absolute and qualified privileges bar his lawsuit, he shies away from one key detail: Every statement Boren alleged as defamatory—conclusory as his allegations were—was connected to the CUP proceedings. Under this Court's rulings, that's enough for the privileges to bar Boren's claims. Affirming will protect both privileges from lawsuits seeking to silence public debate.

1. Because of its importance to robust public proceedings, courts apply the absolute litigation privilege broadly.

"Idaho has long recognized that defamatory statements made in the course of a judicial proceeding are absolutely privileged, even if made with malicious intent or knowledge of their falsity." *Berian v. Berberian*, 168 Idaho 394, 403, 483 P.3d 937, 946 (2020). That absolute

privilege extends to quasi-judicial proceedings, like the CUP proceedings here. *Richeson v. Kessler*, 73 Idaho 548, 551, 255 P.2d 707, 709 (1953); *S Bar Ranch v. Elmore Cnty*., 170 Idaho 282, 304, 510 P.3d 635, 657 (2022).

The absolute privilege serves a crucial role in protecting public proceedings and the public debate. Indeed, the privilege "keep[s] the paths leading to the ascertainment of truth as free and unobstructed as possible." 50 Am. Jur. 2d Libel and Slander § 280 (2020) (citation omitted). And it does so by ensuring citizens can speak freely in quasi-judicial proceedings "without the fear of reprisal through a civil suit for defamation or libel." *Taylor v. McNichols*, 149 Idaho 826, 836, 243 P.3d 642, 652 (2010). As the Court has explained, "[p]roceedings connected with judicature of the country are so important to the public good it is only in extreme cases and circumstances that a libelous publication in a judicial proceeding can be used as the basis for damages in a libel suit." *Richeson*, 73 Idaho at 552, 255 P.2d at 709.

For those reasons, "[t]his Court has consistently indicated that litigation privilege should broadly apply." *Dickinson Frozen Foods,* 164 Idaho at 678, 434 P.3d at 1284. Only two requirements are needed for the absolute privilege to apply: First, "the defamatory statement was made in the course of a proceeding"; and second, it "had a reasonable relation to the cause of action of that proceeding[.]" *Id.* (quoting *Weitz v. Green*, 148 Idaho 851, 862, 230 P.3d 743, 754 (2010)). The face of Boren's First Amended Complaint met both requirements.

2. The district court correctly construed and applied the absolute privilege in dismissing Boren's lawsuit.

Boren argues that the district court erred because "the litigation privilege does not appear

on the face of Boren's complaint" and the court's ruling "is contrary to law and facts alleged in Boren's complaint." (Appellant's Br. 34, 38). But Boren cannot dodge one certainty: Everything he alleged as defamatory was "made in the course of" and relevant to the CUP proceedings. *See* Section I.C, *supra*. On that basis alone, the district court rightly held that "Boren's FAC leaves open no set of facts where a court or jury could determine the alleged statements had no relation to the CUP process or that they were not in the course of the CUP process." (R. pp. 942–43).

In effect, Boren alleged two sets of defamatory statements. First were those that Boren alleged Gadwa and Michael said or wrote during the CUP proceedings. As the district court held, "it is clear they are absolutely privileged and shall not be the basis for any causes of action Boren has brought"—a conclusion Boren conceded below. (R. p. 942). Yet Boren now contends the district court erred by considering the public CUP records incorporated by reference because they were not "on the face" of his complaint. (Appellant's Br. 35). Boren is wrong.

On their face, Boren's allegations show he sued Gadwa and Michael for what they allegedly said and wrote during the CUP proceedings. (R. pp. 23-24, 43 ¶ 36, 44, 270, 339–58, 348). And a court can decide a motion to dismiss on an affirmative defense if it is disclosed "by the complaint itself." *Gardner*, 96 Idaho at 611, 533 P.2d at 732. Boren made the CUP proceedings the focus of his complaint, and so the CUP records incorporated by reference were part of "the complaint in its entirety[.]" *See Bennett*, 167 Idaho at 486, 472 P.3d at 1130. Thus, they were fair game for showing why the absolute privilege barred Boren's lawsuit.

The second set of statements are those that Boren alleged Respondents made outside the CUP proceedings, like the *Post-Register* op-ed, statements to federal officials, Facebook posts

criticizing the CUP grant, and "various communications with the media and local residents." (R. p. 40 ¶ 27, 43 ¶ 34, 44 ¶ 37–39). Boren argues that because those statements "occurred outside of the CUP hearings," the district court erred in holding the absolute privilege applied. (Appellant's Br. 37, 42). He is wrong for three reasons: (1) there is no "outside" exemption to the absolute privilege; (2) these alleged outside statements were made "in the course" of the CUP proceedings; and (3) these alleged outside statements were relevant to those proceedings.

First, the absolute privilege can shield statements made outside the four walls of a quasi-judicial proceeding, as the district court correctly recognized. (R. pp. 942–43). The Court affirmed in *Dickinson Frozen Foods* that if a statement "had a reasonable relation to the cause of action of that proceeding," it enjoys absolute privilege. 164 Idaho at 680; 434 P.3d at 1286; *c.f. Richeson*, 73 Idaho at 551, 255 P.2d at 709 ("[T]o be privileged it is not absolutely essential that the language be spoken in open court or contained in a pleading, brief or affidavit."). Even if *where* a speaker made a statement factors into the "reasonable relation" inquiry, it is not decisive. Otherwise, statements at stakeholder meetings, online comments to public officials, and a host of other "outside" expression about public proceedings could fall victim to libel suits. That would upend the privilege's purpose, stifling the truth- and information-seeking goals of public proceedings.

Second, Boren's complaint showed that any alleged "outside" statement was "made in the course" of the CUP proceedings. Take the *Post-Register* op-ed Boren complained about—it asked readers to email their views to the Custer County Commissioners. (Boren Decl. Ex. 10). Or consider Boren's allegations that some Defendants spoke to the Forest Service and other agencies to urge their involvement in the CUP proceedings. (R. pp. 39–40 ¶¶ 26–27). Even the social media

statements Boren alleged as criticizing the CUP process were "made in the course" of the CUP proceedings (R. pp. 44–45). If anything, the CUP process was not over, as the CUP's opponents could have sought judicial review under the Local Land Use Planning Act, Idaho Code § 67-6521. *See Malmin v. Engler,* 124 Idaho 733, 736–37, 864 P.2d 179, 182–83 (Idaho Ct. App. 1993) (applying litigation privilege to letters an attorney sent a judge *after* entry of a default judgment, because "following a default judgment, a party is entitled to move to set aside such judgment . . . or to appeal the judgment.") These examples, taken as true, show citizens like Respondents speaking to further their positions in the CUP proceedings.[3]

Third, all the statements Boren challenged were related to the CUP proceedings. Boren maintains the alleged statements from Gadwa and Michael were irrelevant to the CUP proceedings because they opposed Boren's airstrip generally, not its permitting "for use as an emergency landing area." (Appellant's Br. 16). But again, Boren told the Commission in his CUP application that he wanted not just a permit for emergency use, but "a conditional use permit for the grass area occasionally used as a runway on [Hell Roaring Ranch] to be offic[i]ally recognized by Custer County as a designated county airstrip." (R. p. 207). And even assuming the scope of the CUP proceedings were as narrow as Boren frames it, critiques of Boren's use of his land for aviation within the SNRA would still relate to the CUP proceedings. For instance, Custer County's stated policy for CUP decisions is "to protect, enhance, and ensure private property values and rights

[3] For that reason, the alleged statements differ from the gratuitous attorney press release in the *Landry's Inc. v. Animal Legal Defense Fund* case Boren cites. (Appellant's Br. 41, citing 631 S.W.3d 40 (Tex. 2021)).

within the accepted confines of federal, state, and local laws." (R. p. 275). So the statements Boren alleged Gadwa and Michael made about Boren not complying with Forest Service regulations or the scenic easement would have related to the Custer County CUP proceedings. *Id.*

Nor were these allegedly "outside" statements less related to the CUP proceedings because Gadwa or Michael were "not acting in the capacity of a witness or party." (Appellant Br. 38). The Court rejected a similar argument in *Dickenson Frozen Foods,* explaining that "the relevant inquiry for determining whether litigation privilege applies is not whether one is a party to litigation, but rather, whether the statement concerning the party had a reasonable relation to the cause of action of that proceeding[.]" 164 Idaho at 680, 434 P.3d at 1286. So too should the Court reject it here.

In short, there is nothing on the face of Boren's First Amended Complaint casting doubt on the district court's dismissal under the absolute privilege. The Court should affirm.

3. *Berian* is distinguishable.

Throughout his arguments against the absolute privilege, Boren leans on the Court's decision in *Berian.* (Appellant's Br. 42–45). But the ultimate holding in *Berian* is quite distinguishable: "[D]efamatory statements made by private individuals to law enforcement officials *prior to the institution of criminal charges* are entitled to a qualified privilege, not an absolute privilege." 483 P.3d at 948 (emphasis added). That's a far cry from the statements made during and in the course of the public quasi-judicial proceedings that Boren's lawsuit described. The Court's decision in *Dickinson Frozen Foods* is more analogous to this case—and it upheld the absolute privilege over arguments like Boren's, as detailed above.

4. The qualified privilege also merited dismissal.

On top of holding the absolute privilege barred Boren's lawsuit, the district court also held that "at a minimum, a qualified immunity applies to the statements made before the CUP hearings." (R. p. 943 (citing *Berian*, 168 Idaho 394, 483 P.3d 937)). That was right for two reasons.

First, Boren's First Amended Complaint shows that he sued Gadwa and Michael over alleged statements made to those with a common interest in the use and welfare of the SNRA. That's enough for the qualified privilege to cover those alleged statements. *See Gough v. Trib.-J. Co.*, 75 Idaho 502, 509, 275 P.2d 663, 667 (1954) (explaining that the qualified privilege "afford[s] a protection based upon a public policy which recognizes that it is essential that true information shall be given whenever it is reasonably necessary for the protection of one's own interests, the interests of third persons, or certain interests of the public") (citation omitted). Indeed, the face of Boren's complaint shows Boren only complained about statements made to Custer County and SNRA stakeholders, the local public, and news media.

Second, the district court rightly concluded that Boren failed to allege the malice needed to overcome qualified privilege: "[H]is only reference to malice or to facts that could support a finding of malice is contained in a cause of action against only Conti, who is differently situated than the three defendants involved in this motion to dismiss." (R. p. 943). Boren suggests that simply hinting at animosity between the parties in enough. (Appellant's Br. 47). But dislike alone does not suffice to show any statements were made with malice or bad faith. At most, Boren's non-conclusory allegations painted Gadwa and Michael as disliking the idea of Boren's airstrip within the SNRA, and exercising their constitutional and common-law privileges to say so. *See id*.

5. Dismissal under the privileges did not "invade the jury's province."

Boren claims that the district court wrongly decided fact issues when holding that the absolute and qualified privileges barred his lawsuit, insisting that the jury should decide both. (Appellant's Br. 36–38, 47). But the Court has rejected Boren's argument that "litigation privilege should not have been determined on a Rule 12(b)(6) motion to dismiss," explaining that "this Court has done so before." *Dickinson Frozen Foods*, 164 Idaho at 680, 434 P.3d at 1286 (2019) (citing *Taylor*, 149 Idaho at 845, 243 P.3d at 661). Boren's argument defies a settled rule that even he admits: Courts can dismiss lawsuits when an affirmative defense appears on the face of the complaint. *Id.*; Appellant's Br. 34. That is the case here.

On qualified privilege, Boren points to a 1975 decision to argue "if a complaint discloses only a conditional privilege, it is not subject to dismissal under" Rule 12(b)(6). (Appellant's Br. 47, citing *Gardner v. Hollifield,* 96 Idaho 609, 612–14, 533 P.2d 730, 733–75 (1975)). His argument, however, conflicts with a more recent rule from this Court. "[I]n determining if a qualified privilege applies, whether a given set of facts constitutes a privileged occasion, in regard to liability for defamation, is a matter of law for . . . the court." *Siercke v. Siercke*, 167 Idaho 709, 716, 476 P.3d 376, 383 (2020). Taking Boren's well-pled allegations as true, the face of his First Amended Complaint shows that the qualified privilege barred his lawsuit as a matter of law.

In the end, Boren's First Amended Complaint alleged exactly what the absolute and qualified privileges shield from lawsuits. The Court should affirm dismissal under both privileges.

D. The right to petition also shielded Gadwa and Michael from Boren's lawsuit, as the district court rightly concluded.

Seeing that Boren's lawsuit against Gadwa and Michael centered on alleged statements

aimed at the CUP proceedings, the district court also dismissed Boren's lawsuit because "all the activity alleged to have been taken by Michael, Fosbury, and Gadwa in Boren's FAC is protected petitioning activity under the First Amendment." (R. p. 944). The Court should affirm that ruling.

Both the First Amendment and the Idaho Constitution protect the right to petition the government. U.S. Const. amend. I; Idaho Const. art. I, § 10. That right "protects efforts to influence the actions of government officials, whether in the legislative, executive, or judicial branch." *Cheryl Lloyd Humphrey Land Inv. Co. v. Resco Prod., Inc*., 377 N.C. 384, 388 (2021) (citation omitted). Rather than protect only a narrow view of "redress of grievances," the right to petition also protects demands that the government act in the petitioner's interest, even if those demands are at political odds with the government's view. *See, e.g.*, *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961); *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 382 (1991).

On that basis, the district court correctly decided that the right to petition protected the "statements allegedly made by Michael, Fosbury, and Gadwa before the CUP hearing to garner support for the petition and to spread awareness about the petition, during the CUP hearing as an existing absolute privilege applies, and after the CUP decision to address grievances with the governmental activity." (R. p. 944). The district court's decision parallels another case arising out of Custer County, in which the Ninth Circuit held that the First Amendment right to petition protected public and private communications with Custer County Commissioners to influence their actions. *Evers v. Custer County*, 745 F.2d 1196, 1204 (9th Cir. 1984). In *Evers*, the plaintiff alleged that her neighbors conspired with the government—echoing Boren's conspiracy claim here—to

deprive her of due process when the neighbors complained to the Commissioners about the plaintiff blocking a road on her property and urged them to declare the road public. *Id.* at 1198–99. In another similar case, the North Carolina Supreme Court upheld the dismissal of a tortious interference claim under the right to petition, ruling for citizens who, like Gadwa and Michael, publicly opposed a zoning board approving a development plan. *Cheryl Lloyd*, 377 N.C. at 390.

At the root of these decisions is the *Noerr-Pennington* doctrine. Under this doctrine, "those who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct." *Sosa v. DirecTV, Inc.*, 437 F.3d 923, 929 (9th Cir. 2006) (citing *Empress LLC v. City & Cnty. of San Francisco*, 419 F.3d 1052, 1056 (9th Cir. 2005)). This immunity covers conduct related to petitioning activities, and preserves the breathing room needed to safeguard public participation. *Id*. To that end, some courts have concluded *Noerr-Pennington* shields exercises of the right to petition from defamation claims, although they differ on the extent of immunity. *See, e.g.*, *Cheryl Lloyd*, 377 N.C. at 388 (citing *McDonald*, 472 U.S. at 485); *Smith v. Chestnut Ridge Storage*, *LLC*, 244 W. Va. 541, 552 (2021); *Lucas v. Swanson & Dowdall,* 61 Cal. Rptr. 2d 507, 514 (Ct. App. 1997), as modified on denial of reh'g (Mar. 31, 1997).[4]

In any event, Boren's complaint left no doubt that the alleged statements, like those in the above cases, were about Respondents urging Custer County officials to reject his CUP application

[4] Some courts have held otherwise. *See, e.g.*, *Singh v. Sukhram*, 56 A.D.3d 187, 188 (2008). Regardless, the principles that underpin *Noerr-Pennington* immunity extend more generally to shielding petitioning activity from tort liability and upholding the breathing space the right to petition demands. *See McDonald*, 472 U.S. at 485 ("The Petition Clause, however, was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble."); *Snyder*, 562 U.S. at 451.

and rallying fellow residents to their cause. This is precisely the type of petitioning activity that the First Amendment and Idaho Constitution protect against liability. And Boren's arguments against the constitutional shield are unpersuasive. Again, Boren cannot hurdle the constitutional limits on tort liability by simply reciting the truism that "the First Amendment . . . does not protect defamatory . . . petitioning activity." (Appellant's Br. 26). Of course, the Petition Clause is not a license to do or say whatever one wants in seeking to influence government actors. *McDonald*, 472 U.S. at 485. But to inflict liability for petitioning activity, Boren must pierce the breathing space that he admits petitioning enjoys. *See* Section I.B–C, *supra*; Appellant's Br. 29.

Boren failed to do that. For instance, he alleged nothing meeting the "sham" exception to *Noerr-Pennington* immunity. *See City of Columbia*, 499 U.S. at 380–81; *Chestnut Ridge Storage*, 244 W. Va. at 552. Nor did Boren sufficiently allege actual malice, as the district court concluded. (R. p. 943); *see also McDonald*, 472 U.S. at 485 (suggesting actual malice limits recovery for defamation based on petitioning activity under North Carolina law). As a result, the face of Boren's complaint showed he could not evade the constitutional protection for petitioning activity.

Boren may have wanted an "easy, unopposed CUP application" process, (R. p. 50), hoping his fellow citizens stayed quiet over his "public minded" application (R. p. 37). But that's not how self-government works in Idaho, which guarantees that "[a]ll political power is inherent in the people." Idaho Const. art. I, § 2. Gadwa and Michael exercised that power here, and the Court should affirm under the right to petition.

E. Boren's failure to state a defamation claim is another reason to affirm.

While Respondents challenged the sufficiency of Boren's defamation claim below (R. pp.

161–66, 886-90; 905–11), the district court had no need to reach that issue because privilege and the right to petition both shielded Gadwa and Michael from Boren's lawsuit. For the same reason, neither does the Court. All the same, if the Court does reach that question on *de novo* review, it should hold Boren failed to state a claim for defamation, underscoring why dismissal was correct.

1. Boren obscured the statements he complained of, meriting dismissal.

A defamation plaintiff "must prove that the defendant: (1) communicated information about the plaintiff to others; (2) that the information was defamatory; and (3) that the plaintiff was damaged because of the communication." *Elliott v. Murdock,* 161 Idaho 281, 287, 385 P.3d 459, 465 (2016). But Boren's allegations, even when taken as true, did not meet those elements.

For example, Boren repeated that "FOSBURY, MICHAEL and the Opposition Group" made the alleged defamatory statements to all who would listen, yet failed to identify which of those potentially countless individuals made any particular statement. (*E.g.,* R. pp. 34 ¶¶ 2–4, 37 ¶¶ 17–19, 43-44 ¶¶ 36–37 , 48 ¶ 51). Lumping all Defendants together did not "impart[] sufficient notice of his claim against" either of Gadwa or Michael. *Straley v. Idaho Nuclear Corp*., 94 Idaho 917, 921, 500 P.2d 218, 222 (1972); *see also Fulfer v. Sorrento Lactalis, Inc*., 171 Idaho 296, 520 P.3d 708, 713 (2022) ("The key issue in determining the validity of a complaint is whether the adverse party is put on notice of the claims brought against it."). Instead, Boren's allegations would leave a defendant puzzled about what he allegedly said to others. *See Scofield*, 2023 WL 5045274, at *5 ("Reflexively lumping Plaintiff and her counsel together, without distinguishing their conduct in any way, fails to satisfy" the pleading standard for defamation and conspiracy counterclaims). In the same way, Boren failed to provide sufficient notice by refusing to attach,

recite, or accurately quote any meaningful part of Gadwa or Michael's statements he believed defamatory. The most he could muster is a few out-of-context words from the *Post-Register* op-ed. (R. p. 23 ¶ 34, p. 43 ¶ 34).

That's not enough. To assess whether a statement is defamatory, a court must read and construe the statement "as a whole; the words used are to be given their common and usually accepted meaning and are to be read and interpreted as they would be read and understood by the persons to whom they are published.'" *Irish v. Hall*, 163 Idaho 603, 607, 416 P.3d 975, 979 (2018) (quoting *Gough*, 75 Idaho at 508, 275 P.2d at 666), abrogated on other grounds by *Siercke*, 167 Idaho at 719–20, 476 P.3d at 386–87. If a plaintiff fails to allege a substantially complete statement he accuses as defamatory, a court cannot read the statement "as a whole" when presented a motion to dismiss—and that merits dismissal. *See Creative Compounds, LLC v. ThermoLife Int'l, LLC,* 669 S.W.3d 330, 339 (Mo. Ct. App. 2023) ("Because Creative's first amended petition fails to set out the words published, it cannot be determined whether the statements are actionable."). "This is a rule of reason. Defamation actions cannot be based on snippets taken out of context." *Kaelin v. Globe Commc'ns Corp*., 162 F.3d 1036, 1040 (9th Cir. 1998). And an accused statement's context is central, because "the First Amendment demands" that courts assess accused statements "in their proper context." *Weyrich v. New Republic, Inc.*, 235 F.3d 617, 625 (D.C. Cir. 2001). Boren omitted that context here, underscoring his failure to state a claim.

True enough, the Idaho Rules state that "[i]n an action for libel or slander it is sufficient to state, generally, the defamatory matter that was published or spoken concerning the plaintiff." I.R.C.P. 9(i). But that rule should not *relax* the general requirement that a "pleading imparts

sufficient notice of his claim against" the defendant. *Straley*, 94 Idaho at 921, 500 P.2d at 222. As one court perceived, pleading matters like "libel and slander" under the Idaho rules requires "more depth," not less. *Liberty Bankers Life Ins. Co. v. Green*, No. CV 2011 10121, 2012 WL 4108871, at *3 (Idaho Dist. Sept. 05, 2012). To that end, the Idaho rules align with the principle that a libel plaintiff cannot evade dismissal by obscuring the statements he accuses as defamatory.

Likewise, Boren's "republication" arguments fail. (Appellant's Br. 55–57). Although Boren claims he pled "actual intent and expectation that others would republish" the alleged statements, (*id.* at 57), his conclusory allegations failed to state a claim because Boren obscured what statements he believed defamatory, let alone those one could reasonably foresee as ripe for republication. Even more, Boren obscured what was republished, offering only conclusions like "[j]ournalists reported the Opposition Group's falsehoods in a multiplicity of articles that repeated, again and again, the inaccuracies stated above." (R. p. 39 ¶ 21). Just as his allegations about who said what failed to provide sufficient notice, so too did his allegations about "republication."

At bottom, Boren is asking the Court to fill in the blanks that his lawsuit failed to. The Court should decline. Not only do slippery allegations like Boren's defy basic pleading rules, if accepted, they would endanger protected expression. If defamation plaintiffs can simply lump defendants into ill-defined "opposition groups" or conceal the statements over which they sue, it will chill engaged Idahoans from exercising their fundamental freedoms to voice their concerns on important public issues. The First Amendment and the Idaho Constitution demand more.

2. Gadwa's and Michael's statements were protected opinion.

Even if the Court were to find that Boren pleaded the accused statements with sufficient

notice, those statements are protected. The one specific statement Boren attributed to Gadwa in the *Post-Register* op-ed was protected opinion, if not substantially true. So too are Respondents' statements during the CUP proceeding protected opinion, incapable of being proved true or false.

"[I]n determining whether a statement is defamatory, [a]n assertion that cannot be proved false cannot be held libel[]ous." *Irish*, 163 Idaho at 608, 416 P.3d at 980 (quotation marks omitted). Thus, "statements of opinion enjoy the constitutional protection provided by the First Amendment." *Elliott*, 161 Idaho at 287, 385 P.3d at 465 (citing *Gertz*, 418 U.S. at 339–40). Indeed, the Supreme Court of the United States has affirmed First Amendment protection from defamation claims for speech that an ordinary reader would understand, in context, as mere opinion or otherwise not stating verifiable facts. For example, it held no ordinary person would have thought the term "blackmail" used in a heated debate over a wealthy developer's request for zoning variances was the literal accusation of crime. *Greenbelt Co-op. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 14 (1970); *see also Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 282–85 (1974) (confirming that "loose language or undefined slogans" like "traitor" and "fascist" are not factual, but "part of the conventional give-and-take in our economic and political controversies"). If an accusation of "blackmail" was protected opinion in the heat of public debate, then so too protected are the far milder opinions Gadwa and Michael voiced during the course of the CUP debate.

Take Boren's allegation that Gadwa, in the *Post-Register* op-ed, "accused BOREN of lying to 'regulators' about 'fixing irrigation' on his pasture 'when it was obvious that he had graded an airstrip.'" (R. p. 23 ¶ 34, p. 43 ¶ 34). The op-ed states: "In 2016 and 2017, when it was obvious that he had graded an airstrip, Boren told regulators he was fixing irrigation and gopher holes."

(Ex. 10 to Boren's Decl. in Support of Appellant's Mot. for Expedited Appeal).[5] That Boren had "told regulators he was fixing irrigation and gopher holes" was a matter of public record. (R. p. 307; *see also* R. pp. 285–86, 304–05). The op-ed's disclosed facts, then, were substantially true and no ground for defamation. *See Steele v. Spokesman-Review*, 138 Idaho 249, 252–53, 61 P.3d 606, 609–10 (2002) (statements that are "not a material deviation from the truth" are substantially true); *Standing Comm. on Discipline of U.S. Dist. Ct. for Cent. Dist. of Cal. v. Yagman*, 55 F.3d 1430, 1439 (9th Cir. 1995) (opinion based on disclosed facts was protected, as "readers are free to accept or reject the author's opinion based on their own independent evaluation of the facts").

To that end, even taking Boren's allegation that the op-ed accused him of "lying" to regulators on its face, whether Boren lied was at least an opinion, incapable of being proved true or false. An ordinary reader would have understood that, especially in the context of an *opinion* piece. *E.g.*, *Underwager v. Channel 9 Austl.*, 69 F.3d 361, 367 (9th Cir. 1995) (holding that the "general tenor and . . . specific context" of professionals giving their points of view over "heated debate" at a conference rendered accusations of "lying" nonactionable hyperbole). And even more so because the op-ed disclosed true facts underlying that opinion. *Yagman,* 55 F.3d at 1439.

Gadwa's and Michael's public comments during the CUP proceedings are also protected opinion. Consider Michael's words from the CUP hearing, memorialized in the public record (R. p. 301). She explained how other landowners in the SNRA "have property rights too and those rights and quality of life for those other owners should be protected as well." *Id.* She voiced her

[5] The op-ed, though not attached or fairly quoted in Boren's First Amended Complaint, is incorporated by reference, and gives context for the alleged statement. *See* p. 9 n.2, *supra*.

belief that because "[a]irports in Custer County in all areas require a conditional use permit, she would argue that Mr. Boren's airstrip has been in violation of Custer County's ordinances." *Id.* And she stated her view that the airstrip was "not a good use for emergencies." *Id.*

Taken in context, Michael's public comments are quintessential opinion incapable of supporting a defamation claim. No ordinary reader or listener would have thought otherwise, nor were these statements capable of being proven true or false. That includes Michael's opinions based on disclosed facts, like the documents reciting relevant laws that she included with her letter she sent before the appeal hearing. (R. pp. 339–58). Boren's attempt to hang a defamation claim on these opinions, to the extent he pled them at all, failed.

Likewise, Gadwa's public comment during the CUP appeal is protected opinion. He voiced his "grave concerns" about the CUP approval; his "worry about the possible effects it could have on local fish and wildlife"; his view that EMS would not use the airstrip; and his belief that the CUP would set a "dangerous precedent." (R. p. 348). No ordinary listener would believe those to be anything but Gadwa's opinions, incapable of being proven true or false.

At bottom, Boren's allegations targeted Gadwa's and Michael's protected opinions—including those based on accurate public records—providing this Court one more reason to affirm.

3. Boren failed to sufficiently allege actual malice.

Having made himself the center of the CUP controversy, Boren is at least a limited purpose public figure. *See Elliott*, 161 Idaho at 287–88, 385 P.3d at 465–66 ("[A]n individual can become a public figure on a limited range of issues through voluntary public engagement on those issues."). Thus, the First Amendment required Boren to sufficiently allege actual malice. *Id.* But he did not.

Boren's CUP application and the ensuing process were a matter of great controversy. To be sure, merely applying for the CUP, without more, might not have sufficed to render Boren a public figure. One's "participation in community and professional affairs" does not "automatically render him a public figure." *Bandelin v. Pietsch*, 98 Idaho 337, 340, 563 P.2d 395, 398 (1977). Rather, the Court "looks to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *Id.* (quoting *Gertz*, 418 U.S. at 352). And here, Boren took full advantage of his opportunities to make himself the public focus of that controversy.

For example, Boren's spokesman, Todd Cranney, revealed that Boren took the name "Friends of the SNRA"—the original name of the group appealing the CUP grant—and registered it with the Idaho Secretary of State as his own entity. Noah Kirsch, *Money Man Twists the Knife in Land Fight With Idaho Neighbors*, The Daily Beast (Aug. 24, 2021), https://www.thedailybeast.com/multimillionaire-michael-boren-battles-idaho-neighbors-over-sawtooth-airstrip. According to Boren, he spent "hundreds of thousands of dollars" on the CUP process. (R. p. 49-50 ¶ 56). Boren owns a large ranch in the SNRA where he runs his aircraft, and several other hobby ranches in Idaho. (R. pp. 207, 260). And Boren, through his representatives, made many more public statements about the CUP controversy. [6] All in all, that is enough to show

[6] *See, e.g.,* Nicole Blanchard, *Update: Controversial airstrip near Stanley can stay. Opponents find 'silver linings*,' Idaho Statesman (Sept. 3, 2021), https://www.idahostatesman.com/news/northwest/idaho/article252753648.html; Nicole Blanchard, *Update: Officials approve controversial airstrip near Sawtooths*, Idaho Statesman (May 10, 2021), https://www.idahostatesman.com/news/northwest/idaho/article251152224.html); Nicole Blanchard, *Boren's defamation lawsuit alleging 'reckless' lies over Sawtooth airstrip dismissed*, Idaho Statesman (Oct. 26, 2022), https://www.idahostatesman.com/news/northwest/idaho/article267835852.html.

Boren is a limited purpose public figure as to the CUP debate. *Elliott*, 161 Idaho at 288, 385 P.3d at 466 (affirming that an "outspoken advocate of animal welfare" who authored many letters to the editor and was president of a local Humane Society was "clearly" a "limited public figure" on animal welfare issues in southeastern Idaho).

Because Boren was a public figure within the CUP controversy, the First Amendment required him to show "actual malice, knowledge of falsity or reckless disregard of the truth, by clear and convincing evidence." *Clark v. Spokesman-Rev.*, 144 Idaho 427, 430, 163 P.3d 216, 219 (2007) (citing *Sullivan*, 376 U.S. 254). Boren must have alleged sufficient facts showing that Gadwa and Michael "in fact entertained serious doubts as to the truth of his publication or acted with a high degree of awareness of . . . probable falsity." *Id.* at 431, 163 P.3d at 220.

Boren did not come close to meeting this standard, even under Idaho's notice-pleading rules. Bare assertions cannot state a claim of actual malice. *See Elliot*, 161 Idaho at 288–89, 385 P.3d at 466–67 ("[B]ald assertions that [defendant] made his statements in revenge and out of personal animus" did not meet actual malice standard.); *Peterson v. Gannett Co. Inc.,* No. CV-20-00106-PHX-MTL, 2020 WL 7714539, at *5 (D. Ariz. Dec. 29, 2020), aff'd, No. 21-15057, 2021 WL 5507338 (9th Cir. Nov. 24, 2021) (dismissing defamation claim because the plaintiff, a limited purpose public figure, alleged only conclusions on actual malice.) Yet bare assertations are all Boren offered: "FOSBURY, MICHAEL, the Opposition Group and CONTI knew the information was false, or reasonably should have known that it was false." (R. p. 49 ¶ 55). And even that conclusory allegation failed to include Gadwa. *Id.*

Nor did Boren plead factual matter supporting his bare allegation that Respondents knew

their statements were false. And by pleading that they "reasonably should have known that it was false," he improperly sought to hold them to an objective negligence standard (which his allegations also did not meet). But where the plaintiff is a public figure, "[m]ere negligence is insufficient" to show actual malice. *Clark*, 144 Idaho at 431, 163 P.3d at 220. Likewise, Boren alleged no facts supporting his bare assertion that Respondents "knew" unspecified "information" "was false, or acted with reckless disregard for its truth." (R. p. 50 ¶¶ 58–62).

The best Boren could muster was alleging that "FOSBURY, MICHAEL and the Opposition Group intentionally disseminated these defamatory statements concerning BOREN knowing they would harm BOREN's reputation, subject him to ridicule and anger from the community and jeopardize BOREN's continued use of his pasture as a landing area for his aircraft." (R. pp. 34–35 ¶ 3). That too badly missed the mark. At most, this was an allegation that Respondents intentionally communicated. It says nothing about Respondents' knowledge of falsity or their subjectively reckless disregard of truth or falsity. Boren's failure to sufficiently plead actual malice, as the Constitution demands, is another reason to affirm.

4. Boren failed to allege reputational harm.

Damage, or reputational harm, is essential to any defamation claim. *Gough*, 73 Idaho at 177–78, 249 P.2d at 194–95. And there must be a causal nexus between that harm and the allegedly defamatory statements. *See, e.g.*, *Clark*, 144 Idaho at 430, 163 P.3d at 219 (a plaintiff must have been harmed *because of* the defamatory statement). Boren's allegations failed on both counts.

In his defamation claim, Boren baldly asserted "damage to [his] reputation." (R. pp. 49–50 ¶ 56). But that conclusion was not sufficient notice of reputational harm. Boren also alleged "the

significantly increased costs associated with defending against that defamation and FOSBURY's, MICHAEL's and the Opposition Group's challenge to BOREN's CUP application." *Id.* Those are not reputational damages. Nor is there any general right to costs or attorney's fees for administrative procedures in Idaho—only a statute can provide that relief. (R. pp. 156–57, citing *Idaho Power Co. v. Idaho Pub. Utils. Comm'n*, 102 Idaho 744, 750, 639 P.2d 442, 448 (1981)).

Unable to allege reputational harm, Boren also included a claim of defamation per se (R. p. 50), which does not require allegations of specific damages. *Siercke*, 167 Idaho at 718, 476 P.3d at 385. A statement "is defamatory per se when it imputes conduct constituting a criminal offense chargeable by indictment or by information either at common law or by statute and of such kind as to involve infamous punishment (death or imprisonment) or moral turpitude conveying the idea of major social disgrace." *Id.* (cleaned up). Where an allegedly defamatory statement "is plain and unambiguous, it is a question of law for the court to determine whether it is libelous per se, otherwise it is a question of fact for the trier of fact." *Id.* (citations omitted).

Yet Boren did not plead which particular statements, by which particular speakers, he believes constitute defamation per se. *See* Section II.E.1, *supra.* That failure alone is reason to affirm dismissal of his defamation per se claim. While Boren alleged that "Defendants communicated information," that related to his business and "impugned [his] honesty, integrity, virtue and reputation as a rancher," he alleged no facts about what the "information" was. (R. p. 50 ¶ 58–59). Boren also alleged that Gadwa and Michael claimed that he had "committed a crime of moral turpitude." (R. p. 50 ¶ 60). But he alleged no statement relating to a "crime of moral turpitude" that the Court can assess as a matter of law or leave to the jury, one way or the other.

He identified no specific crime of moral turpitude involving "[s]hameful wickedness," nor did he set out the crime's punishment. *Siercke*, 167 Idaho at 720, 476 P.3d at 387; Restatement (Second) of Torts § 571 cmt. g (1977). Boren offered nothing beyond conclusions for a court to assess his defamation per se claim, and that shortcoming is just one more reason for the Court to affirm.

In sum, Boren failed to state a claim for defamation and overcome First Amendment limits on defamation. On the other hand, his allegations on their face reveal a lawsuit lacking in merit and designed to chill Respondents and the public from opposing Boren ever again.

F. Boren failed to state claims for civil conspiracy and a declaratory judgment.

The district court correctly dismissed Boren's claim for "conspiracy to commit defamation," finding that "such a claim is not a proper independent cause of action." (R. p. 945). And Boren conceded the point: "[I]t is true that civil conspiracy does not qualify as an independent cause of action or theory of liability and, hence, a remedy cannot be provided for a conspiracy alone[.]" (R. p. 866). Moreover, civil-conspiracy claims targeting public participation, like Boren's, threaten not only individual rights to free speech and petition, but also the right to collective expression. *See NAACP*, 357 U.S. at 460 (recognizing the First Amendment right to association). If an Idahoan associates with others on a public issue only to face a conspiracy claim based merely on a common view, it will chill collective expression—often the only way people can make their voice heard. Here, Boren lumped Gadwa and Michael in with an ill-defined "Opposition Group" and Jon Conti, yet alleged no discernable link between them. (*E.g.,* R. p. 51). That conflation both threatened free expression and failed to satisfy Idaho's pleading standards.

The district court also properly dismissed Boren's claim for declaratory judgment because

a judgment "'would not terminate the uncertainty or controversy' between these defendants and Boren[.]" (R. p. 944). Under the Idaho Declaratory Judgment Act, "a controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Westover v. Idaho Cntys. Risk Mgmt. Program*, 164 Idaho 385, 390, 430 P.3d 1284, 1289 (2018) (citation omitted). While Boren is correct that the Act "is to be liberally construed and administered," (R. p. 862), that does not cure Boren's failed declaratory judgment claim.

In essence, Boren wants an advisory opinion on whether "Respondents' statements are false and defamatory." (Appellant's Br. 54). The Court should shut that door. No one should be able to drag another into court for defamation without needing to show reputational harm or overcome First Amendment limits on liability.

G. In the end, Boren's lawsuit attacked only constitutionally protected expression.

All these reasons for dismissal harken back to the central point: Boren sued Gadwa and Michael for exercising their constitutional rights to voice their opposition to the CUP application and the airstrip at issue. The First Amendment, however, does not tolerate those who use lawsuits to muzzle the right to disagree on public issues. Protecting Gadwa's and Michael's expressive freedoms—and those of all Idahoans—is paramount, emphasizing why the Court should affirm.

III. The District Court Did Not Abuse Its Discretion in Denying Boren Leave to Amend His Lawsuit a Second Time.

The district court did not abuse its discretion in denying Boren leave to amend. After twice

failing to plead sufficient claims against Gadwa and Michael—and twice running head-on into the Constitution and common-law privileges—Boren did not deserve another do-over *after* dismissal.

The Court reviews the denial of a motion to amend a complaint for abuse of discretion, upholding a denial where: "[T]he trial court (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason." *Lunneborg v. My Fun Life*, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018). To that end, a lower court may weigh any "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc." *DAFCO LLC v. Stewart Title Guar. Co.*, 156 Idaho 749, 755, 331 P.3d 491, 497 (2014).

Under those standards, the district court did not abuse its discretion denying Boren post-dismissal leave to amend. In essence, Boren's motion was in fact one for reconsideration, as the district court spotted. (Tr. 110:20–25). It rightly refused Boren's recycled arguments. Even if "district courts should favor liberal grants of leave to amend a complaint," *Hines v. Hines*, 129 Idaho 847, 853, 934 P.2d 20, 26 (1997), they should not be so lenient with post-dismissal motions for leave that recycle prior claims and allegations, especially when expressive rights are at stake.

The district court also was right to conclude that Boren's proposed amendments were futile. Boren added no new claims. Nor did he point out any defamatory statements unconnected to the CUP process, even after the district court ruled that "Boren's FAC makes clear that each and every alleged statement of Michael, Fosbury, and Gadwa were related to and in the course of the CUP

process." (R. pp. 942–43; 1012–41). Instead, Boren mostly tacked on variants of the conclusory phrase, "but made outside the context of the CUP process." (*E.g.*, R. p. 1023). Boren offered little reason for that about-face. More to the point, as the district court reasoned, the absolute privilege and the right to petition still would bar Boren's claims because any amended alleged statements still related to the CUP process. (R. pp. 1193–94); *see also* Section II.C. *supra.*

Boren also tried to fix his failure to allege malice, alleging that Respondents "appear to hate Boren due, at least in part, to his success and his political and religious beliefs." (R. p. 1025). But he alleged no facts in support. *See id.* Rank speculation that Respondents "appear to hate" Boren cannot support even a generous inference of either actual malice or the malice needed to beat qualified privilege. *Sullivan*, 376 U.S. at 280; *Siercke*, 167 Idaho at 714, 476 P.3d at 381.

As the district court reasoned, "if the amendment were allowed and the defendants were required to file substantially similar motions to dismiss to those the court has already granted . . . [t]he court's decision on the motions to dismiss would not be altered by Boren's proposed amendment" and the proposed amendment would be futile. (R. p. 1194). Boren insists the district court's "decision was . . . an abuse of discretion when denying leave to amend because it lacked the authority to invade the jury's province and decide factual issues on a motion to dismiss." (Appellant's Br. 37). But that misses the point of Rule 12(b)(6), which filters out lawsuits lacking the merit to get before a jury. Boren's lawsuit lacked sufficient merit to warrant discovery, let alone a jury.

The Court should affirm the denial of Boren's attempt to prolong his lawsuit against those who exercised their constitutional rights to speak out against his CUP application.

IV. There Is No Basis to Recuse Judge Thompson.

The Court should refuse Boren's demand for a new judge on remand for three reasons. First, the Court should affirm, making remand a moot point. Second, Boren never sought recusal in the district court, and so he has waived that argument here. *E.g., Siercke*, 167 Idaho at 715, 476 P.3d at 382 ("It is axiomatic that this Court will not consider issues raised for the first time on appeal."). And third, the record shows Judge Thompson considered the parties' arguments and rendered a thoughtful opinion. (*E.g.*, Tr. 131–194; R. pp. 939–45). He explained that because of the constitutional rights at stake, allowing the case to proceed "without any guidance from the Idaho Supreme Court . . . would not be in the interests of justice." (R. p. 944). Striving to faithfully apply the Constitution is no basis for removing a judge from a case.

V. This Case Highlights the Need to Affirm That Idaho Courts Can and Should Swiftly Dismiss Lawsuits That Target Exercises of the Rights Protecting Public Participation.

In affirming dismissal, the Court should take up the district court's invitation to clarify how courts should account for expressive freedoms when facing motions to dismiss baseless lawsuits, like Boren's, that threaten expression on matters of public concern. Often called "SLAPPs" ("Strategic Lawsuits Against Public Participation"), these lawsuits lack merit and aim instead at "preventing citizens from exercising their political rights or punishing those who have done so." *Simpson Strong-Tie Co. v. Gore*, 49 Cal. 4th 12, 21 (2010). No Idahoan or any other American should be forced to endure censorship by lawsuit—especially on matters of public concern—and early dismissal is key to stopping these lawsuits in their tracks. That is why Gadwa and Michael urge the Court to affirm that Idaho courts can and should be free expression gatekeepers on motions

to dismiss lawsuits that have the hallmarks of a SLAPP, consistent with Rule 12(b)(6) and Idaho's pleading standards.

A. Lawsuits that imperil public participation must meet swift ends.

Lawsuits that target expression on matters of public concern punish the exercise of constitutional rights, intimidate others from speaking out, and ultimately stifle the public debate. These plaintiffs care little about the merits of a case—their goal is "to use litigation to intimidate opponents' exercise of rights of petitioning and speech." *Leiendecker v. Asian Women United of Minn.*, 848 N.W.2d 224, 228 (Minn. 2014). And that forces critics and opponents into an impossible choice: Self-censor, or suffer the financial pain of litigation. *See, e.g,* John C. Barker, *Common Law and Statutory Solutions to the Problems of SLAPPs*, 26 Loy. L.A. L. Rev. 395, 406 (1993) (explaining how SLAPP plaintiffs "seek to silence their critics by forcing them to spend thousands of dollars to defend themselves").

As one court said of SLAPPs, "[s]hort of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined." *Gordon v. Marrone*, 590 N.Y.S.2d 649, 656 (Sup. Ct. 1992), *aff'd*, 616 N.Y.S.2d 98 (App. Div. 1994). Because of that threat, "[i]n other states, a SLAPP suit is subject to an early intervention by the court wherein the court can determine if the suit has merits to proceed," as the district court noted. (R. p. 943). Indeed, 31 states and the District of Columbia have "anti-SLAPP" statutes that protect speakers from SLAPPs, often entailing quick dismissal. Dan Greenberg & David Keating, *Anti-SLAPP Statutes: A Report Card*, Institute for Free Speech (Feb. 28, 2022), https://www.ifs.org/anti-slapp-report/. But despite what Boren suggests, SLAPPs are not an invention of state statutes, somehow beyond the reach of courts in

states like Idaho that lack anti-SLAPP statutes. (Appellant's Br. 50–53).

In fact, American courts have thwarted lawsuits attacking public participation for decades. For instance, when the Supreme Court recognized First Amendment limits on defamation lawsuits in *Sullivan*, it did so against the backdrop of Alabama officials using defamation lawsuits to silence critics of segregation. Christopher W. Schmidt, *New York Times v. Sullivan and the Legal Attack on the Civil Rights Movement*, 66 Ala. L. Rev. 293, 294 (2014). Consider too the decision in *Greenbelt*, explained above, another of many times a court has employed constitutional principles to thwart a lawsuit targeting public participation under the guise of a libel claim. *Greenbelt*, 398 U.S. at 11–12; *see also Steele*, 138 Idaho at 252, 61 P.3d at 609.

So despite Boren's protests otherwise, Idaho courts are not helpless to tackle SLAPPs, even without an anti-SLAPP statute. (*See* Appellant's Br. 50–53). And neither the district court nor Respondents are asking this Court to "create[] anti-SLAPP law out of whole cloth." (*See id.* at 51). Idaho courts can, as others have, apply the settled constitutional principles protecting public participation to put an early end to SLAPPs. For instance, the North Carolina Supreme Court dismissed a lawsuit attacking statements made in a public hearing, concluding without the help of an anti-SLAPP statute that "[l]awsuits that seek to impose liability based on petitioning activity inevitably chill the exercise of this fundamental right" to petition. *Cheryl Lloyd*, 377 N.C. at 384; *see also Westfield Partners, Ltd. v. Hogan,* 740 F. Supp. 523, 525 (N.D. Ill. 1990) (dismissing a lawsuit "based upon nothing more than defendants' exercise of their right, under the [F]irst [A]mendment, to petition the government for a redress of grievances"). Like those courts, the district court rightly viewed Boren's lawsuit as imperiling Gadwa's and Michael's First

Amendment rights and dismissed it. (R. p. 944).

B. Boren's lawsuit carried the hallmarks of a SLAPP.

By his own words, Boren's lawsuit embodies a SLAPP: He expected an "easy, unopposed" public proceeding, and when many voiced their opposition, he sued them.[7] (R. p. 50). Boren's complaints carry all the signs of a lawsuit designed to chill public debate. They targeted his opponents' exercise of their rights to petition and to speak on matters of public concern. *See* Section I.C, *supra*. At the same time, Boren's claims lacked merit, resting on conclusory and obstruse allegations about who said what, while also lacking meaningful allegations about harm and fault. *See* Section II.E.i, *supra*. And of course, the lawsuit contravened both constitutional protections and state law privileges for expression on matters of public concern.

The nature of Boren's claims also highlight why his lawsuit threatens public participation. For instance, Boren sued 20 Doe defendants—a hallmark of SLAPPs seeking to intimidate the public at large from speaking out. *See* Barker, *supra* page 46, at 404. Boren's onslaught of immediate discovery requests, including eleven third-party subpoenas and "dozens" of depositions is also a SLAPP staple, aiming to flood a speaker with litigation burdens. (*See* R. pp. 377, 767–68; Tr. 6:16–19). And Boren lumping together over twenty of the CUP's opponents in a civil-

[7] Boren contends he tried to "resolve" his complaints against Respondents before suing. (Appellant's Br. 24; R. p. 1035). But the record suggests he tried to silence his critics and the public. For example, Jon Conti alleged under oath that Boren's lawyer visited Conti's workplace to tell him that he was "in trouble." (R. pp. 62–63, 72). And Boren's proposed settlement to Conti demanded that he remove his criticism of Boren from YouTube, apologize publicly, identify those he communicated with about his video, and notify Boren's lawyer anytime someone contacted him about his video. (R. pp. 76–78, 80–81).

conspiracy claim highlights an effort to ensnare speakers as joint tortfeasors just for joining the public debate over his CUP application, offending the First Amendment right to associate on public issues.

Even now, Boren wants to silence his opponents, threatening in his brief to sue Michael over "her extra-judicial statements to the public" about Boren's lawsuit being a SLAPP. (Appellant's Br. 60). If anything, that threat confirms the district court was right to express concerns that "this is merely a SLAPP suit." (R. p. 944). And that threat also underscores why Idaho courts must be able to dismiss lawsuits like Boren's—and swiftly so—to protect those who participate in the public debate from the burdens and expense of litigation.

C. The Court should clarify that Idaho courts ought to serve as gatekeepers when presiding over lawsuits that on their face target public participation.

Boren's lawsuit gives the Court an opportunity to confirm that Idaho courts can and should dismiss meritless lawsuits under I.R.C.P. 12(b)(6) that, like Boren's, on their face show the hallmarks of a lawsuit aimed at chilling public participation. As Gadwa and Michael have shown throughout this brief, that principle does not flout Idaho law or rules of procedure. At the same time, that principle harmonizes with the Idaho Constitution's strong protections for public participation.

Some might argue this principle will bar defamation claims altogether, preventing people from seeking remedy for reputational harm. But that is not the case. If a plaintiff's allegations suffice to make out a defamation claim, even on a matter of public concern, then his lawsuit will survive a motion to dismiss. *C.f. Straley,* 94 Idaho at 921, 500 P.2d at 222 (explaining Idaho's

"sufficient notice" pleading standard). On the other hand, suing one's opponent for libel over disagreement on a public issue should never survive a motion to dismiss. "SLAPPs are by definition meritless suits." Barker, *supra* page 46, at 399. A baseless defamation suit may target constitutionally protected opinion or fail to allege facts on actual malice. It may plead itself headlong into an affirmative defense like absolute privilege. Or it may so noticeably conceal what a defendant really said that a court should have little trouble throwing the lawsuit out.

Thus, courts should cast a wary eye toward lawsuits based on expression about public issues. After all, "in cases raising First Amendment issues," courts have "an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union of U.S., Inc*., 466 U.S. 485, 499 (1984) (citation omitted). To protect public participation and the constitutional rights that enable it, courts must also carefully examine the entire complaint on a motion to dismiss, to ensure that the lawsuit does not intrude on the "field of free expression."

The Court should affirm that principle here. That would not require issuing "an advisory opinion," as Boren suggests. (Appellant Br. 49–50). Rather, his lawsuit allows the Court to clarify how the constitutional protections for public participation fit with Idaho's pleading rules and standards. Gadwa and Michael urge the Court to do so—because if history tells us anything, Boren's defamation lawsuit will not be the last in Idaho targeting one's critics on public issues.

CONCLUSION

For all these reasons, the Court should affirm.

Dated: September 29, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of September 2023, a true and correct copy of the foregoing was served by the method indicated below, and addressed to the following:

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