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Recommended Citation

Dorit R. Reiss and Viridiana Ordonez, *Law in the Service of Misinformation: How Anti-Vaccine Groups Use the Law to Help Spin a False Narrative*, 18 *NW J. L. & Pub. Pol'y* 51 (2022).

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Law in the Service of Misinformation: How Anti-Vaccine Groups Use the Law to Help Spin a False Narrative

Dorit Reiss*
Viridiana Ordonez†

ABSTRACT

Social movements use legal tools to create narratives. Those narratives support social agendas which certain movements leverage to mislead their followers and potential followers. In this Article, we examine one influential anti-vaccine organization, the Informed Consent Action Network (ICAN), that uses its far-reaching platform to create false narratives around legal action. Again and again, this anti-vaccine group misrepresented both the legal and the factual meanings of court decisions, settlements, and other legal actions to create a narrative to galvanize its followers and influence newcomers. ICAN filed lawsuits that make anti-vaccine arguments—even when the legal framework did not fit doing so—and misrepresented the results. Most commonly in this category, while FOIA requests can only ask for documents and cannot ask queries, ICAN framed its frequent FOIA requests and subsequent lawsuits as if they were asking the agency to answer questions, rather than provide records. The group then presented the results to support one of its narratives—that vaccines cause autism—when the results did not, in fact, support such a narrative. This Article shows how legal tools advance disinformation and misinformation, creating a misleading, alternative reality.

Keywords: social movements, vaccines, public health, misinformation

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INTRODUCTION

On November 11, 2021, Attorney Aaron Siri published an article on his Substack website, responding to a Freedom of Information Act (FOIA) request on behalf of the Informed Consent Action Network (ICAN), an anti-vaccine organization.¹ The FOIA request claimed the Center for Disease Control (CDC) admitted it had no proof that the naturally immune—people who previously had COVID-19—could reinfect others.² This meant, Mr. Siri wrote, there was no justification for the CDC’s concerns about unvaccinated people.³

Mr. Siri’s claim was untrue, a fact he likely knew. FOIA requests are designed to provide agency records, not to answer specific questions.⁴ FOIA requests provide citizens access to all federal agency records unless the records or portions of those records are protected from disclosure; this right is enforceable by the courts.⁵

As linked from the article, ICAN’s request was submitted on September 2, 2021, and the CDC responded on November 5, 2021. The CDC’s response to the FOIA request meant only that a search of the CDC’s computers did not find *agency records showing* any case of an individual who (1) never received a COVID-19 vaccine; (2) was infected with COVID-19 once, recovered and then later became infected again; and (3) transmitted the virus to another person when infected the second time.⁶ Possible explanations for the CDC’s response could be that such cases exist, but the CDC does not keep them as records; that the request did not provide enough guidance for an effective search that would lead to such records; or that the evidence for reinfection is not based on a documented single case, but on other data. The law firm that submitted the FOIA request on ICAN’s behalf has, as this Article documents, significant experience with FOIA. Thus, its lawyers should know the FOIA response indicates neither that the CDC has no evidence for the possibility of

¹Aaron Siri, *CDC Admits Crushing Rights of Naturally Immune Without Proof They Transmit the Virus*, INJECTING FREEDOM (Nov. 11, 2021), https://aaron Siri.substack.com/p/cdc-admits-crushing-rights-of-naturally?utm_source=substack&utm_medium=email&utm_content=share.

²*Id.* Specifically, the firm asked for “[d]ocuments reflecting any documented case of an individual who: (1) never received a COVID-19 vaccine; (2) was infected with COVID-19 once, recovered, and then later became infected again; and (3) transmitted SARS-CoV-2 to another person when reinfected.”

³*Id.*

⁴Fred H. Cate, D. Annette Fields, & James K. McBain, *The Right to Privacy and the Public’s Right to Know: The “Central Purpose” of the Freedom of Information Act*, 46 ADMIN. L. REV. 41, 48–49 (1994).

⁵*What Information Is Available Under the FOIA?*, U.S. DEPT. OF HEALTH & HUM. SERVS. (Sept. 17, 2015), <https://www.hhs.gov/foia/faqs/what-information-is-available-under-the-foia/index.html>.

⁶Siri, *supra* note 1.

reinfection from the naturally immune, nor that the documents do not exist. Rather, the FOIA response merely shows that the requested search queries did not reveal any documents in the agency's files.

Mr. Siri's conclusion—that the CDC's response means concerns about previously infected, unvaccinated individuals are unfounded—is also wrong.⁷ The CDC has extensive evidence that reinfections occur, especially in those who do not get vaccinated after their initial infection.⁸ COVID-19 is highly contagious, and even more so with recent variants.⁹ Consequently, the CDC does not need to point to a specific case in which an unvaccinated person reinfected and transmitted COVID-19 to others to demonstrate that the risk exists (let alone need to have such a case as an agency record). The CDC can merely acknowledge the risk of reinfection and viral transmission by unvaccinated people based on the known facts about COVID-19.¹⁰ Nevertheless, Mr. Siri argued that the FOIA request did not provide proof that previously infected and unvaccinated people pose a risk. Mr. Siri's claim subsequently went viral and became an anti-vaccine talking point.¹¹

Using legal tools to create misleading narratives is a recurring pattern. Creating a narrative is one way that social movements, including ICAN and the anti-vaccine movement, reinforce their beliefs and spread their claims to their followers. In this case, the anti-vaccine narrative is untrue and part of a concerted effort to create an alternate reality.

Interest groups and social movements have always played an important role in shaping politics and society in the United States.¹² Social movements from both sides of the political spectrum shape policy and law in many areas, including racial justice,

⁷ *Id.*

⁸ Alyson M. Cavanaugh, DPT, Ph.D, Kevin B. Spicer, M.D., Ph.D, Douglas Thoroughman, Ph.D, Connor Glick, MS, & Kathleen Winter, Ph.D, *Reduced Risk of Reinfection with SARS-CoV-2 After COVID-19 Vaccination — Kentucky, May–June 2021*, 70 CTRS. FOR DISEASE CONTROL & PREVENTION: MORBIDITY & MORTALITY WKLY. REP. 1081 (Aug. 13, 2021); Christian Holm Hansen, Daniela Michlmayr, Sophie Madeleine Gubbels, Kåre Mølbak, & Steen Ethelberg, *Assessment of Protection Against Reinfection with SARS-CoV-2 Among 4 Million PCR-tested Individuals in Denmark in 2020: a Population-level Observational Study*, 397 LANCET 1204 (Mar. 27, 2021); Christina D Mack, Caroline Tai, Robby Sikka, Yonatan H. Grad, Lisa L. Maragakis, Nathan D. Grubaugh, Deverick J. Anderson, David Ho, Michael Merson, Radhika M. Samant, Joseph R. Fauver, James Barrett, Leroy Sims, & John DiFiori, *Severe Acute Respiratory Syndrome Coronavirus 2 Reinfection: A Case Series From a 12-Month Longitudinal Occupational Cohort*, 2022:74 CLINICAL INFECTIOUS DISEASES 1682 (Aug. 28, 2021).

⁹ *What You Need to Know About Variants*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 26, 2022), https://www.cdc.gov/coronavirus/2019-ncov/variants/about-variants.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fvariants%2Fdelta-variant.html.

¹⁰ *Id.*

¹¹ See Siri, *supra* note 1; see also Lauren Dempsey, *CDC Admits There is No Data That the Naturally Immune Spread COVID*, FISM TV (Nov. 16, 2021), <https://fism.tv/cdc-admits-there-is-no-data-that-the-naturally-immune-spread-covid/>; Shawn Fleetwood, *CDC Admits It Has No Evidence of Recovered COVID Patients Spreading the Virus*, FEDERALIST (Nov. 12, 2021), <https://archive.ph/EAr3D>; Michael Nevradakis, Ph.D., *CDC Forced to Admit It Doesn't Collect Data on Natural Immunity to COVID*, DEFENDER (Nov. 18, 2021), <https://archive.ph/S8C6j>; Zachary Stieber, *CDC: No Record of Naturally Immune Transmitting COVID-19*, EPOCH TIMES (Nov. 13, 2021), <https://archive.ph/UwrCu>.

¹² DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS* 33, 264 (1951); BURDETT A. LOOMIS & ALLAN J. CIGLER, *INTEREST GROUP POLITICS* 1–4 (2002).

reproductive rights, LGBTQIA+ rights, and religious freedom, among others.¹³ This Article explores what happens when a social movement, such as the anti-vaccine movement, uses legal tools to support an alternative reality undermining public and individual health.

Some social movements organize around issues that directly impact public and individual health.¹⁴ Examples include movements such as Fight For \$15 dedicated to promoting labor laws, and Act Up, an organization that sought treatment for AIDs; both movements have clear health implications.¹⁵ On the other hand, movements like the anti-vaccine movement directly work to undermine health benefits and protection against diseases.¹⁶ Health-related movements directly and physically harm others when they replace actual science with “junk” science and embrace conspiracy theories.¹⁷ At some point, factual disagreements become “epistemically unreasonable,” meaning they go beyond the boundaries of simple disagreements about facts that democratic communities should respect when making policy.¹⁸

The COVID-19 pandemic further revealed the harmful epistemic unreasonableness of vaccine opponents, including ICAN, who worked to create distrust of COVID-19 vaccines and other mitigation efforts, such as mask mandates.¹⁹ However, despite the amplified link between misinformation, illness, and deaths, the tactics used by ICAN predate the pandemic.²⁰

This Article describes how one influential anti-vaccine group—ICAN—used the courts and the legal system to create and promote a false narrative to undermine individual and public health. Part I provides a theoretical background on social movements’ use of

¹³ Peter Millward & Shaminder Takhar, *Social Movements, Collective Action and Activism*, 53 SOCIO. 1, 2–5 (2017); Austin Sarat & Stuart Scheingold, *What Cause Lawyers Do for, and to, Social Movements: An Introduction*, CAUSE LAWS. & SOC. MOVEMENTS, 1, 1–6 (1st ed. 2006).

¹⁴ Wendy E. Parmet, *What Makes Social Movements ‘Healthy’?* BILL OF HEALTH (Aug. 17, 2021), <https://blog.petrieflom.law.harvard.edu/2021/08/17/healthy-social-movements-anti-vax/>.

¹⁵ See FIGHT FOR \$15, <https://fightfor15.org> (last visited Jun. 26, 2022); ACT UP, <https://actupny.com> (last visited Jun. 26, 2022). For more information, see also James H. Buszkiewicz, Heather D. Hill, & Jennifer J. Otten, *Association of State Minimum Wage Rates and Health in Working-Age Adults Using the National Health Interview Survey*, 190 AM. J. EPIDEMIOLOGY 21, 21–23 (2020); George L. Wehby, Dhaval M. Dave, & Robert Kaestner, *Effects of the Minimum Wage on Infant Health*, 39 J. POL’Y ANALYSIS & MGMT. 411, 412–16 (2019).

¹⁶ Amarylliss Mavragani & Gabriela Ochoa, *The Internet and the Anti-Vaccine Movement: Tracking the 2017 EU Measles Outbreak*, 2 BIG DATA COGNITIVE COMPUTING 2 (Jan. 16, 2018).

¹⁷ Parmet, *supra* note 14 (“In effect, skepticism about the scientific agenda turns to nihilism about established science, ultimately giving way to alternative (or ‘junk’ science) and conspiracy theories.”).

¹⁸ James R. Steiner-Dillon, *Sticking Points: Epistemic Pluralism in Legal Challenges to Mandatory Vaccination Policies*, 88 U. CIN. L. REV. 169, 173–74 (Oct. 2019). Professor Steiner-Dillon coined the term “epistemically unreasonable” and set up principled ways to identify what is and is not epistemically unreasonable.

¹⁹ Seth C. Kalichman, Lisa A. Eaton, Valerie A. Earnshaw, & Natalie Brousseau, *Faster than Warp Speed: Early Attention to COVID-19 by Anti-vaccine Groups on Facebook*, J. PUB. HEALTH (Apr. 9, 2021).

²⁰ See Dorit R. Reiss, *Misinformation and the COVID-19 Pandemic*, SANTA CLARA L. REV. (forthcoming 2022) [hereinafter Reiss, *Misinformation and COVID-19*] (discussing how the anti-vaccine groups used a set of common themes—claims that preventable diseases are not so bad, vaccines are dangerous, there are alternatives to vaccines, there is a conspiracy to hide the data, and the issue is actually civil rights—both before the COVID-19 pandemic, to deter people from using childhood vaccines, and during the pandemic, to deter people from using COVID-19 vaccines). This article also demonstrates a continuation of pre-pandemic tactics, although the groups intensified their efforts during the pandemic.

law to create narratives that further their core goals and demonstrate their purpose. Given the voluminous literature on social movement, we briefly address the early focus of the courts, and then closely review the use of legal tools by activists to create a narrative. Part II introduces ICAN, their law firm, and how ICAN follows the pattern of creating narratives from legal tools. ICAN is a relative newcomer on the anti-vaccine scene but stands out as a group that aggressively uses legal tools to create a narrative to promote its goals. Although ICAN's litigation success has been extremely limited, it has continued using its legal activity to generate talking points—often by misrepresenting cases and results. Part III describes how ICAN, as part of the anti-vaccine movement, uses the legal system to further its movement's goals. This Part provides an empirical description of the group's activities, detailing three types of legal actions by ICAN: FOIA requests, citizen petitions, and direct litigation. Finally, Part IV discusses how ICAN's use of legal tools to create a misleading narrative aims to galvanize its followers, strengthen support, and give followers talking points. By creating talking points based on its legal efforts, ICAN influences others by creating fear, uncertainty, and doubt about vaccines.

I. SOCIAL MOVEMENTS & THE COURTS

There is a large literature on social movements generally, and specifically on their use of the courts. This Article draws on that literature in analyzing ICAN's legal efforts. To set that up, we describe social movements, then address how the literature on social movements and the courts developed over time. Finally, this Part focuses on the most important discussion for our case study: how activists use legal tools to create narratives that empower, galvanize, and otherwise help organize and motivate followers.

Social movements are collections of people who come together to advance their goals and ideas about the dynamics of society and how institutions should operate.²¹ Often, a national event, repeated instances of injustice, oppression, dissatisfaction with governments and institutions, a desire to change the status quo, or a desire for safety and protection can trigger social movements.²² Individuals who join movements organize to make structural changes in society or redistribute society's resources to trigger the sought-after social change.²³

²¹ Christian Fuchs, *The Self-Organization of Social Movements*, 19 SYSTEMIC PRAC. & ACTION RSCH. 101, 104 (2006).

²² *Id.*

²³ There are two main approaches to social movement theory: the European New Social Movement approach (NSM) and the U.S. Resource Mobilization. The NSM approach assumes that structural changes in society cause the emergence of social movements, while the U.S. Resource Mobilization approach assumes that social movements are a result of the successful mobilization of resources. *See id.* at 103; John D. McCarthy & Mayer N. Zald, *Resource Mobilization and Social Movements: A Partial Theory*, 82 AM. J. SOCIO. 1212, 1214 (1977); Cary Coglianese, *Social Movements, Law, and Society: The Institutionalization of the Environmental Movement*, 150 U. PA. L. REV. 85, 85 (2001).

Sociolegal scholars study both social movements and the law²⁴ to understand when and how the law matters for social change.²⁵ Although many studies of law and social movements focus on courts and their key players, such as judges and lawyers, studies also look at movements themselves.²⁶ The literature on law and social movements is complex, multi-faceted, and built on several separate strands of literature approaching the topic from different directions.²⁷ Initially, scholars from different disciplines treated social movements and the law as separate spheres, often talking past each other and unable to combine their research on each subject, even when looking at the same phenomenon.²⁸

For decades, sociolegal scholars have examined the intersection between law and social movements. Early sociolegal scholars looked to movements that sought legal redress through the courts, especially through the Supreme Court, and studied whether legal institutions effectively achieved a social movement's core goals.²⁹ Many of these scholars arrived at pessimistic conclusions.³⁰ They saw courts as ineffective and even leading to backlash, including the rise of reactionary social movements who fought to block or reverse social changes.³¹

²⁴ Law, for the purpose of this article, is defined as a system of rules established by the governing institutions of a society. See HELENA SILVERSTEIN, *CONSTITUTING LEGAL MEANING, UNLEASHING RIGHTS: LAW, MEANING, AND THE ANIMAL RIGHTS MOVEMENT* 2 (1996) (providing this definition of “law”). There are other definitions, and a debate about the meaning of law, which are not thoroughly covered by this article, but can be read about more in depth in BRIAN Z. TAMANAHA, *A REALISTIC THEORY OF LAW* 46–73 (2017); MATTHEW ROSS LIPPMAN, *LAW AND SOCIETY* 3–9 (3d ed. 2020).

²⁵ This question, and whether social movements use legal tactics to promote social change, are questions that have been of great interest to sociolegal scholars in the past decades. In an effort to find an answer to these questions, studies have taken a critical view of the law. See Idit Kostiner, *Evaluating Legality: Toward a Cultural Approach to the Study of Law and Social Change*, 37 *LAW & SOC’Y REV.* 323–24 (2003); see also SILVERSTEIN, *supra* note 24, at 1–2 (in describing diversity in the scholarship, stated that “the deployment of legal tactics by social movements has provoked extensive litigation. Some have examined the potential problems of using the courts to produce reform policy. Others have questioned whether this deployment reinforces existing power structures. Many have explored whether or not turning to the legal system has proven successful for the movements and their reform-oriented goals.”). See also Lynette J. Chua & David M. Engel, *Legal Consciousness Reconsidered*, 15 *ANN. REV. L. & SOC. SCI.* 335, 336 (2019).

²⁶ See generally SILVERSTEIN, *supra* note 24.

²⁷ See Chua & Engel, *supra* note 25, at 336 (describing the presence of diversity in the field of law and social movements. The authors explain that “[t]here has been extraordinary diversity in our field on these matters. In some respects, the story is one of “restless searching” for new and better research paradigms.”).

²⁸ See *id.*; Steven A. Boutcher & Lynette J. Chua, *Introduction: Law, Social Movements, and Mobilization Across Contexts*, 40 *U. DENVER L. & POL’Y* 5, 6 (2018).

²⁹ Kenneth T. Andrews & Kay Jowers, *Lawyers and Embedded Legal Activity in the Southern Civil Rights Movement*, 40 *U. DENV. L. & POL’Y* 10, 12 (2018).

³⁰ See Kostiner, *supra* note 25, at 323–24 (stating that “[s]ome studies of the effects of law on social change have tended toward a critical view of law, arguing that legal tactics are usually futile in bringing about meaningful social reform”). See also GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008) (concluding that major litigation campaigns such as ending school segregation, abortion rights, and environmental justice have failed to produce the significant social change sought by social movement and activists).

³¹ See ROSENBERG, *supra* note 30, at 175–228 (particularly in his discussion about abortion rights movement); see also Kostiner, *supra* note 25, at 325 (discussing Rosenberg’s account of the landmark decisions and his description of the negative effects these decisions have had on the social movements).

Gerald Rosenberg’s analysis of the Supreme Court’s landmark decisions in *Brown v. Board of Education* and *Roe v. Wade* exemplifies this pessimistic outlook.³² Rosenberg argued that the decision in *Brown v. Board* failed to create the social change that activists fought for.³³ Activists and organizations, such as the National Association for the Advancement of Colored People (“NAACP”), advocated for *Brown v. Board*’s holding, believing that integration would bring the social change that their movement fought for.³⁴ However, while *Brown v. Board* legally established the end of segregation, schools remained segregated for a long time after the decision.³⁵ Instead, Rosenberg attributed the end of segregation to the 1964 Civil Rights Act and threats by the Federal government to cut school funding.³⁶ Essentially, Rosenberg argued, the Court and its key actors—judges—had failed.

Similarly, Rosenberg found that the Supreme Court failed to create social change in *Roe v. Wade*.³⁷ The decision, in which the Supreme Court found a constitutional right to abortion through the right to privacy, should have been a meaningful victory for the reproductive choice movement. Instead, the Court’s decision triggered attacks from anti-abortion groups, which in turn helped entrench anti-abortion ideological positions around the narrative of women’s abortion rights.³⁸ Other scholars also documented how the anti-abortion views of conservative groups created a negative impact that overshadowed the *Roe v. Wade* decision.³⁹ Some scholars attributed the conservative reaction to the Court’s actions, though others added complexity or outright disagreed.⁴⁰

Thus, many scholars do not see legal tools as helpful to social movements, even when court decisions appear to achieve a movement’s core objective.⁴¹ In strong language, Rosenberg described courts as “fly-paper” for social movements:

... courts act as ‘fly-paper’ for social reformers who succumb to the ‘lure of litigation.’ If the constraints of the Constrained Court view are correct, then courts can seldom produce significant social reform. Yet if groups

³² ROSENBERG, *supra* note 30.

³³ *Id.* at 47.

³⁴ JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* xiii–xix (2001). Of course, scholars and supporters have, for a long time, also acknowledged concerns and limits of the decision; *id.* at xxvii–xxix.

³⁵ Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 885 (2013).

³⁶ ROSENBERG, *supra* note 30, at 47. 33

³⁷ *Id.* at 174–78 (describing that at “first glance, the results appear spectacular” with respect to the Court’s decision, sending shock waves and becoming a landmark decision. However, at the same time, the decision triggered more litigation around abortion, forcing states to change their abortion laws to comply with the Court’s decision, making it harder for women to access safe abortions.).

³⁸ Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 447 (2001).

³⁹ JOSHUA C. WILSON, *THE NEW STATES OF ABORTION POLITICS* 33–37 (2016); ZIAD W. MUNSON, *THE MAKING OF PRO-LIFE ACTIVISTS* 76–79 (2019). For a partial agreement, but with additional complexity, see Mary Ziegler, *Beyond Backlash: Legal History, Polarization, and Roe v. Wade* 71 WASH. & LEE L. REV. 969, 970–75 (2014). For rejection of the backlash view, see Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028, 2029–34 (2011).

⁴⁰ *Id.*

⁴¹ STUART SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 24–55 (2d ed. 2004).

advocating such reform continue to look to the courts for aid, and spend precious resources in litigation, then the courts also limit change by deflecting claims from substantive political battles, where success is possible, to harmless legal ones, where it is not. Even when major cases are won, the achievement is more often symbolic than real. Thus, courts may serve an ideological function of luring movements for social reform to an institution that is structurally constrained from serving their needs, providing only an illusion of change.⁴²

While many law and social movement scholars focus on the role of courts, other studies focus on achievements and meanings adopted by activists who routinely participate in the legal campaigns.⁴³ Instead of focusing on the Supreme Court as an avenue to create change and achieve core social movement goals, the next generation of scholars focused on how *activists* use their rights and the law.⁴⁴

A. *Focusing Away from the Courts*

More recent scholarship on social movements and law perceives the relationship between law and social movements as dynamic, with the law providing a structure for social movements to generate collective identities and claim their rights.⁴⁵ For example, some scholars focus on how legal consciousness and identity emerge from and shape one another.⁴⁶

Other scholars focus on how activists' legal tactics indirectly empower social movements.⁴⁷ Instead of focusing on the courts as central figures, scholars focused on whether and how law matters for social change more broadly.⁴⁸ Under this shift, scholars recognize social movements as seeking more than legal reform through the courts. For many social movements, if not all, victories do not necessarily stem from landmark court

⁴² ROSENBERG, *supra* note 30, at 427–28.

⁴³ MICHAEL W. MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* (1994); Kostiner, *supra* note 25, at 324; *see also* SILVERSTEIN, *supra* note 24, at 4 (stating that the decentered view of the law does not “focus on what is often taken to be the centerpiece of law, that is the courts. Instead, the decentered view stresses the importance of looking at law as it is manifest in the wider spheres of society.”).

⁴⁴ Boutcher & Chua, *supra* note 28, at 6; *see also* Cummings & Eagly, *supra* note 38, at 445–46 (describing the different strategies in the 1970s, 1980s and 1990s); Andrews & Jowers, *supra* note 29, at 2–3 (taking the traditional top-down approach but extending earlier research by focusing on the many roles that lawyers play in a social movement, rather than focusing on the traditional, powerful role of attorneys); Alesha Doan, Carolina Costa Candal, & Steven Sylvester, “*We Are the Visible Proof*”: *Legitimizing Abortion Regret Misinformation Through Activists' Experiential Knowledge*, 40 U. DENV. L. & POL'Y 33 (2018) (analyzing conservative legal mobilization by focusing on the anti-abortion movement in the United States, and examining how individual, experiential evidence counters scientific knowledge).

⁴⁵ *See* Andrews & Jowers, *supra* note 29.

⁴⁶ Chua & Engel, *supra* note 25, at 337–38.

⁴⁷ Kostiner, *supra* note 25, at 324; *see also* MCCANN, *supra* note 43, at 550–51; SILVERSTEIN, *supra* note 24, at 4 (suggesting that “a decentered approach recommends that we proceed with an examination of law by exploring the continuous and dynamic interaction between the judicial and the nonjudicial” and that by “examining the interaction between these two realms[,]” we can understand the “way each informs and shapes the other.”).

⁴⁸ *See* NeJaime, *supra* note 35, at 885; Boutcher & Chua, *supra* note 28, at 6.

decisions, such as *Brown v. Board* and *Roe v. Wade*. Instead, social movements seek to change public opinion, mobilize voters, enact legislation, and create new behavioral norms.⁴⁹ Social movements recognize that changes in society's values and public opinion feed back into the legal system and affect the prospects for legal reform.⁵⁰ These approaches analyze how the law affects activism, the impact of litigation, and the use of law in lobbying, policymaking, and implementation.⁵¹ Instead of focusing solely on legal institutions and legal elites, such as lawyers and judges, this bottom-up approach focuses on the law's effect on social movement efforts.⁵²

In looking at the civil rights movement through a bottom-up approach, scholars such as Kenneth Andrews and Kay Jowers turned away from the pessimistic view that courts are powerless.⁵³ They introduce the concept of embedded legal activity, in which lawyers, legal organizations, and social movements entwine, rather than focusing solely on decisions by the Supreme Court or courts generally.⁵⁴ These efforts do not require a major legal change through landmark decisions such as *Brown v. Board* to achieve meaningful gains. Andrews and Jowers describe using the law beyond achieving landmark legal victories.⁵⁵ For example, civil rights attorneys devoted considerable resources to representing Black citizens in need of legal representation in the South. Attorneys traveled from different states to the South to represent individuals unable to find local attorneys on matters such as the denial of government benefits or routine legal matters such as adoption proceedings.⁵⁶ Though these matters may be unrelated to the movement's more general efforts, they hindered these peoples' participation in the movement if left unresolved. While these activities on their own did not seek to achieve a core goal for the movement, they provided support for the communities where the movement's organization and gatherings took place.⁵⁷ Law can also help formulate demands, supply bargaining chips in negotiation, be used symbolically to mobilize, form, and argue for interests, and provide social movements with tools to promote their goals.⁵⁸ This approach does not discount the importance of symbols in social battles.⁵⁹ Through embedded legal activity, lawyers support the movement's constituents and the social movement's organizing efforts, and move away from impact litigation's exclusive focus on legal reform.

⁴⁹ Coglianesse, *supra* note 23, at 86.

⁵⁰ *Id.*

⁵¹ Boutcher & Chua, *supra* note 28, at 5.

⁵² SILVERSTEIN, *supra* note 24, at 5 (explaining that while courts, judges, lawyers, and litigation remain important components of the analysis, it is moving is away from court-centered study. Further, by examining "nonjudicial forms of social regulation in relation to judicial forms, the goal is to see how they are mutually constituted" so that we can "understand law not as something removed from social life . . . but as fused with and thus inseparable from all the activities of living and knowing" (quoting Susan S. Silbey & Austin Sarat, *Critical Traditions in Law and Society*, 21 *LAW & SOC'Y* 165, 173 (1987)).

⁵³ Andrews & Jowers, *supra* note 29, at 10–11.

⁵⁴ *Id.* at 10.

⁵⁵ *Id.* at 11.

⁵⁶ *Id.* at 26.

⁵⁷ *See generally id.* at 27.

⁵⁸ Michael W. McCann, *Reform Litigation on Trial*, 17 *LAW & SOC. INQUIRY* 715, 733–34 (1992).

⁵⁹ *Id.*

B. Social Movements Using Narratives in and Out of Legal Contexts

Another line of studies of social movements' use of the law examined how these movements embedded narratives by drawing on legal language, or, alternatively, narratives seeking to influence legal realities. Doan, Costa Candal, and Sylvester focused on the social movements in the wake of *Roe v. Wade*, describing how groups fighting against abortion used creating a narrative about "abortion regret" to reframe the issue of abortion as in tension with women's rights and welfare.⁶⁰ Anti-abortion activists also interacted with the courts, but they focused on community efforts to spread a message of personal experience, mixed with false information, to influence the courts and create a basis for legal change.⁶¹ Specifically, the movement spread abortion regret messages through experiential anecdotes as additional evidence to generalize—mostly inaccurately—about the long-term consequences of abortion.⁶² Anecdotes are compelling because they are based on an individual's experiential knowledge, rather than second-hand retellings. They are particularly powerful because it is difficult to argue that a person's experience is false or incorrect.⁶³ Many anti-abortion activists used abortion regret as a talking point based on experiential knowledge, explaining that their own experiences of regret motivated their participation in the movement.⁶⁴

In this case, anecdotes functioned as a powerful tool to create a narrative—that abortion harms women—to advance the group's social change agenda. Many participants felt the media was not always the best place to spread the anti-abortion movement's narrative. Instead, participants utilized other methods, such as playing films with the anti-regret rhetoric; "uncovering" pro-abortion bias using experiential evidence; and using newsletters, blogs, online testimonies, and support groups.⁶⁵ One interviewee, for instance, stated the following:

Well we figured the best way to do it is just go to the people.... We showed that film [Silent Scream] and several other films four or five hundred times. Over time, you build up this mass of people ... that's the way to do it, and that's the way we continue to do it. We continue to just do the grassroots stuff, anything from door hanging, to bulleted inserts, to billboards ... all we have to do is bring it to the forefront.⁶⁶

The anti-abortion movement used these anecdotes on multiple fronts. First, they used regret narratives to challenge research that discredited the legitimacy of abortion regret.⁶⁷

⁶⁰ See Doan, Candal, & Sylvester, *supra* note 44 (focusing their piece on how anti-abortion activists mobilized themselves to counter *Roe v. Wade*, a landmark decision on abortion and women's rights).

⁶¹ *Id.*

⁶² *Id.*; see also Jody Lyneé Madeira, *Aborted Emotions: Regret, Rationality, and Regulation*, 21 MICH. J. GENDER & L. 1 (2014) (discussing several common missteps in current constructions, including conflating regret with psychopathy; confusing regret with remorse; and coupling regret with moral culpability).

⁶³ Doan, Candal, & Sylvester, *supra* note 44, at 38.

⁶⁴ *Id.*

⁶⁵ *Id.* at 48.

⁶⁶ *Id.*

⁶⁷ *Id.* at 25.

Second, the movement promoted the “post-abortive woman”⁶⁸ and her narrative of regret as the key political strategy. Part of that strategy contained misinformation, often linking abortion to ailments such as depression, suicide, breast cancer, and infertility.⁶⁹ This was especially important for a movement whose reputation suffered from negative coverage of protests outside of abortion clinics.⁷⁰ To counter the pro-choice depiction of the anti-abortion movement as “extremist bent on ‘saving babies’ while callously disregarding women,” anti-abortionists reframed their ideas by linking abortion to inherent psychological and physical harms to the women involved.⁷¹ Several studies counter this connection—at least as a general phenomenon—through statistical and medical evidence, linking the ailments to other issues such as violence and preexisting conditions.⁷² However, the anecdotes of regret remain a strong influence.

Third, the movement promoted abortion regret in their lobbying efforts to restrict abortion services. Some scholars argue that these regret anecdotes are the bedrock of a larger anti-abortion narrative and reinforce the misinformation contained in the anti-abortion legislation of several states, which rely on abortion regret as the backbone for legislation.⁷³ For example, anti-abortion activists lobbied legislators to pass incremental restrictions on abortion services, and justified it by linking abortion to a variety of ailments and health risks, through the narratives described above.⁷⁴ However, their influence went further than state legislation; the abortion regret narrative made its way into the Supreme Court. For example, the concept of regret influenced multiple key court decisions, such as *Gonzales v. Carhart*, where the court described, “some women come to regret their choice” and “severe depression and loss of esteem can follow.”⁷⁵ Not only did the Court invoke

⁶⁸ *Id.* at 35 (using the term “post-abortive women,” as coined by pro-life activists, in reference to women who have had abortions).

⁶⁹ See Brenda Major, Mark Appelbaum, Linda Beckman, Mary Ann Dutton, Nancy Felipe Russo, & Carolyn West, *Abortion and Mental Health: Evaluating the Evidence*, 64 AM. PSYCH. 863, 866 (2009) (suggesting that women who reject the relationship between her and fetus through abortion can experience “post-abortion syndrome” (PAS), which can include: depression, grief, anxiety, low self-esteem, regret, remorse, and even suicidal thoughts).

⁷⁰ Doan, Candal, & Sylvester, *supra* note 44, at 34.

⁷¹ *Id.* at 35.

⁷² *Id.* at 37 (indicating that studies have refuted the methodological soundness of research indicating a link between abortion and adverse mental health. For example, a Harvard Review of Psychiatry examined 216 studies of abortion and mental health and concluded that research linking abortion and subsequent poor mental health is plagued by numerous methodological flaws while other more methodically sound studies found that the experience of sexual assault, violence, and preexisting disorders were the strongest predictors of mental health problems following an abortion).

⁷³ *Id.* at 34.

⁷⁴ *Id.* at 36.

⁷⁵ *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007). In making its decision, the Supreme Court wrote: “Whether to have an abortion requires a difficult and painful moral decision . . . it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.” *Id.* The Court obtained the information about regret it relies on from briefs submitted by attorneys. Justice Ginsberg, with whom Justices Stevens, Souter, and Breyer joined in dissent, clearly pointed out the majority’s use of anti-abortion “shibboleth for which it concededly has no reliable evidence.” *Id.* at 183–84; see also *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992) (stating that “[a]bortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life . . .”).

the regret narrative, but it established that it is “self-evident” that women struggle with grief after an abortion.⁷⁶ These types of decisions, influenced by “women’s regret,” are significant for the movement because they set precedent and remain part of court opinions that can be cited later. Abortion regret narratives continue to aid the introduction of new legislation that perpetrates and legitimizes this narrative.

One main issue with experiential knowledge is that it is limited to one person’s experience and is often incomplete.⁷⁷ Experiential anecdotes are attractive. However, to counter the experience is to attack the individual’s account or credibility and perhaps go as far as having to prove that regret was not part of the experience at all. Such a counter is an impossible and invasive task and could spark backlash. As such, anecdotes play a powerful role in shaping legislation and spreading misinformation in the meantime.

This example shows the power of using narratives to shape social realities and the link between legal tools and narratives. This approach is not unique to the anti-abortion movement. Other social movements follow a similar approach. Specific to our case, the anti-vaccine movement uses similar tactics, such as creating narratives and using experiential knowledge.

Narratives are important because they are the “primary form by which human experience is made meaningful.”⁷⁸ All narratives are stories with a beginning, middle, end, and plot. Narratives in social movements create a particularly powerful form of meaning by focusing on an “end.” These narratives are then used to shape the discourse.⁷⁹ As another example, the anti-vaccine movement uses anecdotes to create narratives, too.⁸⁰ However, this is not the only way to create narratives, and in this Article, we show another way that narratives are created and promoted. ICAN created a narrative of a grand conspiracy that harms the public, and, as we will demonstrate, ICAN used its legal efforts to support this narrative.

Different impetuses also construct narratives. In the anti-abortion movement, litigation was an impetus for the movement’s narrative, and the narrative grew out of the litigation.⁸¹ In contrast, as we will discuss, the anti-vaccine group we focused on, the Informed Action Network (ICAN), used legal tools to help support and create its own narrative. ICAN became a key player in the anti-vaccine movement, as Part II shows. To do so, ICAN used its legal efforts to create the narratives it used to spread false information about vaccine safety, thereby creating an alternate reality. ICAN’s reality is, in part, grounded on a purposeful misinterpretation of court decisions and findings.

⁷⁶ The Court continues with its abortion regret discourse by stating that “[t]he State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.” *Id.* at 159–60.

⁷⁷ Doan, Candal, & Sylvester, *supra* note 44, at 39.

⁷⁸ DONALD E. POLKINGHORNE, *NARRATIVE KNOWING AND THE HUMAN SCIENCES* 1 (1988).

⁷⁹ See generally Doan, Candal, & Sylvester, *supra* note 44 (discussing the use of anecdotes to create a narrative).

⁸⁰ Ashley Shelby & Karen Ernst, *Story and Science: How Providers and Parents Can Utilize Storytelling to Combat Antivaccine Misinformation*, 9 *HUM. VACCINES & IMMUNOTHERAPEUTICS* 1795, 1795–96 (2013); Anna Kata, *Anti-Vaccine Activists, Web 2.0 and the Postmodern Paradigm – An Overview of Tactics and Tropes Used Online by the Anti-Vaccination Movement*, 30 *VACCINE* 3778, 3784 (2012).

⁸¹ Doan, Candal, & Sylvester, *supra* note 44, at 33–34.

As we set out in this section, a large literature has studied social movements' use of the courts in past decades. After an initial focus on the top-down effect of court decisions, a more recent strand looked at the way activists used legal tools in a variety of practical and symbolic ways, and we hope our analysis of ICAN's actions will add to that literature. Specifically, we emphasized the subset of those studies that looked at constructive narratives around legal struggles and will look at the ways ICAN used the law to construct narratives.

II. INTRODUCING ICAN

ICAN was created in 2016 and filed its first 990-EZ tax return for a nonprofit exempt from income tax that year.⁸² ICAN's website describes its mission as “[i]nvestigating the safety of medical procedures, pharmaceutical drugs, and vaccines while educating the public of their right to ‘informed consent.’”⁸³

ICAN was created and founded by Del Bigtree,⁸⁴ who previously worked as a producer on two shows that brought medicine into popular culture, *Dr. Phil* and *The Doctors*, where he learned to dramatize medicine through stories.⁸⁵ *The Doctors* was not always medically accurate, with one article finding that there was some medical support (not necessarily compelling) for 63% of their recommendations, but only 53% had believable evidence in support.⁸⁶ Similarly, a journalist providing an in-depth profile of Mr. Bigtree described *Dr. Phil* in terms that suggest the show may not have been focused on providing scientifically accurate information.⁸⁷

Additionally, in 2016, Bigtree worked with disgraced anti-vaccine doctor Andrew Wakefield to create a film called *Vaxxed*, which used an alleged whistleblower from the CDC to claim that the MMR vaccines caused autism in children.⁸⁸ This claim is untrue: large studies show no link between the MMR vaccine and autism.⁸⁹ *Vaxxed* aired in April

⁸² DEP'T OF TREASURY INTERNAL REVENUE SERV., 990-EZ SHORT FORM RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX (2021), <https://www.irs.gov/pub/irs-pdf/f990ez.pdf>.

⁸³ ICAN, <https://www.icandecide.org> (last visited Feb. 22, 2022).

⁸⁴ Team, ICAN, <https://www.icandecide.org/team/> (last visited June 11, 2021).

⁸⁵ Patrick A. Coleman, *Where Del Bigtree's Anti-Vaccine Conspiracy Theories Come from*, YAHOO (Apr. 30, 2019), <https://www.yahoo.com/video/where-del-bigtree-anti-vaccine-172356321.html>.

⁸⁶ Christina Korownyk, Michael R. Kolber, James McCormack, Vanessa Lam, Kate Overbo, Candra Cotton, Caitlin Finley, Ricky D. Turgeon, Scott Garrison, Adrienne J. Lindblad, Hoan Linh Banh, Denise Campbell-Scherer, Ben Vandermeer, & G. Michael Allan, *Televised Med. Talk Shows—What They Recommend and the Evidence to Support Their Recommendations: A Prospective Observational Study*, 349 BRIT. MED. J. 1–9 (Dec. 17, 2014).

⁸⁷ Coleman, *supra* note 85 (commenting on the show: “*Dr. Phil* was, in the early 2000s when Bigtree worked there, disaster porn on a human level.”).

⁸⁸ Jackie Kucinich, *Top Anti-Vaxxer Says He Learned All He Needs to Know from Being a Producer on 'Dr. Phil' and 'The Doctors'*, DAILY BEAST (Apr. 24, 2019, 7:04 PM), <https://www.thedailybeast.com/anti-vaxxer-del-bigtree-got-his-start-on-the-tv-show-the-doctors>.

⁸⁹ The most recent study on MMR and autism looked at 663,236 children in Denmark between 1999–2010, and found no link between MMR and autism, or between MMR and vaccines generally (4,729 children in the cohort received no childhood vaccines, and the rates were similar in that group). Anders Hviid, Jørgen V. Hansen, Morten Frisch, & Mads Melbye, *Measles, Mumps, Rubella Vaccination and Autism: A Nationwide Cohort Study*, 170 ANNALS INTERNAL MED. 513, 513–15 (2019). This study followed many large studies, of which several were included in a meta-analysis from Australia that covered over five

2016 and received more attention than it otherwise may have from national media after the Tribeca Film Festival rescinded its offer to show the film.⁹⁰

ICAN uses its show, *The Highwire with Del Bigtree*, which airs online every Thursday, as a tool to diffuse anti-vaccine information.⁹¹ On this show, Bigtree talks for about two hours (sometimes more) with an anti-vaccine spin on current events.⁹² *The Highwire with Del Bigtree* provides claims, themes, and facts that later become talking points for anti-vaccine activists. These talking points spread through the alternative reality of the anti-vaccine movement, and on occasion, calls to action that reach large segments of the anti-vaccine world.⁹³ Anti-vaccine claims aired by ICAN quickly find their way into online anti-vaccine discussions, and reach a large number in the anti-vaccine community.⁹⁴ Bigtree also frequently uses press releases.⁹⁵

million children. Luke E. Taylor, Amy L. Swerdfeger, & Guy D. Eslick, *Vaccines are Not Associated with Autism: An Evidence-Based Meta-Analysis of Case-Control and Cohort Studies*, 32 *VACCINE* 3623 (2014). Another large study from recent years in the United States looked at over 95,000 children. Anjali Jain, Jaclyn Marshall, Ami Buikema, Tim Bancroft, Johnathan P. Kelly, & Craig J. Newschaffer, *Autism Occurrence by MMR Vaccine Status Among U.S. Children with Older Siblings with and Without Autism*, 313 *J. AM. MED. ASS'N*. 1534 (2015). On this extensive evidence, the claim that MMR causes autism was not colorable in 2016—even before the 2019 Hviid, Hansen, Frisch, and Melbye study. While it is beyond the focus of this paper, the initial paper alleging a link between MMR and autism was retracted and can be fairly described as an intentional fraud. Brian Deer, *How the Case Against the MMR Vaccine Was Fixed*, 342 *BRIT. MED. J.* c5347, c5347–49 (2011).

⁹⁰ Nigel M. Smith, *Director of Controversial Vaxxed Film Calls Tribeca Snub a Free Speech Issue*, *GUARDIAN* (Mar. 30, 2016), <https://www.theguardian.com/film/2016/mar/30/vaxxed-andrew-wakefield-tribeca-robert-de-niro-free-speech>.

⁹¹ Tara C. Smith & Dorit Rubinstein Reiss, *Digging the Rabbit Hole, COVID-19 Edition: Anti-Vaccine Themes and the Discourse Around COVID-19*, 22 *MICROBES & INFECTION* 608, 608–09 (2020).

⁹² This description draws on Dorit Reiss' following of the show. While she no longer watches it fully, she checks the topics and does spot-checking every week to remain current on its content. *Episode 280: Rigged*, *HIGHWIRE* (Aug. 12, 2022), <https://thehighwire.com/watch/>. ICAN also links to it through a tab on the top of its website.

⁹³ Brandy Zadrozny, *Once Struggling, Anti-Vaccination Groups Have Enjoyed a Pandemic Windfall*, *NBC NEWS* (Feb. 3, 2022, 8:39 AM), <https://www.nbcnews.com/tech/internet/struggling-anti-vaccination-groups-enjoyed-pandemic-windfall-rcna14402> [hereinafter Zadrozny, *Once Struggling*] (“According to data from Similarweb, a digital analytics tool, The Highwire’s website is among the most popular ‘alternative and natural medicine sites’ in the world, and reaches just over 1 million visits per month.”).

⁹⁴ Brandy Zadrozny, *COVID-19 Vaccines Face a Varied and Powerful Misinformation Movement Online*, *NBC NEWS* (Nov. 30, 2020, 2:10 PM), <https://www.nbcnews.com/tech/tech-news/covid-19-vaccines-face-varied-powerful-misinformation-movement-online-n1249378>.

⁹⁵ See, e.g., *Following ICAN Lawsuit, CDC Removes Claim ‘Vaccines do not Cause Autism’ From its Website*, *NEWSWIRES* (Jan. 25, 2021, 8:15 AM), https://www.einnews.com/pr_news/535022586/following-ican-lawsuit-cdc-removes-claim-vaccines-do-not-cause-autism-from-its-website [hereinafter *CDC Removes Claim*]. This specific press release, reflecting an article published by the group on its own site, may have been a mistake, since not only was the claim wrong from the start—since the CDC just changed its site to say “there is no link between vaccines and autism”—but CDC revised its page to return the language ICAN alleged it removed on January 26, 2021, the day after the press release. See *Autism and Vaccines*, *CTRS. FOR DISEASE CONTROL & PREVENTION* (Dec. 1, 2021), <https://www.cdc.gov/vaccinesafety/concerns/autism.html> (stating that there is no link between vaccines, and citing a 2013 CDC study to show that vaccines do not cause autism); see also Dorit R. Reiss, *ICAN, CDC, and the Reformatted “Vaccines do Not Cause Autism” Page*, *SKEPTICAL RAPTOR* (Jan. 26, 2021), https://www.skepticalraptor.com/skepticalraptorblog.php/ican-claims-win-because-cdc-reformatted-vaccines-and-autism-page/?fbclid=IwAR2v2_M0U0qRkXs0xBd9kHQqSKDj-OIzpwefMWkLrUH50vEbZMpNjtKIWbY [hereinafter *ICAN, CDC, and the Reformatted*].

In addition to Mr. Bigtree, ICAN's team, as described on its website, includes Catharine and Patrick Layton, parents who believe vaccines caused their child's autism.⁹⁶ ICAN's website describes Catharine Layton as "an advocate for children, scientific integrity and fundamental rights at local, state and national levels," with "ten years of experience in nonprofit organizational operation" who "also holds a Certificate in Immunology from Harvard Medical School."⁹⁷ Patrick Layton joined after working as a bus driver for the team behind the *Vaxxed* film.⁹⁸

ICAN is not short of funding. In 2017, it received more than a million dollars in donations, making it a very well-funded nonprofit organization.⁹⁹ Much of the money comes from a wealthy New York couple, Bernard and Lisa Selz.¹⁰⁰ In its 2019 990 form, ICAN reported \$3,446,656 as income,¹⁰¹ \$2,460,000 of which came via the charitable foundation from investment firm T. Rowe Price, which allows donors to set up accounts and anonymously recommend which charities to give donations.¹⁰² It is unclear who actually gave the money to ICAN. These donations grew during the pandemic, reaching \$5.5 million in 2020.¹⁰³

The donations ICAN receives provide generous salaries to its members. In 2019, ICAN's 990 form showed that four group members received salaries: Del Bigtree received \$232,000; Catharine Layton, described as COO, received \$138,836; Jenn Sherry Parry, described as "executive producer," received \$162,500; and Patrick Layton, described as "creative director," received \$111,164.¹⁰⁴

ICAN's funding also provides enough resources to cover its use of the law. According to its 2019 990 form, out of ICAN's \$3.4 million in funding, \$1,264,765 went to legal expenses.¹⁰⁵ The entire \$1,264,756 was paid to one New York legal firm, Siri & Glimstad, which has worked with ICAN for several years.¹⁰⁶ In 2020, ICAN's payments to the firm reached \$2.1 million.¹⁰⁷

⁹⁶ *Team*, *supra* note 84.

⁹⁷ *Id.*

⁹⁸ *Id.*; Orac, *Trolling the Antivaccine Trolls*, RESPECTFUL INSOLENT (Aug. 31, 2017), <https://respectfulinsolence.com/2017/08/31/trolling-the-antivaccine-trolls/> (describing the *Vaxxed* bus and its tour). ICAN's website mentions several other members of the team, including Jeffery Jaxen, an anti-vaccine journalist. Additional members are mentioned on the group's 990 form. *See infra* note 101.

⁹⁹ *Informed Consent Action Network: Tax Filing by Year*, PROPUBLICA, <https://projects.propublica.org/nonprofits/organizations/814540235> (last visited Oct. 25, 2022).

¹⁰⁰ Lena H. Sun & Amy Brittain, *Meet the New York Couple Donating Millions to the Anti-Vax Movement*, WASH. POST (June 19, 2019, 7:05 PM), https://www.washingtonpost.com/national/health-science/meet-the-new-york-couple-donating-millions-to-the-anti-vax-movement/2019/06/18/9d791bcc-8e28-11e9-b08e-cfd89bd36d4e_story.html.

¹⁰¹ *Informed Consent Action Network: Form 990 for Period Ending December 2019*, PROPUBLICA, https://projects.propublica.org/nonprofits/display_990/814540235/09_2020_prefixes_81-82%2F814540235_201912_990_2020090917286667 (last visited Feb. 22, 2022) [hereinafter *Form 990*].

¹⁰² Zadrozny, *Once Struggling*, *supra* note 93.

¹⁰³ Zadrozny, *Once Struggling*, *supra* note 9394. ICAN also received PPP funding. Sami Sparber, *Texas Based Anti-Vaccine Group Received Federal Bailout Funds in May as Pandemic Raged*, TEX. TRIB. (Jan. 18, 2021, 2:00 PM), <https://www.texastribune.org/2021/01/18/texas-coronavirus-vaccines-ppp/>.

¹⁰⁴ *See Form 990*, *supra* note 101.

¹⁰⁵ *Id.*

¹⁰⁶ Isaac Stanley-Becker, *Resistance to Vaccine Mandate is Building. A Powerful Network is Helping.*, WASH. POST (May 26, 2021, 1:28 PM), <https://www.washingtonpost.com/health/2021/05/26/vaccine-mandate-litigation-siri-glimstad-ican/>.

¹⁰⁷ Zadrozny, *Once Struggling*, *supra* note 93.

One of the firm's partners, Aaron Siri, has represented parents in cases challenging vaccine mandates before COVID-19,¹⁰⁸ and the firm has done extensive legal work for ICAN. While nearly \$1.3 million—or even \$2.1 million—may not be a large amount for some New York law firms, that amount for a nonprofit like ICAN is over a third of its total income.¹⁰⁹

ICAN's large funding and its use of legal tools help create an alternative reality for its audience. In combination, these two aspects make ICAN an interesting case study for the way the anti-vaccine movement interacts with courts.

In October 2021, attorney Aaron Siri created his own page on Substack and started posting articles himself.¹¹⁰ The content of the articles reflects some of the themes we discuss, but several of the articles mentioned are not with ICAN.¹¹¹ Because this Article focuses on ICAN, we will not address these writings, and we will not focus on Siri's personal role in creating an anti-vaccine narrative.

III. ICAN'S USE OF THE COURTS

ICAN's mobilization uses a combination of approaches explored by social movements and legal scholars. Some of ICAN's biggest efforts combine false successes in the court system with messages that appear legally sound but are not in practice. ICAN focuses its efforts on three main areas within the legal system: FOIA requests and surrounding lawsuits, citizen petitions, and mandate lawsuits. However, similar to the anti-abortion movement, much of ICAN's focus is on shaping public opinion. Like the abortion regret narrative spread by anti-abortionists after *Roe v. Wade*, ICAN created its own narrative, an alternative reality, to spread misinformation about vaccine safety.

For this Article, we collected and examined ICAN's legal efforts, tracking FOIA requests filed, citizen petitions, and lawsuits filed until February 2022.

A. Freedom Of Information Act Requests

Some of ICAN's most significant efforts involve Freedom of Information Act (FOIA) requests. When citizens seek to obtain information not readily available to the public, they can submit a written FOIA request to an agency's FOIA office that reasonably

¹⁰⁸ Siri represented parents suing New York City to challenge its vaccine mandate; see Dorit Rubeinstein Reiss, *Flu Vaccine Mandate for Day Care Reinstated by New York Court*, SKEPTICAL RAPTOR (July 1, 2018), <https://www.skepticalraptor.com/skepticalraptorblog.php/flu-vaccine-mandate-day-care-new-york-court/>. He also represented parents in a challenge to a New York City rule allowing children to consent to HPV vaccines without parental consent in some circumstances; see Dorit Rubeinstein Reiss, *HPV Vaccine Consent Case in New York – a Review*, SKEPTICAL RAPTOR (Mar. 9, 2017), <https://www.skepticalraptor.com/skepticalraptorblog.php/hpv-vaccine-consent-case-new-york-review/>.

¹⁰⁹ The average hourly lawyer fee in New York is hundreds of dollars. See Susan Kostal, *Solo and Small Firm Hourly Rates: Winners and Losers, by State and Practice Area*, ATT'Y AT WORK (June 13, 2022), <https://www.attorneyatwork.com/solo-and-small-firm-lawyer-hourly-rates/>.

¹¹⁰ *Aaron Siri Profile*, SUBSTACK, <https://substack.com/profile/32334676-aaron-siri> (last visited Feb. 25, 2022).

¹¹¹ See, e.g., Dorit Rubenstein Reiss, *FDA Responses to FOIA Requests on COVID Vaccines – Not a Conspiracy*, SKEPTICAL RAPTOR (Nov. 26, 2021), <https://www.skepticalraptor.com/skepticalraptorblog.php/fda-responses-to-foia-requests-on-covid-vaccines-not-a-conspiracy/>.

describes the records requested,¹¹² and under 5 U.S.C. § 552, an agency is required to make the information available to the public.¹¹³ While there are established deadlines, agencies often fail to meet them.¹¹⁴ Usually, the requests are completed in the order received, with complex requests taking more time. When an agency fails to provide the requested records or to respond promptly, the courts can order their production and enjoin the agency from withholding its records.¹¹⁵

ICAN submitted many FOIA requests to agencies and used the requests in two ways: using unsuccessful requests as “proof” that the agencies are either “untruthful” or hiding information from the public and presenting responses as support for the anti-vaccine narrative, often in misleading ways.¹¹⁶ When ICAN receives what they consider an unsatisfactory response, or no response at all, they file suit in federal court, as afforded by law. Sometimes, other organizations join in the FOIA requests and court challenges. Children’s Health Defense, for example, led by Robert F. Kennedy, Jr., and the Institute for Autism Science, another large anti-vaccine organization, joined ICAN in some of its FOIA requests.¹¹⁷ Table 1 describes several FOIA requests submitted by ICAN and other organizations up until February 2022.

In the following sections, we describe several of ICAN’s FOIA requests to different federal agencies, such as the U.S. Department of Health and Human Services (HHS), the Food and Drug Administration (FDA), and the Centers of Disease Control and Prevention (CDC). ICAN used FOIA requests most aggressively to spread misinformation and distorted the meaning of the stipulations or orders obtained from court proceedings. The next three subsections each tell the story of one FOIA request, explaining what was requested, what happened, how ICAN presented the results, and how that presentation is legally and substantively misleading. We use these three case studies to establish a pattern of behavior. We then provide a subsection discussing, more broadly, ICAN’s FOIA requests during the COVID-19 pandemic, and making the case that these, too, follow the same pattern.

1. ICAN’s FOIA Request to Health and Human Services

One of ICAN’s first forays into using FOIA to create talking points occurred in 2017, with a request based on the National Childhood Vaccine Injury Compensation Act. On

¹¹² *How Do I Make A FOIA Request?*, U.S. DEP’T. JUST., <https://www.foia.gov/how-to.html> (last visited Feb. 22, 2022).

¹¹³ 5 U.S.C. § 552(a) (laying out an agency’s requirements regarding the information that needs to be provided to the public when a FOIA request is made. For instance, § 552(a)(2)(A)-(E) includes information such as final opinions, statements of policy and interpretation which have been adopted by the agency, non-published, administrative staff manuals that affect a member of the public, and “copies of all records”).

¹¹⁴ Margaret B. Kwoka, *FOIA, Inc.*, 65 DUKE L.J. 1361, 1374–75, 1423–24 (2016).

¹¹⁵ 5 U.S.C. § 552(a)(4)(B) (stating that “[o]n complaint, the district court of the United States . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” Furthermore, a court also “determines the matter *de novo*, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld” based on an exemption.).

¹¹⁶ See Table 1 for a list of FOIA requests.

¹¹⁷ Michelle R. Smith, *How a Kennedy Built an Anti-Vaccine Juggernaut Amid COVID-19*, AP NEWS (Dec. 15, 2021), <https://apnews.com/article/how-rfk-jr-built-anti-vaccine-juggernaut-amid-covid-4997be1bcf591fe8b7f1f90d16c9321e>.

August 25, 2017, ICAN submitted a FOIA request to HHS seeking “any and all reports transmitted to the Committee on Energy and Commerce of the House of Representatives and the Committee on Labor and Human Resources of the Senate by the Secretary of HHS pursuant to 42 U.S.C. §300aa-27(c).”¹¹⁸ ICAN ostensibly sought to verify that the HHS was complying with the mandate for safer childhood vaccines.¹¹⁹ The mandate requires the Secretary of HHS to prepare and transmit to Congress a report describing actions taken to comply with the mandate.¹²⁰ After ICAN filed suit in the District Court of the Southern District of New York, HHS replied to the request stating, “the [Department]’s searches for records did not locate any records responsive to” ICAN’s request despite conducting a “thorough search of its document tracking systems and a comprehensive review of all relevant records.”¹²¹ In court, ICAN and HHS stipulated to the following: “ICAN believes the foregoing response from HHS [to the FOIA] now resolves all claims asserted in this action” and the action was voluntarily dismissed.¹²²

While the stipulation simply means that ICAN agrees that HHS’s response is enough to satisfy the FOIA request, ICAN described the results differently to its followers. ICAN told its followers that this stipulation demonstrates that HHS failed to follow its primary responsibility to ensure vaccine safety after removing product liability from vaccine manufacturers and that HHS failed to comply with the mandate.¹²³ Specifically, ICAN stated on its website that the stipulation order confirmed non-compliance and that “HHS has not acted in its duties regarding vaccine safety, forcing 78 million American children into a vaccine program with no safety provisions.”¹²⁴ However, that is not what the order says or means. The order only stipulates that both parties agree HHS’s response to the FOIA completes the FOIA request.

ICAN also argued that HHS’s inability to find the requested reports means that HHS failed to submit bi-annual reports to Congress detailing actions taken to ensure vaccine

¹¹⁸ Stipulation at 2, *Informed Consent Action Network v. U.S. Dep’t of Health & Hum. Servs.*, No. 1:18-cv-03215 (S.D.N.Y. July 9, 2018).

¹¹⁹ *See* 42 U.S.C. § 300aa-27.

¹²⁰ *Id.* (requiring that the report demonstrate that the Secretary promotes the development of a childhood vaccine that results in fewer adverse reactions than the vaccines marketed on December 22, 1987, and that the Secretary “makes or ensures improvement in the licensing, manufacturing, distribution, storage, administration...” of vaccines).

¹²¹ *See* Stipulation, *supra* note 118, at 2.

¹²² *Id.*

¹²³ *ICAN vs. HHS: Key Legal Win Recasts Vaccine Debate*, CISION PR NEWSWIRE (Sept. 14, 2018, 9:45 AM), <https://www.prnewswire.com/news-releases/ican-vs-hhs-key-legal-win-recasts-vaccine-debate-300712629.html> [hereinafter *ICAN vs. HHS*] (quoting Del Bigtree as saying “HHS spends billions annually promoting vaccines and generates a steady stream of reports promoting vaccines . . . Yet, when, despite Federal law, HHS cannot bother to complete the simple task of preparing a biennial report on vaccine safety, there is little hope HHS is tackling the much harder job of improving vaccine safety.”).

¹²⁴ *Stipulated Order Confirming Non-Compliance with 42 USC 300AA-27C*, ICAN (2021), https://www.icandecide.org/ican_lawsuits/his-lawsuit/; *see also ICAN vs. HHS*, *supra* note 123 (stating that “[t]he U.S. Department of Health and Human Services (HHS) has admitted that, in direct violation of Federal law, it failed to provide a single vaccine safety report to Congress for thirty years”). This article also presents a picture of a smiling Robert F. Kennedy, Jr., who represented ICAN and founder Del Bigtree in its “successful suit against HHS.” Initially, *The Highwire with Del Bigtree* described the stipulation as showing that there were no safety studies on vaccines for 30 years—something that is demonstrably false. *See Alternative Facts from Court, the Anti-Vaccine Edition*, PRAWFSBLAWG (July 17, 2018), <https://prawfsblawg.blogspot.com/2018/07/alternative-facts-from-court-the-anti-vaccine-edition.html>. But even after retreating from that claim, ICAN continued to misrepresent the stipulation.

safety, and that there were no such actions.¹²⁵ This argument is factually wrong on several levels. HHS acted extensively to oversee vaccine safety in the past several decades. HHS engaged our top scientific institution—the Institute of Medicine (IOM), now the National Academies of Science, Engineering and Medicine—to prepare a variety of reports on vaccines safety, following different prompts (for example, some reports looked at specific vaccines, some at adverse events generally, and so forth).¹²⁶ These detailed reports summarize a large body of studies, and draw conclusions based on this ongoing data. For example, at the request of HHS in 2013, a committee of independent experts from then-IOM examined the childhood schedule.¹²⁷ The committee concluded:

The committee found no significant evidence to imply that the recommended immunization schedule is not safe. Furthermore, existing surveillance and response systems have identified known adverse events associated with vaccination. The federal research infrastructure is a strong system.¹²⁸

In July 2014, scientists completed a largescale report of vaccine risks commissioned by HHS and concluded that serious harms were rare.¹²⁹

Further, four different federal committees within HHS look at vaccine safety from different directions. The FDA’s Vaccines and Related Biological Products Advisory Committee (VRBPAC) reviews vaccines before authorization or licensure, providing an additional layer of oversight beyond the FDA’s professionals’ review.¹³⁰ The Advisory Committee on Immunization Practices reviews vaccine safety data before initial recommendations and periodically follows up with detailed reviews of vaccine safety data.¹³¹ Two more committees attached to HHS, the National Vaccine Advisory Committee (NVAC) and the Advisory Committee on Childhood Vaccines (ACCV), also have a role in looking at vaccine safety. NVAC recommends ways to prevent human infectious diseases through vaccine development and provides direction to prevent adverse

¹²⁵ See language quoted in the text about “no safety provisions”.

¹²⁶ DEP’T HEALTH & HUM. SERVS., NATIONAL VACCINE PLAN, FIRST REPORT TO THE CONGRESS (Apr. 1988), <https://www.documentcloud.org/documents/5835885-Report-1.html>; DEP’T HEALTH & HUM. SERVS., NATIONAL VACCINE PLAN, SECOND REPORT TO THE CONGRESS (May 1989), <https://www.documentcloud.org/documents/5835886-Report-2.html>.

¹²⁷ INST. OF MED. OF NAT’L ACADS, THE CHILDHOOD IMMUNIZATION SCHEDULE AND SAFETY: STAKEHOLDER CONCERNS, SCIENTIFIC EVIDENCE, AND FUTURE STUDIES (Nat’l Acad. Press, 2013), [hereinafter THE CHILDHOOD IMMUNIZATION SCHEDULE AND SAFETY].

¹²⁸ *Id.* at 15.

¹²⁹ Margaret A. Maglione, Lopamudra Das, Laura Raaen, Alexandria Smith, Ramya Chari, Sydne Newberry, Roberta Shanman, Tanja Perry, Matthew B. Goetz, & Gourtney Gidengil, *Safety of Vaccines Used for Routine Immunization of U.S. Children: A Systematic Review*, 134 PEDIATRICS 1079, 1089 (2014).

¹³⁰ *Vaccines and Related Biological Products Advisory Commission*, U.S. FOOD & DRUG ADMIN. (Apr. 26, 2019), <http://www.fda.gov/AdvisoryCommittees/CommitteesMeetingMaterials/BloodVaccinesandOtherBiologics/VaccinesandRelatedBiologicalProductsAdvisoryCommittee/>.

¹³¹ *Advisory Committee on Immunization Practices (ACIP): General Committee – Related Information*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 8, 2020), <https://www.cdc.gov/vaccines/acip/committee/index.html>; Jean C. Smith, *The Structure, Role, and Procedures of the U.S. Advisory Committee on Immunization Practices (ACIP)*, 285 VACCINE: X A68, A68 (2010).

reactions to vaccines.¹³² The ACCV advises and makes recommendations to the Secretary of HHS on issues relating to the operation of the National Vaccine Injury Compensation Program.¹³³

All these committees have independent experts and slots for consumer representatives among their members.¹³⁴ To give a more detailed example of their work, the NVAC creates standards for best practices related to vaccines, including a requirement to report adverse events.¹³⁵ The American Academy of Pediatrics endorses these standards, shares them, and offers guidance on implementation.¹³⁶

Additionally, four monitoring systems, one passive and three active, oversee vaccine safety:

- The Vaccine Adverse Events Reporting System (VAERS) is a passive reporting system designed to catch safety signals, where anyone can submit a report without verification.¹³⁷
- The Vaccine Safety Datalink, a collaboration of the CDC and several large health care organizations, allows for active monitoring and studies of over 9 million people.¹³⁸ This system includes both oversight through computer models seeking and detecting signals and specific studies.¹³⁹

¹³² *Vaccines & Immunizations: National Vaccine Advisory Commission (NVAC)*, U.S. DEP'T HEALTH & HUM. SERVS. (Sept. 13, 2021), <https://www.hhs.gov/nvpo/nvac/>.

¹³³ *Federal Advisory Committees: Advisory Committee on Childhood Vaccines (ACCV)*, HEALTH RES. & SERVS. ADMIN. (July 2022), <https://www.hrsa.gov/advisory-committees/vaccines/index.html>.

¹³⁴ For more discussion, see Dorit Rubinstein Reiss, *The COVID-19 Vaccine Dilemma*, 6 ADMIN. L. REV. ACCORD 49, 58–62 (2020).

¹³⁵ *The Standards for Pediatric Immunization Practice: Does Your Child's Health Care Provider Meet the Standards?* U.S. DEP'T OF HEALTH & HUM. SERVS. (Mar. 21, 2016), <https://www.hhs.gov/vaccines/nvac/reports-and-recommendations/the-standards-for-pediatric-immunization-practice/index.html>.

¹³⁶ For example, here is one statement of endorsement by the American Academy of Pediatrics: *Enhancing the Work of the HHS National Vaccine Program in Global Immunizations*, 133 AM. ACAD. PEDIATRICS (June 2014), <https://doi.org/10.1542/peds.2014-0952>.

¹³⁷ VACCINE ADVERSE EVENT REPORTING SYS., <https://vaers.hhs.gov/> (last visited Feb. 22, 2022).

¹³⁸ *Vaccine Safety Datalink*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 24, 2020), <https://www.cdc.gov/vaccinesafety/ensuringsafety/monitoring/vsd/>; James Baggs, Julianne Gee, Edwin Lewis, Gabrielle Gowler, Patti Benson, Tracy Lieu, Allison Naleway, Nicola P. Klein, Roger Baxter, Edward Belongia, Jason Glanz, Simon J. Hambidge, Steven J. Jacobsen, Lisa Jackson, Jim Nordin, & Eric Weintraub, *The Vaccine Safety Datalink: A Model for Monitoring Immunization Safety*, 127 PEDIATRICS S45 (May 2011); Michael M. McNeil, Julianne Gee, Eric S. Weintraub, Edward A. Belongia, Grace M. Lee, Jason M. Glanz, James D. Nordin, Nicola P. Klein, Roger Baxter, Allison L. Naleway, Lisa A. Jackson, Saad B. Omer, Steven J. Jacobsen, & Frank DeStefano, *The Vaccine Safety Datalink: Successes and Challenges Monitoring Vaccine Safety*, 32 VACCINE 5390 (Aug. 6, 2014).

¹³⁹ Roger Baxter, Edwin Lewis, Kristin Goddard, Bruce Fireman, Nandini Bakshi, Frank DeStefano, Julianne Gee, Hung Fu Tseng, Allison L. Naleway, & Nicola P. Klein, *Acute Demyelinating Events Following Vaccines: A Case-Centered Analysis*, 63 CLINICAL INFECTIOUS DISEASES 1456 (2016); Julianne Gee, Allison Naleway, Irene Shui, James Baggs, Ruihua Yin, Rong Li, Martin Kulldorff, Edwin Lewis, Bruce Fireman, Matthew F. Daley, Nicola P. Klein, & Eric S. Weintraub, *Monitoring the Safety of Quadrivalent Hum. Papillomavirus Vaccine: Findings from the Vaccine Safety Datalink*, 29 VACCINE 8279 (2011).

- PRISM, a collaboration between FDA and provider organizations that use insurance claims records, can also be used for active monitoring.¹⁴⁰
- The CDC’s Clinical Immunization Safety Assessment (CISA) project allows for studies of especially vulnerable populations and for consultation with individual providers facing adverse events or potentially at-risk patients.¹⁴¹

In light of the various committees and systems that function as additional layers of safety measures, ICAN’s claim that HHS has not been active on vaccine safety is untrue. ICAN could potentially raise more nuanced claims by pointing out specific gaps or issues in monitoring. However, that is not how ICAN used HHS’s response to its FOIA request. Further, a lack of records does not mean reports do not exist. In fact, several reports were found: an investigative reporter from the Daily Beast reached out to Congress, who located two reports.¹⁴² Congress indicated that, from the Congressional Committee’s statement and viewpoint, all reports that had to be submitted as a response to the FOIA requests were submitted.¹⁴³ Regardless of whether one agrees with that viewpoint, ICAN’s claim that no reports existed was incorrect.

2. ICAN’s FOIA Request to the Food & Drug Administration

ICAN submitted another FOIA request to obtain information from the FDA in early 2019.¹⁴⁴ ICAN sought “[a] copy of the report for each clinical trial relied upon by the FDA when approving for use by pregnant women any influenza vaccine currently approved by the FDA.”¹⁴⁵ The FDA responded by stating it did not have records responsive to ICAN’s request. Thus, the action was voluntarily dismissed without prejudice against ICAN.¹⁴⁶ Dismissing the suit without prejudice left the door open for ICAN to potentially file the same suit again in the future.¹⁴⁷

This case, therefore, ended with the agency responding to the FOIA request stating it found no records, and nothing else. Afterwards, the message ICAN gave its followers stated the FDA admitted there was no data and that the FDA failed to demonstrate that

¹⁴⁰ *FDA Voices: Insights from FDA Leadership and Experts into the Agency's Work in the Following Topic Areas*, U.S. FOOD & DRUG ADMIN. (Feb. 28, 2022), <https://blogs.fda.gov/fdavoices/index.php/2017/04/prism-identifies-vaccine-safety-issues/> (last visited Feb. 22, 2022).

¹⁴¹ *Vaccine Safety: Clinical Immunization Safety Assessment (CISA) Project*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 14, 2020), <https://www.cdc.gov/vaccinesafety/ensuringsafety/monitoring/cisa/>.

¹⁴² Kucinich, *supra* note 88.

¹⁴³ *Id.*

¹⁴⁴ Notice of Voluntary Dismissal at 1, *Informed Consent Action Network v. U.S. Food & Drug Admin.*, No. 18-cv-11237-VEC (S.D.N.Y. Feb. 10, 2019).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Dismissal with prejudice means that the court has made a final determination on the merits of the case, and that the plaintiff is not allowed to file another suit based on the same grounds. That did not for this dismissal, nor does it happen for many of the dismissals that ICAN obtains.

clinical trials show these vaccines are safe during pregnancy.¹⁴⁸ On its website, ICAN provided a copy of the voluntary dismissal under a page titled “Stipulated Order Showing the FDA’s Off-Label Use of Vaccines During Pregnancy.”¹⁴⁹ The title alone implies the FDA admitted to the “off-label” use of influenza vaccines during pregnancy, although the FDA simply stated that it did not have the records requested. Specifically, ICAN promoted the voluntary dismissal as follows:

In the end, as seen from the document which ended the lawsuit, it is clear the FDA has not licensed any influenza vaccine as an indicated use for pregnant women, let alone conducted or required any pharmaceutical company to conduct any clinical trial which supports the safety of injecting pregnant women with the influenza vaccine.¹⁵⁰

The claim is misleading both substantively and legally. Regarding substance, ICAN used the request to imply that there is no legal or scientific basis for using Tdap¹⁵¹ and influenza vaccines during pregnancy.¹⁵² That is not true. While the FDA has not licensed influenza and Tdap vaccines for use during pregnancy, a CDC expert committee recommended their off-label use, something doctors can, legally, do once FDA approves a product.¹⁵³ The term off-label use refers to using an approved drug in a way that was not clearly indicated in the initial license, and the FDA acknowledges that off-label use is permissible.¹⁵⁴ The CDC expert committee did not base its recommendation on clinical trials but on large retrospective studies showing that influenza is dangerous during

¹⁴⁸ *Stipulated Order Showing FDA’s Off-Label Use of Vaccines During Pregnancy*, ICAN, https://www.icandecide.org/ican_lawsuits/the-food-and-drug-administration-fda-admits-it-has-never-licensed-any-influenza-vaccine-for-use-by-pregnant-women-and-does-not-have-a-single-trial-supporting-the-safety-of-this-practice/ (last visited Jun. 26, 2022).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ The Tdap vaccine can prevent tetanus, diphtheria, and pertussis. For more information on each of these infections, see *Tdap (Tetanus, Diphtheria, Pertussis) VIS*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 6, 2021), <https://www.cdc.gov/vaccines/hcp/vis/vis-statements/tdap.html>.

¹⁵² In addition to its press release, ICAN made the same claims in a Facebook post from February 13, 2019; see *Informed Consent Action Network*, FACEBOOK (Feb. 13, 2019), <https://www.facebook.com/ICANdecide/posts/the-fda-admits-it-has-never-licensed-any-influenza-vaccine-for-use-by-pregnant-w/1353754178097916/>.

¹⁵³ An unapproved use of an approved drug is called “off-label” use. See *Understanding Unapproved Use of Approved Drugs “Off Label”*, U.S. FOOD & DRUG ADMIN. (Feb. 5, 2018), <https://www.fda.gov/patients/learn-about-expanded-access-and-other-treatment-options/understanding-unapproved-use-approved-drugs-label> [hereinafter *Understanding Unapproved Use*]; see also Anthony E. Fiore, Timothy M. Uyeki, Karen Broder, Lyn Finelli, Gary L. Euler, James A. Singleton, John K. Iskander, Pascale M. Wortley, David K. Shay, Joseph S. Bresee, & Nancy J. Cox, *Prevention and Control of Influenza with Vaccines: Recommendations of the Advisory Comm. on Immunization Practices (ACIP)*, 2010, 59 CTRS. FOR DISEASE CONTROL & PREVENTION: RECOMMENDATIONS & REPS. 1, 7 (Aug. 6, 2010).

¹⁵⁴ *Understanding Unapproved Use*, *supra* note 153 (“From the FDA perspective, once the FDA approves a drug, healthcare providers generally may prescribe the drug for an unapproved use when they judge that it is medically appropriate for their patient.”).

pregnancy and that vaccines are safe.¹⁵⁵ In other words, it is open and public knowledge that the basis for the CDC recommendation was not clinical trials, not dependent on the FDA, and not part of the initial licensure. In that sense, ICAN added no new information. The recommendation for pregnant women did have data to support it—just not clinical trial data collected by FDA. Claiming that the FDA’s response shows vaccines were recommended to pregnant women without data was misleading. Presenting this information to imply a conspiracy—that the FDA and CDC pretended the vaccines are recommended based on the initial clinical trials, which is what ICAN’s characterization does—is also misleading.

The claim is also legally incorrect. Voluntary dismissal is simply a termination of a lawsuit by request of the plaintiff.¹⁵⁶ In this case, ICAN, as the plaintiff, sought termination of the lawsuit,¹⁵⁷ which could imply that ICAN was satisfied with the resolution and could terminate the lawsuit without loss. The dismissal, however, cannot by itself demonstrate that the “FDA has not licensed any influenza vaccine” for pregnant women or that the FDA failed to require “any pharmaceutical company to conduct any clinical trial which supports the safety of injecting pregnant women with the influenza vaccine” as ICAN suggested.¹⁵⁸ Legally, the only possible resolution for FOIA requests is providing or not providing the documents.¹⁵⁹ The request did not inquire as to whether there was licensure of these vaccines for use during pregnancy—the request only asked for clinical trials. The FDA replied to the request without making specific statements about licensure. Thus, ICAN’s comments also misled its followers about the legal meaning of the procedure.

As explained, if there were such a question, the FDA would have to answer no, but the request simply did not ask. FOIA is not a mechanism to submit queries, such as “What is the basis for recommending these vaccines to pregnant women?” FOIA is only an avenue to ask for documents. In any case, such a query would be more appropriate for the CDC, which recommends vaccines, than for the FDA, which licenses them. It is actually correct that the FDA did not independently license influenza vaccines for pregnancy—that is an off-label use—but the FOIA request does not address licensing influenza vaccines or not licensing them, and that information was publicly known before it. By claiming otherwise, ICAN implied a conspiracy of silence that did not exist.

In short, here, too, ICAN misrepresented the result of its FOIA request in multiple ways to create talking points to feed a narrative to its followers.

3. ICAN’s Autism FOIA Request to the Centers for Disease Control and Prevention

ICAN, in collaboration with the Institute for Autism and Science, submitted a FOIA request to the CDC for studies relied upon by the CDC to claim that the Tdap vaccine,

¹⁵⁵ See Fiore, Uyeki, Broder, Finelli, Euler, Singleton, Iskander, Wortley, Shay, Bresee, & Cox, *supra* note 153, 7–8 (explaining that influenza is dangerous in pregnancy). See also *supra* notes 146–150 and accompanying text for safety of the vaccines in pregnancy.

¹⁵⁶ See FED. R. CIV. P. 41(a)(1)(A)(i) (A voluntary dismissal can be brought by the plaintiff without a court order and by filing a notice of dismissal before the opposing party serves either an answer or motion for summary judgment).

¹⁵⁷ *Id.*

¹⁵⁸ See Fiore, Uyeki, Broder, Finelli, Euler, Singleton, Iskander, Wortley, Shay, Bresee, & Cox, *supra* note 153.

¹⁵⁹ Cate, Fields, & McBain, *supra* note 4.

Engerix-B, Rcombivax HB, Prevnar 12, Hib, and IPV do not cause autism.¹⁶⁰ It also requested copies of the studies that the CDC relied upon to claim that children’s cumulative exposure to the recommended vaccines administered during the first six months of life do not cause autism.¹⁶¹ ICAN then sued.

The complaint is an unusual one for a FOIA claim. Generally, FOIA requests name-specific agency records the requester wants to receive. These are generally administrative records the agency has in its possession. Lawsuits following FOIA requests set out the records requested and make a case that the agency inappropriately failed to provide the records.¹⁶² The court can then order the agency to provide the records to the requester.¹⁶³ Instead of simply requesting records, ICAN and its fellow complainants—as developed in the next section—argued there was no basis for the CDC’s claim that vaccines do not cause autism—they made a substantive argument that vaccines cause autism.¹⁶⁴ But FOIA is not the framework to address such a claim; FOIA only addresses access to government records.¹⁶⁵

ICAN’s complaint did not ask for government records at all. In its complaint, ICAN alleged that Autism Groups, which include doctors and scientists, conducted their own research to identify the studies the CDC used to claim vaccines do not cause autism. However, their research found no studies, indicating that those studies did not exist.¹⁶⁶ ICAN alleges that because the Autism Groups could not find these studies on their own, they were left with no choice but to submit a FOIA request to the CDC for those studies.¹⁶⁷

¹⁶⁰ See Complaint at 2–4, *Inst. for Autism Sci. v. Ctrs. for Disease Control & Prevention*, No. 19-cv-11947 (S.D.N.Y. Dec. 31, 2019), <https://www.icandecide.org/wp-content/uploads/2019/12/001-COMPLAINT-against-Centers-for-Disease-Control-and-Prevention.pdf> [hereinafter Complaint, *Inst. for Autism Sci.*] (describing ICAN and other autism groups’ efforts to obtain information about the CDC’s claim that vaccines do not cause autism, specifically, DTaP vaccine, Engerix-B, Recombivax HB, Prevnar 12, Hib, and IPV).

¹⁶¹ *Id.*

¹⁶² 5 U.S.C. § 552(a)(4)(B) empowers a court “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” That is the remedy available under FOIA; in contrast, 5 U.S.C. § 706(2)(A) permits courts to “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” That is a direct challenge to agency discretion—a different cause of action.

¹⁶³ 5 U.S.C. § 552(a)(4)(F).

¹⁶⁴ See, e.g., Complaint, *Inst. for Autism Sci.*, *supra* note 160, at 11–14. The complaint argues that vaccines are not thoroughly tested. That is incorrect. See *THE CHILDHOOD IMMUNIZATION SCHEDULE AND SAFETY*, *supra* note 127, at 2–3, 132–36. But more importantly, it is not something that can or would be addressed in a FOIA claim, where the focus is on whether the records requested are available and should be provided. See generally, WILLIAM F. FUNK, SIDNEY A. SHAPIRO, & RUSSELL L. WEAVER, *ADMINISTRATIVE PROCEDURE AND PRACTICE: A CONTEMPORARY APPROACH* 737–39 (6th ed. 2019) (providing further discussion of judicial review under FOIA and its difference from administrative judicial review).

¹⁶⁵ See, e.g., *U.S. Dep’t of Just. v. Tax Analysts*, 492 U.S. 136, 142–43 (1989).

¹⁶⁶ See Complaint, *Inst. for Autism Sci.*, *supra* note 160, at 3 (“The Autism Groups, which include many doctors and scientists, engaged in research to identify these studies. However, as detailed below, the more research the Autism Groups conducted, the more apparent it appeared that these studies do not exist.”).

¹⁶⁷ *Id.* at 3–4; see also Stipulation at 1–2, *Inst. for Autism Sci. v. Ctrs. for Disease Control & Prevention*, No. 19-cv-11947 (S.D.N.Y. Mar. 2, 2020), <https://www.icandecide.org/wp-content/uploads/2020/03/Stipulation-and-Order-Fully-Executed.pdf> (describing ICAN’s FOIA request and providing the CDC’s list of studies responsive of the FOIA request) [hereinafter Stipulation, *Inst. for Autism Sci.*].

However, published scientific studies are not “government records” in the usual meaning of the word; the Government would not have to keep the studies as records, nor are they likely to do so.¹⁶⁸

In essence, the complaint tried to use a FOIA request to make a substantive claim and require the Government to disprove it. That is a misuse of FOIA, and it would have been appropriate and correct for the Government to reject the request for failing to ask for government records. Instead, the Government settled, and the CDC provided a list of studies that indicated that vaccines are not associated with autism.¹⁶⁹ Settling under these circumstances may have played into the hands of the anti-vaccine group. It is conceivable that the Department of Justice, which represents the Government in litigation, decided this FOIA request was not worth the time and effort to litigate thoroughly. Instead, the Department of Justice may have asked the CDC to provide a response with the list of studies on vaccines and autism to make the case go away.

As a result, the court stipulation permitted ICAN to mislead its followers on both the law and the substance. ICAN included a page on its website titled “*Stipulated Order Proving CDC Has No Studies to Support Claim that Vaccines Given in First 6 Months of Life Do Not Cause Autism.*”¹⁷⁰ The title suggests the Order proves that the CDC does not have studies to show vaccines do not cause autism; ICAN also claimed that “[d]espite months of demands, the CDC failed to produce a single specific study in response to these FOIA requests.”¹⁷¹ ICAN presented the CDC as conceding it has no studies to support that any of these vaccines do not cause autism.¹⁷² However, the order itself provides a list of the studies the CDC provided in response to ICAN’s request; by dismissing the claim, ICAN implied the government filled the request.¹⁷³ Presenting the order as proving the opposite is misleading.

ICAN also misleadingly presented the substantive response as showing the CDC cannot show that infant vaccines do not cause autism. ICAN’s claim failed on the substance in three ways.

First, the requests could not show the conclusion ICAN wanted to draw from them and were intentionally phrased to misrepresent the totality of the data. However, the CDC does not need a specific study on each vaccine to conclude they do not cause autism for two reasons. First, researchers do not generally conduct studies unless there is a basis to do

¹⁶⁸ See *Forsham v. Harris*, 445 U.S. 169, 185–86 (1980) (stating that the Freedom of Information Act deals with “agency records,” not information in the abstract. Petitioners place great reliance on the fact that HEW has a right of access to the data, and a right if it so chooses to obtain permanent custody of the UGDP records. But in this context, the FOIA applies to records which have been *in fact* obtained, and not to records which merely *could have been* obtained.).

¹⁶⁹ See Complaint, Inst. for Autism Sci., *supra* note 160; Stipulation, Inst. for Autism Sci., *supra* note 167.

¹⁷⁰ *Stipulated Order Proving CDC Has No Studies to Support Claim that Vaccines Given in First 6 Months of Life Do Not Cause Autism*, ICAN (Mar. 5, 2020), https://www.icandecide.org/ican_lawsuits/stipulated-order-proving-cdc-has-no-studies-to-support-claim-that-vaccines-given-in-first-6-months-of-life-do-not-cause-autism/.

¹⁷¹ *Id.*

¹⁷² *Id.* (“ICAN was therefore forced to sue the CDC in federal court, where the CDC finally conceded, in a stipulation signed by a Federal court judge, that that it has no studies to support that any of these vaccines do not cause autism.”).

¹⁷³ As a reminder, a FOIA lawsuit can only provide the requested records; it is not a challenge to agency action or a demand for giving reasons. See also Complaint, Inst. for Autism Sci., *supra* note 160, at 1 (listing 20 different studies provided by the CDC as a response to ICAN’s FOIA request).

so. If there was no basis for associating a specific vaccine with autism, that vaccine would not be studied. Many large studies looked at whether there is a link between vaccines and autism, but those studies were not random: they followed hypotheses that came up.¹⁷⁴ Complaining about the lack of studies for vaccines that were never implicated in causing autism is like complaining that there are no studies showing that alfalfa turns horses into unicorns: there was no basis to do such studies. There is even less basis to do them since there are several studies that covered the entire schedule and found no link between vaccines and autism.¹⁷⁵ Further, CDC does not need a specific study about a specific vaccine to rule out such a link. Like other expert bodies, the CDC looks at the totality of evidence, including the growing body of evidence on the causes, patterns, and timing of autism,¹⁷⁶ and the already abundant literature on vaccines and autism. The CDC does not need to have an individual study on each vaccine to conclude vaccines do not cause autism based on the totality of evidence. The CDC's conclusions are in line with those of many other expert bodies.¹⁷⁷

Second, some of the studies in question do cover the vaccines discussed. For example, a study given to ICAN included this language:

We found no evidence indicating an association between exposure to antibody-stimulating proteins and polysaccharides contained in vaccines during the first 2 years of life and the risk of acquiring ASD, AD, or ASD with regression. We also detected no associations when exposures were

¹⁷⁴ Jeffrey S. Gerber & Paul A. Offit, *Vaccines and Autism: A Tale of Shifting Hypotheses*, 48 CLINICAL INFECTIOUS DISEASES 456, 457–59 (2009) (telling the story of how anti-vaccine activists continuously shifted hypotheses as their earlier claims were disproven by studies and setting out the first hypotheses and their corresponding studies).

¹⁷⁵ Michael J. Smith & Charles R. Smith, *On-time Vaccine Receipt in the First Year Does Not Adversely Affect Neuropsychological Outcomes*, 125 PEDIATRICS 1134, 1134–35 (2010); Shahed Iqbal John P. Barile, William W. Thompson, & Frank DeStefano, *Number of Antigens in Early Childhood Vaccines and Neuropsychological Outcomes at Age 7-10 Year*, 22 PHARMACOEPIDEMIOLOGY & DRUG SAFETY 1263, 1263–64 (2013). In a recent large MMR study, the authors not only looked at MMR vaccines, but also compared a completely unvaccinated group of several thousand children to children who received the schedule and concluded that the rates of autism were not different. Hviid, Hansen, Frisch, & Melbye, *supra* note 89, at 518 (“We evaluated the association between MMR and autism in children with no DTaP-IPV/Hib vaccinations in the first year of life; we found no support for an association in this vaccine naive subpopulation”).

¹⁷⁶ See, e.g., Dan Bai, Benjamin H. K. Yip, Gayle C. Windham, Andre Sourander, Richard Francis, Rinat Yoffe, Emma Glasson, Behrang Mahjani, Auli Suominen, Helen Leonard, Mika Gissler, Joseph D. Buxbaum, Kingsley Wong, Diana Schendel, Arad Kodesh, Michaeline Breshnahan, Stephen Z. Levine, Erik T. Parner, Stefan N. Hansen, Christina Hultman, Abraham Reichenberg, & Sven Sandin, *Association of Genetic and Environmental Factors with Autism in a 5-Country Cohort*, 76 J. AM. ASS'N. MED. PSYCHIATRY 1035, 1035–37 (2019).

¹⁷⁷ The CDC's conclusions are also those of the National Academies of Science, Engineering and Medicine, Johns Hopkins' Vaccine Experts, The American Academy of Pediatrics, and the Autism Science Foundation, to name a few bodies. *Claims that Vaccines Cause Autism are Not True*, NAT'L ACADS.: SCIS., ENG'G & MED. (Oct. 2019), <https://www.nationalacademies.org/based-on-science/vaccines-do-not-cause-autism/>; *The Science is Clear: Vaccines are Safe, Effective, and Do Not Cause Autism*, JOHNS HOPKINS U. (Jan. 11, 2017), <https://hub.jhu.edu/2017/01/11/vaccines-autism-public-health-expert/>; *Vaccine Safety: Examine the Evidence*, AM. ACAD. PEDIATRICS (July 24, 2018), <https://www.healthychildren.org/English/safety-prevention/immunizations/Pages/Vaccine-Studies-Examine-the-Evidence.aspx>; *Autism and Vaccines*, AUTISM SCI. FOUND. (2022), <https://autismsciencefoundation.org/autism-and-vaccines/>.

evaluated as cumulative exposure from birth to 3 months, from birth to 7 months, or from birth to 2 years, or as maximum exposure on a single day during those 3 time periods. These results indicate that parental concerns that their children are receiving too many vaccines in the first 2 years of life or too many vaccines at a single doctor visit are not supported in terms of an increased risk of autism.¹⁷⁸

This essentially says that the authors found no link between the components contained in vaccines given to babies and autism, exactly what ICAN alleged was not included.

Another study in the list, although it focused on MMR, also addressed vaccines more generally:

In this study, we could not find the evidence that MMR vaccination increases the risk of ASD onset. The present results support the findings from the previous case-control studies conducted in Caucasian populations. Furthermore, we could not find any evidence that other types of vaccines or a combined effect of multiple vaccines was associated with ASD onset. Therefore, this study did not support the theory that vaccinations should be avoided to reduce the risk of ASD onset. We should be more concerned about acquiring infectious diseases by avoiding vaccinations.¹⁷⁹

It is possible that ICAN simply did not read—or did not understand—the studies provided well enough to realize they covered vaccines more broadly. After all, ICAN members are not experts. However, in reality, the evidence ICAN relied on did address the issue.

Third and finally, since FOIA requests cannot prove or disprove a fact other than the existence of a record, it was unfair for Mr. Bigtree to draw such a conclusion from them.¹⁸⁰ As pointed out above, the only legal meaning of the stipulation is that the records provided satisfied the request.

In brief, the CDC was not required to have individual studies about each vaccine in its records to look at the totality of the data and conclude that vaccines do not cause autism. Rather, the link between vaccines and autism has been studied extensively, and the CDC can use the entire body of evidence to assess this matter, rather than specific studies.¹⁸¹

¹⁷⁸ Frank DeStefano, Cristofer S. Price, & Eric S. Weintraub, *Increasing Exposure to Antibody-Stimulating Proteins and Polysaccharides in Vaccines is Not Associated with Risk of Autism*, 163 *PEDIATRICS* 561, 563 (2013). This point was made by Vince Ilannelli. Vince Ilannelli, M.D., *Did the CDC Concede That There Are No Studies to Support Claim That Vaccines Given in First 6 Months of Life Do Not Cause Autism?*, VAXOPEDIA (Mar. 7, 2020), <https://vaxopedia.org/2020/03/07/did-the-cdc-concede-that-there-are-no-studies-to-support-claim-that-vaccines-given-in-first-6-months-of-life-do-not-cause-autism/>.

¹⁷⁹ Yota Uno, Tokio Uchiyama, Michiko Kurosawa, Branko Aleksic, & Norio Ozaki, *The Combined Measles, Mumps, and Rubella Vaccines and the Total Number of Vaccines are Not Associated with Development of Autism Spectrum Disorder: The First Case-Control Study in Asia*, 30 *VACCINE* 4292, 4296 (2012). This point was also taken from Dr. Ilannelli's post. See Ilannelli, *supra* note 178.

¹⁸⁰ For more elaboration on each of these points, see Dorit Rubinstein Reiss, *ICAN FOIA Lawsuit – Misrepresenting Another Non-Win from Anti-Vaccine Group*, SKEPTICAL RAPTOR (Mar. 8, 2020), <https://www.skepticalraptor.com/skepticalraptorblog.php/ican-foia-lawsuit-misrepresenting-another-non-win-from-anti-vaccine-group/>.

¹⁸¹ *Id.*

Further, at least some of the studies looked at vaccines during the first year of life more generally.¹⁸² Ultimately, there is no scientific basis for the conclusion ICAN attempted to draw from CDC's response.

4. ICAN's FOIA Requests During the COVID-19 Pandemic

During the COVID-19 pandemic, ICAN, along with other well-known anti-vaccine figures and organizations, continued to use FOIA to spread vaccine misinformation, particularly about the COVID-19 vaccines' safety.¹⁸³

ICAN filed a FOIA request to the National Institutes of Health (NIH) on June 29, 2020, about one of the COVID-19 vaccines for "all safety and efficacy data and information regarding mRNA-1273, including from Phase I clinical trial."¹⁸⁴ The FOIA request asked for: (1) "copies of any and all employee invention report related to any vaccine or therapeutic for COVID-19"; (2) "copies of any and all royalty or licensing agreements related to any vaccine or therapeutic for COVID-19"; (3) "a copy of the page of any patent application filed with regard to mRNA-1273 vaccine which lists the inventors."¹⁸⁵

ICAN then filed a complaint against the NIH in federal court seeking an order directing the NIH to produce the requested records.¹⁸⁶ The complaint claimed the NIH did not produce documents in response to its request, demanded expeditious action from the NIH to produce the requested documents, and requested that the court award ICAN financial compensation for costs and reasonable attorneys' fees.

ICAN filed a similar complaint against the CDC after filing a FOIA request seeking "all emails sent/received by Nancy Messonnier, Robert Redfield, Frank DeStefano, and Anne Schuchat that include the term SARS-CoV, COVID, COVID-19 or coronavirus in any portion of the email."¹⁸⁷ In response, the CDC stated that the FOIA requests were too broad, particularly because the volume of emails on the topic was substantial during the pandemic. Thus, reviewing and providing "all emails sent/received" as ICAN requested would have been exceedingly labor intensive. Despite the valid response, ICAN argued the CDC failed to disclose the information and sought a federal court order declaring that it was unlawful for the CDC to withhold the information.

ICAN's challenge to the CDC's response was not surprising and is instructive of ICAN's tactics. ICAN simultaneously alleged that the CDC failed to provide documents,

¹⁸² *Id.* On May 7, 2021, ICAN filed a complaint against the Secretary of Health and Human Services (HHS) demanding that the Secretary remove the statement "Vaccines Do Not Cause Autism" from the CDC site. *See infra* notes 265–271. On March 31, 2022, Judge Andrew L. Carter from the Southern District of New York dismissed the complaint, finding that ICAN lacked standing. *See infra* note 277.

¹⁸³ *See* Table 1.

¹⁸⁴ Complaint at 1, *Informed Consent Action Network v. Nat'l Inst. of Health*, No. 20-cv-1277-JJT (D. Ariz., June 29, 2020), <https://www.icandecide.org/wp-content/uploads/2020/07/001-COMPLAINT.pdf> (litigation is ongoing).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ Complaint at 3, *Informed Consent Action Network v. Ctrs. for Disease Control & Prevention*, No. 20-cv-06177 (S.D.N.Y. Aug. 6, 2020). Nancy Messonnier served as the director of the National Center for Immunization and Respiratory Diseases at the CDC from 2016 to 2021; Robert Redfield served as the director of the CDC from 2018 to 2021; Director Frank DeStefano of the Immunization Safety office of the CDC; Anne Schuchat served as the deputy director of the CDC until 2021.

while acknowledging that it did provide documents, and ignored the CDC's request for more specificity.¹⁸⁸ Although ICAN argued that the CDC failed to provide any information requested, in its complaint, ICAN stated, "CDC located 281 pages of responsive records, withheld 81 of those pages in full and partially redacted an additional 30 pages."

Some of ICAN's FOIA litigation has not ended with a court stipulation, and the agencies' responses have never been enough for ICAN.¹⁸⁹ For instance, in its FOIA request to the NIH, requesting all safety and efficacy data and information about mRNA-1273, the Moderna vaccine, the agency provided a redacted version of the 1,093-page Safety Summary Report.¹⁹⁰ In addition, the NIH informed ICAN that the purpose of Phase I of the trial was to establish safety. Thus, it only had access to safety data, not efficacy data, and for that reason did not provide efficacy data in the FOIA response.¹⁹¹ ICAN filed suit, arguing that the NIH failed to demonstrate search adequacy and alleged that the NIH employed overly narrow terms to produce few results. Additionally, ICAN sought unredacted copies of the report.¹⁹²

The court in this case granted the NIH's motion for summary judgment regarding ICAN's claim about the adequacy of its research and search terms. However, the court also granted ICAN's request to produce an unredacted version of the Safety Report.¹⁹³ Unlike the stipulations that ICAN falsely promoted as a win for the anti-vaccine movement in the past, this court order actually granted one of ICAN's requests.

By filing multiple FOIA requests and complaints against agencies, ICAN and similar organizations did not actually provide evidence to support ICAN's core belief that vaccines are dangerous.¹⁹⁴ However, ICAN often used stipulations, signed court orders, and complaints to create a narrative that vaccines are unsafe. ICAN used the results to create fear, uncertainty, and doubt about vaccines by misrepresenting the results.¹⁹⁵ Further, ICAN promoted its own, often misleading, interpretation of the results wherever it could through its website and news articles to convince its followers and potential followers that the court was on ICAN's side.

B. ICAN's Citizen Petitions

As with its FOIA requests, ICAN uses citizen petitions to send messages suggesting victories for the anti-vaccine movement. As we describe below, ICAN filed several FDA Citizen Petitions related to the COVID-19 pandemic and vaccine development. Similar to the FOIA requests, ICAN's attorneys used the law to further anti-vaccine rhetoric and create fear, uncertainty, and doubt about vaccines by making claims that the FDA refuted. This section sets out the citizen petition process the FDA uses, and then describes several

¹⁸⁸ *Id.* at 1.

¹⁸⁹ *See* Informed Consent Action Network v. NIH, No. CV-20-01277-PHX-JJT, 2021 U.S. Dist. LEXIS 118185 (D. Ariz. June 24, 2021).

¹⁹⁰ *Id.* at *4.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at *24.

¹⁹⁴ *See* Table 1.

¹⁹⁵ Bryan Pfaffenberger, *The Rhetoric of Dread: Fear, Uncertainty, and Doubt (FUD) in Information Technology Marketing*, 13 KNOWLEDGE, TECH. & POL'Y 78, 78 (2000).

petitions ICAN filed, including the content of each petition, the FDA's response, and how ICAN used the process.

Title 21 of the Code of Federal Regulations sets out the FDA Citizen Petition process.¹⁹⁶ Title 21 provides the format for citizens to petition the FDA for policy changes and the Commissioner's responsibility upon receiving a petition.¹⁹⁷ Under this format, citizens can make any request, including requesting the FDA to refrain from particular action(s).¹⁹⁸ Then, the petitioner must produce a statement of grounds, which includes a full statement of the factual and legal grounds on which the petition relies.¹⁹⁹ These grounds include both information that is favorable and unfavorable to petition.²⁰⁰

Citizen petitions must describe any environmental effects of the requested action²⁰¹ and include a statement certifying that the petition "includes all information and views on which the petition relies, and that it includes representative data and information known to the petitioner which are unfavorable to the petition."²⁰² Further, if the FDA Commissioner requests, the petition must also address the petition's economic impact.²⁰³

Upon receiving a citizen petition, the Commissioner must furnish a response to each petitioner within 180 days of receipt.²⁰⁴ The response can approve, deny, dismiss the petition, or the Commissioner can provide a tentative response to indicate why the agency has not reached a decision.²⁰⁵ The Commissioner does not necessarily have to approve, deny, or dismiss the *entire* petition; section 10.30(e)(3) allows the Commissioner to grant or deny in whole or in part or grant other relief.²⁰⁶

Citizen petitions can raise legitimate concerns about a vaccine or a drug under process.²⁰⁷ However, in some cases, groups use such petitions to delay FDA approval of a vaccine or drug.²⁰⁸ Several leading officials observed that many citizen petitions are filed on questionable grounds and that "it is very rare that petitions present new issues" not previously considered.²⁰⁹ Leading officials also pointed out that citizen petitions "appear designed not to raise timely concerns with respect to the legality or scientific soundness of approving a drug application, but rather to delay approval by compelling the agency" to examine the arguments made in the petitions.²¹⁰

¹⁹⁶ 21 C.F.R. § 10.30. The Administrative Procedure Act provides citizens a right to petition an agency, and this section sets out how the Federal Drug Administration will handle such petitions. 5 U.S.C. § 553(e) requires that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."

¹⁹⁷ 21 C.F.R. § 10.30

¹⁹⁸ *Id.* § 10.30(b)(3)(A)(3).

¹⁹⁹ *Id.* § 10.30(b)(3)(B).

²⁰⁰ *Id.*

²⁰¹ *Id.* § 10.30(b)(3)(C).

²⁰² *Id.* § 10.30(b)(3)(E); *see also id.* § 10.30(b)(3)(C)-(D), which includes an environmental impact and economic impact section.

²⁰³ *Id.* § 10.30(b)(3)(D).

²⁰⁴ *Id.* § 10.30(e)(2).

²⁰⁵ *Id.* § 10.30(e)(1)-(2).

²⁰⁶ *See id.* § 10.30(e)(3).

²⁰⁷ Michael A. Carrier & Daryl Wander, *Citizen Petitions: An Empirical Study*, 34 CARDOZO L. REV. 249, 249 (2012).

²⁰⁸ *Id.* at 251–53. The authors describe how brand-name companies used petitions to delay approving generics based on their brand.

²⁰⁹ *Id.* at 261.

²¹⁰ *Id.*

ICAN used petitions to mobilize anti-vaccine activists during the peak of COVID-19. For instance, on August 17, 2020, ICAN's citizen petition requested an administrative stay on Phase III of the trial for mRNA-1273, the Moderna vaccine,²¹¹ until the study design implemented changes for the duration of the trial.²¹² ICAN made four requests to the FDA: (1) the documentation of any and all adverse events and reactions for the entire duration of the trial; (2) that such documentation last at least twelve months for adults, thirty-six months for children, and sixty months for infants and toddlers; (3) that the study use an adequate sample size; and (4) that participants are tested for T-cell reactivity to SARS-CoV-2 pre-vaccination and post-vaccination.²¹³

The FDA denied the requests because ICAN failed to provide reasonable grounds for each concern.²¹⁴ In response, the FDA stated that COVID-19 vaccines are safe and there are various methods by which the FDA ensures veracity.²¹⁵ The FDA explained that an Emergency Use Authorization for a new vaccine is only issued if it meets the relevant statutory standards.²¹⁶ For the COVID-19 vaccine, the FDA first concluded that (1) SARS-CoV-2 can cause a serious or life-threatening disease/condition; (2) based on the totality of scientific evidence available, it is reasonable to believe that the product may be effective in diagnosing, treating, or preventing the disease or condition that SARS-CoV-2 can cause; (3) the known and potential benefits of the product to treat the condition outweigh the known and potential risks of the product; and (4) there is no adequate, approved, and available alternative to the product for diagnosing, preventing, or treating the condition.²¹⁷ The FDA also explained the process for investigational new drugs.²¹⁸

The FDA identified ICAN's failure to support each of its requests and claims with statistical analysis or scientific evidence.²¹⁹ For instance, ICAN argued that the sample size

²¹¹ An administrative stay can be issued by the Commissioner at any time to "stay" or halt temporarily or indefinitely the effective date of an action pending or following a decision on any matter. In this case, a stay on Phase III of the Moderna vaccine means that the Commissioner would halt this phase until the requests ICAN submitted on its citizen petition are met. See 21 C.F.R. § 10.35.

²¹² *Citizen Petition from Siri & Glimstad LLP on Behalf of Informed Consent Action Network*, REGULATIONS.GOV 1 (Aug. 17, 2020), <https://www.regulations.gov/document/FDA-2020-P-1769-0001> [hereinafter *Citizen Petition from Siri & Glimstad*].

²¹³ *Id.*

²¹⁴ See *Response Letter to Siri & Glimstad LLP from FDA CBER*, REGULATIONS.GOV 30 (Dec. 18, 2020), <https://www.regulations.gov/document/FDA-2020-P-1769-0011> [hereinafter *Response Letter to Siri & Glimstad*].

²¹⁵ *Id.* FDA explained that "[p]rior to approval by FDA, vaccines are extensively tested in non-clinical studies and in humans. FDA's regulations describe some of the extensive data and information that each sponsor of a vaccine must submit to FDA in order to demonstrate the product's safety before FDA will consider licensing the vaccine. FDA requires that the sponsor's application include, among other things, data derived from nonclinical and clinical studies showing the product's safety, purity, and potency; a full description of manufacturing methods for the product; data establishing the product's stability through the dating period; and a representative sample of the product and summaries of results of tests performed on the lot(s) represented by the sample." For further discussion of the additional systems used to monitor vaccines, see *supra* Part III.A.1.

²¹⁶ *Response Letter to Siri & Glimstad*, *supra* note 214, at 5–6.

²¹⁷ *Id.*

²¹⁸ For a summary of the petition, see Viridiana Ordonez, *Covid-19 Vaccine Trials – FDA Rejects ICAN Petition to Stop the Trials*, SKEPTICAL RAPTOR (Jan. 31, 2021), <https://www.skepticalraptor.com/skepticalraptorblog.php/covid-19-vaccine-trials-fda-rejects-ican-petition-to-stop-the-trials/>.

²¹⁹ See *Response Letter to Siri & Glimstad*, *supra* note 214, at 17.

is small and could not possibly provide an adequate safety profile.²²⁰ ICAN used a general report about clinical trial considerations and the appropriate size for trials to make its arguments.²²¹ However, that report did not address the appropriate size for a COVID-19 vaccine clinical trial and thus did not counter the FDA's expert judgment.²²² Further, the FDA already determined that 15,000 subjects in each group was an adequate size; a typical size for most clinical trials is 3,000-15,000, and without more specific support for ICAN's claim that the size was inappropriate for COVID-19 vaccines trials, the FDA had no basis to change its initial determination.²²³

In another citizen petition, ICAN made the exact same requests, but this time for the Johnson & Johnson/Jensen vaccine.²²⁴ In addition to the four requests, ICAN added two more: (1) Germline transmission tests to be conducted for male participants and (2) that HIV incidences be monitored at the end of the study and that the trial evaluate the levels and distribution of both vector and insert responses in target tissues where HIV acquisition is known to occur.²²⁵

As with its first response, the FDA denied every single request, explaining that the petition did not contain facts to demonstrate any reasonable grounds for the requests.²²⁶ Again, the FDA explained that vaccines are safe and that there was an appropriate process for an Emergency Use Authorization that only allowed issuance if the vaccine in question met the statutory standards.²²⁷ Nearly identical to the first petition, ICAN failed to support its second petition with scientific data and analysis to show that each request was valid.²²⁸ Instead, the FDA demonstrated that each request was unnecessary and explained that safeguards exist to prevent the fears ICAN expressed.²²⁹

ICAN filed similar petitions for the COVID-19 vaccine trials for Pfizer and AstraZeneca on the same day as the Moderna petition.²³⁰ Each petition included near-identical language and similar requests, though some, like with the Johnson & Johnson vaccine, included additional requests.²³¹

As with its FOIA requests and responses, ICAN created an air of urgency to describe the citizen petitions on its website. For instance, regarding a petition submitted to the FDA

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ See *Citizen Petition from Siri & Glimstad*, *supra* note 212212, at 2.

²²⁵ *Id.*

²²⁶ See *Denial of Citizen Petition for Siri & Glimstad LLP*, REGULATIONS.GOV 2 (Feb. 28, 2021), <https://www.regulations.gov/document/FDA-2020-P-2096-0009> (stating that “[b]ased on our review of these materials, and for the reasons described below, we conclude that the CP does not contain facts demonstrating any reasonable grounds for the requested action.”).

²²⁷ *Id.* at 4 (explaining that “the manufacturers of vaccines that have been licensed in the United States (U.S.) have necessarily demonstrated the safety of the vaccines within the meaning of the applicable statutory and regulatory provisions before the vaccines were licensed and allowed to be marketed.”).

²²⁸ *Id.* at 17 (noting that “Petitioner has not pointed to any statistical analyses or other scientific literature demonstrating the inadequacy of the study that Petitioner identifies.”).

²²⁹ *Id.*

²³⁰ See generally, *Citizen Petition from Siri & Glimstad*, *supra* note 212, at 2. For a copy of the petitions for Pfizer and AstraZeneca, see *Amended Citizen Petition Siri & Glimstad LLP on behalf of Informed Consent Action Network*, REGULATIONS.GOV (Oct. 15, 2020), <https://www.regulations.gov/document/FDA-2020-P-1768-0010>.

²³¹ *Citizen Petition from Siri & Glimstad*, *supra* note 212, at 3.

requesting that it require a placebo control group in clinical trials of COVID-19 vaccines, ICAN provided a copy of the petition to its followers, stating the clinical trials for the vaccine “raise exigent concerns that demand immediate attention.”²³² The website also provided social media link buttons under the title of the page for followers to easily share on Facebook, Twitter, and LinkedIn.²³³ However, ICAN did not upload a copy of the FDA’s response for its followers to read, nor did it tell its followers that the organization submitted the same requests for each vaccine. Some of the language used in other blog entries included “ICAN therefore filed a forceful petition” and “ICAN is awaiting responses to additional petitions and will not stop applying the pressure until the FDA adequately does its job”²³⁴

ICAN also filed similar petitions for other vaccines unrelated to COVID-19 and repeatedly employed similar tactics to further its narrative that vaccines are unsafe.²³⁵ First, in at least one case, ICAN presented an early petition as leading to a success. ICAN alleged that the FDA adopted saline placebo in the trials in response to an ICAN citizen petition—even though FDA arrived at this decision itself without any evidence that the FDA responded to ICAN’s petition.²³⁶ Filing additional petitions could allow ICAN to claim success if the FDA adopted any of its requests—whether or not the FDA’s action drew on petitions. Further, ICAN could use denied or ignored petitions to allege flaws in the trials and claim a mantle of official statement: it is not just ICAN saying this, it is an official position presented to the agency, with a link to a formal letter from a lawyer. ICAN also made a point of responding to the FDA’s refusals.²³⁷ ICAN, in doing so, covered its vaccine criticism with official-sounding language to increase its legitimacy. It also fed into a narrative of conspiracy and wrongdoing by the agencies overseeing the trials, a narrative that readily speaks to ICAN’s anti-vaccine audience.²³⁸

ICAN’s statements about petitions are routinely included in its emails to its followers, reinforcing existing views, and demonstrating to these followers that ICAN is acting.

²³² *Citizen Petition and a Petition for Administrative Stay of Action Filed by Del Bigtree and the Informed Consent Action Network (“ICAN”) Regarding Clinical Trials of Vaccines for SARS-CoV-2*, ICAN (June 2020), https://www.icandecide.org/ican_government/citizen-petition-and-a-petition-for-administrative-stay-of-action-filed-by-del-bigtree-and-the-informed-consent-action-network-ican-regarding-clinical-trials-of-vaccines-for-sars-cov-2/.

²³³ *Id.*

²³⁴ See *ICAN Petitions to FDA Regarding COVID-19 Vaccines*, ICAN (May 2020), <https://www.icandecide.org/ican-petitions-to-fda-regarding-covid-19-vaccines/>.

²³⁵ *Id.*

²³⁶ *Petition to FDA Regarding COVID-19 Vaccines*, ICAN (Aug. 4, 2020), https://www.icandecide.org/ican_press/petition-to-fda-regarding-covid-19-vaccines/.

²³⁷ See e.g., *ICAN Cover Letter and Response to Administrative Stay of Action*, INFORMED CONSENT ACTION NETWORK (Mar. 3, 2021), https://www.icandecide.org/wp-content/uploads/2021/03/1601_Cover-letter-and-ICAN-reply-to-FDA-denial_03_03_2021.pdf.

²³⁸ *FDA Response to Certain of ICAN’s COVID-19 Petitions*, DATA SCIENTIST {EDC DEV. + STAT. EXPERT & DATA MANAGER} (Apr. 16, 2021), <https://edcdeveloper.wordpress.com/2021/04/16/fda-response-to-certain-of-icans-covid-19-vaccine-petitions/>.

C. ICAN's Lawsuits

This section addresses ICAN's direct, non-FOIA litigation, and explains how ICAN brought litigation to advocate for issues near and dear to it. We examine two sets of cases ICAN brought. In one, ICAN fought back against social media companies' de-platforming it and limiting its reach. In messaging to its members, ICAN used these lawsuits to create an image as fighting against censorship. The second lawsuit we address is a continuation of ICAN's efforts to link vaccines to autism: ICAN challenged the CDC's statement that vaccines do not cause autism and presented its suit to its followers as a continuation of its battle.²³⁹

1. ICAN Sued Social Media Platforms

In addition to legal activities that do not directly involve courts, ICAN also filed direct lawsuits, often naming Del Bigtree himself as a plaintiff, in addition to the organization. One of its lawsuits involved Facebook and YouTube, platforms that removed ICAN's pages and content when its anti-vaccine rhetoric violated their respective policies.²⁴⁰

One of ICAN's professed goals is "investigating the safety of medical procedures, pharmaceutical drugs and vaccines while educating the public of their right to 'informed consent.'"²⁴¹ In practice, this means ICAN uses its social media platforms, particularly YouTube and Facebook, to spread misinformation about the safety of vaccines (for example, claiming a causal link between autism and vaccines).²⁴² These efforts conflict with social media platforms' growing efforts to police and prevent the spread of misinformation on their sites. ICAN consistently used Facebook and YouTube to spread its anti-vaccine rhetoric and create uncertainty in its followers and potential followers.²⁴³ As part of their efforts to reduce misinformation, both Facebook and YouTube removed ICAN's pages from their platforms.

In December 2020, in response to Facebook and YouTube removing their content, ICAN and Del Bigtree filed a complaint for a *Bivens* violation and breach of covenant and fair dealing against both major social media platforms.²⁴⁴ In its complaint, ICAN requested

²³⁹ In addition to these lawsuits, ICAN also set itself up as willing to support those opposing vaccine mandates. Isaac Stanley-Becker, *Resistance to Vaccine Mandates Is Building. A Powerful Network is Helping*, WASH. POST (May 26, 2021, 1:28 PM), <https://www.washingtonpost.com/health/2021/05/26/vaccine-mandate-litigation-siri-glimstad-ican/>. We did not focus on those line of cases because ICAN is not a litigant and not in the driver's seat for those. Rather, in this article, we focus on cases ICAN brought and used.

²⁴⁰ See *infra* text accompanying notes 243–248.

²⁴¹ ICAN, <https://www.icandecide.org> (last visited Feb. 25, 2022).

²⁴² Dorit Rubinstein Reiss & Nili Karako-Eyal, *Informed Consent to Vaccination: Theoretical, Legal, and Empirical Insights*, 45 AM. J. L. MED. 357, 372 (2019).

²⁴³ CTR. FOR COUNTERING DIGIT. HATE, THE ANTI-VAXX PLAYBOOK (2020), https://252f2edd-1c8b-49f5-9bb2-cb57bb47e4ba.filesusr.com/ugd/f4d9b9_fddbfb2a0c05461cb4bdce2892f3cad0.pdf.

²⁴⁴ See Complaint at 1, *Informed Consent Action Network v. YouTube LLC & Facebook, Inc.*, No. 20-cv-09456 (N.D. Cal. Dec. 30, 2020) [hereinafter *Complaint*, *YouTube*]. *Bivens* allows litigants to sue individual officers in violation of constitutional rights in torts and to collect money damages. James E. Pfander, Alexander A. Reinert, & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When Bivens Claims Succeed*, 72 STAN. L. REV. 561, 569–70. (2020). As we address below, because it is an

an order directing YouTube to restore ICAN’s channel and an order directing Facebook to restore ICAN’s and HighWire’s Facebook pages.²⁴⁵ ICAN also requested an order enjoining both parties from restricting its freedom of speech.²⁴⁶ Specifically, ICAN argued that both social media platforms violated the First Amendment by suspending ICAN’s accounts.²⁴⁷ Both YouTube and Facebook responded with motions for summary judgment, arguing the videos ICAN posted on both platforms misled the public by repeatedly asserting “that wearing a mask interferes with the development of children’s brains, belittled people who abide by government-imposed quarantine, and actively encouraged viewers to contract COVID-19.”²⁴⁸ Both platforms reached the same decision to remove the content because both YouTube and Facebook expressly prohibit misleading health content.²⁴⁹

Additionally, both defendants argued that a *Bivens* claim does not apply to private online forums because the cause of action only applied to state actors.²⁵⁰ ICAN attempted to persuade the court to deviate from precedent that limited the First Amendment’s reach to state actors and attempted to connect the social media platforms’ actions, comments, and letters to federal actors. ICAN presented comments and letters from individual members of the House of Representatives and congressional committees, alleging they used both social media platforms as “cat’s paw[s]” to censor its speech.²⁵¹ For example, Congressman Adam Schiff wrote a letter to Google and Facebook, asking them to address anti-vaccine misinformation.²⁵² However, courts consistently found, to date, that private online platforms have the right to exercise editorial discretion on their platforms.²⁵³

uncomfortable fit for a lawsuit against private social media companies going in, and this likely made the claim weak from the start. But it is the rubric ICAN chose to use.

²⁴⁵ See Complaint, YouTube, *supra* note 244, at 29 (seeking an order directing YouTube to restore ICAN’s channel; an order directing Facebook to restore ICAN’s and the Highwire’s page; and an order enjoining both social media platforms from restricting Plaintiff’s speech).

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 26 (alleging that “Plaintiffs’ videos on their YouTube channel and Facebook pages were designed to educate and disseminate medically relevant information to the American public and were thus, constitutionally protected speech under the First Amendment.”).

²⁴⁸ See Defendants’ Notice of Motion and Motion to Dismiss First Amended Complaint; Memorandum of Points and Authorities in Support Thereof at 6, Informed Consent Action Network & Del Bigtree v. YouTube LLC & Facebook, Inc., No. 20-cv-09456 (N.D. Cal. Apr. 12, 2021), <https://icandecide.org/wp-content/uploads/2021/06/047-MOTION-to-Dismiss-First-Amended-Complaint-filed-by-YouTube-LLC.pdf> [hereinafter Memorandum of Points and Authorities in Support Thereof].

²⁴⁹ Memorandum of Points and Authorities in Support Thereof, *supra* note 248, at 1 (stating, “[w]hile they reached their decisions independently, both YouTube and Facebook expressly prohibit such misleading health content.”).

²⁵⁰ *Id.* (alleging, “Plaintiffs’ claim runs headlong into an unbroken series of cases—including the Ninth Circuit’s controlling decision in *Prager University v. Google LLC*, 951 F.3d 991 (9th Cir. 2020)—holding that private online platforms are not state actors.”).

²⁵¹ *Id.* at 2 (“Plaintiffs’ theory is that because members of Congress expressed concern about the spread of online health-related misinformation, Defendants’ decisions to remove such material from their private property were somehow transformed into government censorship.”).

²⁵² *Schiff Sends Letter to Google, Facebook Regarding Anti-Vaccine Misinformation*, OFF. REP. ADAM SCHIFF (Feb. 14, 2019), <https://schiff.house.gov/news/press-releases/schiff-sends-letter-to-google-facebook-regarding-anti-vaccine-misinformation>.

²⁵³ See *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019) (“merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state

The content removed was part of the anti-vaccine movement's practice of spreading misinformation. Many times, the misinformation focused on children's health, such as ICAN alleging that the use of masks interfered with children's development. Using children as a tool in its rhetoric made the misinformation potentially more effective as it targeted parents worried about the health of their children who were therefore vulnerable to this misinformation.

Further, the *Bivens* claim represented another instance of ICAN using the courts to make a strange legal argument. *Bivens* claims are filed by individuals to assert a constitutional civil rights violation by a federal agent.²⁵⁴ Thus, *Bivens* violations apply against federal and state agents, including from the Drug Enforcement Administration (DEA), federal prison officials, and Congress members.²⁵⁵ However, private companies and their employees are not government actors and *Bivens* actions do not work against them.²⁵⁶

Social media platforms are not federal actors and cannot be sued under a *Bivens* claim. ICAN's complaint mentioned only *private* companies, YouTube and Facebook, and failed to include any federal or state officials. Unless government coercion or extraordinarily direct encouragement is attributed to the companies' choice to act in removing misinformation from their platforms, the claim will fail.²⁵⁷ In a recent case, a judge denied a similar claim by another anti-vaccine group, Children's Health Defense, against Facebook precisely because Facebook is a private company.²⁵⁸

On January 31, 2022, a judge granted YouTube and Facebook's motion for summary judgment.²⁵⁹ The court explained that neither the platforms' public statements indicating their intent to work with Congress, nor the statements made by members of Congress, sufficiently demonstrated that the Government was a "joint participant in the challenged activity."²⁶⁰ The court noted that ICAN misapplied the law,²⁶¹ contradicted itself,²⁶² and

actors subject to First Amendment constraints."); *Prager Univ. v. Google LLC*, 951 F.3d 991, 997 (9th Cir. 2020) ("YouTube may be a paradigmatic public square on the Internet, but it is 'not transformed' into a state actor solely by 'provid[ing] a forum for speech.'" (quoting *Halleck*, 139 S. Ct. at 1930, 1934)).

²⁵⁴ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971). *See also* Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809 (2010) for a brief explanation of the legal significance of the *Bivens* decision.

²⁵⁵ *See Bivens*, 403 U.S. at 388 (involving the DEA); *Carlson v. Green*, 466 U.S. 14 (1980) (involving federal prison officials); *Wheeldin v. Wheeler*, 373 U.S. 647 (1963) (involving an investigator for the House Committee on Un-American Activities).

²⁵⁶ *See Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001) (pertaining to a private prison company sued under a *Bivens* claim); *see also Minneci v. Pollard*, 565 U.S. 118 (2012).

²⁵⁷ *See Heineke v. Santa Clara Univ.*, 965 F.3d 1009, 1013–14 (9th Cir. 2020) (stating, "[w]e begin 'with the presumption that private conduct does not constitute governmental action.' That presumption may be overcome in limited circumstances, such as where the state 'has exercised coercive power or has provided such significant encouragement' that the challenged action must be considered that of the state." (citing *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982))).

²⁵⁸ Dismissal at 25–26, *Children's Health Def. v. Facebook, Inc.*, Case No. 20-cv-05787-SI (N.D. Cal. June 29, 2021), <https://childrenshealthdefense.org/wp-content/uploads/FACEBOOK-ORDER-OF-DISMISSAL-WITH-PREJUDICE-Dkt.-107-06-29-2021.pdf>.

²⁵⁹ Order Granting Motion to Dismiss at 7, *Informed Consent Action Network v. YouTube LLC & Facebook, Inc.*, No. 20-cv-09456 (N.D. Cal. Jan. 31, 2022).

²⁶⁰ *Id.*

²⁶¹ *Id.* at 9.

²⁶² *Id.* at 10.

failed to support its inferences with factual allegations.²⁶³ Overall, ICAN failed to properly allege that YouTube and Facebook acted as state actors when removing its account from their platforms.²⁶⁴ Although the court wrote it seemed “doubtful that ICAN could plead the factual allegations necessary” to meet the legal standards required for this case, the court dismissed the complaint without prejudice.²⁶⁵

ICAN announced to its followers that it sued Facebook and YouTube, alleging “censorship by these companies, at the behest of the government, cannot stand.”²⁶⁶ ICAN did not, as far as we have seen, tell its followers that the court ruled against it.

2. Other Legal Efforts Against Vaccines

In another line of cases brought against the federal government, ICAN attempted to challenge the CDC’s statement that vaccines do not cause autism. This dispute started with the FOIA claim discussed in Part III.A. As readers may recall, ICAN and the Institute for Autism Science filed a complaint requesting the court to enter an order for the CDC to provide the studies it relied upon to claim that vaccines during the first years of a child’s life did not cause autism, or to admit that no such studies existed.²⁶⁷ The CDC provided several studies, but ICAN claimed that none of those studies were sufficient to address its request.²⁶⁸

After this initial salvo, which ended in March 2020 with ICAN claiming a win against the CDC,²⁶⁹ ICAN claimed another “victory” on January 21, 2021.²⁷⁰ In August 2020, the CDC changed its page on vaccines and autism. The page was previously titled “Vaccines Do Not Cause Autism” and the CDC updated it to “Autism and Vaccines.” Other than the title, however, the content of the page remained the same. For example, before and after the title change, the page contained a heading that stated, “There is no link between vaccines and autism[.]”²⁷¹ The text continued:

Some people have had concerns that ASD might be linked to the vaccines children receive, but studies have shown that there is no link between receiving vaccines and developing ASD. The National Academy of Medicine, formerly known as Institute of Medicine, reviewed the safety of

²⁶³ *Id.* at 13.

²⁶⁴ *Id.* at 14.

²⁶⁵ *Id.* at 15.

²⁶⁶ *Lawsuit Against Facebook, YouTube and Twitter*, ICAN (Aug. 4, 2020, 12:00 PM), https://www.icandecide.org/ican_press/lawsuit-against-facebook-youtube-and-twitter/. It also posted an update on June 26, 2021. *ICAN Files Opposition to Facebook and YouTube’s Motion to Dismiss its Censorship Lawsuit*, ICAN (June 26, 2021, 10:00 AM), https://www.icandecide.org/ican_press/ican-files-opposition-to-facebook-and-youtubes-motion-to-dismiss-its-censorship-lawsuit/.

²⁶⁷ Complaint, Inst. for Autism Sci., *supra* note 160, at 1.

²⁶⁸ See *supra* discussion in Part III.A.3 for more details. See also Complaint at 1, *Informed Consent Action Network & the Inst. for Autism Sci. v. Xavier Becerra*, No. 1:21-cv-04134-ALC (S.D.N.Y. May 7, 2021) [hereinafter Complaint, Becerra].

²⁶⁹ Reiss, *supra* note 180.

²⁷⁰ *ICAN, CDC, and the Reformatted*, *supra* note 95.

²⁷¹ See *Vaccine Safety: Autism and Vaccines*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 1, 2021), <https://www.cdc.gov/vaccinesafety/concerns/autism.html> (last visited Feb. 24, 2022).

8 vaccines to children and adults. The review found that with rare exceptions, these vaccines are very safe.

A CDC study published in 2013 added to the research showing that vaccines do not cause ASD. The study focused on the number of antigens given during the first two years of life. Antigens are substances in vaccines that cause the body's immune system to produce disease-fighting antibodies. The results showed that the total amount of antigen from vaccines received was the same between children with ASD and those that did not have ASD.²⁷²

This text never changed, and even under the new, updated title, the page stated that vaccines do not cause autism. Nonetheless, ICAN presented this small website change as a substantial victory by publishing an article titled, "The CDC Finally Capitulated to ICAN's Legal Demands and Removed the Claim that 'Vaccines Do Not Cause Autism' From Its Website!"²⁷³

On January 26, 2021, the CDC made another change to its page, changing the subheading "Vaccines are not linked to autism" to "Vaccines do not cause autism," making the apparent victory very short-lived.²⁷⁴ Likely in response to this change, ICAN and the Institute of Autism Science filed a complaint demanding a jury trial against the Secretary, alleging the Secretary violated his duties pursuant to 42 U.S.C. §§ 300aa-27 and 300aa-26 by asserting that vaccines do not cause autism without producing scientific studies to support that claim.²⁷⁵ ICAN and the Institute of Autism Science sought an order requiring the Secretary to remove the assertion from any public-facing communications until it could show that the Secretary possessed scientific studies that specifically support that vaccines given to children under one year old do not cause autism.²⁷⁶

In this demand for a jury trial, ICAN described the studies provided, stating that "the CDC may have concealed an association between that vaccine and autism."²⁷⁷ As we discussed in subpart III.A.3 above, this is incorrect. In total, its complaint is fifty-two pages long, with one section titled "The Truth Matters."²⁷⁸ Ultimately, the court granted a motion to dismiss against ICAN for lack of subject matter jurisdiction.²⁷⁹ The court found that even if ICAN demonstrated an injury to it as an organization, it could not show that the Secretary of Health and Human Service's actions caused its injury.²⁸⁰ There was no evidence that without the language, there would be more research on vaccines and autism by third parties, nor could ICAN show that ordering the CDC to change the language would lead to additional research on vaccines and autism.²⁸¹

²⁷² *Id.*

²⁷³ *The CDC Finally Capitulated to ICAN's Legal Demands and Removed the Claim that "Vaccines Do Not Cause Autism" from its Website*, ICAN (Jan. 21, 2021, 9:20 PM), <https://archive.vn/fmFxO>.

²⁷⁴ *ICAN, CDC, and the Reformatted*, *supra* note 95.

²⁷⁵ Complaint, Becerra, *supra* note 268, at 1.

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 24.

²⁷⁸ *Id.* at 48.

²⁷⁹ Opinion and Order, *Informed Consent Action Network & the Inst. for Autism Sci. v. Xavier Becerra*, No. 1:21-cv-04134-ALC (S.D.N.Y. Mar. 31, 2022).

²⁸⁰ *Id.* at 13.

²⁸¹ *Id.*

IV. DISCUSSION

The examples above support several observations about ICAN's use of the courts. First, like other social movements, ICAN seeks to use legal tools to achieve its goals and increase its legitimacy. ICAN designed at least some of its FOIA requests and lawsuits to achieve direct results. For example, ICAN'S FOIA requests actually ask for information it can use; for example, it asked for—and received—a list of studies it could then attack as insufficient to claim that vaccines do not cause autism. Its lawsuit against Facebook and YouTube is another example—ICAN clearly aimed to overturn Facebook and YouTube's decision to ban ICAN's content on their platforms.

However, achieving direct results does not appear to be the primary goal of much of ICAN's extensive legal activity. As a reminder, ICAN spent over a third of its income in 2019—more than one million dollars—on legal services from one law firm.²⁸² That amount is an enormous portion of a nonprofit's income, which leads to a reasonable conclusion that legal tools are one of ICAN's primary strategies for achieving its stated goals. Much of that activity was likely never designed to achieve concrete goals, or at least, not primarily designed for it. Instead, ICAN's litigation appears focused on in-movement goals: (1) to communicate to movement members that ICAN is acting and achieving something; (2) to create talking points for anti-vaccine activists; and (3) to reinforce anti-vaccine beliefs.

First, the fact that many of ICAN's FOIA requests and complaints filed used identical language demonstrates that when ICAN takes legal action, it seeks to communicate with its followers and show them it makes efforts to be a champion of their anti-vaccine views. An extensive litigation history demonstrates to its followers that ICAN acts and establishes itself as a leading anti-vaccine voice. However, the substance of much of the work sent out—different citizen petitions, lawsuits and FOIA requests that are then uploaded to its website and social media platforms—is almost the same. This kind of copy and paste effort may be less labor intensive and require less time, but it is not necessarily the most effective legal strategy to achieve external change. As we discussed, most of ICAN's attempts through FOIA requests, citizen petitions, and lawsuits are unsuccessful. Rather, its strategy is effective for internal messaging and spreading its narrative among its followers (who can, in turn, serve as ambassadors to the outside) rather than changing external reality by getting its narrative accepted outside the movement.

ICAN's lawsuits were routinely publicized to members in a variety of ways. ICAN highlighted alleged wins on its weekly online show, *The Highwire with Del Bigtree*. ICAN issued press releases related to legal issues and published its newsworthy content on different outlets.²⁸³ In its fundraising emails to followers, ICAN highlighted legal efforts and routinely emphasized its lawsuits on its website.²⁸⁴ ICAN similarly publicized its FDA petitions. ICAN published a copy of its petitions to the FDA on its website, and ICAN spun the FDA's responses to promote its narrative, featuring it on its weekly shows and website.

²⁸² See Form 990, *supra* note 101101.

²⁸³ ICAN vs. HHS, *supra* note 123; *Informed Consent Action Network's Attorneys Challenge DOJ Mandatory Vaccine Opinion*, EIN PRESSWIRE (Aug. 10, 2021, 11:48 AM), <https://www.einpresswire.com/article/548512480/informed-consent-action-network-s-attorneys-challenge-doj-mandatory-vaccine-opinion?r=pabnzgloZIZNKZYRuW>; *CDC Removes Claim*, *supra* note 95.

²⁸⁴ Informed Consent Action Network, *ICAN Sues NIH for Proof of Fauci's Claim Regarding the Wuhan Lab*, ICAN (Sept. 2, 2021, 4:11 PM), https://www.icandecide.org/ican_press/ican-sues-nih-for-proof-of-faucis-claims-regarding-the-wuhan-lab/.

ICAN clearly wants to give a strong impression to its followers that it is working hard towards its goals. Upon closer inspection, much of its work is repetitive, and more importantly, legally dubious. However, for individuals unfamiliar with the legal process, FOIAs, and court stipulations, ICAN's work indicates activity and dedication. It is hard not to see that ICAN uses litigation to show its supporters and funders that it is, in fact, working hard in the service of the anti-vaccine movement.

Second, even when ICAN unsuccessfully uses the legal system, it creates symbolic value by creating talking points for its followers. For example, following the initial FOIA requests, as described above, ICAN's talking points included claims that HHS did not oversee vaccine safety for thirty-two years,²⁸⁵ that the CDC recommended "untested" vaccines for pregnant women,²⁸⁶ and that the CDC did not have studies supporting its conclusion that vaccines do not cause autism.²⁸⁷ ICAN announces its talking points through *The High Wire with Del Bigtree*, press releases, and comments on social media by team members. None of these talking points are true. Despite these statements' falsity, these points became staples of anti-vaccine lore, shared routinely by members of the movement to fuel conspiracy theories and distrust.

Finally, ICAN frames and presents its legal arguments to reinforce anti-vaccine beliefs. For example, the lawsuit supporting the FOIA request for autism studies included a litany of anti-vaccine claims, even though such claims had nothing to do with a FOIA request.²⁸⁸ It appears evident that ICAN wrote the lawsuits for its supporters, not the court.

Further, ICAN presented the lawsuits results as legal validation for anti-vaccine beliefs. ICAN did not tell followers, "We settled the claim, and that shows we agreed we received sufficient documents, and nothing more." They did not tell followers, "When an agency says it did not find documents, all it means is that it did not find documents." Nor did they tell followers, "ICAN agreed to voluntarily dismiss the suit." Instead, ICAN consistently spun results to misinform its supporters that ICAN succeeded in its legal efforts to support anti-vaccine claims, including that vaccines cause autism. Through these efforts, ICAN reinforces anti-vaccine beliefs.

Bringing low-chance lawsuits is not by itself an indication that results do not matter. In fact, several social movements built a body of law that led to ultimate success by working through many low-chance cases (for example, the NAACP worked for decades to

²⁸⁵ *ICAN vs. HHS*, *supra* note 123.

²⁸⁶ Quinn Summerville, *FDA Admits to Recommending Untested Vaccines to Pregnant Women*, OCSA LEDGER (Feb. 20, 2019), <https://ocsaledger.com/6011/world-stage/fda-admits-to-recommending-untested-vaccines-to-pregnant-women/>.

²⁸⁷ Informed Consent Action Network, *CDC Concedes in Federal Court It Does Not Have Studies to Support its Claim "Vaccines Do Not Cause Autism,"* IND. AUTISM ALL. (Mar. 5, 2020), <https://www.indianaautismalliance.org/wp-content/uploads/2020/03/450664627-Ican-vs-Cdc-Lawsuit-Pr-1.pdf>.

²⁸⁸ *E.g.*, the complaint misrepresented a CDC 2004 study by stating that the study showed a link between vaccines and autism. The study, however, did not suggest any such link. Paul A. Offit, *Anti-Vaccine Doc 'Vaxxed': A Doctor's Film Review*, HOLLYWOOD REP. (Apr. 11, 2016, 12:22 PM), <https://www.hollywoodreporter.com/movies/movie-reviews/anti-vaccine-doc-vaxxed-a-882651/>. CDC also issued a statement about this conspiracy theory. *CDC Statement: 2004 Pediatrics Paper on MMR and Autism*, CTRS. FOR DISEASE CONTROL & PREVENTION (AUG. 24, 2020), <https://www.cdc.gov/vaccinesafety/concerns/autism/cdc2004pediatrics.html>.

create legal precedent to overturn segregation).²⁸⁹ Social movements similarly used partial wins or non-wins to achieve meaningful results (as NAACP did in relation to racial covenants).²⁹⁰ However, the combination of how ICAN wrote the lawsuits and how it presented results suggests that ICAN—or at least its lawyers—did not aim for actual legal wins. Instead, it used legal tools as part of a communication strategy geared mostly towards its own followers to build a base, reinforce its beliefs, and create talking points. ICAN also used legal tools to reach out-of-movement, to provide convincing talking points to those without the knowledge or experience to recognize misrepresentations, such as policymakers or potential new followers. A person hesitant about vaccines may be concerned or influenced by hearing a claim that the CDC conceded they do not have studies to show that vaccines do not cause autism.²⁹¹ That person may likely lack the background or familiarity with the specific lawsuit necessary to realize that they are being misled.²⁹² For ICAN, creating such doubts is a clear gain.

Reinforcing the beliefs of its followers and creating doubt in others both benefit ICAN's efforts to change the narrative and create fear and uncertainty about vaccines. Changing the narrative may not immediately lead to broad change, but ICAN can reasonably see it as a step towards achieving its goals of undermining the vaccine program in all its aspects.

CONCLUSION

Anti-vaccine movements' *raison d'être* is to create fear, uncertainty, and doubt about vaccines. While their members may sincerely believe vaccines are bad, they consistently use misleading tactics and tropes, and their information is generally unreliable.²⁹³ In this Article, we discussed the various ways social movements have used the law to further their movement goals, and we tracked how one influential anti-vaccine organization used legal tools in the service of creating a false narrative designed to mislead followers about vaccines. The organization invested heavily in legal tools and consistently misrepresented the results of its litigation. The law can serve social movements by helping movements like the anti-vaccine group achieve important goals—but it can cause harm to society when those movement goals are driven by false information.

²⁸⁹ MARK V. TUSHNET, *THE NAACP: LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950*, at 70–100 (1987).

²⁹⁰ *Id.* Although its language is—today—racist, *see also* Clement E. Vose, *NAACP Strategy in the Covenant Cases*, 6 CASE W. RES. L. REV. 101, 101–04 (1955).

²⁹¹ *See* CTR. FOR COUNTERING DIGIT. HATE, *supra* note 243 (explaining that anti-vaxxers raise vaccine hesitance to convert the vaccine-hesitant population by (1) providing answering spaces where the undecided individuals can address their questions about vaccines; (2) taking advantage of the fact that vaccine-hesitant populations are highly active and engaged with anti-vaccination clusters; and (3) promoting misinformation on their websites, such as guides on vaccine ingredients and polls, to show widespread hesitance to vaccines).

²⁹² *See id.*

²⁹³ Kata, *supra* note 80, at 3780–81; Reiss, *Misinformation and COVID-19*, *supra* note 20; Dorit Rubinstein Reiss & John Diamond, *Tort Law: Liability for Anti-Vaccine Misinformation*, 4 JUDGES' BOOK 107 (2020).

Table 1: FOIA Requests Submitted by ICAN

	FOIA	FOIA Response	Legal Action	ICAN’s Response/Argument
<i>Informed Consent Action Network v. United States Department of Health and Human Services</i> , No. 18-cv-03215 stipulation (S.D.N.Y. July 9, 2018).	ICAN previously submitted a FOIA request for “any and all reports transmitted to the committee on Energy and Commerce of the House of Representatives and the Committee on Labor and Human Resources of the Senate by the Secretary of HHS pursuant to 42 U.S.C. §300aa-27(c).”	HSS replied to the FOIA request from April 2018 stating that “the [Department]’s searches for records did not locate any records responsive to your request.” The court concludes “whereas, ICAN believes foregoing response from HHS now resolves all claims asserted in this action.”	Both parties stipulated that the action is voluntarily dismissed with prejudice, with each side bearing its own costs, attorney fees and expenses.	ICAN argued that this stipulation demonstrates that HHS failed to follow its primary responsibility in light of ensuring vaccine safety after removing product liability from vaccine manufacturers as required by the National Childhood Vaccine Injury Compensation Act because it failed to submit bi-annual reports to Congress detailing actions taken to ensure vaccine safety. ICAN used this stipulation to claim the CDC has not reported to Congress in over thirty-three years and now it is stipulated that it could not locate any reports to Congress required under the act.
<i>Informed Consent Action Network v. National Institutes of Health and Health Resources & Services Administration</i> , No. 18-cv-02000, complaint (S.D.N.Y Mar. 6, 2018).	ICAN submitted a FOIA on August 25, 2017, asking NIH to provide records created after January 1, 2009 in NIH’s possession regarding any and all recommendations to the Secretary of HHS pursuant to 42 U.S.C. §300aa-27(b)(3).	NIH responded by stating that neither the NIH nor the HRSA found any records reflecting recommendations by the Task Force in Safer Childhood Vaccines to the Secretary of the HHS.	ICAN filed a complaint in federal court. The action was voluntarily dismissed with prejudice.	

	FOIA	FOIA Response	Legal Action	ICAN’s Response/Argument
<i>Informed Consent Action Network v. United States FDA</i> , No. 18-cv-11237-VEC, <i>Notice of Voluntary Dismissal</i> (S.D.N.Y. Feb. 10, 2019).	ICAN submitted a FOIA to the FDA requesting copies of trials it relied upon when licensing any influenza vaccine for use in pregnant women.	The FDA replied that it did not have the records ICAN requested.	The action was voluntarily dismissed without prejudice against the FDA.	ICAN argued the FDA “failed to respond” and that “it is clear the FDA has not licensed any influenza vaccine as an indicated use for pregnant women, let alone conducted or required any pharmaceutical company to conduct any clinical trial which supports the safety of injecting pregnant women....”
<i>Institute for Autism Science v. Centers for Disease Control and Prevention</i> , No. 19-cv-11947, <i>complaint filed</i> , (S.D.N.Y. Dec. 31, 2019)	ICAN submitted a request for studies CDC relied on to claim that DTaP vaccine, Engerix-B, Rcombivax HB, Prevnar 12, Hib, IPV do not cause autism. It also requested copies of the studies that CDC relied on to claim that babies’ cumulative exposure to vaccines recommended during the first six months of life do not cause autism.	The CDC provided a list of studies.	The action was voluntarily dismissed with prejudice.	When ICAN received the response to its FOIA request, it argued the CDC failed to provide an appropriate response. As a result, ICAN sued in federal court. ICAN then filed suit, and upon its dismissal, announced that the CDC was only able to identify 20 studies that were not related to its FOIA request. It also argued that the CDC could not point to a study that shows DTaP does or does not cause autism

	FOIA	FOIA Response	Legal Action	ICAN’s Response/Argument
<p><i>Informed Consent Action Network v. National Institutes of Health</i>, No. 20-cv-1277-JJT, <i>complaint filed</i> (D. Ariz., June 29, 2020).</p>	<p>ICAN filed a FOIA for documents regarding COVID-19 and a potential vaccine. Specifically, ICAN requested “all safety and efficacy data and information regarding mRNA-1273, including from Phase I clinical trial.” The FOIA request includes: (1) “copies of any and all employee invention report related to any vaccine or therapeutic for COVID-19”; (2) “copies of any and all royalty or licensing agreements related to any vaccine or therapeutic for COVID-19”; (3) “a copy of the page of any patent application filed with regard to mRNA-1273 vaccine which lists the inventors.”</p>	<p>FOIA granted expedited request.</p>	<p>ICAN files a Complaint for Declaratory & Injunctive Relief. ICAN filed a FOIA for documents regarding COVID-19 and a potential COVID-19 vaccine. Specifically, ICAN requested an order directing NIH to comply with the FOIA requests within ten days.</p>	<p>ICAN argues that NIH granted the expedited processing request but failed to further respond to this and other requests submitted under FOIA.</p>

	FOIA	FOIA Response	Legal Action	ICAN's Response/Argument
<i>Informed Consent Action Network v. United States Food and Drug Administration</i> , No. 20-cv-05554, <i>complaint filed</i> (S.D.N.Y. July 17, 2020).	ICAN filed an expedited FOIA request to the FDA for the data and information in the biological product file for MENVEO.	The FDA denied the expedited request.	ICAN filed a complaint requesting an order declaring that it was unlawful for the FDA to fail to grant the expedited processing request and an order directing the FDA to provide the requested information within five days.	
<i>Informed Consent Action Network v. Centers For Disease Control and Prevention</i> , No. 20-cv-06177, <i>complaint filed</i> , 2020 WL 4547948 (S.D.N.Y. Aug. 6, 2020).	ICAN, under FOIA, sought all emails sent and received by Nancy Messonnier, Robert Redfield, Frank DeStefano, and Anne Schuchat that include the term SARS-CoV, COVID, COVID-19 or coronavirus in any portion of the email.	The CDC determined that the requests were too broad.	ICAN requested an Order declaring that it was unlawful for the CDC to fail to disclose.	ICAN argues that the CDC failed to disclose the information.
<i>Informed Consent Action Network v. United States FDA</i> , No. 1:20-cv-00689 (SDA) (AJN), <i>amended complaint filed</i> , 2020 U.S. Dist. LEXIS 175817 (S.D.N.Y. Sep. 24, 2020)	ICAN filed a FOIA request for a copy of the report for each clinical trial relied on to approve Engerix-B for babies and children in 1989 that had a safety review period longer than seven days following administration of the vaccine.		ICAN originally sought to obtain an Order declaring that it was unlawful for the FDA to fail to disclose documents in response to FOIA. The court held that discovery in a FOIA action is rare and only granted when a plaintiff has made a sufficient showing that the agency acted in bad faith, has raised a sufficient question as to the agency's bad faith, or when a factual dispute exists.	ICAN objected to the order and filed a motion to quash. Court holds ICAN is allowed to file objections to an order within 14 days after being served with a copy. A judge can consider timely objection and set aside an order or modify it if it is clearly erroneous or contrary to the law. That was not the case for this suit. Instead, the Judge interpreted the order as allowing ICAN to seek discovery, but that does not give ICAN the right to discovery. The Court upholds the order to quash.
<i>Informed Consent Action Network v. FDA</i> , No. 19-cv-10235,	ICAN requested a copy of the clinical study report for each clinical trial relied upon by		ICAN filed complaint for declaratory and injunctive relief against the FDA. It requested that the court	

<p><i>complaint filed,</i> (S.D.N.Y. Nov.4, 2019)</p>	<p>the FDA when approving Varicella in 1995.</p>		<p>declare the FDA’s failure to disclose the clinical trials it relied on when licensing the varicella vaccine as unlawful and issue an order directing the FDA to provide the information within 30 days.</p>	
<p><i>Informed Consent Action Network v. CDC,</i> No. 20-CV-01453-ALC-OTW, 2020 U.S. Dist. LEXIS 234536 (S.D.N.Y. Dec. 14, 2020)</p>	<p>ICAN submitted a FOIA request for all communications sent and received by Frank DeStefano, GlaxoSmithKline or Sanofi and Merck & Co. to ensure that the CDC is fulfilling its responsibilities in holding manufacturers accountable.</p>		<p>A stipulation and order were entered, resulting in a voluntary dismissal with prejudice.</p>	

Table 2: Lawsuits filed by ICAN

	Complaint Description	Specific Request/Arguments	Results:
<i>Informed Consent Action Network v. Youtube LLC and Facebook, INC., complaint filed</i> , No. 20-cv-09456 (N.D.Cal. Dec. 30, 2020).	ICAN and Del BigTree filed a complaint for <i>Bivens</i> violations and breach of the covenant of good faith and fair dealing.	ICAN specifically requested an order directing YouTube to restore ICAN’s channel and an order directing Facebook to restore ICAN’s and the HighWire’s Facebook page. ICAN also requested and order enjoining both parties from restricting its freedom of speech and requested awards for breach of implied covenant of good faith and fair dealing from both parties.	On January 31, 2022, the court granted summary judgment in favor of YouTube and Facebook and against ICAN. The court established, among other things, that ICAN failed to meet the <i>Bivens</i> standard. ICAN did not properly allege the government was a participant in the challenged activity and failed to properly allege that YouTube and Facebook acted as state agents. The court dismissed ICAN’s complaint prejudice.
<i>Informed Consent Action Network & the Institute for Autism Science v. Xavier Becerra, complaint</i> , No. 1:21-cv-04134-ALC (S.D.N.Y. May 7, 2021).	Complaint demanding a Jury trial. This complaint is a culmination of the majority of the FOIA requests that ICAN and organizations such as the Institute for Autism Science have filed for records that the CDC allegedly is supposed to have in its possession.	ICAN sought the following: <ol style="list-style-type: none"> (1) Declaration that the Secretary “violated his duties pursuant to 42 U.S.C. §§ 300aa-27 and §300aa-26 by asserting that ‘vaccines do not cause autism’ without processing scientific studies to support that claim.” (2) Order for the Secretary “to remove the assertion that ‘vaccines do not cause autism’ from any public facing communications until the Secretary can show to the Court’s satisfaction that the Secretary possesses scientific studies that specifically support that the vaccines given to children under one year of age do not cause autism.” (3) Attorneys’ fees and costs. 	On March 31, 2022, the court granted a motion to dismiss against ICAN and the Institute of Autism Science. The court dismissed and closed the case for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.
<i>Informed Consent Action Network v. NIH</i> , No. CV-20-01277-PHX-JJT, 2021 U.S. Dist. LEXIS 118185 (D. Ariz. June 24, 2021)	The complaint stems from ICAN’s FOIA request to NIH seeking, “All safety and efficacy data and information regarding mRNA-1273, including from the Phase I clinical trial of this experimental vaccine conducted by the National Institute of Allergy and Infectious Diseases.”	ICAN argued NIH “failed to demonstrate search adequacy, both in employing overly narrow search terms, and failing to search relevant repositories.” It also requested unredacted copies of the safety report.	The Court granted NIH’s motion for Summary Judgment for ICAN’s claim regarding the adequacy of its research. The Court also ordered NIH to remove the redaction and provide ICAN with a Safety Report within three weeks.

	<p>The search returned one document, a 1,093-page Safety Summary Report (the “Safety Report”). On August 13, 2020, NIH informed ICAN that because the “purpose of a Phase I trial is to establish safety... NIAID has access to safety data, but no efficacy data,” and that it withheld the Safety Report.</p> <p>NIH provided ICAN a version of the Safety Report with reduced redactions.</p>		
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