

1 QUINN EMANUEL URQUHART & SULLIVAN LLP
2 John Potter (CA Bar No. 165843)
3 johnpotter@quinnemanuel.com
4 Charles B. Stevens (CA Bar No. 324425)
5 charliestevens@quinnemanuel.com
6 50 California St., 22nd Floor
7 San Francisco, CA 94111
8 (415) 875-6600

9 QUINN EMANUEL URQUHART & SULLIVAN LLP
10 Michael E. Williams (CA Bar No. 181299)
11 michaelwilliams@quinnemanuel.com
12 Sage R. Vanden Heuvel (CA Bar No. 294868)
13 sagevandenheuvel@quinnemanuel.com
14 865 S Figueroa St, 10th Floor
15 Los Angeles, CA 90017
16 (213) 443-3100

17 QUINN EMANUEL URQUHART & SULLIVAN LLP
18 Derek L. Shaffer (CA Bar No. 212746)
19 derekshaffer@quinnemanuel.com
20 1300 I Street NW, Suite 900
21 Washington, D.C. 20005
22 (202) 538-8000

23 *Attorneys for Plaintiff U.S. News & World Report, L.P.*

24 **IN THE UNITED STATES DISTRICT COURT**
25 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
26 **DIVISION**

27 **U.S. NEWS & WORLD REPORT, L.P.**

28 Plaintiff,

vs.

DAVID CHIU, in his Official Capacity as
City Attorney of the City and County of
San Francisco,

Defendant.

Case No. _____

**COMPLAINT FOR INJUNCTIVE RELIEF
AND A DECLARATORY JUDGMENT**

JURY TRIAL DEMANDED

Introduction

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3 1. The First Amendment to the United States Constitution safeguards the
4 freedom of speech and the freedom of the press against viewpoint-based
5 discrimination by the government. The Liberty of Speech Clause in the California
6 Constitution, Art. I, § 2, similarly protects these foundational rights. And
7 California’s Reporters’ Shield Law, embodied in the California Constitution (Art. I,
8 § 2, subd. (b)) and California law (Cal. Evid. Code § 1070), defends the press against
9 intrusive inquiries by the government into unpublished information, newsgathering,
10 and methodologies.
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14 2. Despite these bedrock protections, San Francisco’s City Attorney David
15 Chiu (the “City Attorney”) is now investigating and issuing burdensome subpoenas
16 to Plaintiff U.S. News & World Report, L.P. (“U.S. News”) because he disagrees
17 with U.S. News’ viewpoint and methodology (which is publicly available) for
18 arriving at U.S. News’ rankings. Specifically, the City Attorney disapproves of U.S.
19 News’ rigorous and well-respected Best Hospital rankings. It is flatly
20 unconstitutional for the City Attorney to harass U.S. News due to his differing views
21 on these rankings; his mounting harassment must be put to a stop.
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25 3. At its core, the City Attorney’s actions pose a fundamental threat to our
26 First Amendment rights and set a dangerous precedent for all media platforms and
27 news organizations. The City Attorney is threatening invasive, sweeping,
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1 burdensome incursions against a news organization merely because he disagrees
2 with an editorial viewpoint – specifically, U.S. News’ rankings and methodology.
3 The independence of editorial determinations—free from business considerations—
4 is a bedrock principle of journalism, to which U.S. News proudly adheres.
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7 4. U.S. News firmly stands behind its hospital rankings as a valuable and
8 reliable public resource for individuals and families making critical decisions about
9 medical care for themselves and their loved ones.
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11 5. Throughout its storied 90 year history, U.S. News has been a news
12 organization that has consistently maintained the highest level of journalistic
13 integrity. U.S. News has won a variety of prestigious awards, including multiple
14 National Magazine Awards and other recognition from the Society of Professional
15 Journalists, Investigative Reporters and Editors, the National Press Club, and the
16 Overseas Press Club of America. Its mission has been and remains to equip its
17 readers and consumers with the information needed to make important life decisions.
18 Over the decades, U.S. News has learned that its readers consume information in
19 different formats, which led to the development of robust ranking systems based on
20 multiple data sources, compiled and summarized with rigor and journalistic
21 expertise. For over 34 years, U.S. News has provided hospital rankings to recognize
22 excellence in healthcare services and provide important information to healthcare
23 consumers. U.S. News maintains fidelity to its mission of helping consumers make
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1 the best healthcare decisions and operates according to the highest journalistic
2 standards.
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4 6. On June 20, 2023, and with no prior warning, the City Attorney sent
5 U.S. News a demand letter (attached hereto as Exhibit A) criticizing the results of
6 U.S. News' hospital rankings and seeking information about U.S. News' ranking
7 methodology, purportedly under the auspices of the California Business and
8 Professions Code section 17508. The City Attorney claimed (incorrectly) that the
9 rankings "suffer from poor and opaque methodology" and questioned U.S. News'
10 claim that it is the "global authority in hospital rankings." In a thorough response
11 dated July 19, 2023 (Ex. B), U.S. News raised grave, pointed concerns about the
12 City Attorney's infringement on U.S. News' rights under the United States and
13 California Constitutions and California's Reporters' Shield Laws, while also
14 explaining that its ranking methodology is published annually, communicated
15 widely, and is wholly transparent.
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21 7. When U.S. News did not receive any further correspondence from the
22 City Attorney for nearly six months, it reasonably assumed that the City Attorney's
23 misguided inquiry was at an end. It was not.
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25 8. On January 9, 2024, the City Attorney inexplicably returned and
26 escalated his intrusive inquiry by issuing, without notice, two subpoenas seeking
27 documents and information relating to U.S. News' hospital rankings (the
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1 “Subpoenas”). Exs. D, E. The Subpoenas mark an unconstitutional intrusion into
2 U.S. News’ journalistic practices, motivated by the City Attorney’s disapproval of
3 U.S. News’ viewpoint regarding which hospitals deserve to be ranked higher than
4 others.
5

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7 9. The Subpoenas make clear that the City Attorney is using governmental
8 process to engage in viewpoint discrimination—and, indeed, is proceeding as though
9 he holds censorial (or editorial) authority over how U.S. News performs its
10 journalistic work ranking hospitals. The Subpoenas ask U.S. News to “[d]escribe
11 [U.S. News’] basis for not including measures of health equity in its rankings of
12 adult Hospitals”; “[d]escribe how, if at all, [U.S. News] has incorporated primary
13 and preventive care in each annual version of the Best Hospitals rankings”; and
14 “[d]escribe [U.S. News’] basis for believing that Medicare outcomes information
15 from at least 18 months ago accurately reflects current Hospital outcomes.”
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19 10. Simply put, the City Attorney believes his office has the power to
20 second-guess and redirect the journalistic decision-making of U.S. News based on
21 his own view of what factors should and should not be considered. This is the same
22 power that governmental censors and licensors had claimed over the press until the
23 Framers of the U.S. Constitution enshrined the First Amendment more than 200
24 years ago in order to abolish any such power. Because the City Attorney today is
25 flouting the First Amendment’s protection of Freedom of Expression and the
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1 Freedom of the Press along with California’s Constitution, U.S. News is respectfully
2 seeking injunctive and declaratory relief.
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4 11. If the City Attorney’s actions are allowed to stand, any journalistic
5 enterprise that provides analyses or opinions to the public—analyses or opinions that
6 elected officials may wish to fault—may for that reason be subject to subpoena and
7 investigation. Government actors who disagree with any form of journalism,
8 including articles, rankings, product reviews, editorials, op-eds, or even political
9 cartoons, may feel free to use their powers of investigation to harass, reshape, and
10 chill those views. Such actions are an affront to the foundational freedoms upon
11 which our Constitution and nation are built.
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14 12. Forcing U.S. News to respond to the Subpoenas would violate the core
15 right of U.S. News to be free from viewpoint-based discrimination by the
16 government. Defendant’s adverse government action implicates U.S. News’
17 fundamental rights both as a private speaker and a world-renowned journalistic
18 enterprise. It thus falls to this Court to vindicate the freedoms of speech and of the
19 press embedded in the First Amendment and the Liberty of Speech Clause.
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23 13. Faced with violation and chilling of First Amendment freedoms, U.S.
24 News has been forced to bring this suit pursuant to 42 U.S.C. §§ 1983 and 1988 and
25 28 U.S.C. §§ 2201-02 to obtain injunctive and declaratory relief to secure its rights,
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1 privileges, and immunities under the United States Constitution, the California
2 Constitution, and California's Reporters' Shield Laws.

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4 14. Specifically, U.S. News seeks a declaration that the Subpoenas violate
5 the First and Fourteenth Amendments to the United States Constitution, Article I,
6 section 2 of the California Constitution, and section 1070 of the California Evidence
7 Code. U.S. News also seeks an order permanently enjoining Defendant from
8 enforcing the Subpoenas.
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11 **Parties**

12 15. U.S. News is a privately held company that, for over 90 years, has been
13 a leading journalistic institution with a reputation for fact-based and data-driven
14 reporting. U.S. News is famous for, among other things, providing trusted rankings
15 of colleges, graduate schools, hospitals, states, countries, and healthiest
16 communities. There are tens of millions of visitors to U.S. News' website,
17 usnews.com, every month, consisting of people seeking research and guidance.
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21 16. Defendant David Chiu is the City Attorney of the City and County of
22 San Francisco. In that capacity, he exercises enforcement authority on behalf of the
23 City and County of San Francisco and holds ultimate authority over the Subpoenas
24 and any actions to force compliance with same.
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Jurisdiction

17. This case presents federal questions within this Court’s jurisdiction pursuant to Article III of the United States Constitution and 28 U.S.C. §§ 1331 and 1343(3). U.S. News brings this action pursuant to 42 U.S.C. §§ 1983 and 1988 (deprivation of rights, privileges, and immunities secured by the Constitution and federal law) and 28 U.S.C. §§ 2201-02 (declaratory judgment as to an actual controversy).

Divisional Assignment

18. This civil action should be assigned to the San Francisco division. Defendant is the City Attorney for the City and County of San Francisco, and a substantial part of the events giving rise to the claims occurred in San Francisco.

Venue

19. Venue in this Court is proper under 28 U.S.C. § 1391(b).

Facts

I. BACKGROUND OF U.S. NEWS AND ITS METHODOLOGY FOR HOSPITAL RANKINGS

20. U.S. News has been ranking hospitals for 34 years. Its “Best Hospital” rankings are broken into two subcomponents — specialty rankings and procedure and condition ratings.

21. The specialty rankings are meant for patients with life-threatening or rare conditions who need a hospital that excels in treating complex, high-risk cases.

1 Hospitals are ranked from 1 to 50 in most specialties, with hospitals not in the top
2 50 but still in the top 10% of all rated hospitals in those specialties receiving a
3 designation of “high performing.”
4

5 22. The procedure and condition ratings, meanwhile, focus on specific and
6 more commonly required individual procedures and conditions, such as hip
7 replacement and heart failure, rather than on broader specialties like orthopedics and
8 cardiology. The goal for these rankings is to evaluate how well hospitals perform in
9 each procedure or condition—not just for the most challenging cases, as with the
10 specialty rankings, but across the full range of patients. Because the procedures and
11 conditions evaluated are performed at many more hospitals than the specialties, the
12 evaluations produce ratings rather than numerical rankings. Hospitals that treat
13 enough patients to be evaluated are rated one of three ways for each procedure or
14 condition: high performing, average, or below average.
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19 23. In 2023, U.S. News evaluated thousands of hospitals across 15
20 specialties and 21 procedures.
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22 24. U.S. News provides its Best Hospital rankings to recognize excellent
23 healthcare facilities and to provide the public with an informed view of the relative
24 strengths of particular hospitals. As stated on U.S. News’ website, the rankings are
25 intended to be taken as a “starting point,” and “[a]ll care decisions should be made
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1 in conjunction with medical professionals.”¹ Depending on any particular
2 individual’s health situation, it might make more sense to go to an average hospital
3 that is close by or in-network for insurance purposes rather than a high-performing
4 hospital that is far away and out-of-network.
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7 25. The methodology used to produce each year’s Best Hospitals rankings
8 is updated and refined on an annual basis by a team of professionals and journalists
9 led by a Managing Editor and a Senior Health Data Scientist. Each member of the
10 editorial team works full time on health rankings, including the hospital rankings.
11 Editorial team members are not involved in sales of any products or services and
12 revenue considerations do not impact the rankings in any way.
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15 26. In formulating its rankings, U.S. News has contracted for nearly 20
16 years with an independent, nonprofit research institute to support the publication of
17 Best Hospitals: Specialty Rankings and Best Children’s Hospitals. Additionally,
18 U.S. News has from time to time contracted with other professional organizations to
19 support its analytical work.
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22 27. The process that U.S. News’ editorial team uses to iteratively refine its
23 methodology is designed to be responsive to stakeholder feedback, advances in
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27 ¹ Ben Harder, *FAQ: How and Why We Rank and Rate Hospitals*, U.S. News Dec.
28 5, 2023, available at <https://health.usnews.com/health-care/best-hospitals/articles/faq-how-and-why-we-rank-and-rate-hospitals> (last visited Jan. 23, 2024).

1 measurement science, and changes in how healthcare is delivered to beneficiaries of
2 America's largest insurance plan, Medicare. This process entails long-standing
3 journalistic practices that includes judgment and evidentiary rigor.
4

5 28. Stakeholder feedback is an essential component of the journalistic
6 process, and the team obtains feedback via multiple modalities, including: (1)
7 working groups comprising medical experts; (2) U.S. News-convened focus groups
8 of healthcare consumers; (3) U.S. News-initiated interaction with medical
9 researchers and study authors; (4) memoranda and letters submitted by specialty
10 societies, hospital consortia, researchers, clinicians, patients, patient advocate
11 groups, hospital and health system administrators, and other stakeholders; (5)
12 professional meetings at which U.S. News staff present and receive feedback; (6)
13 U.S. News-hosted conferences and webinars in which U.S. News staff present and
14 receive feedback; and (7) other miscellaneous communications with stakeholders.
15 All of this unpublished information obtained during U.S. News' editorial process is
16 protected by the First Amendment and California's Reporters' Shield Law.
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22 29. Advances in measurement science are identified by: (1) reading peer-
23 reviewed studies published in relevant scientific journals, such as the Journal of the
24 American Medical Association, Health Affairs, and Health Services Research; (2)
25 speaking with and corresponding with researchers about the methods they have used
26 in such studies; and (3) conducting independent scientific research.
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1 30. Relevant changes in healthcare delivery are identified by studying
2 policy announcements issued by the Centers for Medicare and Medicaid Services,
3 as well as studying data, whether issued by other groups or derived internally, to
4 understand changing trends in how and where diseases are treated and how
5 treatments are documented in the data sets available for our analysis.
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8 31. The U.S. News team curates the feedback received and identifies
9 candidate methodology changes that, in its members' opinions, are likely to improve
10 the precision with which the methodology identifies high-performing hospitals.
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12 32. U.S. News publishes, along with the actual rankings, reports that
13 describe in detail the methodologies underlying each of its Best Hospital rankings
14 for that year. Examples of these reports are attached hereto as Exhibits G and H. In
15 particular, the reports describe the changes that have been made from the prior year's
16 methodology, the data that is collected/used, the weighting of the data and criteria,
17 the expert opinion component to the rankings, and even methodological
18 improvements that are being considered for future years. These detailed
19 methodology reports are available for downloading so that anyone can see the
20 methodology used for a particular ranking in any particular year.
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25 33. U.S. News gives no weight to financial considerations when
26 determining and publishing its rankings. Higher rankings cannot be bought at any
27 sum, as this would fatally undermine U.S. News' standing as a leader in unbiased,
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1 quality-driven rankings. While U.S. News accepts advertising and other revenues
2 from entities that may be ranked—just as television networks and newspapers
3 regularly accept ads from businesses that are the subject of news stories—such
4 advertising plays no role in the rankings. Ranked entities have the option to license
5 a “badge” to highlight their placement on the rankings on their own website and in
6 their own advertisements, a practice followed by many other publications. The
7 licensing of badges is common in the publishing industry. The licensing of the badge
8 has absolutely no connection with the rankings an entity may receive.

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12 34. U.S. News is just one of many publications that provide rankings and/or
13 ratings to the public, both about hospitals and otherwise. The Wall Street Journal,²
14 The San Francisco Chronicle,³ Newsweek,⁴ The L.A. Times,⁵ The New York Times’
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21 ² 2024 Best Colleges in the U.S., WALL STREET JOURNAL, available at
22 <https://www.wsj.com/rankings/college-rankings/best-colleges-2024> (last visited Jan. 23,
23 2024).

24 ³ Cesar Hernandez and Soleil Ho, *Top 25 Restaurants*, SAN FRANCISCO
25 CHRONICLE, Jan. 15, 2024, available at [https://www.sfchronicle.com/projects/2023/best-
26 sf-restaurants-bay-area/](https://www.sfchronicle.com/projects/2023/best-sf-restaurants-bay-area/) (last visited Jan. 23, 2024).

27 ⁴ *World’s Best Hospitals 2023*, NEWSWEEK, available at
28 <https://www.newsweek.com/rankings/worlds-best-hospitals-2023/united-states> (last
visited Jan. 23, 2024).

⁵ Bill Addison, *The 101 Best Restaurants in Los Angeles of 2023*, LOS ANGELES
TIMES, Dec. 5, 2023, available at [https://www.latimes.com/food/list/101-best-los-angeles-
restaurants-ranked-2023](https://www.latimes.com/food/list/101-best-los-angeles-restaurants-ranked-2023) (last visited Jan. 23, 2024).

1 Wirecutter,⁶ Forbes,⁷ Consumer Reports,⁸ Better Homes and Gardens,⁹ CNET,¹⁰
2 Money.com,¹¹ and countless other websites, newspapers, and magazines offer
3 rankings, reviews, and “best of” lists to their readers. If the City Attorney’s actions
4 are permitted to stand, the overreach threatens to chill all media, not just U.S. News.
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6 **II. U.S. NEWS’ HOSPITAL RANKINGS ARE WIDELY RECOGNIZED** 7 **AS A VALUABLE RESOURCE**

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9 35. Numerous third-party evaluations by experts in the healthcare industry
10 support U.S. News’ view that its hospital rankings are a valuable and trusted resource
11 for the public. Most notably, in 2019, health researchers writing in the New England
12 Journal of Medicine (long renowned as one of the world’s most respected and
13 influential medical journals) bestowed upon U.S. News the highest grade among the
14 hospital rankings they evaluated.¹² The researchers conducted a comprehensive
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18 ⁶ New York Times Wirecutter, *available at* <https://www.nytimes.com/wirecutter/>
19 (last visited Jan. 23, 2024).

20 ⁷ *Forbes Lists*, FORBES, *available at* <https://www.forbes.com/lists/list-directory/>
21 (last visited Jan. 23, 2024).

22 ⁸ CONSUMER REPORTS, *available at* <https://www.consumerreports.org/> (last
23 visited Jan. 23, 2024).

24 ⁹ *BHG Recommends*, BETTER HOMES & GARDENS, *available at*
25 <https://www.bhg.com/shopping/bhg-recommends/> (last visited Jan. 23, 2024).

26 ¹⁰ *Best Products*, CNET, *available at* <https://www.cnet.com/best/> (last visited Jan.
27 23, 2024).

28 ¹¹ *The Best Hospitals of 2024*, MONEY, *available at* [https://money.com/best-
hospitals/](https://money.com/best-hospitals/) (last visited Jan. 23, 2024).

¹² Karl Y. Bilimoria, et al., *Rating The Raters: An Evaluation Of Publicly Reported
Hospital Quality Rating Systems*, NEW ENG. J. OF MED. CATALYST, Aug. 14, 2019,
available at <https://catalyst.nejm.org/doi/full/10.1056/CAT.19.0629> (last visited Jan. 23,
2024).

1 study to evaluate various hospital ranking systems, including the federal
2 government's CMS Hospital Compare Overall Star Ratings, Healthgrades Top
3 Hospitals, Leapfrog Safety Grade and Top Hospitals, and U.S. News. The study
4 involved a group of experienced methodologists, consisting of physician scientists
5 who bring expertise in healthcare quality measurement from academic centers and
6 the private sector. The study established six major criteria for assessing these rating
7 systems: Potential for Misclassification of Hospital Performance,
8 Importance/Impact, Scientific Acceptability, Iterative Improvement, Transparency,
9 and Usability. The assessment aimed to identify strengths, weaknesses, and
10 opportunities for improvement in the rating systems. This rigorous study spanned
11 several months and aimed to provide users with valuable insights into the different
12 rating systems, ultimately aiding in their decision-making process.

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18 36. U.S. News emerged as the health researchers' top-ranking system. It
19 surpassed even the U.S. Government's own rating system, Hospital Compare. The
20 New England Journal of Medicine study concluded, "[w]e qualitatively agreed that
21 the U.S. News rating system had the least chance of misclassifying hospital
22 performance. There was considerable agreement in overall grade assignments
23 among the six individuals who performed the ratings."¹³ As one of the most highly
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28 ¹³ *Id.*

1 regarded peer-reviewed publications in the world, the New England Journal of
2 Medicine study affirms the credibility and significance of U.S. News rankings.

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4 37. In January 2021, the Journal of General Internal Medicine published an
5 article entitled “Revisiting US News & World Report’s Hospital Rankings—Moving
6 Beyond Mortality to Metrics that Improve Care”, written by respected physicians at
7 Brigham and Women’s Hospital, Harvard Medical School, and Johns Hopkins
8 Medicine.¹⁴ The authors concluded: “[U.S. News] rankings have a powerful ability
9 to provide useful information about where patients should seek care at a specialty
10 and overall hospital level. Similarly, they can motivate hospitals to provide patient-
11 centered care. We applaud [U.S. News’] efforts to help patients make informed
12 decisions, and we hope that these rankings will evolve to be as reliable and valuable
13 as possible to patients and providers.”¹⁵

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18 38. U.S. News’ hospital rankings has garnered additional acclaim from
19 countless other publications. USA Today, for instance, published an article on July
20 27, 2021 emphasizing U.S. News’ inclusion of a health equity analysis in its 2022
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25 ¹⁴ Mallika L. Mendu, et al., *Revisiting US News & World Report’s Hospital*
26 *Rankings—Moving Beyond Mortality To Metrics That Improve Care*, J. OF GENERAL
27 INTERNAL MED. 36(1):209-210, July 7, 2020, available at
https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7858726/pdf/11606_2020_Article_6002.pdf (last visited Jan. 23, 2024).

28 ¹⁵ *Id.*

1 Best Hospitals rankings.¹⁶ This health equity analysis identified that “racial and
2 ethnic minorities were underrepresented among patients in roughly 4 out of 5
3 hospitals in the country,” highlighting the importance for hospitals to be more
4 cognizant of these issues when administering healthcare to their local populations.
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7 39. On July 12, 2023, USA Today published a news article entitled
8 “Hospital Rankings Are Far From Perfect. But Experts Say Patients Still Need
9 Them.”¹⁷ In that article, an expert on quality care and patient safety noted generally
10 with respect to hospital rankings: “The industry doesn’t put out anything more
11 accurate and doesn’t put out anything more useful or more timely.”¹⁸ The article
12 indicated that “[t]he annual ratings also create health competition where hospitals
13 vie for patients by devoting resources to hospital quality and safety, which leads to
14 better care and health outcomes.”¹⁹
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18 40. U.S. News believes that its methodology relies on “world-class data and
19 technology,” and it has ample justification for its opinion. The rankings rely on the
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22 ¹⁶ See Adrianna Rodriguez, *US Hospitals Struggle To Reduce Health Disparities: Minority Patients Underrepresented In 4 Of 5 Hospitals*, USA TODAY, July 27, 2021,
23 available at <https://www.usatoday.com/story/news/health/2021/07/27/us-news-best-hospital-ranking-includes-first-health-equity-analysis/8090005002/> (last visited Jan. 23,
24 2024).

25 ¹⁷ Adrianna Rodriguez, *Hospital Rankings Are Far From Perfect. But Experts Say Patients Still Need Them*, USA TODAY, July 12, 2023, available at
26 <https://www.usatoday.com/story/news/health/2023/07/12/why-patients-need-us-hospital-health-rankings/70396794007/> (last visited Jan. 23, 2024).
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28 ¹⁸ *Id.*

¹⁹ *Id.*

1 Medicare fee-for-service data set, a widely employed data set by academic
2 researchers and various stakeholders. Notably, the rankings incorporate
3 sophisticated technologies from third-party software companies which are highly
4 regarded in the industry. These robust data sources and advanced technological tools
5 contribute to the reliability and accuracy of U.S. News' hospital rankings. As
6 discussed above, U.S. News continually enhances its data points through ongoing
7 improvements and refinements. As the New England Journal of Medicine notes in
8 its study, U.S. News notably improved its rating system by "weighting volume for
9 proportion of Medicare Advantage patients, improving outcome measures with
10 exclusion of external transfers, and adding risk adjustment for sociodemographic
11 factors."²⁰

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17 41. These are only a handful of the reputable publications that support U.S.
18 News' beliefs and assertions about the quality and value of its hospital rankings.
19 Undoubtedly, there are other publications that may disagree. Views on both sides
20 are subjective opinions entitled to the fullest First Amendment protections. It is not
21 up to any government to choose between any competing opinions or to respond to
22 one view or the other with adverse governmental action or inquiry.
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²⁰ Karl Y. Bilimoria, et al., *supra* n.12.

1 **III. DEFENDANT’S UNCONSTITUTIONAL INQUIRY INTO U.S.**
2 **NEWS’ PROTECTED SPEECH**

3 42. On June 20, 2023, the City Attorney sent U.S. News a demand letter
4 seeking information regarding the Best Hospital rankings. *See* Exhibit A. On its
5 face, the City Attorney’s letter evinced viewpoint-based criticisms of the U.S. News’
6 rankings and methodologies. Among other things, the letter expressed “significant
7 concerns about the rankings of hospitals,” stated that the rankings “suffer from poor
8 and opaque methodology,” questioned the “reliability of the rankings,” and
9 suggested (falsely) that “USNWR’s ranking methodology is seriously flawed.”
10 Exhibit A at 1-2. From there, the letter called out specific aspects of the
11 determinations that U.S. News has made in producing its rankings—such as the
12 selection of “Honor Roll” hospitals, the relative emphasis on cystic fibrosis versus
13 sickle cell disease, the alleged “fail[ure] to incorporate indicators of health equity,”
14 an “undue emphasis on mortality,” and U.S. News’ regard for “subjective opinion
15 surveys.” *Id.* at 2-3. The letter was a textbook example of content and viewpoint-
16 based discrimination by a government entity.

17 43. The City Attorney’s letter sought to couch its criticisms of the content
18 of U.S. News rankings with specious allegations of potential wrongdoing. For
19 example, the City Attorney alleged a potential violation of California Business and
20 Professions Code section 17508 because U.S. News “advertises itself as an
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1 authoritative resource in comparing hospitals overall, regionally, and with respect to
2 specialties, procedures, and specific medical conditions.” *Id.* at 1-2. Specifically,
3 the City Attorney challenged U.S. News’ portrayal of itself as the “global authority
4 in hospital rankings,” and the assertions that its rankings are “authoritative,” based
5 on “world-class data and technology,” and to aid patients and families in “find[ing]
6 the best healthcare,” making “data-informed decisions,” and identifying “sources of
7 skilled inpatient care.” *Id.* According to the City Attorney, U.S. News may not offer
8 favorable opinions of itself without providing “all evidence of the facts on which” it
9 bases such opinions. *Id.* If this were the law, every news organization and business
10 in America would face potential legal peril anytime it speaks highly of itself. But
11 the First Amendment says otherwise.

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17 44. Moreover, the statute that the City Attorney relied on is inapplicable
18 because these statements are not “advertising claim[s].” Under Section 17508, an
19 actionable statement must meet a three-part test to fall within the purview of
20 California’s False Advertising Law (Cal. Bus. & Prof. Code § 17500 et seq.): “(1) a
21 commercial speaker, (2) an intended commercial audience, and (3) representations
22 of fact of a commercial nature.” *Bernardo v. Planned Parenthood Fed’n of Am.*, 115
23 Cal. App. 4th 322, 347–48 (2004) (citing *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 964
24 (2002)). The City Attorney’s letter did not identify any commercial statements of
25 fact. In *Bernardo*, the court held that mere statements of opinion on Planned
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1 Parenthood’s website were not actionable as commercial advertisements. *Bernardo*,
2 115 Cal. App. 4th at 348; *see also Nike*, 27 Cal. 4th at 967 (holding that the False
3 Advertising Law and Unfair Competition Law “do not suppress points of view but
4 instead suppress false and misleading *statements of fact*”) (emphasis added).
5
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7 45. The same no less follows for U.S. News’ descriptions of its rankings.
8 These statements about U.S. News’ journalism are subjective opinion, not
9 commercial statements of fact, and they accordingly are not actionable as a matter
10 of law. In any event, these statements are amply validated by the views of
11 independent third-party publications and industry observers, as detailed above.
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14 46. The City Attorney also baselessly alleged that U.S. News had violated
15 16 C.F.R. § 255.5, a provision of FTC’s Guides Concerning the Use of Endorsements
16 and Testimonials in Advertising (“Guides”), by failing to disclose payments from its
17 ranked hospitals for badge licensing, data subscriptions, and advertising on U.S.
18 News’ website and guidebook. According to the letter, the Guides apply to U.S.
19 News because it is an “endorser” under Section 255.0 of the Guides, and the hospital
20 payments “might materially affect the weight or credibility of the endorsement,”
21 thereby triggering disclosure obligations under Section 255.5. Exhibit A at 3.
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25 47. The City Attorney’s FTC allegations are misplaced for four reasons.
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1 48. First, U.S. News’ rankings of hospitals are not “endorsements” or
2 “testimonials” in advertising as defined by the Guides. In its notice of adoption in
3 2009, the FTC stated:

4
5 In general, under usual circumstances, the Commission **does not**
6 **consider reviews published in traditional media** (i.e., where a
7 newspaper, magazine, or television or radio station **with**
8 **independent editorial responsibility** assigns an employee to review
9 various products or services as part of his or her official duties, and
10 then publishes those reviews) **to be sponsored advertising**
11 **messages**. Accordingly, **such reviews are not “endorsements”**
12 within the meaning of the Guides. Under these circumstances, the
13 Commission believes, knowing whether the media entity that
14 published the review paid for the item in question would not affect
15 the weight consumers give to the reviewer’s statements.²¹

16 49. The Commission further clarified that its view regarding endorsements
17 “would be the same . . . **for an Internet News website with independent editorial**
18 **responsibility**, rather than a traditional brick-and-mortar periodical.”²² In other
19 words, there is no endorsement so long as the news media is editorially independent
20 in its reporting, rather than reporting on behalf of advertisers or their agent.²³ U.S.
21 News is a media company with independent editorial responsibility; its editorial
22 content is assigned to staff who review and report hospitals as their official duties
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26 ²¹ Guides Concerning the Use of Endorsements and Testimonials in Advertising,
27 74 Fed. Reg. 53136 (Oct. 15, 2009) (revising 16 C.F.R. § 255) (emphasis added).

28 ²² *Id.* at 53136 n.101.

²³ *Id.* at 53136.

1 and have no involvement in the company’s advertising content.²⁴ The Guides simply
2 do not apply.
3

4 50. Second, even if the Guides did apply—and they do not—no disclosure
5 would be warranted under the circumstances. Section 255.5 requires disclosure of a
6 *material* connection between the endorser and the seller of the advertised product.
7 A “material connection” is a relationship that “might materially affect the weight or
8 credibility of the endorsement, and that connection is not reasonably expected by the
9 audience....”²⁵ The Commission acknowledges that “some connections may be
10 immaterial because they are too insignificant to affect the weight or credibility given
11 to endorsements.”²⁶ Here, there is absolutely no connection between the rankings a
12 hospital may receive and their decision to license a badge or purchase advertising in
13 U.S. News.
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18 51. Third, the Guides are merely “administrative interpretations” of the
19 Federal Trade Commission Act (“FTCA”); they do not constitute binding law subject
20 to enforcement by the City Attorney’s Office.²⁷ Section 255.0, the “purpose and
21 definitions” section of the Guides, provides that the Guides “address the application
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24

25 ²⁴ U.S. News, *U.S. News & World Report Editorial Guidelines*, available at
26 <https://www.usnews.com/about-us/editorial-guidelines> (last visited Jan. 23, 2024).

27 ²⁵ 16 C.F.R. § 255.5(a).

28 ²⁶ *Id.*

²⁷ 16 C.F.R. § 255.0(a).

1 of section 5 of the FTC Act, 15 U.S.C. 45, to the use of endorsements and
2 testimonials in advertising” and “provide the basis for voluntary compliance with
3 the law by advertisers and endorsers.”²⁸ Thus, although “[p]ractices inconsistent
4 with these Guides may result in corrective action by the [Federal Trade]
5 Commission,” they do not automatically constitute violations of the law or the
6 FTCA.²⁹ Moreover, only the FTC – not the City Attorney nor anyone else – can
7 enforce the FTCA. “It is well-established that there is no private right of action for
8 violation of the FTCA; only the Federal Trade Commission has standing to enforce
9 it.”³⁰

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14 52. Finally, and contrary to the implications in the City Attorney’s letter,
15 commercial relationships with hospitals have no influence whatsoever in
16 determining a hospital’s position in U.S. News’ rankings or even whether a hospital
17 is ranked at all. The independence of editorial determinations—free from business
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22 ²⁸ *Id.*

23 ²⁹ *Id.*; see also *F.T.C. v. Garvey*, 383 F.3d 891, 903 (9th Cir. 2004); *BHRS Grp.,*
24 *LLC v. Brio Water Tech., Inc.*, 2020 WL 9422352, at *9 (C.D. Cal. Dec. 14, 2020);
25 *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (holding mere interpretations
26 expressed in policy statements, agency manuals, and enforcement guidelines lack the force
27 of law).

28 ³⁰ *Kerr v. Am. Home Mortg. Servicing, Inc.*, 2010 WL 3743879, at *3 (S.D. Cal.
Sept. 23, 2010); see also *Carlson v. Coca-Cola Co.*, 483 F.2d 279 (9th Cir. 1973) (“The
protection against unfair trade practices afforded by the Act vests initial remedial power
solely in the Federal Trade Commission”).

1 considerations—is a bedrock journalistic principle, to which U.S. News proudly
2 adheres.

3
4 53. On June 20, 2023, shortly after sending the letter to U.S. News, the City
5 Attorney expounded, via his personal Twitter account, his disagreement with the
6 content of U.S. News’ hospital rankings:
7

8 Today, my Office sent a letter seeking information on @usnews
9 hospital rankings, which have come under scrutiny for **questionable**
10 **methodology, bias & undisclosed financial relationships** with highly
11 ranked hospitals. Consumers use these rankings to make consequential
12 health care decisions, and yet there is little understanding that **the**
13 **rankings are fraught** & that U.S. News has financial relationships with
14 the hospitals it ranks. The **hospital rankings appear to be biased**
15 **towards providing treatment for wealthy, white patients, to the**
16 **detriment of poorer, sicker, or more diverse populations**. This creates
17 perverse incentives that may be warping our healthcare system.
18 Hospitals are essentially “treating to the test” by investing in specialties
19 that rack up the most points rather than in primary care or other worthy
20 specialties.³¹

21 54. In parallel, the City Attorney announced the letter from the official City
22 Attorney account and on the City Attorney’s website, again repeating his baseless
23 allegation that U.S. News’ rankings have a “questionable methodology.”³² Six days
24 later, the City Attorney tweeted, again from his personal account, that, “[f]ollowing

23 ³¹ David Chiu, Tweet Message, X.com, *available at*
24 <https://x.com/DavidChiu/status/1671246558967500800?s=20> (last visited Jan. 23, 2024)
(emphasis added).

25 ³² San Francisco City Attorney, Tweet Message (June 20, 2023), *available at*
26 <https://twitter.com/SFCityAttorney/status/1671245937271005184> (last visited Jan. 23,
27 2024); San Francisco City Attorney, *U.S. News & World Report Faces Legal Scrutiny Over*
28 *Dubious Hospital Rankings*, June 20, 2023, *available at*
[https://www.sfcityattorney.org/2023/06/20/u-s-news-world-report-faces-legal-scrutiny-](https://www.sfcityattorney.org/2023/06/20/u-s-news-world-report-faces-legal-scrutiny-over-dubious-hospital-rankings/)
[over-dubious-hospital-rankings/](https://www.sfcityattorney.org/2023/06/20/u-s-news-world-report-faces-legal-scrutiny-over-dubious-hospital-rankings/) (last visited Jan. 23, 2024).

1 the letter my office sent US News last week, the University of Pennsylvania Health
2 System has joined other hospitals in withdrawing from US News & World Report’s
3 dubious hospital rankings.”³³ The City Attorney was evidently pleased that his use
4 of his official government powers had caused damage to U.S. News’ business and
5 reputation. Moreover, the City Attorney’s public statements—issued before U.S.
6 News even had an opportunity to respond—demonstrate that the City Attorney had
7 prejudged the issues at the very outset of the investigation.

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11 55. U.S. News met with the City Attorney’s Office on July 11, 2023 to
12 discuss the June 20 Letter. During the meeting, the City Attorney’s Office confirmed
13 that it believes that U.S. News should be using a different methodology or factors in
14 its hospital rankings. The City Attorney’s Office also expressed the view that it was
15 well within the City Attorney’s power to question U.S. News over which factors and
16 criteria it should be considering when conducting its hospital rankings. Indeed, a
17 review of many of the informational requests in Attachment A to the letter confirms
18 that the City Attorney is claiming power to second-guess and reshape U.S. News’
19 chosen approach to its rankings. Ex. A at 5-7. For example, the letter asks whether
20 U.S. News has considered and declined modifications and changes to certain ranking
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27 ³³ David Chiu, Tweet Message, X.com, *available at*
28 <https://x.com/DavidChiu/status/1673456048882208769> (last visited Jan. 23, 2024).

1 methodologies. *Id.* It asks what plans U.S. News has to address what the City
2 Attorney perceives as disparities in weighting certain diseases. *Id.* It asks what
3 plans does U.S. News have to expand and develop its measures of health equity. *Id.*
4 The Attachment also advocates for certain changes in the methodology raised by
5 critics of U.S. News’ rankings under the heading “Data Limitations.” *Id.*
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8 56. The City Attorney’s questions about the propriety of U.S. News’
9 methodology and the factors considered are misplaced and cannot be justified under
10 the guise of regulating mere advertising. As the Ninth Circuit Court of Appeals
11 recently explained with respect to ratings systems, “there is an inherently subjective
12 element in deciding which scientific and objective criteria to consider. For example,
13 publications that rank colleges or law schools purportedly rely on objective criteria
14 (*e.g.*, acceptance rates, test scores, class size, endowment), but selecting those
15 criteria involves subjective decision-making.” *ARIIX, LLC v. NutriSearch Corp.*,
16 985 F.3d 1107, 1121 (9th Cir. 2021). That healthcare professionals disagree
17 regarding the best data and modeling methods to be used in hospital rankings only
18 underlines the subjectivity at work here. No such opinion can be properly labeled
19 or regulated as though it is false advertising.
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25 57. On July 19, 2023, U.S. News sent a response to the City Attorney’s
26 letter. A copy of this letter is attached as Exhibit B. U.S. News alerted the City
27 Attorney that his inquiries infringed upon U.S. News’ rights under the First
28

1 Amendment and the Liberty of Speech Clause, but nonetheless provided a
2 thoroughgoing response to the baseless allegations in the letter.
3

4 58. On January 9, 2024, the City Attorney sent a response letter to U.S.
5 News in which he simply reiterated his view that U.S. News must disclose the
6 methodology behind its hospital rankings, must substantiate its statements about the
7 quality and value of these rankings, and must disclose additional financial
8 information relating to the rankings. A copy of this letter is attached as Exhibit C.
9 The letter attached two Subpoenas: one seeking documents relating to the hospital
10 rankings, and another containing interrogatories relating to the rankings. A copy of
11 the Subpoenas are attached as Exhibits D and E.
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15 59. The interrogatory Subpoena contains fourteen interrogatories relating
16 to U.S. News hospital rankings. Each of these interrogatories infringes upon U.S.
17 News' First Amendment rights as a private speaker and a media enterprise. For
18 example, the Subpoena includes no less than seven interrogatories second-guessing
19 and challenging U.S. News' protected speech regarding its rankings:
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21

22 Describe USNWR's basis for stating that its Best Hospitals rankings
23 are "[h]ow to find the best medical care in 2023," as stated on the
24 following webpage: <https://health.usnews.com/best-hospitals>.

25 Describe USNWR's basis for according 19 times greater weight to
26 cystic fibrosis treatment than to sickle cell disease treatment in the
27 Children's Hospital rankings;

28 Describe how, if at all, USNWR has incorporated primary and
preventive care in each annual version of the Best Hospitals rankings;

1 Describe USNWR’s basis for not including measures of health equity
2 in its rankings of adult Hospitals;

3 Describe how USNWR has adjusted the Medicare fee-for-service
4 dataset to reflect actual patient populations in each annual version of its
Best Hospitals rankings;

5 Describe USNWR’s basis for believing that Medicare outcomes
6 information from at least 18 months ago accurately reflects current
7 Hospital outcomes;

8 Describe USNWR’s basis for using opinion surveys as the exclusive
9 method for ranking Hospitals in ophthalmology, psychiatry, and
rheumatology and for incorporating opinion surveys into other
10 specialties ranked by USNWR.

11 Ex. D at 3-4 (Rog. Nos. 7-13).

12 60. The interrogatory Subpoena also demands that U.S. News identify *all*
13 hospitals who have paid U.S. News for *any* purpose, including badge licensing, data,
14 advertising, and promotion. Ex. D at 3 (Rog Nos. 1-6). These requests reflect an
15 improper governmental attempt to intimidate and dissuade U.S. News and the
16 hospitals from entering into commercial relationships with each other, harming U.S.
17 News’ business, simply because the City Attorney disagrees with U.S. News’
18 hospital rankings and methodology.
19
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21 61. The document Subpoena is similarly intrusive, demanding U.S. News’
22 agreements with any hospitals identified in the interrogatories, as well as its
23 contracts with certain partners who have assisted U.S. News in creating the Best
24 Hospitals rankings. Ex. E at 3.
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1 62. The City Attorney’s attempt to seek confidential, unpublished
2 information and documents regarding U.S. News’ business relationships, and to
3 imply through government coercion and investigation that these relationships are in
4 any way improper, appear designed to cause economic and reputational harm to U.S.
5 News. The City Attorney has previously touted the harm that his investigation has
6 caused to U.S. News, and there is substantial risk that enforcement of the Subpoenas
7 will intimidate hospitals and other entities from advertising with U.S. News or
8 providing data to assist its rankings.
9

10 63. If U.S. News were to surrender to the City Attorney’s demands and alter
11 its hospital rankings to align with his preferences, the implications would be severe.
12 The City Attorney, for example, has accused U.S. News of placing “an undue
13 emphasis on mortality”³⁴, and has subpoenaed information regarding the use of
14 “opinion surveys” in its rankings.³⁵ But readers are entitled to make their own
15 decisions about these factors when making personal health care decisions. To be
16 sure, the City Attorney may have his own differing opinions from U.S. News’
17 editors, to which he is entitled. What he should not be doing is trying to dictate and
18 second-guess the editorial judgments of U.S. News. No government official should
19 be imposing his personal views at the expense of a free press.
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27 ³⁴ Ex. A at 2.

28 ³⁵ Ex. D (Rog. No. 13).

1 **IV. THE CITY ATTORNEY'S ENFORCEMENT ACTION APPEARS**
2 **MOTIVATED BY THE AGENDA OF U.S. NEWS' CRITICS, AS**
3 **OPPOSED TO ANY PURPORTED GOVERNMENT INTEREST**

4 64. The City Attorney's brazen efforts to trample the First Amendment
5 rights of U.S. News are facially unlawful. Concerns are further compounded,
6 however, by indications that the City Attorney is furthering the personal agenda of
7 critics of U.S. News and its rankings, as opposed to any genuine governmental
8 interest.
9

10 65. The original June 20, 2023, letter from the City Attorney instructed U.S.
11 News to "direct any questions and provide the requested documentation,
12 information, and confirmation by July 5, 2023, to Chief of Complex and Affirmative
13 Litigation Sara Eisenberg." Ex. A at 3-4. U.S. News met with Ms. Eisenberg and
14 others on July 11, 2023 to discuss its concerns with the letter, and U.S. News sent its
15 response letter to Ms. Eisenberg. Ex. B at 1. And when the City Attorney's Office
16 sent its Subpoenas on January 9, 2024, Ms. Eisenberg was once again copied. Ex. F
17 (Jan. 9, 2024 Email from City Attorney's Office). Ms. Eisenberg, meanwhile, is the
18 City Attorney's liaison with Yale Law School's San Francisco Affirmative Litigation
19 Project ("SFALP"), a partnership between Yale Law School and the San Francisco
20 City Attorney's Office. SFALP is led by Dean Heather Gerken of Yale Law School,
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1 an outspoken critic of U.S. News’ rankings, who works closely with Ms. Eisenberg
 2 to oversee this partnership.³⁶

3
 4 66. Dean Gerken founded SFALP in 2006³⁷ and “is one of the few Deans
 5 in the country to run a clinic.”³⁸ The program “pairs Yale Law students with lawyers
 6 from the San Francisco City Attorney’s Office to conceive, develop, and litigate
 7 cutting-edge public interest cases.”³⁹ The SFALP website explains how the Yale
 8 program works closely and fluidly with the City Attorney’s Office:
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10
 11 Imagine a public interest law firm with significant resources,
 12 outstanding attorneys, and standing to bring suits that most public
 13 interest groups cannot bring without costly class-action litigation. With
 14 a long history of engaging in civil law enforcement and public policy
 15 litigation, the San Francisco City Attorney’s Office deploys top-flight
 16 lawyers to pursue affirmative litigation on behalf of the people of San
 17 Francisco and California. Yale students work with deputy city attorneys
 18 on the Affirmative Litigation Task Force through every stage of the
 19 litigation process, from brainstorming possible suits to filing
 20 complaints to motions practice.⁴⁰

21 67. SFALP “embodies the vision of Dean Heather K. Gerken[.]”⁴¹ A
 22 litigation guide co-published by the City Attorney and SFALP encourages “city,
 23

24 ³⁶ Yale Law School, *San Francisco Affirmative Litigation Project, About Us*,
 25 available at <https://law.yale.edu/sfalp/about-us> (last visited Jan. 23, 2024).

26 ³⁷ *Id.*

27 ³⁸ Yale Law School, *Heather Gerken*, available at <https://law.yale.edu/heather-gerken> (last visited Jan. 23, 2024).

28 ³⁹ Yale Law School, *San Francisco Affirmative Litigation Project*, available at
<https://law.yale.edu/sfalp> (last visited Jan. 23, 2024).

⁴⁰ Yale Law School, *San Francisco Affirmative Litigation Project, SF City
 Attorney’s Office* available at <https://law.yale.edu/sfalp/sf-city-attorneys-office> (last
 visited Jan. 23, 2024).

⁴¹ Yale Law School, SFALP, The Opioid Epidemic, And Public Interest at [SFALP,
 the Opioid Epidemic, and Public Interest | Yale Law School](https://law.yale.edu/sfalp/the-opioid-epidemic-and-public-interest) (last visited Jan. 23, 2024).

1 county, and district attorney’s offices to embrace a broader sense of mission: as not
2 only the attorney for the city or county as an institution, but also as the attorney
3 representing the interests of its residents.”⁴²

4
5 68. The litigation guide also discusses strategies for using consumer
6 protection laws to achieve public interest goals: “What makes consumer protection
7 law especially valuable for impact litigation is its breadth and versatility. When local
8 law offices take full advantage of consumer protection law, they can engage in a
9 wide range of public interest litigation. They may engage in prototypical consumer
10 protection cases—combatting deceptive sales tactics, false advertising, or unfair
11 banking and lending practices. But, local law offices can also use consumer
12 protection laws to protect residents from business practices that cause other types of
13 widespread harm or threaten residents’ well-being.”⁴³

14
15 69. For the past few years, while partnering with the City Attorney through
16 SFALP, Dean Gerken has become one of the leading critics of the rankings of U.S.
17 News. In 2022, Yale became the first top 14 law school to decline to participate in
18 U.S. News’ ranking survey of law schools.⁴⁴ In her public notice describing the
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24 ⁴² *Local Action, National Impact: A Practical Guide To Affirmative Litigation For*
25 *Local Governments*, at 4, available at [A-Practical-Guide-to-Affirmative-Litigation-](#)
26 [FINAL-4.13.19-1.pdf \(sfcityattorney.org\)](#) (last visited Jan. 23, 2024).

27 ⁴³ *Id.* at 16.

28 ⁴⁴ See Ines Chomnalez, *Yale Law School withdraws from “perverse” U.S. News*
rankings, Yale News, Nov. 16, 2022 at [https://yaledailynews.com/blog/2022/11/16/yale-](https://yaledailynews.com/blog/2022/11/16/yale-law-school-withdraws-from-perverse-u-s-news-rankings/)
[law-school-withdraws-from-perverse-u-s-news-rankings/](https://yaledailynews.com/blog/2022/11/16/yale-law-school-withdraws-from-perverse-u-s-news-rankings/) (last visited Jan. 23, 2024).

1 reasons for Yale Law School’s decision, Dean Gerken criticized the rankings as
2 “profoundly flawed” and lacking a “sound methodology,” and stated that “the
3 rankings process is undermining the core commitments of the legal profession.”⁴⁵
4 Dean Gerken went further, stating that the “ill-conceived system” of U.S. News’
5 rankings “applies a misguided formula that discourages law schools from doing what
6 is best for legal education,” uses a “backward approach” to student debt loads, and
7 provides “inadequate weight” to how much financial aid a law school provides to its
8 students.⁴⁶ Even after U.S. News met with over 100 law school administrators and
9 made changes to the law school ranking criteria,⁴⁷ Dean Gerken continued to
10 criticize U.S. News, telling press outlets that Yale Law School had “cemented our
11 decision to stop participating in the rankings.”⁴⁸ Such comments notwithstanding,
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18 ⁴⁵ *Dean Gerken: Why Yale Law School Is Leaving the U.S. News & World Report*
19 *Rankings*, Yale Law School, Nov. 16, 2022 at <https://law.yale.edu/yls-today/news/dean-gerken-why-yale-law-school-leaving-us-news-world-report-rankings> (last visited Jan. 23,
20 2024).

21 ⁴⁶ *Id.*

22 ⁴⁷ Robert Morse and Stephanie Salmon, *Plans for Publication of the 2023-2024*
23 *Best Law Schools*, U.S. News, Jan. 2, 2023 available at
24 <https://www.usnews.com/education/blogs/college-rankings-blog/articles/2023-01-02/plans-for-publication-of-the-2023-2024-best-law-schools> (last visited Jan. 23, 2024).

25 ⁴⁸ Ines Chomnalez, *U.S. News Rankings To Be Modified, Yale Law Doubles Down*
26 *On Withdrawal*, Yale Daily News, Jan. 23, 2023, available at
27 <https://yaledailynews.com/blog/2023/01/23/u-s-news-rankings-to-be-modified-yale-law-doubles-down-on-withdrawal/> (last visited Jan. 23, 2024); see also *Education Secretary Cardona And Expert Panelists Discuss A Future Beyond Rankings*, Yale Law School, March 2, 2023, available at <https://law.yale.edu/yls-today/news/education-secretary-cardona-and-expert-panelists-discuss-future-beyond-rankings> (last visited Jan. 23, 2024);
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1 U.S. News published its news law school rankings in 2023, and Dean Gerken
2 continued her criticism of U.S. News.⁴⁹

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4 70. The City Attorney’s letter mirrors Dean Gerken’s criticism of U.S.
5 News’ rankings. Both the City Attorney and Dean Gerken have criticized U.S.
6 News’ “methodology” and the “weight” U.S. News gives to certain factors,⁵⁰ both
7 have called the rankings “flawed,”⁵¹ both claimed that U.S. News’ rankings cause
8 “harm,”⁵² and both have accused U.S. News of “disincentiviz[ing]” programs that
9 assist individuals with fewer means.⁵³

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12 71. It is striking that U.S. News’ primary contact with the City Attorney’s
13 Office has been Ms. Eisenberg, Dean Gerken’s liaison and partner in the SFALP
14 program. While U.S. News respects Dean Gerken’s First Amendment right to
15 express her views publicly, such criticism belongs in the public square, where it may
16 (or may not) persuade—it should not be weaponized by the City Attorney’s Office
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20 ⁴⁹ See, e.g., Jack Stripling, *Yale Sparked A U.S. News Rankings Revolt. Here’s*
21 *What Happened Next*, Washington Post, Dec. 4, 2023, available at
22 <https://www.washingtonpost.com/education/2023/12/04/us-news-law-school-revolt-yale>
(last visited Jan. 23, 2024).

23 ⁵⁰ Compare *Dean Gerken*, *supra* n. 45 with Ex. A (June 20, 2023 Letter from the
24 City Attorney); see also Ex. D (Interrogatory Subpoena) at 3-4.

25 ⁵¹ Compare *Dean Gerken*, *supra* n. 45 with Ex. A (June 20, 2023 Letter from the
26 City Attorney).

27 ⁵² Compare *Dean Gerken*, *supra* n. 45 with City Attorney of San Francisco, *U.S.*
28 *News & World Report Faces Legal Scrutiny Over Dubious Hospital Rankings* (June 20,
2023), *supra* n. 32.

⁵³ Compare *Dean Gerken*, *supra* n. 45 with Ex. A (June 20, 2023 Letter from the
City Attorney).

1 to launch unconstitutional enforcement actions. This Court should not allow any
2 private party, in any way, to co-opt government so as to impose a personal viewpoint
3 on others. By adopting Dean Gerken’s preferred viewpoint as though it deserves the
4 force of law, the City Attorney’s Subpoenas are overstepping beyond the bounds of
5 proper law enforcement and unconstitutionally attempting to chill and penalize a
6 disfavored viewpoint. Despite the prevalence of countless media publications that
7 perform various types of rankings, including of hospitals, U.S. News is unaware of
8 the City Attorney investigating any of these other publications.
9

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11
12 **Count I – First Amendment (Chilling Freedom of Speech and of the Press)**
13 **(Pursuant to 28 U.S.C. §§ 2201, 2202; 42 U.S.C. §§ 1983, 1988)**

14 72. Plaintiffs repeat, re-allege, and incorporate the allegations in
15 paragraphs 1–71 of this Complaint as though fully set forth herein.
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17 73. The First Amendment to the United States Constitution applies to
18 California by virtue of the Fourteenth Amendment.
19

20 74. The First Amendment provides that “Congress shall make no law ...
21 abridging the freedom of speech, or of the press” U.S. Const. amend. I.
22

23 75. “The First Amendment, applied to states through the Fourteenth
24 Amendment, prohibits laws abridging the freedom of speech.” *Animal Legal Def.*
25 *Fund v. Wasden*, 878 F.3d 1184, 1193 (9th Cir. 2018) (internal quotation omitted).
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1 76. “Under that Clause, a government, including a municipal government
2 vested with state authority, has no power to restrict expression because of its
3 message, its ideas, its subject matter, or its content.” *Reed v. Town of Gilbert, Ariz.*,
4 576 U.S. 155, 163 (2015) (internal quotation omitted).
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7 77. “That the First Amendment speaks separately of freedom of speech and
8 freedom of the press is no constitutional accident, but an acknowledgment of the
9 critical role played by the press in American society.” *Houchins v. KQED, Inc.*, 438
10 U.S. 1, 17 (1978) (Stewart, J., concurring).
11

12 78. The Liberty of Speech Clause in the California Constitution similarly
13 provides that “[e]very person may freely speak, write and publish his or her
14 sentiments on all subjects” and “[a] law may not restrain or abridge liberty of speech
15 or press.” Cal. Const. art. I, § 2. The California Supreme Court has held that the
16 Liberty of Speech Clause “grants broader rights to free expression than does the First
17 Amendment to the United States Constitution.” *Fashion Valley Mall, LLC v. Nat’l*
18 *Lab. Rels. Bd.*, 42 Cal. 4th 850, 857 (2007).
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22 79. In violation of 42 U.S.C. § 1983, the Subpoenas, on pain of criminal
23 penalties for lack of compliance, infringes the rights of U.S. News that are secured
24 by the First and Fourteenth Amendments and the Liberty of Speech Clause,
25 irreparably injuring U.S. News.
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1 80. Here, the City Attorney is investigating and threatening enforcement
2 against U.S. News because the City Attorney faults the content of U.S. News' speech
3 in the form of its journalism and methodologies. Such adverse government action
4 implicates both the First Amendment and the Liberty of Speech Clause, and is
5 subject to strict scrutiny. "The level of scrutiny with which [a court reviews] a
6 restriction of free speech activity depends upon whether it is a content-neutral
7 regulation of the time, place, or manner of speech or restricts speech based upon its
8 content." *Fashion Valley Mall, LLC*, 42 Cal. 4th at 865 (2007). A law is content-
9 based "if the main purpose in enacting it was to suppress or exalt speech of a certain
10 content, or it differentiates based on the content of speech on its face." *Matter of*
11 *Search Warrant for [redacted].com*, 248 F. Supp. 3d 970, 981 (C.D. Cal. 2017)
12 (search warrant notice preclusion order was a content-based restriction subject to
13 strict scrutiny) (internal quotation omitted).

14 81. A law that is intended to regulate speech based on its particular content
15 or viewpoint is "presumptively unconstitutional and may be justified only if the
16 government proves that they are narrowly tailored to serve compelling state
17 interests." *Reed*, 576 U.S. at 163. "It is rare that a regulation restricting speech
18 because of its content will ever be permissible." *United States v. Playboy Ent. Grp.,*
19 *Inc.*, 529 U.S. 803, 818 (2000).

1 82. The City Attorney’s June 20, 2023 letter and subsequent Subpoenas
2 demonstrate content- and viewpoint-based criticisms and intrusions against the U.S.
3 News’ journalism and methodologies. Among other things, the June 20 letter
4 expresses “significant concerns about the rankings of hospitals,” states that the
5 rankings “suffer from poor and opaque methodology,” questions the “reliability of
6 the rankings,” and suggests (falsely) that “[U.S. News’] ranking methodology is
7 seriously flawed.” Ex. A at 1-2. The Subpoenas go a step further, threatening
8 potential contempt for noncompliance if U.S. News does not answer the City
9 Attorney’s hostile, invasive questions and produce requested documents behind the
10 hospital rankings. Exs. D, E.

11 83. U.S. News’ rankings and opinions are its own. They are not published
12 by the City Attorney, nor does U.S. News need the City Attorney’s approval and
13 endorsement in order to publish them as it does. By the same token, the City
14 Attorney lacks legal charter to translate any potential disagreement with U.S. News’
15 rankings into a burdensome, intrusive investigation, let alone an enforcement action,
16 at U.S. News’ grave expense. *See, e.g., Giebel v. Sylvester*, 244 F.3d 1182, 1188–89
17 (9th Cir. 2001) (attempts to single out and silence a particular speaker amount to
18 impermissible viewpoint discrimination); *Hurley v. Irish-Am. Gay, Lesbian &*
19 *Bisexual Grp. of Bos.*, 515 U.S. 557, 581 (1995) (“Disapproval of a private speaker’s
20 statement does not legitimize use of the [state’s] power to compel the speaker to alter
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1 the message by including one more acceptable to others.”); *Miami Herald Pub. Co.*
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3 *v. Tornillo*, 418 U.S. 241, 256 (1974) (requirement that newspaper “publish that
4 which reason tells them should not be published is unconstitutional”) (internal
5 quotation omitted); *Nat’l Rifle Ass’n of Am. v. City of Los Angeles*, 441 F. Supp. 3d
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7 915, 930 n.3 (C.D. Cal. 2019) (enjoining, as an impermissible content-based
8 restriction on speech, city ordinance that “collaterally attack[s] disfavored speech
9 via a disclosure requirement”).

11 84. The City Attorney’s demand gives U.S. News two choices. Either it
12 must provide the requested documents and information, which will chill and burden
13 its protected speech. Or else it must bear the penalties of noncompliance with the
14 Subpoenas. So whichever way U.S. News goes with this Hobson’s choice, it stands
15 to lose First Amendment freedoms—and thus suffer irreparable injury—unless this
16
17 Court issues declaratory and injunctive relief.

19
20 **Count II – California Reporters’ Shield Law**
21 **(Pursuant to California Constitution [Art. I. § 2(b)]**
22 **and Cal. Evid. Code § 1070)**

23 85. Plaintiffs repeat, re-allege, and incorporate the allegations in
24 paragraphs 1–84 of this Complaint as though fully set forth herein.

25 86. The City Attorney’s demands for information regarding U.S. News’
26 rankings, methodologies, and sources of funding also conflict with the Reporters’
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1 Shield Law, embodied in the California Constitution (art. I, § 2, subd. (b)) and the
2 California Evidence Code (Cal. Evid. Code § 1070).
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4 87. “A publisher, editor, reporter, or other person connected with or
5 employed upon a newspaper ... shall not be adjudged in contempt ... for refusing to
6 disclose the source of any information . . . or for refusing to disclose any unpublished
7 information[.]” Cal. Const. art. I, § 2(b); *see also* Cal. Evid. Code § 1070 (same).
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9
10 88. The Shield Law safeguards the press against intrusive inquiries into
11 unpublished information, confidential sources, and methodologies. “Since contempt
12 is generally the only effective remedy against a nonparty witness, the California
13 enactments . . . grant such witnesses virtually absolute protection against compelled
14 disclosure.” *New York Times Co. v. Superior Ct.*, 51 Cal. 3d 453, 461 (1990).
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17 89. This solicitude for the press is also reflected in United States
18 Department of Justice policy guidelines, which circumscribe the instances in which
19 the DOJ will subpoena the press:
20

21 (1) A free and independent press is vital to the functioning of our
22 democracy. Because freedom of the press can be no broader than the
23 freedom of members of the news media to investigate and report the
24 news, the Department’s policy is intended to provide protection to
25 members of the news media from certain law enforcement tools and
actions, whether criminal or civil, that might unreasonably impair
newsgathering. . . .

26 (2) The Department recognizes the important national interest in
27 protecting journalists from compelled disclosure of information
28 revealing their sources, sources they need to apprise the American
people of the workings of their Government. For this reason, with the
exception of certain circumstances set out in this section, the

1 Department of Justice will not use compulsory legal process for the
2 purpose of obtaining information from or records of members of the
3 news media acting within the scope of newsgathering.

4 28 C.F.R. § 50.10.

5 90. The City Attorney's letter does not compare favorably. It disregards the
6 critical role that a longstanding news organization such as U.S. News plays in the
7 public sphere. The City Attorney has combined legal threats with burdensome
8 demands for confidential information as part of a concerted effort to censor and
9 revise U.S. News' rankings so that they better align with the City Attorney's
10 viewpoint. Its Subpoenas should be enjoined as violations of California's Reporters'
11 Shield Law.
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14 **Prayer for Relief**

15 Wherefore, U.S. News respectfully requests that judgment be entered in its
16 favor and against the City Attorney as follows:
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18 1. A declaration that the Subpoenas violate the First Amendment (as
19 incorporated by the Fourteenth Amendment), the Liberty of Speech Clause of the
20 California Constitution, and California's Reporters' Shield Law, and is therefore null
21 and void in its entirety;
22

23 2. An order temporarily restraining the City Attorney from enforcing the
24 Subpoenas until a hearing can be held on a preliminary injunction, unless the City
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1 Attorney agrees his office will not enforce the Subpoenas before such a hearing may
2 be held;
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4 3. An order preliminarily enjoining the City Attorney from enforcing the
5 Subpoenas during the pendency of the litigation, unless the City Attorney agrees his
6 office will not enforce the Subpoenas before this Court can issue a decision on the
7 merits;
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10 4. An order permanently enjoining the City Attorney from enforcing the
11 Subpoenas;

12 5. An award to U.S. News of its reasonable attorneys' fees and costs; and

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14 6. A grant to U.S. News of such additional or different relief as the Court
15 deems just and proper.
16

17 **Jury Demand**

18 Plaintiff U.S. News hereby demands a trial by jury as to all issues so triable
19 in this case.
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Dated: January 23, 2024

Respectfully submitted,

QUINN EMANUEL URQUHART &
SULLIVAN LLP

By /s/ John Potter
John Potter

Attorneys for Plaintiff
U.S. News & World Report, L.P.