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Countering the Big Lie: The Role of the Courts in the Post Truth World

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ESSAY

COUNTERING THE BIG LIE: THE ROLE OF THE COURTS IN THE POST-TRUTH WORLD

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INTRODUCTION

During President Donald J. Trump's administration, Americans witnessed an unprecedented assault on the truth by Trump and his political allies. Throughout his time in office (and even before), Trump lied to gain and maintain political support. *The Washington Post* has reported that in the course of his four years as President, Trump made 30,573 false or misleading claims, an average of 21 per day.[1] No detail was too small to lie about—whether the size of the crowds at his 2017 inauguration, his "landslide" election victory in 2016, or the popularity of his spouse as First Lady. Nor was any lie too big—that the presided over the most prosperous economy in US history, that his policies minimized loss of life during the Covid-19 Pandemic, and unquestionably, the biggest Big Lie, that 2020 election was stolen from him as a result of massive voter fraud in five swing states—Arizona, Georgia, Michigan, Pennsylvania, and Wisconsin.[2]

The reality is that Trump failed in his re-election bid, losing by over 7 million ballots in the popular vote and by a substantial margin in the electoral college.[3] Having come up short in the political arena, Trump cried foul and then enlisted the courts in an effort to overturn the election results in five swing states that he had failed to carry, even though, within days of

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1 Glenn Kessler, Salvador Rizzo, & Meg Kelly, *Trump's False or Misleading Claims Total 30,573 Over 4 Years*, WASH. POST (Jan. 24, 2021), https://www.washingtonpost.com/politics/2021/01/24/trumps-false-or-misleading-claims-total-30573-over-four-years/ [https://perma.cc/EZ5N-HMQL].

2 Alexa Corse, *Election Fraud Claims: A State-By-State Guide*, WALL ST. J. (Jan. 6, 2021), https://www.wsj.com/articles/election-fraud-claims-a-state-by-state-guide-11609962846 [https://perma.cc/DQK9-2UEW].

3 The official tally of the popular vote by the Federal Election Commission reflects that President Biden received 81,268,924 votes (51.3%) and Trump received 74,216,154 votes (46.86%). In the Electoral College, Biden received 306 votes to Trump's 232. Official 2020 Presidential Election Results, available at fec.gov/resources/cms-content/documents/2020presgeresults.pdf [https://perma.cc/D8QT-VBLJ]; *see also* cases collected at Wikipedia, *Post-election lawsuits related to the 2020 United States presidential election*, https://en.wikipedia.org/wiki/Post-election_lawsuits_related_to_the_2020_United_States_presidential_election (as of Jan. 26, 2022) [https://perma.cc/977D-F3PZ].

the election, his own campaign staff had prepared a memorandum debunking "many of the outlandish claims" of voter fraud conspiracy subsequently made by Trump's legal team.[4] Trump and his allies filed over 60 lawsuits in state and federal courts alleging, without credible supporting evidence, election irregularities and widespread voter fraud in the those swing states.[5] Trump's claims were rejected out of hand and dismissed by the courts.[6] Joe Biden was inaugurated as the 46th President of the United States on January 20, 2021.

One way to view these post-election events is to say that our Constitutional system of checks and balances worked. As the third branch of government, the judiciary asserted itself and foiled the lame duck Chief Executive's brazen attempts to seize power by dismissing Trump's baseless claims that the election was stolen from him, thereby preserving the balance of power among the three branches of government. Those dismissals, in turn, paved the way for a peaceful transition of power to a new administration and ensured that the will of the people was not thwarted. That narrative, although perhaps comforting, does not tell the whole story. The transition of power did occur, but it was neither routine nor peaceful. Trump may not have been dragged from the White House kicking and screaming, but he certainly resisted turning over the reins of government and spent hours scheming to remain in power. For much of the interregnum, his administration did not cooperate with the Biden transition team, making it nearly impossible for the new administration to hit the ground running on January 20, 2021. Defying tradition and good manners, Trump declined to attend the inauguration of his successor on that day.[7]

Nor, in light of the January 6, 2021 Capitol riot, can the transition be properly viewed as peaceful.[8] Rather, an armed mob descended on the

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4 Alan Feuer, *Trump Campaign Knew Lawyers' Voting Machine Claims Were Baseless, Memo Shows*, N.Y. TIMES (Sept. 21, 2021), https://www.nytimes.com/2021/09/21/us/politics/trump-dominion-voting.html [https://perma.cc/5HAZ-4CV5].

5 For a listing of cases, see Current Litigation, ABA Journal (Apr. 30, 2021) available at americanbar.org/groups/public_interest/election_law/litigation [https://perma.cc/Y42H-5VK3].

6 *Id.*

7 Savannah Behrmann, *The Trumps, Jimmy Carter: Who Did Not Attend Biden's Inauguration*, USA TODAY (Jan. 20, 2021), https://www.usatoday.com/story/news/politics/2021/01/20/inauguration-who-wont-attendance-bidens-swearing/4167208001/ [https://perma.cc/B6W3-4Q38].

8 See O'Rourke v. Dominion Voting Systems Inc., No. 20-CV-03747-NRN, 2021 WL 3400671, at *23 (D. Colo. Aug 3, 2021), wherein the court observed:

> Horrifyingly, that two-century tradition arguably came to an end on January 6, 2021, when the United States Capitol was stormed during a violent attack against the United States Congress, with a mob attempting to overturn President Trump's defeat by disrupting the joint session of Congress assembled to formalize Joe Biden's victory. The Capitol complex was locked down and lawmakers and staff were evacuated while rioters occupied and vandalized the building for several hours. People died. "This was a singular and chilling event in

Capitol, killing two police officers and seriously injuring scores more; ransacking the Capitol building and Congressional offices; and threatening the safety and well-being of the Vice President, Senators, and Representatives.[9] The unruly mob acted under the mistaken belief that they could somehow disrupt the report of the electoral vote to Congress and thereby allow Trump to continue serving in office.

Still, even after its falsity was exposed for all to see in court rulings, Trump's election lie refused to die.[10] Indeed, the notion that the election was stolen from Trump is alive and even thriving among Trump loyalists and a majority of Republican voters[11]—and spreading. After nearly a year, "the Big Lie is metastasizing" and now infecting the 2022 midterm election with many Republican candidates preemptively "raising the specter of rigged elections in their own [2022] campaigns."[12] The irony of the "stop the steal" movement, lost on the Trump faithful, is that Trump—not Biden—was the only one seeking to "steal" the election. More importantly, Trump's false

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U.S. history, raising legitimate concern about the security—not only of the Capitol building—but of our democracy itself." United States v. Cua, No. CR 21-107 (RDM), 2021 WL 918255, at *3 (D.D.C. Mar. 10, 2021); *see also* United States v. Munchel, 991 F.3d 1273, 1284 (D.C. Cir. 2021) ("It cannot be gainsaid that the violent breach of the Capitol on January 6 was a grave danger to our democracy. . . .").

9 *Id.*

10 *Id.* The court in *Dominion Voting Systems* noted:

> Even today, the judges of the District of Columbia, who are presently making detention decisions about alleged insurrectionists, are keeping people in jail precisely because of the continued propagation of evidence-lacking allegations of election fraud that spawned the insurrection to begin with. *See* United States v. Meredith, Crim. No. 21-0159 (SBJ), Dkt. #41 at 24 (D.D.C. May 26, 2021) (detaining defendant and listing as one basis for decision that "[t]he steady drumbeat that inspired defendant to take up arms has not faded away; six months later, the canard that the election was stolen is being repeated daily on major news outlets and from the corridors of power in state and federal government, not to mention the near-daily fulminations of the former President."); United States v. Whitton, 534 F.Supp.3d 32, 47 (D.D.C. 2021) (detaining defendant in part because "the Court is not convinced that dissatisfaction and concern about the legitimacy of the election results has dissipated for all Americans" and citing former President Trump's "forceful public comments about the 'stolen election,' chastising individuals who did not reject the supposedly illegitimate results that put the current administration in place"); United States v. Dresch, Crim. No. CR 21-0071 (ABJ), 2021 WL 2453166, at *8 (D.D.C. 2021) (detaining defendant in part "given that his singular source of information, [former President Trump], continues to propagate the lie that inspired the attack on a near daily basis, And the anger surrounding the false accusation continues to be stoked by multiple media outlets as well as the state and federal party leaders who are intent on censuring those who dare to challenge the former President's version of events") (citation omitted).

11 According to a Reuters/Ipsos Poll conducted in May 2021, 53% of Republicans "view Trump as the true president." *53% of Republicans view Trump as True U.S. President*, REUTERS (May 24, 2021), https://www.reuters.com/world/us/53-republicans-view-trump-true-us-president-reutersipsos-2021-05-24/ [https://perma.cc/QZ45-AQYZ].

12 David Siders & Zach Montellaro, '*It's spreading': Phony election fraud conspiracies infect midterms*, POLITICO (Sept. 20, 2021), https://www.politico.com/news/2021/09/20/election-fraud-conspiracies-infect-midterms-512783 [https://perma.cc/QVW5-MXP7].

claims of fraud have spurred state legislatures to enact election "reform" legislation that are nothing more than thinly disguised voter suppression statutes.[13] The reality is that Trump's challenge to the 2020 election results "was never about fraud—it was about undermining the People's faith in our democracy and debasing the judicial process to do so."[14] In short, Trump's election lie, although it did not put him back in the White House, has inflicted serious, and now lasting, damage on our democratic institutions.[15] Trump has created a post-truth world where facts no longer matter, eroding trust in all branches of the government, including the courts. For Trump followers, the facts are irrelevant; only what Trump says matters. This view is not limited to Trump's diehard "base." Even main line Republican legislators are embracing the Trump approach. Witness the attempts to reframe the events of January 6, not as a violent and lawless riot, but rather simply as a peaceful exercise of free speech—in the face of overwhelming video and testimonial evidence to the contrary.[16] Yet, other than losing his lawsuits, Trump has never been called to account for his baseless and irresponsible attempts to have the courts overturn the results of the 2020 Presidential election.

This Essay analyzes the role of the courts in handling Trump's election lie. It argues that the courts were certainly correct in giving short shrift to Trump's lawsuits, but further that the courts should have done more than simply dismiss Trump's claims. Had the courts aggressively utilized existing tools to identify and punish prosecution of baseless claims, including Rule 11 of the Federal Rules of Civil Procedure and the courts' inherent powers to control proceedings before them, the Trump election lie might well have

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13 At least 18 states have enacted laws that restrict access to the vote. *See Voting Laws Round Up: July 2021*, BRENNAN CTR. FOR JUST. (July 22, 2021) (citing AL H.B. 285, AL H.B. 538, AR H.B. 1112, AR H.B. 1244, AR H.B. 1715, AR S.B. 643, AZ S.B. 1003, AZ S.B. 1485, AZ S.B. 1819, FL S.B. 90, GA S.B. 202, IA S.F. 413, IA S.F. 568, ID H.B. 290, IN S.B. 398, KS H.B. 2183, KS H.B. 2332, KY H.B. 574, LA H.B. 167, MT H.B. 176, MT H.B. 530, MT S.B. 169, MT S.B. 196, NH H.B. 523, NV S.B. 84, OK H.B. 2663, TX H.B. 3920, TX S.B. 1111, UT H.B. 12, WY H.B. 75), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-july-2021 [https://perma.cc/G58Q-HXVB].

14 King v. Whitmer, No. 20-13134, 2021 WL 3771875 at *1 (E.D. Mich. Aug. 25, 2021).

15 CAROL LEONNIG & PHILIP RUCKER, I ALONE CAN FIX IT 1–2 (Penguin Press, 2021):

> Trump's actions and word nevertheless had painful consequences. His assault on the rule of law degraded our democratic institutions and left Americans reasonably fearful they could no longer take for granted basic civil rights and untainted justice. His contempt for foreign alliances weakened America's leadership in the world and empowered dictators and despots. His barbarous immigration enforcement ripped migrant children out of the arms of their families. His bigoted rhetoric emboldened white supremacists to step out of the shadows.

16 Lisa Lerer & Nicholas Fandos, *Already Distorting Jan. 6, G.O.P. Now Concocts Entire Counternarrative*, N.Y. TIMES (July 31, 2021), https://www.nytimes.com/2021/07/31/us/politics/jan-6-capitol-riot-pelosi.html [https://perma.cc/M758-28MQ] ("No longer content to absolve Mr. Trump, they concocted a version of events in which those accused of rioting were patriotic political prisoners and Speaker Nancy Pelosi was to blame for the violence.").

been put to rest immediately before it could take root among die-hard Trump supporters. This Essay also suggests how the courts might more effectively handle future baseless and politically-motivated election challenges in the post-truth world and prevent efforts to debase the judicial process in their incipiency.

I
THE BIG LIE AS A POLITICAL STRATEGY

A. The Big Lie Defined

The strategy of subverting or even disregarding the truth in order to curry political favor, which I shall refer to as the Big Lie, did not begin with Trump. Rather, the Big Lie has been a tool of authoritarian regimes from time immemorial.[17] The operational premise of the Big Lie is deceptively simple—if you tell a lie loud enough, long enough, and with enough authority, people will begin to believe it. In modern times, the Big Lie was utilized by authoritarian regimes in Europe in the 1920's and 1930's, most notably Nazi Germany and the Soviet Union, not only to gain a popular following, but also to intimidate the populace and to discourage political opposition.[18] The Nazi government rose to power by propagating one outrageous lie— that Germany had not lost World War I, but rather that it had been betrayed by Jews and Bolsheviks who had caused Germany's surrender to the Allied powers.[19] This patently false rewriting of history resonated with the German populace that embraced Hitler and supported his rise to power. Once in power and throughout its tyrannical reign, the Nazi government used lies and suppressed the truth to stay in power and root out political opposition.

Although Trump did not invent the Big Lie, he adopted the Big Lie

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17 Andrew Higgins, *The Art of the Lie? The Bigger the Better*, N.Y. TIMES (Jan. 10, 2021), www.nytimes.com/2021/01/10/world/105urope/trump-truth-lies-power.html [https://perma.cc/E83A-CWMU] ("Lying as a political tool is hardly new. Niccolo Machiavelli, writing in the 16th century, recommended that a leader try to be honest but lie when telling the truth 'would place him at a disadvantage.' People don't like being lied to, Machiavelli observed, but 'one who deceives will always find those who allow themselves to be deceived.') (citation omitted).

18 *Id.*

> The utility of lying on a grand scale was first demonstrated nearly a century ago by leaders like Stalin and Hitler, who coined the term "big lie" in 1925 and rose to power on the lie that Jews were responsible for Germany's defeat in World War I. For the German and Soviet dictators, lying was not merely a habit or a convenient way of sanding down unwanted facts but an essential tool of government.
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> It tested and strengthened loyalty by forcing underlings to cheer statements they knew to be false and rallied the support of ordinary people, who, Hitler realized, "more readily fall victims to the big lie than the small lie," because, while they might fib in their daily lives about small things, "it would never come into their heads to fabricate colossal untruths."

19 *Id.*

playbook and implemented it with gusto. Even before he declared himself a candidate for the office of President, Trump test-drove the Big Lie by supporting birtherism—the argument that President Barack Obama was not a native-born American and hence not legitimately elected to the nation's highest office.[20] Not only did Trump lie as he sowed the seeds of doubt about Obama's citizenship, he supported that position with even more lies, saying, among other things, that he had authorized an investigation of Obama's origins and that his "investigation" of Obama had uncovered the fact that Obama's original long-form birth certificate was missing.[21]

After his election, Trump's lies continued, and the pace of Trump's false or misleading claims accelerated as his term progressed to the point where it seemed that objective truth no longer mattered. Indeed, Trump is the epitome of politics in the post-truth world wherein "objective facts are less influential in shaping public opinion than appeals to emotion and personal belief."[22] His unrelenting barrage of lies led Trump's staff to attempt to provide him cover for his falsehoods by characterizing his lies as "alternative facts."[23]

B. Lies in the Political Arena: What is Truth?

The line separating what is true from what is not is often very difficult to draw, especially in the realm of politics. Equally difficult is the question of who decides what is true and what is false. Reasonable people may very well differ on the merits of a whole range of public policy initiatives; for example, whether the Affordable Care Act ("ACA") provides improved medical care; whether the war in Afghanistan should be continued; or whether water fluoridation is beneficial to the public at large. Deciding whether these policies are "right" or "wrong" is largely a question of perspective—one's individual political views and life experiences. We would not suggest that people are lying because they believe the ACA to be a bad idea, that the war on Afghanistan is a mistake, or that water fluoridation is a health hazard. Nevertheless, it is one thing to express a view on issues or to say something by mistake; it is quite another to tell outright lies in connection with debates on those issues. As the late Senator Daniel Patrick Moynihan famously quipped "[e]veryone is entitled to his own opinion, but not to his own facts."[24] Certainly, Trump has made many

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20 BARACK OBAMA, A PROMISED LAND 672–75, 683–84 (Crown Pub., 2020).

21 *Id.* at 674.

22 *Post-truth*, OXFORD ENGLISH DICTIONARY (3rd edition, 2017), https://www-oed-com.proxy.library.cornell.edu/view/Entry/58609044?redirectedFrom=post-truth [https://perma.cc/ZC4Z-FKR8]

23 Aaron Blake, *Kellyanne Conway Says Donald Trump's Team Has 'Alternative Facts' Which Pretty Much Says It All*, WASH. POST (Jan. 22, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/01/22/kellyanne-conway-says-donald-trumps-team-has-alternate-facts-which-pretty-much-says-it-all/ [https://perma.cc/3WM5-WVH4].

24 DANIEL PATRICK MOYNIHAN, A PORTRAIT IN LETTERS OF AN AMERICAN VISIONARY (Steven R.

statements of the former nature, i.e. those statements are not false merely because one disagrees with them. On the other hand, Trump has also made many statements that are outright lies—statements that are verifiable and simply at odds with the truth; for example, that the crowds at his inauguration were the largest in history;[25] that as President he has done more for African Americans than any President, except Abraham Lincoln;[26] that his suggestion that bleach be injected into patients to treat Covid-19 was mere sarcasm;[27] and, of course, that the 2020 election was stolen from him.

Misrepresentations of facts—lies—are not uncommon in the political arena, even at the highest levels of government. Trump is not the first President to have been untruthful; other Presidents have been known to lie. For example, Lyndon Johnson in rationalizing the escalation of the Vietnam war through the 1964 Gulf of Tonkin Resolution;[28] Richard Nixon in defending his behavior in obstructing justice during the Watergate scandal;[29] Ronald Reagan in contending that the U.S. did not trade arms for hostages in the Iran/Contra Affair;[30] Bill Clinton in denying a sexual relationship with a White House intern;[31] and George W. Bush in justifying the 2002 Iraq invasion based on the alleged maintenance of weapons of mass destruction by Iraqi dictator, Saddam Hussein.[32] Less consequential,

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Weisman ed. 2010), excerpt available at https://www.vanityfair.com/news/2010/11/moynihan-letters-201011 [https://perma.cc/RX5Q-XQ2G].

25 *See* Megan Garber, *The First Lie of the Trump Presidency*, ATLANTIC (Jan. 13, 2019), https://www.theatlantic.com/politics/archive/2019/01/the-absurdity-of-donald-trumps-lies/579622/ [https://perma.cc/UXW9-4X45].

26 Linda Qiu, *Trump's False Claim That 'Nobody Has Ever Done' More for the Black Community Than He Has*, N.Y. TIMES (Sept. 10, 2020), https://www.nytimes.com/2020/06/05/us/politics/trump-black-african-americans-fact-check.html [https://perma.cc/DL45-PFBC].

27 Jane C. Timm, *Trump says he was being sarcastic with comments about injecting disinfectants*, NBC NEWS (Apr. 24, 2020), https://www.nbcnews.com/politics/donald-trump/trump-says-he-was-being-sarcastic-comments-about-injecting-disinfectants-n1191991 [https://perma.cc/ZP4R-WMAG].

28 *See* Joseph Stabile, *Political Interference, Strategic Incoherence, and Johnson's Escalation in Vietnam*, STRATEGY BRIDGE (July 19, 2019), https://thestrategybridge.org/the-bridge/2019/7/19/political-interference-strategic-incoherence-and-johnsons-escalation-in-vietnam [https://perma.cc/5LFX-EW8K].

29 Tom van der Voort, *Watergate: The Cover-up*, MILLER CENTER: THE PRESIDENCY, https://millercenter.org/the-presidency/educational-resources/watergate/watergate-cover [https://perma.cc/NBW7-A3RX].

30 Micah Zenko, *Revisiting President Reagan's Iran Arms-for-Hostages Initiative*, COUNCIL ON FOREIGN REL. (Aug. 3, 2016), https://www.cfr.org/blog/revisiting-president-reagans-iran-arms-hostages-initiative [https://perma.cc/VQ87-CN6N].

31 Steven Nelson, *Bill Clinton 15 Years Ago: 'I Did Not Have Sexual Relations With That Woman'*, U.S. NEWS (Jan. 25, 2013), https://www.usnews.com/news/blogs/press-past/2013/01/25/bill-clinton-15-years-ago-i-did-not-have-sexual-relations-with-that-woman [https://perma.cc/5T9D-DZES].

32 Andrew Glass, *Bush makes case for war with Iraq, Sept. 4, 2002*, POLITICO (Sept. 4, 2018), https://www.politico.com/story/2018/09/04/this-day-in-politics-sept-4-2002-805725 [https://perma.cc/H22R-S7G8].

but no less false, were the words of one U.S. Congressman, who described the January 6, 2021 insurrectionists at the U.S. Capitol as ordinary tourists.[33]

Again, however, Trump's lies were different in character. Whereas the lies of his predecessors were occasional and isolated, Trump's lies were systematic and continuous throughout his four-year term. Trump used falsehoods to create an alternative reality in which he and his base would exist. Even Nixon's Watergate cover up pales in comparison with Trump's constant assault on the truth.

In representative democracies, the choice of which public policy to adopt is left to the voters, who can then elect representatives who share their views. We tolerate some dishonesty in the political arena and are reluctant to impose a "truth test" for fear that limiting public debate in that way might chill the free and robust give-and-take that is necessary for our democratic institutions to function and thrive. The Supreme Court has long held that the judiciary may not entertain political questions, such as the merits of the ACA or water fluoridation, because these questions are more properly the province of a coordinate branch of government—the legislature—and hence, not capable of judicial resolution under Article III, section 1 of the United States Constitution.[34] On the other hand, the mere fact that an issue has political overtones, such as whether election results were tainted by voter fraud, does not mean that the issue is not capable of judicial resolution.[35] Indeed, it is ultimately up to the courts to be the final arbiters of Trump's claims of voter fraud.

C. Lies in Court: The Truth Matters

Legislators may well be able to get away with playing fast and loose with the truth, but the rules are different in the judicial arena. As the court in *King v. Whitmer* noted, "[i]ndividuals may have a right (within certain bounds) to disseminate allegations of fraud unsupported by law or fact in the public sphere. But attorneys cannot exploit their privilege and access to the judicial process to do the same."[36] Similarly, the Supreme Court in *California Motor Transport* made clear that "[m]isrepresentations, condoned in the legislative arena, are not immunized when used in the

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33 Bess Levin, *Republican Lawmakers Claim January 6 Rioters were Just Friendly Guys and Gals Taking a Tourist Trip Through the Capitol*, VANITY FAIR (May 12, 2021) (quoting Rep. Andrew Clyde), https://www.vanityfair.com/news/2021/05/capitol-attack-tourist-visit [https://perma.cc/56YT-HQQL] ("Let me be clear, there was no insurrection and to call it an insurrection, in my opinion, is a bold faced lie. Watching the TV footage of those who entered the Capitol and walked through Statuary Hall showed people in an orderly fashion staying between the stanchions and ropes taking videos and pictures. You know, if you didn't know the TV footage was a video from January 6, you would actually think that it was a normal tourist visit.").

34 *See* Marbury v. Madison, 5 U.S. 137, 164–66 (1803).

35 *See* Baker v. Carr, 369 U.S. 186, 209–211 (1962) (holding that apportionment issues are justiciable).

36 *King,* No. 20-13134, 2021 WL 3771875 at *1.

adjudicatory process."[37] The court "is not, and never has been, an arena for *free* debate."[38] Rather, an "attorney's speech in court and in motion papers has always been tightly cabined by various procedural and evidentiary rules, along with the heavy hand of judicial discretion."[39] The civil justice system allows individuals the privilege of accessing the courts to allege violations of law.[40] However, "[i]t is one thing to take on the charge of vindicating rights associated with an allegedly fraudulent election. . .," but it is quite another "to take on the charge of deceiving a federal court and the American people into believing that rights were infringed, without regard to whether any laws or rights were in fact violated."[41]

In addition to alleging and proving violations of law, litigants and their attorneys must adhere to established rules of procedures. As the court in *King v. Whitmer* stated:

> Individuals, however, must litigate within the established parameters for filing a claim. Such parameters are set forth in statutes, rules of civil procedure, local court rules, and professional rules of responsibility and ethics. Every attorney who files a claim on behalf of a client is charged with the obligation to know these statutes and rules, as well as the law allegedly violated.
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> Specifically, attorneys have an obligation to the judiciary, their profession, and the public (i) to conduct some degree of due diligence before presenting allegations as truth: (ii) to advance only tenable claims; and (iii) to proceed with a lawsuit in good faith and based on a proper purpose. Attorneys also have an obligation to dismiss a lawsuit when it becomes clear that the requested relief is unavailable.[42]

Lawyers do have an ethical obligation to zealously represent their clients,[43] just as legislators are expected to represent the interests of their constituents. The obligation of zealous representation, however, does not license lying or making false representation to the court.[44] What separates lawyers from legislators is that lawyers are also officers of the court and have a duty to uphold the truth and the integrity of the judicial process that supersedes their obligations to the client.[45] Accordingly, lawyers may not suborn perjury, coerce or intimidate witnesses, destroy evidence, make false representations to the court, or engage in other conduct that

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37 California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972).

38 *King*, No. 20-13134, 2021 WL 3771875 at *35 (citing Mezibov v. Allen, 411 F. 3d 711, 717 (6th Cir. 2005)).

39 *Id.*

40 *Id.* at *1.

41 *Id.*

42 *Id.*

43 MODEL RULES OF PRO. CONDUCT R. 1.3 (AM. BAR ASS'N 1983).

44 MODEL RULES OF PRO. CONDUCT R. 3.3(a)(3) (AM. BAR ASS'N 1983).

45 *Id.* cmt. 2 ("[Rule 3.3] sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the judicial process.").

undermines the integrity of the judicial process.[46] Moreover, the Federal Rules of Civil Procedure prohibit attorneys and their clients from asserting claims or arguing positions that are knowingly false, objectively baseless or brought for an improper purpose, such as to bleed the assets of an opponent.[47] Also, Rule 9(b) of the Federal Rules of Civil Procedure requires that allegations of fraud be made "with particularity."[48]

Simply put, the truth matters. Once a case is in court, the truth is paramount. A trial, after all, is a search for the truth. To get to the bottom of any lawsuit, the court must review the evidence and separate out that which is true from that which is untrue. Lies corrupt the fact-finding process; perjury is a crime.[49] Trump and his attorneys, by invoking the courts, have a duty to be candid with the court and to file only suits grounded in fact and warranted by existing law. Nevertheless, following his unsuccessful 2020 election campaign, Trump and his allies flooded the courts with over 60 lawsuits rife with false allegations of fraud and supported largely by speculation, conjecture, and hearsay to set aside election results in five swing states.[50] More importantly, Trump's claims were at odds with the facts. Had Trump and his attorneys done even a minimal amount of due diligence prior to filing these lawsuits, they would have come to the inescapable conclusion that their claims were neither supported by the facts nor warranted in law,[51] given that:

1. Trump's own Department of Justice found no evidence of widespread voter fraud;[52]
2. Trump's Department of Homeland Security concluded that the 2020 Presidential election was the most secure in the history of the republic;[53]
3. Recounts in Georgia, Michigan, Wisconsin and Arizona—states that Trump had lost—initiated on behalf of Trump, affirmed

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46 *Id.* cmt. 12 ("Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official, or other participant in the proceeding unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so").

47 FED. R. CIV. P. 11.

48 FED. R. CIV. P. 9(b).

49 18 U.S.C. § 1621.

50 *See, e.g., King*, No. 20-13134, 2021 WL 3771875 at *26–27 (detailing the speculative and conjectural nature of plaintiffs' claims in the Michigan lawsuit).

51 *Dominion Voting Systems*, No. 20-CV-03747-NRN, 2021 WL 3400671 at *18–21.

52 *Id.* at *19, (citing Michael Balsamo, *Disputing Trump, Barr, Says No Widespread Election Fraud*, AP NEWS (December 1, 2020), https://apnews.com/article/barr-no-widespread-election-fraud-b1f1488796c9a98c4b1a9061a6c7f49d).

53 *Dominion Voting Systems*, No. 20-CV-03747-NRN, 2021 WL 3400671 at *18-19 (citing Cybersec. & Infrastructure Sec. Agency, Joint Statement from Elections Infrastructure Sector Coordinating Exec. Comm.) (Nov. 12, 2020), https://www.cisa.gov/news/2020/11/12/joint-statement-elections-infrastructure-government-coordinating-council-election).

the vote count in favor of President Biden;[54]

4. There is no credible evidence from any source supporting claims of voter fraud;[55]
5. Suits challenging the 2020 election results had been uniformly dismissed by the courts;[56] and
6. Once election results had been certified, the claims of election fraud became moot.[57]

Nor were Trump's attorneys always candid with the courts as to the nature of their claims. In Pennsylvania, for example, Trump's attorneys sought to hedge their bets, representing to the public outside the courtroom that their lawsuit involved claims of voter fraud but then filing a complaint that was devoid of any such allegations.[58] Although counsel initially had falsely maintained in court that the action raised voter fraud issues, he finally relented and, under cross-examination by the court, admitted that no fraud had been alleged.[59] In any event, even if fraud had been the gravamen of the action, fraud had not been pleaded with the particularity required by Rule 9(b) of the Federal Rules of Civil Procedure in any suit filed by Trump or on his behalf.[60]

The lack of due diligence by Trump and his attorneys is even more egregious when viewed in light of the circumstances under which these multiple case filings had been made. Courts repeatedly rejected the claims of fraud and conspiracy that the Trump team cobbled together. As the court in *Dominion Voting Systems* noted, the highly contentious atmosphere that developed after the 2020 election imposed a heightened obligation of due diligence.[61]

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54 *Id.* at *19–21.

55 *Id.* at *18–21.

56 *Id.* at *21. The court in *Dominion Voting Systems* observed:

> Thus, while reports of fraud or election rigging may have been widely disseminated across the internet, by certain media outlets, and in allegations and affidavits submitted in pleadings from failed lawsuits around the country, Plaintiffs' counsel were (or should have been) on notice before filing the original Complaint, prior to the attempted amendment, and subsequently, that all of these allegations were heavily disputed, that none had been accepted as true or verified by any government agency or court, that independent investigations by reputable news sources had found no evidence to support the allegations, and that many had been comprehensively rebutted by authoritative sources. This should have put Plaintiffs' counsel on high alert about the need to do significant independent due diligence before cutting and pasting form failed lawsuits, or, worse, directly copying into a federal lawsuit the ex-President's Tweets claiming that the election was fraudulently stolen.

57 *King*, No. 20-13134, 2021 WL 3771875 at *19.

58 *See* Donald J. Trump for President, Inc. v. Sec'y of Pa., 830 Fed. Appx. 377, 381–82 (3d Cir. 2020) (Trump's lawyers concede that the Trump Campaign "doesn't plead fraud. . .[T]his is not a fraud case.").

59 *Id.*

60 Fed. R. Civ. P. 9(b).

61 *Dominion Voting Systems*, No. 20-CV-03747-NRN, 2021 WL 3400671 at *23.

> Given the volatile political atmosphere and highly disputed contentions surrounding the election both before and after January 6, 2021, circumstances mandated that Plaintiffs' counsel perform heightened due diligence, research, and investigation before repeating in publicly filed documents the inflammatory, indisputably damaging, and potentially violence-provoking assertions about the election having been rigged or stolen. *See* Proposed Amended Compl., filed March 15, 2021, five weeks after the assault on the Capitol, Dkt. #48-1 at 74 ¶ 579 (repeating former President Trump's November 12, 2020 Tweet stating: "DOMINION DELETED 2.7 MILLION TRUMP VOTES NATIONWIDE. DATA ANALYSIS FINDS 221,000 PENNSYLVANIA VOTES SWITCHED FROM PRESIDENT TRUMP TO BIDEN. 941,000 TRUMP VOTES DELETED. STATES USING DOMINION VOTING SYSTEMS SWITCHED 435,000 VOTES FROM TRUMP TO BIDEN.") (capitalization in original).

Not only did Trump and his attorneys fail to conduct the necessary due diligence prior to filing their lawsuits, they also played fast and loose with the facts. Indeed, the lack of factual and legal bases for Trump's claims is astounding. The New York State Supreme Court Appellate Division, in suspending Trump attorney Rudolph Giuliani from the practice of law in the State of New York, catalogued the false representations that had been made in support of the various suits filed on behalf of Trump:[62]

1. That more absentee ballots were cast in Pennsylvania than had actually been mailed out;[63]
2. That in *Donald J. Trump for President, Inc. v. Boockvar*, Giuliani falsely represented to the court that the claim was one for fraud and then later admitted under interrogation by the court that no fraud had been alleged with the requisite particularity;[64]
3. That dead people voted in Philadelphia;[65]
4. That the vote count in Georgia was incorrectly reported because of manipulation of voting machines, despite a state-run hand count audit that confirmed the count of the voting machines;[66]
5. That underage voters had illegally cast ballots in Georgia;[67]
6. That more than 2,500 felons had voted illegally in Georgia;[68]
7. That dead people had voted in the Georgia election;[69]
8. That video evidence from security cameras showed illegal

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62 *In re* Giuliani, 146 N.Y.S. 3d 266, 272–280 (1st Dep't. 2021).

63 *Id.* at 272.

64 *Id.* at 273–74.

65 *Id.* at 274–75.

66 *Id.* at 275–76.

67 *Id.* at 276–77.

68 *Id.* at 277.

69 *Id.* at 277–78.

counting of mail in ballots in Georgia;[70]

9. That illegal aliens had voted in Arizona.[71]

Not surprisingly, none of Trump's lawsuits resulted in a ruling invalidating any election outcome in any state. Indeed, it is now clear that the suits by Trump and his allies were never about redressing fraudulent conduct, but rather, these actions were brought to keep Trump in power despite the clearly expressed will of the electorate.[72] That fact leads to the inescapable conclusion that, in prosecuting these actions, Trump and his allies abused the judicial process. Yet, Trump and his allies have, for the most part, not been held accountable for their reckless and irresponsible misuse of the court system. As more fully discussed below,[73] only two courts—the District of Colorado[74] and the Eastern District of Michigan[75]—have imposed sanctions on Team Trump. In both these cases, sanctions were imposed on defendants' motions and not *sua sponte* by the court. As noted,[76] the State of New York has suspended Trump lawyer Rudolph Giuliani, pending a full hearing on allegations of professional misconduct. Both the sanctions rulings and the disciplinary action came months after the final resolutions of Trump's baseless election fraud suits, and now appear to have been too little too late.

What accounts for the courts' willingness to do little more than what was minimally necessary to assert their authority as final arbiter of the legal dispute fabricated by Team Trump? In one sense, the courts' unwillingness to go beyond sending Trump home empty-handed is understandable. Trump's brazen attempt to steal the election had been stymied. The fraud scenarios that Trump and his allies had conjured up seemed so far-fetched that no rational person would take them seriously. The courts surely wanted to avoid not only any appearance of partisanship in the wake of a politically charged and highly partisan presidential campaign, but also to prevent fueling hostilities on either side of the political divide. The stakes could not have been higher, and the allegations of widespread voter fraud in a Presidential election were unprecedented. Also, the courts were no doubt concerned about any ruling that might be viewed as chilling the First Amendment right to free speech—the lifeblood of democracy—or to somehow suggest that the President's right to free speech is not as broad as that of ordinary citizen. Perhaps the courts thought the 2020 election

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70 *Id.* at 278–79.

71 *Id.* at 279–80.

72 *See King*, No. 20-13134, 2021 WL 1875 at *36 (E.D. Mich. Aug. 25, 2021) ("circumstances suggest that this lawsuit was not about vindicating rights in the wake of alleged election fraud. Instead, it was about ensuring that a preferred political candidate remained in the presidential seat despite the decision of the nation's voters to unseat him.").

73 *See infra* notes 110-123 and accompanying text.

74 *Dominion Voting Systems*, No. 20-CV-03747, 2021 WL 340671 at *31–32.

75 *King*, No. 20-13134, 2021 WL 3771875 at *39.

76 *See supra* notes 62–71 and accompanying text.

loss was punishment enough for Trump, that President Biden had been successfully inaugurated, and that the country would be best served by putting the election and events surrounding it behind and moving on to a new administration.

None of these arguments, however, is compelling. The President is not above the law.[77] As President, Trump enjoys no right of special access to the courts; he is governed by the same rules of practice and procedure as ordinary citizens, regardless of the magnitude of the case. It may well be that the issues raised by Trump were both unprecedented and novel, but that by itself does not suggest that the President has free rein to tie up the courts with false or unsubstantiated allegations. Nor would sanctioning Trump and his lawyers chill his right to free speech. As the court in *King v. Whitmer* observed: "While there are many arenas—including print, television, and social media—where protestations, conjecture, and speculation may be advanced, such expressions are neither permitted nor welcomed in a court of law."[78] Finally, the thought that Trump would fade quietly in the background was ill-conceived. Trump refused to concede the election and telegraphed his intent to challenge any adverse outcome as rigged or stolen many months before the election.[79] Moreover, Trump's post-election assertions of a stolen election spawned the January 6, 2021 riot at the U.S. Capitol that resulted in the deaths of two police officers and serious injuries to countless other police officers.[80] These casualties in defense of the seat of government are troubling enough. Even more consequential, however, are the long term effects of Trump's election lie—the undermining of (1) our democratic ideals and (2) the legitimacy of our democratically elected government.

Long after President Biden's inauguration on January 20, 2021, Trump's election fraud narrative lives on as the lie that refuses to die. Trump himself continues to peddle the fraud scenario in public statements months after January 20, which, in turn, has had an adverse effect on the public interest. First, a not insubstantial percentage of voters continue to buy into Trump's lies about the election, notwithstanding the uniform holdings of the courts that Trump's claims were without merit. Not surprisingly, Trump's fraud narrative continues to resonate with his base; shockingly, it has also gained traction among rank and file Republicans, a majority of whom believe that Trump was cheated out of the election.[81] Willingly or not, voters continue to be misled through lies and conspiracy

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77 United States v. Nixon, 418 U.S. 683, 715 (1974).

78 *King*, No. 20-13134, 2021 WL 3771875 at *1.

79 *See Dominion Voting Systems*, No. 20-CV-03747, 2021 WL 340671 at *30.

80 *Id.* at 23. ("Even today, the judges of the District of Columbia, who are presently making detention decisions about alleged insurrectionists, are keeping people in jail precisely because of the continued propagation of evidence-lacking allegations of election fraud that spawned the insurrection to begin with.").

81 *See* Reuters, *supra* note 11 and accompanying text.

theories. A democracy cannot function properly when voters are misled, instead of being informed, by the candidates.

Second, Trump's continued insistence that the election was stolen from him has spurred some state legislatures to undertake audits of the 2020 election results long after President Biden's inauguration. For example, the state of Arizona has undertaken a third—and seemingly endless—audit of the votes in Maricopa County, its most populous county.[82] Although that audit recently concluded with findings that Trump was not cheated of victory,[83] other states, including the Commonwealth of Pennsylvania, are now weighing a similar effort.[84] Continuing or embarking on these audits months after the inauguration of a new President is both untimely and wasteful of taxpayer dollars. However the audits come out, the issue is moot; the results cannot possibly affect the election outcome now. Given their untimeliness and the lack of credible evidence of voter fraud, there is simply no justification for the initiation or continuance of such audits. They are political theatre with no benefit to the public whatsoever.

Third, in response to Trump's persistent lies about a stolen election, some states have turned to voter suppression statutes. Bills introduced in 43 states would limit mail-in voting, as well as in-person and election day voting.[85] The states of Georgia, Florida, and Iowa, among other states, have enacted laws that would limit access to the voting booth.[86] Texas is proposing legislation that would follow suit. As with recounts, there is no factual basis for these election "reforms." Worse, these legislative initiatives are likely to be especially burdensome on minorities, making it more difficult for them to cast ballots.[87]

Fourth, Trump's continued disinformation campaign and the actions of the grassroots following that it has attracted have served as an attack on the cornerstone of our democracy—free and fair elections—seeking to

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82 *See The Arizona Senate's Partisan Audit of Maricopa County Election Results*, AM. OVERSIGHT (Jan. 18, 2022), https://www.americanoversight.org/investigation/the-arizona-senates-partisan-audit-of-maricopa-county-election-results [https://perma.cc/X9E2-46NN].

83 Jack Healy, Michael Wines & Nick Corasaniti, *Republican Review of Arizona Vote Fails to Show Stolen Election*, N.Y. TIMES (Sept. 24, 2021), https://www.nytimes.com/2021/09/24/us/arizona-election-review-trump-biden.html [https://perma.cc/5E45-4R8Y].

84 *See* Marc Levy & Mark Scolforo, *Trump ally launches election audit plan in Pennsylvania*, AP NEWS (July 7, 2021), https://apnews.com/article/pa-state-wire-pennsylvania-elections-election-2020-government-and-politics-cf7cfe0566c9ef47489d7ecef88165f5 [https://perma.cc/WH2C-C3LD].

85 *See* Amy Gardner, Kate Rabinowitz, & Harry Stevens, *How GOP-backed voting measures could create hurdles for tens of millions of voters*, WASH. POST (Mar. 11, 2021), available at https://www.washingtonpost.com/politics/interactive/2021/voting-restrictions-republicans-states/ [https://perma.cc/4JPV-VH3X].

86 *See* Reid Wilson, *States are passing a record number of voting restrictions*, HILL (June 1, 2021), https://thehill.com/homenews/state-watch/556294-states-are-passing-a-record-number-of-voting-restrictions [https://perma.cc/D7NZ-5T6J].

87 *See* Gardner, Rabinowitz, & Stevens, *supra* note 85.

erode public confidence in the electoral process and de-legitimizing government-certified electoral outcomes.

The impact of Trump's election lie on our democratic institutions is potentially devastating. A democratic government ultimately derives its power from its perceived legitimacy by the populace. If people perceive our government as a system of law and not as a mechanism for imposing the will of individual, they will have confidence in the operation of governmental entities and in the outcomes that these entities produce and adhere to those outcomes.

The Supreme Court underscored this point in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[88] *Casey* involved a 1992 challenge to the constitutionality of a Pennsylvania statute that would restrict access to abortion in that state and thereby raised the question of continuing viability of the Supreme Court's decision in *Roe v. Wade*[89] nineteen years earlier, which had limited the authority of states to regulate abortion.[90] The Court in *Casey* declined the invitation to overrule *Roe v. Wade*.[91] In upholding *Roe v. Wade*, the Court emphasized the need to follow precedent, and, citing Cardozo, observed that "no judicial system could do society's work if it eyed each issue afresh in every case that raised it."[92] The Court also observed that the "respect for precedent is, by definition, indispensable" to the rule of law.[93] Elaborating further on this point, the Court noted that the judiciary's power lies not in its ability to campaign for acceptance of its decisions or even in its limited ability to coerce compliance with its rulings, but rather in its legitimacy.[94] Legitimacy is, in turn, "a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands."[95] The Court's legitimacy "depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation."[96]

The reasoning in *Casey* with respect to stare decisis applies equally to the electoral process. Just as disregard for precedent undermines the legitimacy of judicial decisions, the disregard for truth at the heart of the baseless attacks on the 2020 election result erodes confidence in the electoral process and, ultimately, in democracy itself. The public will accept free and fair election results as legitimate, but public confidence in election

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88 Planned Parenthood of Southeastern Pennsylavnia v. Casey, 505 U.S. 833, 112 S.Ct. 2791 (1992).

89 Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705 (1973).

90 *Casey,* 505 U.S. at 916 (Stevens, J., concurring).

91 *Id.* at 860.

92 *Id.* at 854.

93 *Id.*

94 *Id.* at 865.

95 *Id.*

96 *Casey,* 505 U.S. at 866.

results would be shaken if the electoral results were tainted by fraud. Trump's baseless election challenges have had that unsettling effect. As noted above,[97] a majority of Republican voters question the legitimacy for the 2020 Presidential election.

II
WHAT THE COURTS COULD HAVE DONE

The lawsuits brought by Trump and his allies were not only substantively devoid of merit; they were also brought for an improper purpose—to thwart the election results and block Joe Biden from becoming President.[98] The filing of these baseless actions constitutes a clear abuse of the judicial process. Under Rule 11 of the Federal Rules of Civil Procedure,[99] courts have broad powers to control proceedings before them and to hold attorneys and their clients accountable for (1) prosecuting a case in bad faith, (2) using the courts for an improper purpose, or (3) pursuing a claim not reasonably based in fact nor warranted by law or a good faith argument to change the law. Courts may also impose monetary penalties on attorneys who multiply proceedings unreasonably and vexatiously under 28 U.S.C. § 1927.[100] Finally, the courts have inherent powers to impose monetary sanctions on counsel who have "abused the judicial process" of the courts or "acted in bad faith, vexatiously, wantonly, or for oppressive reasons" which includes perpetrating a fraud on the court.[101] A common thread runs through these sanctions provisions. First, the decision as to whether or not to invoke any sanctions provision is left to the sound discretion of the court. Second, each form of sanctions seeks to address an abusive practice —whether the claims are brought in bad faith, objectively baseless, or commenced for an improper purpose. Third, the nature of any sanction imposed is left to the sound discretion of the court. The courts are empowered to impose sanctions *sua sponte* in each of the foregoing instances.[102] Unfortunately, the courts did not impose sanctions *sua sponte*, thereby allowing Trump and his attorneys to avoid accountability for their frivolous filings and, worse, emboldening them to simply file copycat actions in other districts.

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97 *See* Reuters, *supra* note 11 and accompanying text.

98 *See King*, No. 20-13134, 2021 WL 3771875 at *36 ("This game of wait-and-see shows that counsel planned to challenge the legitimacy of the election if and only if Former President Trump lost. And if that happened, they would help foster a predetermined narrative making election fraud the culprit. These things—separately, but especially collectively—evince bad faith and improper purpose in bringing this suit.").

99 FED. R. CIV. P. 11 advisory committee's note to 2007 amendment.

100 28 U.S.C. § 1927.

101 Chambers v. NASCO, Inc., 501 U.S. 32, 45–46 (1991).

102 FED. R. CIV. P. 11(c)(1), (c)(3) (Rule 11 sanctions); *Chambers*, 501 U.S. at 42 n. 8 (sanctions pursuant to inherent powers); Salley v. Truckee Meadows Water Auth., No. 3:12-CV-00306-RCJ, 2015 WL1414038 at *5 (D. Nev. March 27, 2015) (28 U.S.C. §1927 sanctions).

A. Sanctions

1. *Rule 11*

Rule 11 of the Federal Rules of Civil Procedure is the vehicle for assuring the integrity of pleadings and other submissions to the federal courts.[103] Rule 11 does not require parties or their counsel to swear to the truth of their pleadings. Rather, counsel must sign all pleadings and other submissions to the courts, and that signature certifies that to the best of the signer's knowledge, information, or belief, *formed after an inquiry reasonable under the circumstances,* that (1) the claim is not made for any improper purpose, "such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;" (2) the claims are "warranted by existing law or by a nonfrivolous argument for extending, modifying , or reversing existing law or for establishing new law;" and (3) the "factual contentious have evidentiary support or, if specifically so identified, will likely have evidentiary support."[104] The question of whether sanctions should be imposed, once the court finds that Rule 11 has been violated, is left to the discretion of the district court; if the court determines that sanctions would be appropriate, the nature of the sanction to be imposed is also left to the sound discretion of the court.[105]

Rule 11 is intended primarily to deter bad behavior in that the "sanction(s) imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated."[106] The range of sanctions that might be imposed is broad and includes, among other things, an order to pay a penalty into court, or payment of the adversary's attorneys' fees.[107] The court could also consider non-monetary sanctions, such as referral of the attorney's conduct to the appropriate authorities for professional discipline,[108] including disbarment or prohibition upon filing future suits without first conferring with the court.[109]

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103 *See* CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 439 (West Acad. Publ'g 8th ed. 2016).

104 FED. R. CIV. P. 11(b).

105 *See* FED. R. CIV. P. 11(c)(1), (c)(4); *see also* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 404 (1990); Cervantes v. Ocwen Loan Servicing, LLC., No. 5:19-CV-7, 2019 WL6003129 at *9 (S.D. Tex. Aug. 28, 2019),

106 FED. R. CIV. P. 11(c)(4).

107 FED. R. CIV. P. 11 advisory committee's note to 2007 amendment.

108 *Id.; King,* 2021 WL No. 20-13134, 3771875, at *42 (ordering referral of plaintiffs' attorney to disciplinary authorities for investigation.).

109 *Cervantes*, No. 5:19-CV-7, 2019 WL 6003129, at *9 ("There is no constitutional right of access to the court to prosecute frivolous or malicious actions. (citation omitted). A litigant may be enjoined from filing pleadings and complaints when necessary to deter vexatious and frivolous filings or to protect the integrity of the courts and the orderly and expeditious administration of justice." (citations omitted]); *see generally* in 5A CHARLES ALAN WRIGHT, ARTHUR MILLER, & A. BENJAMIN SPENCER, FEDERAL PRACTICE AND PROCEDURE, § 1336.3 n. 38 and cases cited (Thomson Reuters 2018) [hereinafter Wright & Miller].

Given the absence of objective proof of widespread voter fraud in the 2020 election, and given that Trump and his allies continued to file baseless suits even after earlier actions raising the same claims had been dismissed, there can be no doubt that imposition of Rule 11 sanctions would have been appropriate in most, if not all, election fraud cased filed on Trump's behalf. Yet, to date, only two courts have imposed Rule 11 sanctions.

In *King v. Whitmer*,[110] the district court decreed Rule 11 sanctions on the following grounds:

1. The Michigan action was brought for an improper purpose—not to vindicate legally cognizable right, but to achieve the political goal of keeping Trump in power notwithstanding his resounding defeat in the 2020 election.[111]
2. The action was not warranted law and, indeed was barred as a matter of law under the doctrines of mootness, laches and standing.[112] Moreover, the claims asserted under the Michigan Election Law were deficient as a matter of law.[113]
3. The contentions in the complaint lacked evidentiary support and not based on facts but rather on conjecture and speculation.[114]
4. Plaintiffs failed to make reasonable inquiry into the evidentiary support for their factual assertions.[115]
5. Similarly, plaintiffs did little more than "copy and paste" materials from other lawsuits and offered them as proof without further inquiry as to whether those materials supported the claims before this court.[116]

O'Rourke v. Dominion Voting Systems Inc.[117] was a putative class action, purportedly on behalf of all registered voters in America, alleging that officials from the states of Pennsylvania, Wisconsin, Michigan and Georgia; Mark Zuckerberg of Facebook; and Dominion Voting Systems engaged in a vast conspiracy to deny voters their constitutional rights in light of Trump's defeat at the polls.[118] The District of Colorado also imposed Rule 11 sanctions, ruling:

> The claims asserted were frivolous as a matter of law because (a) the

110 *King*, No. 20-13134, 2021 WL 3771875 (E.D. Mich. Aug. 25, 2021).

111 *Id.* at *36.

112 *Id.* at *20.

113 *Id.* at *23–24.

114 *Id.* at *26–28.

115 *Id.* at *30.

116 *King,* No. 20-13134, 2021 WL 3771875, at *30–31.

117 *Dominion Voting Systems*, No. 20-CV-03747-NRN, 2021 WL 3400671 (D. Colo. Aug. 3, 2021).

118 *Id.* at *2.

> claims were not justiciable;[119] (b) the plaintiffs lacked standing;[120] and (c) it would offend due process for Colorado to assert personal jurisdiction over officials from other states for conduct having nothing to do with Colorado.[121]

Plaintiffs failed to make reasonable inquiry into the facts and instead relied on claims made in other suits "via a massive cut-and-paste job, without additional strenuous verification efforts."[122]

Plaintiffs misled the court in pressing their RICO claims.[123]

2. *28 U.S.C. § 1927*

Courts may also impose sanctions on counsel under 28 U.S.C. § 1927, where the attorney has (1) multiplied proceedings; (2) acted in an unreasonable and vexatious manner; (3) increased the cost of proceedings; and (4) acted in bad faith or by intentional misconduct.[124] The purpose of a sanctions award under § 1927 is to "deter dilatory litigation practices and to punish aggressive tactics that far exceed zealous advocacy."[125] An action is considered vexatious "if the attorney acts in bad faith . . . or if the attorney's conduct constitutes a reckless disregard for the duty owed by counsel to the court."[126] Bad faith, however, is not the sine qua non for imposing § 1927 sanctions.[127] The statute "imposes an objective standard of conduct on attorneys, and courts need not make a finding of subjective bad faith before assessing monetary sanctions;"[128] that is, the court need only determine that "an attorney reasonably should [have] know[n] that a claim pursued is frivolous."[129] Clearly, there is significant overlap between Rule 11 and 28 U.S.C. § 1927 in that both provisions are designed to police behavior of attorneys in the course of litigation. Section § 1927 has been construed to "impose a continuing obligation on attorneys to dismiss claims that are no longer viable."[130] A key difference between the two provisions is that the principal remedy under § 1927 is to require the offending counsel to pay that portion of the victim's attorneys' fees attributable to offending counsel's misconduct,[131] whereas under Rule 11, the sanction imposed "must be limited to what suffices to deter repetition of the conduct or

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119 *Id.* at *24.
120 *Id.*
121 *Id.* at *25.
122 *Id*. at *26.
123 *Id.* at *29–31.
124 28 U.S.C. § 1927.
125 *King*, No. 20-13134,2021 WL 3771875 at *7 (citation omitted).
126 *Dominion Voting Systems*, No. 20-CV-03747-NRN, 2021 WL 3400671 at *13.
127 *Id.*
128 *King,* No. 20-13134, 2021 WL 3771875 at *7.
129 *Id.* (citation omitted).
130 Vandeventer v. Wabash Nat. Co., 893 F. Supp. 827, 846 (N.D. Ind. 1995).
131 28 U.S.C. § 1927.

comparable conduct by others similarly situated."[132]

In imposing sanctions under § 1927, the court in *King* called plaintiffs' counsel to task for continuing to prosecute an admittedly moot claim.[133] The court concluded that "[f]orcing Defendants and Intervenor-Defendants to file any pleading or brief at any point after Plaintiffs' claims became moot required them to file one pleading or brief too many."[134] The court in *Dominion Voting Systems*[135] found that § 1927 sanctions were appropriate for the same reasons that Rule 11 sanctions had been imposed.[136]

3. *Inherent Powers*

In addition to Rule 11 and 28 U.S.C. § 1927, the courts have a third string to their sanctions bow. The court may also impose sanctions pursuant to its inherent power to control proceedings before it.[137] The standard for imposing sanctions based on a court's inherent powers is stricter than the Rule 11 and § 1927 standards; it requires a finding of "bad faith or conduct tantamount to bad faith."[138] Specifically, the court must find that (1) "the claims advanced were meritless"; (2) "counsel knew or should have known this"; and (3) "the motive for filing the suit was for an improper purpose."[139] Again, there is some overlap between the court's inherent power to sanction and the provisions of Rule 11 and 28 U.S.C. § 1927. However, neither Rule 11 nor the statute preempts the power of a court of sanction pursuant to its inherent powers,[140] although one court has held that the inherent power to sanction is residual, i.e., should be used only when Rule 11 or 28 U.S.C. § 1927 do not provide an adequate remedy. In *Chambers v. Nasco, Inc.*,[141] the Supreme Court ruled that where Rule 11 or 28 U.S.C. § 1927 adequately address bad faith conduct, courts should rely on those provisions rather than on inherent authority. That said, where a district court in its discretion determines that neither Rule 11 nor 28 U.S.C. § 1927 adequately address the misconduct in question, the court would be on solid ground in imposing sanctions based on inherent powers.[142] In *King*, the court concluded that the same conduct that supported Rule 11 and § 1927 sanctions also supported sanctions based on the court's inherent authority.[143] In *Dominion Voting Systems*, the court concluded that

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132 FED. R. CIV. P. 11(c).

133 *King,* No. 20-13134, 2021 WL 3771875 at *18–19.

134 *Id.* at *20.

135 *Dominion Voting Systems,* No. 20-CV-03747-NRN, 2021 WL 3400671 at *32.

136 *See id.*

137 *Chambers*, 501 U.S. at 48–49.

138 BDT Prods, Inc. v. Lexmark Int'l, Inc., 602 F. 3d 742, 752 (6th Cir. 2010).

139 *Id.*

140 *Chambers*, 501 U.S. at 49–50.

141 *Id. at* 32, 50.

142 *Id.* at 50 ("[I]f, in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power.").

143 *King*, No. 20-13134, 2021 WL 3771875 at *38–39.

sanctions based on a court's inherent powers were appropriate "because of the bad faith nature of the filing of the suit that Plaintiffs' counsel knew or should have known was doomed to failure from the very beginning."[144]

The bottom line is that the courts have ample powers to hold litigants and their attorneys accountable for bringing and prosecuting lawsuits that are baseless, brought in bad faith, or amount to an abuse of process. Yet, no court has imposed sanctions *sua sponte* on Trump or his legal team. In *King* and *Dominion Voting Systems*, the courts waited for the defendants to bring sanctions motions; the thorough and carefully crafted opinions in each of those cases amply demonstrate that Trump and his allies engaged in a pattern of baseless litigation that warranted sanctions. Unfortunately, those sanctions rulings, virtually unassailable as a matter of fact and law, were issued on August 25, 2021 and August 3, 2021, respectively, nine months after the election and some seven months after the filing of the lawsuits. The courts thus closed the barn door long after the horse got out. Had the courts stepped up and imposed monetary sanctions at the time the lawsuits had been dismissed, they may have very well nipped in the bud Trump's apparent strategy of flooding the courts with baseless election litigation. Monetary sanctions would have directly deterred Trump's lawyers in that particular case from bringing other lawsuits. Such monetary sanctions would also achieve *in terrorem* deterrence by making other lawyers think twice before filing similar suits in other forums. The courts' inactions on sanctions had the unfortunate and unintended effect of simply encouraging Trump's lawyers to file similar suits in other forums with impunity. When the two courts did act, it was too little, too late.

B. Referral to Bar Authorities for Professional Discipline

Alternatively, a court addresses the problem of attorney misconduct in a lawsuit by referring the matter to the appropriate bar governance entity for professional discipline.[145] Disciplinary proceedings have been commenced against Trump lawyers in several jurisdictions, although it does not appear that any of these inquiries stem from any court referral. Thus, for example, Rudolph Giuliani has been suspended from the practice of law in the State of New York[146] and the District of Columbia[147], pending a full disciplinary hearing. In *King*, the court referred nine attorneys for investigation and possible disbarment.[148] Trump lawyer Lin Wood is the

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144 *Dominion Voting Systems*, No. 20-CV-03747-NRN, 2021 WL 3400671 at *32.

145 *See* FED. R. CIV. P. 11 adv. comm. notes; *King*, No. 20-13134, 2021 WL 3771875 at *41 ("Lastly, the conduct of Plaintiffs' counsel, which also constituted violations of the Michigan Rules of Professional Conduct, *see, e.g.,* MRPC 3.1 and 3.3, calls into question their fitness to practice law. This warrants a referral for investigation and possible suspension or disbarment to the appropriate disciplinary authority for every state bar and federal court in which each attorney is admitted.").

146 *See In re* Giuliani, 146 N.Y.S. 3d 266, 283–84 (1st Dep't. 2021).

147 *See In re* Rudolph W. Giuliani, No. 21-BG-423 (D.C. July 7, 2021).

148 *King*, No. 20-13134, 2021 WL 3771875 at *42 ("**IT IS FURTHER ORDERED** that the Clerk of

subject of disciplinary action by Georgia bar authorities.[149] Like monetary sanctions and conduct sanctions, referrals to bar authorities for professional discipline can have significant direct and *in terrorem* deterrent effects on the commencement and prosecution of baseless lawsuits. As was the case with sanctions, petitions for disciplinary action against Trump's attorneys for unethical behavior came very late in the litigation cycle. Had these petitions been filed earlier so that courts could have made referrals to the appropriate disciplinary bodies, as part of the remedy in each case, at the time that dismissal orders were entered, the big election lie may well have been stopped in its tracks.

III
LESSONS

Trump's behavior following his loss of the 2020 Presidential election was unprecedented. No one anticipated that he would spend the interregnum sulking, neglecting the duties of his office, thwarting the transition to a new administration, and seeking to engage the courts in a sinister plot to steal the 2020 election and remain in power. Nor did anyone anticipate the lengths to which Trump would go to disenfranchise the electorate, to de-legitimize the Biden Administration, and to undermine the core principles of our democracy. But, he did all that. The good news is that our systems of checks and balances, although tested to the limit ultimately worked; the courts stood firm and denied Trump's brazen attempt to disenfranchise millions of voters. The bad news is that Trump came uncomfortably close to sabotaging American democracy. Worse, it could happen again. A smarter, more refined version of Donald Trump may emerge in the future determined to steer America away from democracy and into autocracy.[150]

The events of the past year offer important lessons to the courts on how to avoid this scenario. First, now that the judicial branch knows that even the most sacred of our democratic institutions are not immune from attack, it can more effectively plan to combat the next autocrat, who, building on the Trump playbook, seeks to enlist the courts in an attempt to

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the Court shall send a copy of this decision to the Michigan Attorney Grievance Commission and the appropriate disciplinary authority for the jurisdiction(s) where each attorney is admitted, referring the matter for investigation and possible suspension or disbarment: (i) Sidney Powell – Texas; (ii) L. Lin Wood – Georgia; (iii) Emily Newman – Virginia; (iv) Julia Z. Haller – the District of Columbia, Maryland, New York, and New Jersey; (v) Brandon Johnson – the District of Columbia, New York, and Nevada; (vi) Scott Hagerstrom – Michigan; (vii) Howard Kleinhendler – New York and New Jersey; (viii) Gregory Rohl – Michigan; and (iv) Stefanie Lynn Junttila – Michigan.")

149 David Cohen, *Georgia State Bar seeking to discipline Lin Wood*, POLITICO (Feb. 14, 2021), https://www.politico.com/news/2021/02/14/lin-wood-georgia-469015 [https://perma.cc/QB3N-ZZH7].

150 LEONNIG & RUCKER, *supra* note 15 (quoting Nancy Pelosi) ("We might get somebody of his ilk who's sane, and that would really be dangerous, because it could be somebody who's smart, who's strategic, and the rest.").

subvert democracy. Trump showed that litigation could be used as a vehicle for delaying disclosure of information that may have serious adverse political ramifications. For example, he was able to hold off on disclosing his income tax returns to Congress for two years after initiating a court fight.[151] Courts must be able to think around corners and avoid being used as unwitting tools to assist the goals of politicians who invoke judicial process, not just to put forth or defend valid claims, but rather to buy time. Granted, litigation takes time and the wheels of justice may turn slowly. Not every case must be summarily dismissed. However, the Supreme Court has left it up to the experience and common sense of judges to decide whether a case is of sufficient merit to warrant the court's entertaining it.[152] *Twombly*[153] held that where a court finds a case lacking in merit, it should be tossed at the motion to dismiss stage. The trial courts should not shy away from invoking *Twombly*, merely because the President is a party.

However, early dismissal is only the first step. The Trump experience has also taught the courts a second important lesson—the courts cannot effectively deal with baseless election-related lawsuits by simply dismissing them. They must take additional steps to rid the system of such baseless suits. The dismissals of Trump's initial suits only led to new equally baseless filings. Experience and common sense strongly suggest that these new filings were a part of a pattern of baseless lawsuits, designed not to assert a cognizable legal right, but rather to delay the transition of power and usurp the Presidency. The courts must never be complicit, wittingly or otherwise, in such an enterprise. As noted,[154] Trump by and large suffered no consequences for his misuse of the courts other than dismissal. The courts must be proactive; they should not wait for parties to file sanctions motions. Only by imposing sanctions *sua sponte* at the time of dismissal can the courts stem the filing of copycat lawsuits in other districts and put an end to baseless litigation. By not holding Trump and his allies accountable at the time of dismissal, the courts gave Trump the opportunity, which he took, to continue to spread his lies and to sow the seeds of distrust of the government and the electoral process. Against all objective evidence to the contrary, Trump still maintains that the 2020 election was stolen from him and in the process inflicts immeasurable damages on our democratic institutions.

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151 Don Mangan & Kevin Breuninger, *Trump tax returns must be released by IRS to Congress, Justice Department Says*, CNBC (July 30, 2021), https://www.cnbc.com/2021/07/30/trump-tax-returns-can-be-released-to-congress-doj-says.html [https://perma.cc/CGE4-K8EX].

152 Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) ("Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals [has] observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.").

153 Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 558 (2007) ("So, when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.") (citation omitted).

154 *See supra* notes 73-74 and accompanying text.

CONCLUSION

With the dawning of the post-truth era and in light of the 2020 election experience, unsuccessful political candidates are now more likely than ever to engage the courts in an effort to referee election outcomes on the pretext that fraud or other election irregularities had occurred. Courts must resist these tactics and hold litigants and their attorneys accountable when they pursue frivolous claims based on objectively verifiable falsehoods. Lying may be indulged in the political realm; but within the courtroom, truth remains sacred. First, courts must be wary of lawsuits asking judges overturn election results, not only because they serve to nullify the will of the people, but also because these efforts in the longer term create mistrust of democratic processes and de-legitimize duly elected officials. Second, courts must act decisively to hold litigants and their attorneys accountable by imposing hefty monetary sanctions and referring the attorneys responsible for the lawsuits to the appropriate authorities for professional discipline, if, like Trump, they engage in a pattern of baseless litigation designed to clog the courts and interfere with the electoral process. In 2020, the courts met the first recommendation by summarily dismissing Trump's baseless suits. Unfortunately, the courts fell short on the accountability prong by not sanctioning Trump and his allies for their abuse of process. The result has been a deepening loss of trust in democratic processes—trust that is going to be hard to win back.