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## **DID PRESIDENT TRUMP’S 2020 ELECTION LITIGATION KILL RULE 11?**

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## INTRODUCTION

The outcome of the 2020 presidential election unleashed an unprecedented wave of litigation by President Donald Trump seeking to overturn the victory of former Vice President Joe Biden.

It was entirely foreseeable.

Even after winning the 2016 presidential election, Trump aired baseless claims of voter fraud, setting up an Advisory Commission on Election Integrity that found no wrongdoing before being dissolved in 2018 after one-and-a-half years of operation—having held only two meetings.<sup>1</sup> Into the 2020 election cycle, Trump continued to insist that he had lost New Hampshire in 2016 due to voter fraud<sup>2</sup> and claimed that millions of “illegals” voted nationwide and contributed to his loss in California.<sup>3</sup> A past proponent of voter suppression,<sup>4</sup>

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<sup>1</sup> See Jessica Taylor, *Trump Dissolves Controversial Election Commission*, NPR (Jan. 3, 2018, 8:44 PM), <https://www.npr.org/2018/01/03/575524512/trump-dissolves-controversial-election-commission> (“Trump created the commission in May 2017 after he continued to insist that as many as 5 million votes were cast illegally in the November 2016 presidential election where he bested Democratic rival Hillary Clinton.”); Marina Villeneuve, *Report: Trump Commission Did Not Find Widespread Voter Fraud*, ASSOCIATED PRESS (Aug. 3, 2018), <https://apnews.com/article/f5f6a73b2af546ee97816bb35e82c18d> (“The now-disbanded voting integrity commission launched by the Trump administration uncovered no evidence to support claims of widespread voter fraud, according to an analysis of administration documents released Friday.”).

<sup>2</sup> See Amy Gardner, *Trump’s Revival of Claim of Voting Fraud in New Hampshire Alarms Some State Republicans*, WASH. POST (Aug. 29, 2019, 8:00 AM), [https://www.washingtonpost.com/politics/trumps-revival-of-claim-of-voting-fraud-in-new-hampshire-alarms-some-state-republicans/2019/08/28/0c22107e-c38f-11e9-9986-1fb3e4397be4\\_story.html](https://www.washingtonpost.com/politics/trumps-revival-of-claim-of-voting-fraud-in-new-hampshire-alarms-some-state-republicans/2019/08/28/0c22107e-c38f-11e9-9986-1fb3e4397be4_story.html) (“‘New Hampshire should have been won last time,’ the president told reporters on Aug. 15, en route to a campaign rally in Manchester, ‘except we had a lot of people come in at the last moment, which was a rather strange situation. Thousands and thousands of people coming in from locations unknown. But I knew where their location was.’”).

<sup>3</sup> Philip Bump, *Yet Again, Trump Falsely Blames Illegal Voting for Getting Walloped in California*, WASH. POST (July 23, 2019, 2:01 PM), <https://www.washingtonpost.com/politics/2019/07/23/yet-again-trump-falsely-blames-illegal-voting-getting-walloped-california/>.

<sup>4</sup> See Brendan Williams, *Forget Kanye: Minority Voter Suppression is on the March*, 62 HOW. L. J. 399 (2019). For example:

[A]s the 2018 election approached, President Trump did all he could to scare voters: “Trump tweeted . . . that ‘all levels of government and law enforcement are watching carefully for VOTER FRAUD,’ even though cases of voter fraud are vanishingly rare. ‘Cheat at your own peril,’ he said, even though his own voter fraud commission was dissolved in January.” On election-eve he doubled-down, tweeting that “Law Enforcement has been strongly notified to watch closely for any ILLEGAL VOTING which may take place in Tuesday’s Election (or Early Voting). Anyone caught will be subject to the Maximum Criminal Penalties allowed by law. Thank you!”

*Id.* at 420 (footnotes omitted). To quote Stacey Abrams: “The miasma of fear that is created through voter suppression is as much about terrifying people about trying to vote as it is about actually blocking their ability to do so.” Kelsey Tamborrino, *Georgia Democratic Candidate:*

Trump had set the stage for post-election grievances by objecting to the heightened use of mailed ballots in 2020 as a means of avoiding the health risks of in-person voting during the COVID-19 pandemic.<sup>5</sup>

In April 2020, Trump falsely accused Michigan of sending absentee ballots to all registered voters.<sup>6</sup> In fact, only *applications* for such ballots had been sent out.<sup>7</sup> He threatened to withhold funding from the state, and similarly threatened to withhold funding from Nevada, whose Republican secretary of state had sent out absentee ballots—without an application requirement—for the June primary.<sup>8</sup>

In June 2020, Trump had gone so far as to claim in an all-caps Twitter post that foreign governments would be printing U.S. ballots: “RIGGED 2020 ELECTION: MILLIONS OF MAIL-IN BALLOTS WILL BE PRINTED BY FOREIGN COUNTRIES, AND OTHERS. IT WILL BE THE SCANDAL OF OUR TIMES!”<sup>9</sup> CNN reported in September 2020 that “President Donald Trump has railed against ‘mail-in voting’ while defending ‘absentee voting,’ baffling experts who say those voting systems are essentially the same thing.”<sup>10</sup>

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*State Law about Scaring People Out of Voting*, POLITICO (Oct. 14, 2018), <https://www.politico.com/story/2018/10/14/georgia-governor-abrams-kemp-voting-rights-898742>.

<sup>5</sup> See Nicholas Riccardi, *Here's the Reality Behind Trump's Claims about Mail Voting*, ASSOCIATED PRESS (Sept. 30, 2020), <https://apnews.com/article/virus-outbreak-joe-biden-election-2020-donald-trump-elections-3e8170c3348ce3719d4bc7182146b582> (“In the final segment of the contentious debate between Trump and Democrat Joe Biden, Trump launched into an extended argument against mail voting, claiming without evidence that it is ripe for fraud and suggesting mail ballots may be ‘manipulated.’”).

<sup>6</sup> Daniel Dale et al., *Fact Check: Trump Falsely Claims Michigan Sent out Absentee Ballots and Broke the Law*, CNN (May 20, 2020, 3:46 PM), <https://www.cnn.com/2020/05/20/politics/fact-check-trump-michigan-nevada-ballots-voting/index.html>.

<sup>7</sup> See *id.*

<sup>8</sup> See *id.*

<sup>9</sup> Marshall Cohen, *Trump Spreads New Lies About Foreign-backed Voter Fraud, Stoking Fears of a ‘rigged election’ this November*, CNN (June 22, 2020, 8:31 PM), <https://www.cnn.com/2020/06/22/politics/trump-voter-fraud-lies-fact-check/index.html>.

<sup>10</sup> Marshall Cohen, *‘It’s the same thing’: Experts Baffled by Trump’s Misleading Distinction between ‘Absentee’ and ‘Mail-in’ Ballots*, CNN (Sept. 25, 2020, 10:47 PM), <https://www.cnn.com/2020/07/10/politics/fact-check-trump-absentee-versus-mail-ballots/index.html>. To indulge Trump’s distinction, although the terms are used interchangeably, originally with an absentee ballot “the idea was that only voters who were ‘absent’ from their local voting jurisdiction on Election Day would be able to request and cast their ballot through the mail.” Michelle Ye Hee Lee, *What’s the Difference Between Absentee and Mail-in Voting?*, WASH. POST (Aug. 18, 2020, 8 AM). However, “[a]bsentee voting has become so common that in 34 states and the District, any voter can ask for an absentee ballot, even if the voter is physically able to vote in person on Election Day, a practice called ‘no-excuse absentee voting.’” *Id.*

Trump himself had voted by mailed ballot in Florida in August 2020.<sup>11</sup> Trump's campaign also encouraged his supporters to vote by mail, according to reporting: "One ad has the headline 'VOTE LIKE PRESIDENT TRUMP!' and includes the text, 'TIME IS RUNNING OUT! Request your ballot today.' The image shows a close-up of an absentee ballot."<sup>12</sup>

Upon losing the election, the Trump campaign attempted to have mailed ballots thrown out, including asking the Dane County Board of Canvassers in Wisconsin to invalidate "roughly 69,000 that were cast in-person during the two weeks before Election Day."<sup>13</sup>

After losing Georgia, *Politico* reported that "Trump has been waging war on Georgia Republicans" and "calling Gov. Brian Kemp and Secretary of State Brad Raffensperger 'clowns' and amplifying a supporter who said the two 'will soon be going to jail' for having certified Trump's loss."<sup>14</sup> Trump even retweeted "a photo of the two Republican leaders sporting photoshopped masks emblazoned with the Chinese flag."<sup>15</sup> He falsely claimed Raffensperger's brother worked for China (Raffensperger does not have a brother) and demanded Kemp's resignation.<sup>16</sup> A recording of a "rambling and at times incoherent" phone call was released in which Trump threatened Raffensperger and demanded that he "find 11,780 votes, which is one more than we have."<sup>17</sup> In a

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<sup>11</sup> See Miles Parks, *Trump, While Attacking Mail Voting, Casts Mail Ballot Again*, NPR (Aug. 19, 2020, 4:11 PM), <https://www.npr.org/2020/08/19/903886567/trump-while-attacking-mail-voting-casts-mail-ballot-again> ("Trump submitted the Florida primary ballot by giving it to a third party to return, a spokesperson for the Palm Beach elections supervisor confirmed to NPR on Wednesday. Republicans often derisively refer to sending in a ballot this way as 'ballot harvesting,' and it's something Trump has criticized.").

<sup>12</sup> Sarah Ewall-Wice & Graham Kates, "Vote like Trump": Campaign Embraces Mail-in Voting in Ad Blitz, CBS NEWS (Oct. 16, 2020, 8:04 PM), <https://www.cbsnews.com/news/mail-in-voting-campaign-ad-blitz/>.

<sup>13</sup> Scott Bauer, *Trump Objects to Counting Thousands of Wisconsin Ballots*, ASSOCIATED PRESS (Nov. 20, 2020), <https://apnews.com/article/election-2020-joe-biden-donald-trump-madison-wisconsin-852ac9f03fcb8a0b407f66b055c9171>.

<sup>14</sup> Sabrina Rodriguez & Maya King, *Democrats in Georgia: 'Trump is Helping Our Case.'*, POLITICO (Dec. 18, 2020, 4:30 AM), <https://www.politico.com/news/2020/12/18/democrats-georgia-trump-disinformation-447991>.

<sup>15</sup> *Id.*

<sup>16</sup> See John Wagner, *Trump Calls for Georgia Gov. Brian Kemp, a Fellow Republican, to Resign*, WASH. POST (Dec. 30, 2020, 9:51 AM), [https://www.washingtonpost.com/politics/trump-calls-for-georgia-gov-brian-kemp-a-fellow-republican-to-resign/2020/12/30/bc297d28-4aab-11eb-839a-cf4ba7b7c48c\\_story.html](https://www.washingtonpost.com/politics/trump-calls-for-georgia-gov-brian-kemp-a-fellow-republican-to-resign/2020/12/30/bc297d28-4aab-11eb-839a-cf4ba7b7c48c_story.html).

<sup>17</sup> See Amy Gardner, *'I Just Want to Find 11,780 Votes': In Extraordinary Hour-Long Call, Trump Pressures Georgia Secretary of State to Recalculate the Vote in his Favor*, WASH. POST (Jan. 3, 2021, 9:59 PM), [https://www.washingtonpost.com/politics/trump-raffensperger-call-georgia-vote/2021/01/03/d45acb92-4dc4-11eb-bda4-615aaefd0555\\_story.html](https://www.washingtonpost.com/politics/trump-raffensperger-call-georgia-vote/2021/01/03/d45acb92-4dc4-11eb-bda4-615aaefd0555_story.html) ("Trump alternately berated Raffensperger, tried to flatter him, begged him to act and threatened him with vague criminal consequences if the secretary of state refused to pursue

separate call Trump reportedly pressured a Georgia elections investigator to find fraud and become a “national hero.”<sup>18</sup>

Trump had unsuccessfully attempted to get Kemp to call a special state legislative session to overturn Biden’s win.<sup>19</sup> Similarly, Trumps’ personal attorney, Rudy Giuliani, reportedly “browbeat” Michigan legislators in a bizarre legislative hearing as part of an effort to get legislative Republicans there to overturn Biden’s win.<sup>20</sup>

All of this was an exceptional break with precedent and law. The Presidential Transition Act of 1963 was enacted to:

[P]romote the orderly transfer of the executive power in connection with the expiration of the term of office of a President and the inauguration of a new President. The national interest requires that such transitions in the office of President be accomplished so as to assure continuity in the faithful execution of the laws and in the conduct of the affairs of the Federal

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his false claims, at one point warning that Raffensperger was taking ‘a big risk.’”). Raffensperger had previously alleged that U.S. Senator Lindsey Graham (R., S.C.) was among Republicans suggesting Raffensperger invalidate ballots that might favor Biden. See Amy Gardner, *Ga. Secretary of State Says Fellow Republicans Are Pressuring Him to Find Ways to Exclude Ballots*, WASH. POST (Nov. 16, 2020, 6:30 PM), [https://www.washingtonpost.com/politics/brad-raffensperger-georgia-vote/2020/11/16/6b6cb2f4-283e-11eb-8fa2-06e7cbb145c0\\_story.html](https://www.washingtonpost.com/politics/brad-raffensperger-georgia-vote/2020/11/16/6b6cb2f4-283e-11eb-8fa2-06e7cbb145c0_story.html) (“Raffensperger said he was stunned that Graham appeared to suggest that he find a way to toss legally cast ballots.”). Ironically, Raffensperger had been “an intense advocate of limiting how people can vote, so much so that just in the spring during primary voting, he was seen on the left as a villain.” Amber Phillips, *What You Need to Know about Brad Raffensperger*, WASH. POST (Jan. 4, 2021, 4:13 PM), <https://www.washingtonpost.com/politics/2021/01/04/who-is-brad-raffensperger-georgia/>.

<sup>18</sup> See Amy Gardner, *‘Find the fraud’: Trump Pressured a Georgia Elections Investigator in a Separate Call Legal Experts Say Could Amount to Obstruction*, WASH. POST (Jan. 9, 2021, 12:20 PM), [https://www.washingtonpost.com/politics/trump-call-georgia-investigator/2021/01/09/7a55c7fa-51cf-11eb-83e3-322644d82356\\_story.html](https://www.washingtonpost.com/politics/trump-call-georgia-investigator/2021/01/09/7a55c7fa-51cf-11eb-83e3-322644d82356_story.html).

<sup>19</sup> Kristen Holmes & Veronica Stracqualursi, *Trump Pressured Georgia Governor in Call to Help Overturn Biden’s Win in State*, CNN (Dec. 5, 2020, 9:13 PM), <https://www.cnn.com/2020/12/05/politics/trump-georgia-brian-kemp-phone-call/index.html>.

<sup>20</sup> Craig Mauger, *Giuliani Pushes Michigan Lawmakers to Intervene in Election*, DETROIT NEWS (Dec. 3, 2020, 8:49 AM), <https://www.detroitnews.com/story/news/politics/2020/12/02/giuliani-michigan-republicans-election-fraud-allegations/3788198001/> (“The committee meeting began at 6 p.m. and ended after 10 p.m. Supporters of the president waited in line outside the House office building to get a seat in the meeting room and heckled TV news crews as they entered.”). Illustrating the farcical nature of Trump’s election challenges, this hearing became the subject of satire due to reports of audible flatulence from Giuliani after he was challenged by a Democratic lawmaker. See Jake Lahut, *Michigan State Representative Confirms Rudy Giuliani Farted During an Election Hearing*, BUS. INSIDER (Dec. 4, 2020, 10:47 AM), <https://www.businessinsider.com/rudy-giuliani-fart-on-camera-confirmed-by-michigan-state-representative-2020-12>; see also Khaleda Rahman, *Kate McKinnon Returns as Farting Rudy Giuliani in SNL Cold Open*, NEWSWEEK (Dec. 6, 2020, 5:51 AM), <https://www.newsweek.com/kate-mckinnon-rudy-giuliani-cold-open-snl-1552650>.

Government, both domestic and foreign. Any disruption occasioned by the transfer of the executive power could produce results detrimental to the safety and well-being of the United States and its people.<sup>21</sup>

Yet it was not until November 23 that the Trump appointee running the U.S. General Services Administration formally acknowledged that Biden had won, allowing the transition process to begin.<sup>22</sup> In contrast, President Obama had hosted President-elect Trump in the White House on November 10, 2016.<sup>23</sup>

Even with the belated transition process underway, President Trump still promulgated conspiracy theories, and reportedly discussed invoking martial law to prevent Biden's inauguration in a wild December Oval Office meeting that devolved into screaming matches.<sup>24</sup> He openly taunted the previous U.S. Senate Majority Leader Mitch McConnell (R., Ky.) for having acknowledged Biden's victory, and threatened to instigate a primary challenge to the second-ranking U.S. Republican senator, John Thune (R., S.D.), whom he derided as "Mitch's boy."<sup>25</sup> President Trump and his supporters even wanted Vice President Mike Pence to somehow overturn the election while presiding over the ceremonial joint session of Congress to accept its result.<sup>26</sup> A litany of Trump's lies and

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<sup>21</sup> Presidential Transition Act of 1963, Pub. L. No. 88-277, § 2 (1964).

<sup>22</sup> See Kristen Holmes & Jeremy Herb, *First on CNN: Key Government Agency Acknowledges Biden's Win and Begins Formal Transition*, CNN (Nov. 24, 2020, 6:14 AM), <https://www.cnn.com/2020/11/23/politics/transition-biden-gsa-begin/index.html>.

<sup>23</sup> See Benjamin Fearnow, *Flashback 2016: Obama Invites President-Elect Trump to Oval Office to 'Facilitate a Transition . . . Come Together'*, NEWSWEEK (Nov. 10, 2020, 4:36 PM), <https://www.newsweek.com/flashback-2016-obama-invites-president-elect-trump-oval-office-facilitate-transitioncome-1546455>.

<sup>24</sup> Kevin Liptak & Pamela Brown, *Heated Oval Office Meeting Included Talk of Special Counsel, Martial Law as Trump Advisers Clash*, CNN (Dec. 20, 2020, 9:15 PM), <https://www.cnn.com/2020/12/19/politics/trump-oval-office-meeting-special-counsel-martial-law/index.html>.

<sup>25</sup> Seung Min Kim et al., *Republicans Plunge into Open Battle Over Attempts to Overturn Trump's Loss to Biden*, WASH. POST (Dec. 22, 2020, 9:40 PM), [https://www.washingtonpost.com/politics/trump-republicans-election-fight/2020/12/22/fa0c2744-446b-11eb-b0e4-0f182923a025\\_story.html](https://www.washingtonpost.com/politics/trump-republicans-election-fight/2020/12/22/fa0c2744-446b-11eb-b0e4-0f182923a025_story.html).

<sup>26</sup> Chris Cillizza, *How Suing Mike Pence is the Last Gasp of the 'Election Fraud' Crowd*, CNN (Dec. 29, 2020, 10:25 AM), <https://www.cnn.com/2020/12/29/politics/louie-gohmert-mike-pence-lawsuit/index.html> ("Texas Republican Rep. Louie Gohmert sued Vice President Mike Pence in federal court in a, um, wacky attempt to transform the vice president's purely ceremonial role in presiding over the announcement of the Electoral College results in Congress into a power broker position in which the VP could effectively hand the election to President Donald Trump."); Colby Itkowitz & Josh Dawsey, *Pence Under Pressure as the Final Step Nears in Formalizing Biden's Win*, WASH. POST (Dec. 24, 2020, 7:29 PM), [https://www.washingtonpost.com/politics/pence-biden-congress-electoral/2020/12/24/48f48da8-4604-11eb-a277-49a6d1f9dff1\\_story.html](https://www.washingtonpost.com/politics/pence-biden-congress-electoral/2020/12/24/48f48da8-4604-11eb-a277-49a6d1f9dff1_story.html).

provocations culminated in a violent takeover of the U.S. Capitol by Trump's supporters interrupting that joint session.<sup>27</sup>

This Article cannot fully cover all the aberrant ways in which Trump and his supporters attempted to overturn the 2020 election, which will, no doubt, be the subject of books and cinema to come. Instead, it largely focuses on the litigation brought to invalidate the election results—"at least 57" lawsuits as of December 10, 2020 according to *NBC News*.<sup>28</sup> And this Article questions whether, as one *Boston Globe* editorial urged,<sup>29</sup> attorneys acting on Trump's behalf should be sanctioned for filing frivolous litigation.

As the *Globe* noted, "[a]ll the suits have been kicked out of federal and state courts because there is no evidence of fraud, much less enough of it to cancel a democratic election."<sup>30</sup> If baseless claims in civil litigation can be filed without sanction, over the highest stakes imaginable—the presidency of the United States—one must question whether we have witnessed the death of the longstanding legal requirement that such claims have sufficient support.

This Article opens with an explanation of the requirement that legal claims have a factual basis. It then examines, against that backdrop, the litigation brought by President Trump's effort to overturn election results in various states, as well as his extraordinary attempt—amidst violence—to have Congress invalidate election results. It concludes by examining these historic events in light of an attorney's duty to avoid frivolous litigation.

## I. AN ATTORNEY'S DUTY TO AVOID FRIVOLOUS LITIGATION

An attorney's responsibility to bring good-faith claims begins with admittance to a bar. Under Rule 3.1 of the American Bar Association's Model Rules of Professional Conduct:

<sup>27</sup> See Dan Barry et al., 'Our President Wants Us Here': The Mob That Stormed the Capitol, N.Y. TIMES (Jan. 9, 2021, 7:10 PM), <https://www.nytimes.com/2021/01/09/us/capitol-rioters.html> ("[T]he term 'Storm the Capitol' was mentioned 100,000 times [online] in the 30 days preceding Jan. 6, according to Signal Labs, a media insights company.").

<sup>28</sup> Pete Williams & Nicole Via y Rada, *Trump's Election Fight Includes Over 50 Lawsuits. It's Not Going Well.*, NBC NEWS (Dec. 10, 2020, 12:42 PM), <https://www.nbcnews.com/politics/2020-election/trump-s-election-fight-includes-over-30-lawsuits-it-s-n1248289>.

<sup>29</sup> Editorial, *Trump Attorneys Must Face Disciplinary Action*, BOS. GLOBE (Dec. 10, 2020, 4:00 AM), <https://www.bostonglobe.com/2020/12/10/opinion/trump-attorneys-must-face-disciplinary-action/>.

<sup>30</sup> *Id.* The *Globe* did overlook the fact that, out of all the lawsuits, there was *one* inconsequential state court victory: "The lone victory for the Trump team was a small one. A Pennsylvania judge sided with the Trump campaign, ruling that voters could not go back and 'cure' their ballots if they failed to provide proper identification three days after the election. The ruling affected few votes and did not change the outcome in Pennsylvania, which Biden won by 81,660 votes." William Cummings et al., *By the Numbers: President Donald Trump's Failed Efforts to Overturn the Election*, USA TODAY (Jan. 6, 2021, 10:50 AM), <https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/>.

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.<sup>31</sup>

As a comment to this rule explains, an “action is not frivolous even though the lawyer believes that the client’s position ultimately will not prevail.”<sup>32</sup> That a case is very weak does not necessarily make it frivolous. Yet it must have factual support, as an attorney’s duty is to “determine that they can make good faith arguments in support of their clients’ positions.”<sup>33</sup>

In a civil legal proceeding, the standard is equally clear. Under Rule 11 of the Federal Rules of Civil Procedure:

By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

- (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
- (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
- (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.<sup>34</sup>

Sanctions are warranted for the violation of this rule,<sup>35</sup> and “[a]bsent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.”<sup>36</sup> The sanction:

[M]ust be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed

<sup>31</sup> MODEL RULES OF PROF’L CONDUCT r. 3.1 (AM. BAR ASS’N 1983).

<sup>32</sup> *Id.* r. 3.1 cmt. 2.

<sup>33</sup> *Id.*

<sup>34</sup> FED. R. CIV. P. 11(b).

<sup>35</sup> *Id.* 11(c).

<sup>36</sup> *Id.* 11(c)(1).



on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.<sup>37</sup>

Further, the U.S. Supreme Court has ruled that "the inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct."<sup>38</sup> Thus, a federal court may "resort to its inherent power to impose attorney's fees as a sanction for bad-faith conduct" without relying on Rule 11.<sup>39</sup> This is true even though "when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power."<sup>40</sup>

As Henry Litman has written in the *Los Angeles Times*, unlike politicians "[j]udges and lawyers operate according to rules, not politics. They have reason, and ample tools, to stand up against abuse of the legal system, to throttle lawsuits that have nothing to do with the good-faith vindication of bona fide legal claims."<sup>41</sup>

## II. THE LEGAL ATTACK ON DEMOCRACY

Following his electoral defeat, surrogates of President Trump, including attorneys he directly retained, filed a reported sixty-two lawsuits seeking to overturn the election result.<sup>42</sup> These lawsuits focused on four states that were critical to the Electoral College victory of President Biden,<sup>43</sup> and we can examine how judges dispensed with claims that failed to meet the standards demanded by Rule 11 and ethical conduct.

### A. Arizona

In Arizona, in *Bowyer v. Ducey*, U.S. District Court Judge Diane J. Humetewa noted that "the relief Plaintiffs seek is extraordinary. If granted, millions of Arizonans who exercised their individual right to vote in the 2020 General Election would be utterly disenfranchised. Such a request should then be accompanied by clear and conclusive facts . . . ."<sup>44</sup> Among other things, the plaintiffs sought to "seize all voting machines, equipment, software, and other

<sup>37</sup> *Id.* 11(c)(4).

<sup>38</sup> *Chambers v. NASCO, Inc.*, 501 U.S. 32, 49 (1991).

<sup>39</sup> *Id.* at 50.

<sup>40</sup> *Id.*

<sup>41</sup> Henry Litman, *Column: Trump's Lawyers Are Abusing the Courts. They Should Be Sanctioned*, L.A. TIMES (Dec. 2, 2020, 10:07 AM), <https://www.latimes.com/opinion/story/2020-12-02/donald-trump-election-lawsuit-rudy-giuliani-jenna-ellis-abuse-of-court>.

<sup>42</sup> *Cummings et al.*, *supra* note 30.

<sup>43</sup> *See id.*

<sup>44</sup> No. CV-20-02321-PHX-DJH, 2020 U.S. Dist. LEXIS 231093, at \*3 (D. Ariz. Dec. 11, 2020).

election-related records and materials, including all ballots cast.”<sup>45</sup> In dismissing the complaint, the judge found that “the Complaint’s allegations are sorely wanting of relevant or reliable evidence . . . .”<sup>46</sup> Judge Humetewa noted that the “Complaint includes a hodge-podge of alleged misconduct by Arizona elections officials, occurring on various dates over the past weeks, months, and even years.”<sup>47</sup>

Although the plaintiffs alleged that “that Arizona’s Secretary of State and Governor conspired with various domestic and international actors to manipulate Arizona’s 2020 General Election results,” Judge Humetewa found no evidence to support their claims: “Plaintiffs append over three hundred pages of attachments, which are only impressive for their volume. The various affidavits and expert reports are largely based on anonymous witnesses, hearsay, and irrelevant analysis of unrelated elections.”<sup>48</sup> As she determined, “[a]llegations that find favor in the public sphere of gossip and innuendo cannot be a substitute for earnest pleadings and procedure in federal court. They most certainly cannot be the basis for upending Arizona’s 2020 General Election.”<sup>49</sup>

It cannot be disputed that “hearsay” and “gossip and innuendo” do not meet the standard of “evidentiary support” for Trump’s claims required by Rule 11.<sup>50</sup> Nor would such claims meet the ethical standard of having “a basis in law and fact.”<sup>51</sup> This Article will show that these pitfalls would be a recurring infirmity in the Trump litigation.

An embittered Rudy Giuliani branded Arizona’s Republican governor, Doug Ducey, a “Democrat” for “[n]ot calling a Special Session for a vote on who won the state.”<sup>52</sup> Yet the matter was out of Ducey’s hands, as Arizona law makes clear:

After the secretary of state issues the statewide canvass containing the results of a presidential election, the presidential electors of this state shall cast their electoral college votes for the candidate for president and the candidate for vice president who jointly received the highest number of votes in this state as prescribed in the canvass.<sup>53</sup>

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<sup>45</sup> *Id.* at \*5.

<sup>46</sup> *Id.* at \*3.

<sup>47</sup> *Id.* at \*28.

<sup>48</sup> *Id.* at \*38–39.

<sup>49</sup> *Id.* at \*46.

<sup>50</sup> FED. R. CIV. P. 11(b)(3).

<sup>51</sup> MODEL RULES OF PROF’L CONDUCT r. 3.1 (AM. BAR ASS’N 1983).

<sup>52</sup> Rudy W. Giuliani (@RudyGiuliani), TWITTER (Jan. 3, 2021, 9:46 PM), <https://twitter.com/RudyGiuliani/status/1345924505483546624> [<https://web.archive.org/web/20210104044844/https://twitter.com/RudyGiuliani>].

<sup>53</sup> ARIZ. REV. STAT. § 16-212 (LexisNexis 2021).

B. Georgia

In *Wood v. Raffensperger*,<sup>54</sup> U.S. District Court Judge Steven D. Grimberg denied an attempt by a member of Trump's legal team, Lin Wood, to overturn Georgia's election results. Among other things, Wood lacked standing, having relied upon "his status as a donor to the Republican Party whose interests are aligned with that party and its political candidates to support his standing argument."<sup>55</sup> He also "failed to submit any evidence explaining why he waited to bring these claims until the eleventh hour."<sup>56</sup> Moreover, "he wants the rules for the already concluded election declared unconstitutional and over one million absentee ballots called into question."<sup>57</sup> As Judge Grimberg noted, "[b]eyond merely causing confusion, Wood's requested relief could disenfranchise a substantial portion of the electorate and erode the public's confidence in the electoral process."<sup>58</sup>

Judge Grimberg noted that "[a]lthough Wood generally claims fundamental unfairness . . . Wood does not allege unfairness in counting the ballots; instead, he alleges that select non-party, partisan monitors were not permitted to observe the Audit in an ideal manner."<sup>59</sup> The judge dismissed the case as "merely a 'garden variety' election dispute."<sup>60</sup> To overturn, based upon petty grievances, "an election that has already concluded would be unprecedented and harm the public in countless ways."<sup>61</sup> It is worth noting that Judge Grimberg was a Trump appointee.<sup>62</sup>

In affirming the decision, the Eleventh Circuit added that "[e]ven if Wood had standing, several of his requests for relief are barred by another jurisdictional defect: mootness."<sup>63</sup> They noted that "Wood's arguments reflect a basic misunderstanding of what mootness is."<sup>64</sup> As the U.S. Supreme Court has explained, "Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies . . . . This case-or-controversy

<sup>54</sup> No. 1:20-cv-04651-SDG, 2020 U.S. Dist. LEXIS 218058 (N.D. Ga. Nov. 20, 2020).

<sup>55</sup> *Id.* at \*18.

<sup>56</sup> *Id.* at \*21–22.

<sup>57</sup> *Id.* at \*23.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at \*35.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at \*37 (citations omitted).

<sup>62</sup> Josh Gerstein, *Federal Judge Rejects Trump Ally's Bid to Block Election Certification in Georgia*, POLITICO (Nov. 19, 2020, 9:58 PM), <https://www.politico.com/news/2020/11/19/federal-judge-rejects-trump-allys-bid-block-election-certification-georgia-438563>.

<sup>63</sup> *Wood v. Raffensperger*, No. 20-14418, 2020 U.S. App. LEXIS 37971, at \*18 (11th Cir. Dec. 5, 2020).

<sup>64</sup> *Id.* at \*20.

requirement subsists through all stages of federal judicial proceedings, trial and appellate.”<sup>65</sup>

Trump’s attorney Lin Wood was a colorful Trump advocate.<sup>66</sup> He listed on his Twitter account the catchphrase for the “QAnon conspiracy theory that posits Trump is fighting a war with a global cabal of satanic pedophiles who drink the blood of children they slay.”<sup>67</sup> During the presidential campaign, Wood, who represented Kyle Rittenhouse—a teenager who fired an assault rifle into a crowd of protesters in Kenosha, Wisconsin—had threatened to sue Joe Biden for libel.<sup>68</sup>

An audit of Georgia’s votes found no evidence of election fraud.<sup>69</sup> And even after the Trump Administration forced a U.S. attorney for Georgia to resign, and replaced him with someone more receptive to election fraud theories, his replacement found no fraud according to a leaked phone call audio recording.<sup>70</sup> There was a lasting consequence, however, as key Republicans blamed the loss of the state’s two U.S. Senate seats in a January 2021 runoff on Trump’s election conspiracy theories and attacks upon Georgia Republicans.<sup>71</sup>

To argue a moot case does not meet the “reasonable diligence” expected of an attorney.<sup>72</sup> As a comment to Rule 1.3 of the American Bar Association’s

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<sup>65</sup> *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990) (emphasis added) (citations omitted).

<sup>66</sup> Marc Caputo, ‘One of the Nuttier Things I’ve Seen’: MAGA Civil War Erupts in Georgia, *POLITICO* (Dec. 3, 2020, 7:37 PM), <https://www.politico.com/news/2020/12/03/maga-georgia-civil-war-trump-senate-republicans-442776>.

<sup>67</sup> *Id.*

<sup>68</sup> See Haven Orecchio-Egresitz, *A Lawyer for Kyle Rittenhouse — The White Teen Charged with Shooting Three Kenosha Protesters — Says He’s Suing Joe Biden for Libel*, *INSIDER* (Oct. 1, 2020, 10:51 AM), <https://www.insider.com/lawyer-for-accused-kenosha-killer-kyle-rittenhouse-suing-biden-2020-10>.

<sup>69</sup> See Mark Niese, *No Fraud: Georgia Audit Confirms Authenticity of Absentee Ballots*, *ATLANTA J.-CONST.* (Dec. 9, 2020), <https://www.ajc.com/politics/no-fraud-georgia-audit-confirms-authenticity-of-absentee-ballots/QF2PTOGLNLDLNDJEWBU56WEQHM/> (“Law enforcement and election investigators didn’t find a single fraudulent absentee ballot during an audit of over 15,000 voter signatures, according to a report by the Georgia secretary of state’s office released Tuesday.”).

<sup>70</sup> See Chris Joyner, *Trump’s Pick for U.S. Attorney in Georgia Dismisses Election Fraud Claims: ‘There’s Just Nothing to Them’*, *ATLANTA J.-CONST.* (Jan. 12, 2021), <https://www.ajc.com/news/trumps-pick-for-us-attorney-in-georgia-dismisses-election-fraud-claims-theres-just-nothing-to-them/7JMIL37WANHWXCZD4FTJXH4CIQ/> (“‘I would love to stand out on the street corner and scream this, and I can’t,’ said Bobby Christine, according to an audio recording of the call obtained by The Atlanta Journal-Constitution.”).

<sup>71</sup> Cleve R. Wootson Jr. et al., ‘Always About Him’: How Trump’s Obsession with Baseless Election Claims Cost Republicans in Georgia, *WASH. POST* (Jan. 10, 2021, 12:45 PM), [https://www.washingtonpost.com/politics/trump-election-fraud-claims-georgia-runoffs/2021/01/10/98c43550-51d4-11eb-bda4-615aaefd0555\\_story.html](https://www.washingtonpost.com/politics/trump-election-fraud-claims-georgia-runoffs/2021/01/10/98c43550-51d4-11eb-bda4-615aaefd0555_story.html).

<sup>72</sup> MODEL RULES OF PROF’L CONDUCT r. 1.3 (AM. BAR ASS’N 1983).

Model Rules of Professional Conduct notes, “A client’s interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client’s legal position may be destroyed.”<sup>73</sup> Not only is the client disserved, but the federal courts are not to be accessed for “any improper purpose, such as to harass, *cause unnecessary delay*, or needlessly increase the cost of litigation.”<sup>74</sup>

### C. Michigan

In *King v. Whitmer*,<sup>75</sup> plaintiffs sought to overturn Biden’s Michigan victory, seeking what a District Court characterized as “relief that is stunning in its scope and breathtaking in its reach. If granted, the relief would disenfranchise the votes of the more than 5.5 million Michigan citizens who, with dignity, hope, and a promise of a voice, participated in the 2020 General Election.”<sup>76</sup> The plaintiffs were “nominees of the Republican Party to be Presidential Electors on behalf of the state of Michigan.”<sup>77</sup> Judge Linda V. Parker ruled that “[t]his case represents well the phrase: ‘this ship has sailed.’ The time has passed to provide most of the relief Plaintiffs request in their Amended Complaint; the remaining relief is beyond the power of any court. For those reasons, this matter is moot.”<sup>78</sup> In any event, Judge Parker noted that the plaintiffs offered “nothing but speculation and conjecture” in asking the court to “to ignore the orderly statutory scheme established to challenge elections and to ignore the will of millions of voters. This, the Court cannot, and will not, do.”<sup>79</sup>

Again, to argue a moot case does not meet the standards expected of an attorney. Nor does “speculation and conjecture” meet the Rule 11 requirement that “claims, defenses, and other legal contentions are warranted by existing law” and have “evidentiary support.”<sup>80</sup>

### D. Pennsylvania

In refusing to overturn Biden’s victory in Pennsylvania, and upholding a District Court decision in *Donald J. Trump for President, Inc. v. Sec’y Pennsylvania*,<sup>81</sup> the U.S Third Circuit Court of Appeals noted: “Free, fair elections are the lifeblood of our democracy. Charges of unfairness are serious. But calling an election unfair does not make it so. Charges require specific

<sup>73</sup> *Id.* r. 1.3 cmt. 3.

<sup>74</sup> FED. R. CIV. P. 11(b)(1) (emphasis added).

<sup>75</sup> No. 20-13134, 2020 U.S. Dist. LEXIS 228621 (E.D. Mich. Dec. 7, 2020).

<sup>76</sup> *Id.* at \*2–3.

<sup>77</sup> *Id.* at \*4–5.

<sup>78</sup> *Id.* at \*13.

<sup>79</sup> *Id.* at \*35–36.

<sup>80</sup> FED. R. CIV. P. 11(b)(2)–(3).

<sup>81</sup> No. 20-3371, 2020 U.S. App. LEXIS 37346 (3d Cir. Nov. 27, 2020).

allegations and then proof. We have neither here.”<sup>82</sup> As the court noted, the Trump campaign’s “allegations are vague and conclusory. It never alleges that anyone treated the Trump campaign or Trump votes worse than it treated the Biden campaign or Biden votes.”<sup>83</sup> The court determined that “[t]he Campaign’s claims have no merit. The number of ballots it specifically challenges is far smaller than the roughly 81,000-vote margin of victory. And it never claims fraud or that any votes were cast by illegal voters.”<sup>84</sup>

Given these infirmities, the court remarked that the Trump campaign sought “breathtaking relief: barring the Commonwealth from certifying its results or else declaring the election results defective and ordering the Pennsylvania General Assembly, not the voters, to choose Pennsylvania’s presidential electors. It cites no authority for this drastic remedy.”<sup>85</sup> In denying that remedy, the court wrote that “[v]oters, not lawyers, choose the President. Ballots, not briefs, decide elections.”<sup>86</sup>

In a separate Pennsylvania case, *Donald J. Trump for President, Inc. v. Boockvar*,<sup>87</sup> a District Court judge noted that: “Plaintiffs ask this Court to disenfranchise almost seven million voters . . . . One might expect that when seeking such a startling outcome, a plaintiff would come formidably armed with compelling legal arguments and factual proof of rampant corruption . . . .”<sup>88</sup>

Instead, Judge Matthew W. Brann found that “this Court has been presented with strained legal arguments without merit and speculative accusations, uncoupled in the operative complaint and unsupported by evidence.”<sup>89</sup>

Judge Brann wrote that:

Although this case was initiated less than two weeks ago, it has already developed its own tortured procedural history. Plaintiffs have made multiple attempts at amending the pleadings, and have had attorneys both appear and withdraw in a matter of seventy-two hours. There have been at least two perceived discovery disputes, one oral argument, and a rude and ill-conceived voicemail which distracted the Court’s attention from the significant issues at hand.”<sup>90</sup>

Of an alleged “violation of equal protection” Judge Brann wrote derisively that “[t]his claim, like Frankenstein’s Monster, has been haphazardly stitched

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<sup>82</sup> *Id.* at \*4.

<sup>83</sup> *Id.* at \*5.

<sup>84</sup> *Id.* at \*6.

<sup>85</sup> *Id.* at \*23.

<sup>86</sup> *Id.* at \*29.

<sup>87</sup> No. 4:20-CV-02078, 2020 U.S. Dist. LEXIS 218351 (M.D. Pa. Nov. 21, 2020).

<sup>88</sup> *Id.* at \*7–8.

<sup>89</sup> *Id.* at \*8.

<sup>90</sup> *Id.* at \*13.

together from two distinct theories in an attempt to avoid controlling precedent.”<sup>91</sup>

It is impossible to discern how such a description is befitting of the professional conduct expected of an attorney. Although Rudy Giuliani attacked Brann’s ruling as coming from a judge appointed by President Barack Obama,<sup>92</sup> the complicated reality, as one columnist noted, is that Brann is a “a member of the Federalist Society, the conservative/libertarian law group that liberals like to demonize[.]”<sup>93</sup> Thus he was “both an Obama appointee and, according to Sen. Pat Toomey (R-Pa.), a ‘longtime conservative Republican.’”<sup>94</sup>

In *Kelly v. Commonwealth*,<sup>95</sup> the lead plaintiff was a Republican U.S. House member who sought to have the Pennsylvania Supreme Court overturn Pennsylvania election results, including, presumably, his own victory. The objective was to have the court declare unconstitutional Act 77, a 2019 law “establishing universal mail-in voting” and, accordingly, “invalidate the ballots of the millions of Pennsylvania voters who utilized the mail-in voting procedures established by Act 77 and count only those ballots that Petitioners deem to be ‘legal votes.’”<sup>96</sup> In the alternative, “Petitioners advocated the extraordinary proposition that the court disenfranchise all 6.9 million Pennsylvanians who voted in the General Election and instead ‘direct[] the General Assembly to choose Pennsylvania’s electors.’”<sup>97</sup>

Noting that Act 77 had been in effect for a year, unchallenged, the court dismissed the case with prejudice and noted “it is beyond cavil that Petitioners failed to act with due diligence in presenting the instant claim.”<sup>98</sup> Concurring, Justice Wecht noted that “[h]aving delayed this suit until two elections were conducted under Act 77’s new, no-excuse mail-in voting system, Petitioners—several of whom participated in primary elections under this system without

<sup>91</sup> *Id.* at \*17.

<sup>92</sup> Here Giuliani should have been mindful of his ethical duty to not “make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or *integrity* of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.” MODEL RULES OF PROF’L CONDUCT r. 8.2(a) (AM. BAR ASS’N 1983) (emphasis added).

<sup>93</sup> Michael McGough, *Opinion: Don’t Jump to Conclusions about an ‘Obama Judge’ Who Ruled against Trump*, L.A. TIMES (Nov. 24, 2020, 3:00 AM), <https://www.latimes.com/opinion/story/2020-11-24/dont-jump-to-conclusions-about-an-obama-judge-who-ruled-against-trump>.

<sup>94</sup> *Id.* Such an ecumenical appointment by a Republican president would be quite impossible to imagine. See, e.g., Brendan Williams, *Contempt of Courts: President Trump’s Transformation of the Judiciary*, DENVER L. REV. F. ONLINE, Oct. 28, 2020, at 1, <https://www.denverlawreview.org/dlr-online-article/contempt-of-courts-president-trumps-transformation-of-the-judiciary>.

<sup>95</sup> No. 68 MAP 2020, 2020 Pa. LEXIS 6071 (Pa. Nov. 28, 2020).

<sup>96</sup> *Id.* at \*1.

<sup>97</sup> *Id.* at \*2 (footnote and citation omitted).

<sup>98</sup> *Id.* at \*3–4.

complaint—play a dangerous game at the expense of every Pennsylvania voter.”<sup>99</sup> Injunctive relief was sought from Justice Alito, who referred the application to the full U.S. Supreme Court—which denied the remedy.<sup>100</sup>

Again, arguing a moot case does not meet the standards expected of an attorney. As the Supreme Court once declared in disposing of a moot case brought by the federal government, “The case is . . . one where the United States, having slept on its rights, now asks us to do what by orderly procedure it could have done for itself.”<sup>101</sup> Clearly in the Pennsylvania Supreme Court case the issue was not Act 77 itself, which could have been challenged before elections that the petitioning politicians had participated in without complaint, but the outcome of one election.

#### E. Wisconsin

Regarding the efforts to overturn Biden’s Wisconsin victory in *Trump v. Wisconsin Elections Commission*,<sup>102</sup> U.S. District Court Judge Brett Ludwig stated the obvious: “This is an *extraordinary* case. A sitting president who did not prevail in his bid for reelection has asked for federal court help in setting aside the popular vote . . . .”<sup>103</sup> He wrote that under Trump’s arguments “any disappointed loser in a Presidential election, able to hire a team of clever lawyers, could flag claimed deviations from the election rules and cast doubt on the election results.”<sup>104</sup> This could create chaos, state-by-state. The U.S. Seventh Circuit Court of Appeals affirmed Judge Ludwig’s decision.<sup>105</sup>

Another, perhaps even more quixotic, effort to overturn Wisconsin’s results came in *Feehan v. Wisconsin Elections Commission*, where the plaintiffs sought to have a U.S. District Court “order state officials to decertify the election results that state officials had certified the day before, order the Governor not to transmit to the Electoral College the certified results he’d transmitted the day before and order the Governor to instead transmit election results that declared Donald Trump to be ‘the winner of this election.’”<sup>106</sup> Denying this request, Judge

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<sup>99</sup> *Id.* at \*12 (Hecht, J., concurring). Act 77 had strong bipartisan support in passing into law. See Ed Palattella, *U.S. Rep. Kelly Targets Wolf over Pa. Mail-in Voting Law, Though It Got Bipartisan Support*, ERIE TIMES-NEWS (Dec. 22, 2020, 4:21 PM), <https://www.goerie.com/story/news/politics/elections/2020/12/22/u-s-rep-mike-kelly-targets-pa-gov-wolf-fight-over-mail-votes/4005835001/> (“The Pennsylvania state law that authorized universal, no-excuses mail-in voting passed with bipartisan support in the Republican-controlled General Assembly in 2019.”).

<sup>100</sup> *Kelly v. Pennsylvania*, No. 20A98, 2020 U.S. LEXIS 5986 (U.S. Dec. 8, 2020).

<sup>101</sup> *United States v. Munsingwear, Inc.*, 340 U.S. 36, 41 (1950).

<sup>102</sup> No. 20-cv-1785-BHL, 2020 U.S. Dist. LEXIS 233765 (E.D. Wis. Dec. 12, 2020).

<sup>103</sup> *Id.* at \*45.

<sup>104</sup> *Id.* at \*40.

<sup>105</sup> *Trump v. Wis. Elections Comm’n*, No. 20-3414, 2020 U.S. App. LEXIS 40360 (7th Cir. Dec. 24, 2020).

<sup>106</sup> No. 20-cv-1771-pp, 2020 U.S. Dist. LEXIS 231603, at \*1–2 (E.D. Wis. Dec. 9, 2020).



Pamela Pepper wrote: “Federal judges do not appoint the president in this country. One wonders why the plaintiffs came to federal court and asked a federal judge to do so. After a week of sometimes odd and often harried litigation, the court is no closer to answering the ‘why.’”<sup>107</sup>

If a judge states that she cannot even *comprehend* the arguments presented in a case, it is obvious that the requirements in Rule 11 of presenting nonfrivolous claims supported by law and evidence were not met.<sup>108</sup>

Trump also sought to persuade the Wisconsin Supreme Court to overturn Biden’s victory, but Wisconsin’s highest court declined to hear the case on original action in a four to three decision in *Trump v. Evers*.<sup>109</sup> After his loss, Trump took to Twitter to attack a conservative justice, Brian Hagedorn, for joining the court’s three liberal justices, falsely claiming Hagedorn had won his office due to Trump’s endorsement.<sup>110</sup>

#### F. U.S. Supreme Court

Trump had been optimistic about his prospects in the U.S. Supreme Court, having appointed three of its justices, and even re-shared on Twitter a supporter’s tweet that, in anticipation of a Court win, “clearly depicted Trump’s recent Supreme Court appointee Amy Coney Barrett appearing to shoot lasers from her eyes.”<sup>111</sup> However, Trump’s bravado proved unfounded as the Court denied an election challenge brought by the state of Texas against Pennsylvania, noting in an unsigned opinion that “Texas has not demonstrated a judicially cognizable interest in the manner in which another State conducts its elections.”<sup>112</sup> The plaintiffs in the case had included “126 congressional

<sup>107</sup> *Id.* at \*2.

<sup>108</sup> See FED. R. CIV. P. 11(b).

<sup>109</sup> No. 2020AP1971-OA, 2020 Wis. LEXIS 191, at \*2 (Wis. Dec. 3, 2020).

<sup>110</sup> Mitchell Schmidt, *Donald Trump Takes Aim at Wisconsin Supreme Court Justice Brian Hagedorn Over Election Ruling*, WIS. ST. J. (Dec. 29, 2020), [https://madison.com/wsj/news/local/govt-and-politics/donald-trump-takes-aim-at-wisconsin-supreme-court-justice-brian-hagedorn-over-election-ruling/article\\_c818b2f3-680e-5225-8c89-2a018924abb8.html](https://madison.com/wsj/news/local/govt-and-politics/donald-trump-takes-aim-at-wisconsin-supreme-court-justice-brian-hagedorn-over-election-ruling/article_c818b2f3-680e-5225-8c89-2a018924abb8.html) (“There is no record of Trump endorsing Hagedorn, though the president did congratulate him after his victory last year.”).

<sup>111</sup> Jeremy Stahl, *SCOTUS Is Over It*, SLATE (Dec. 8, 2020, 6:10 PM), <https://slate.com/news-and-politics/2020/12/scotus-supreme-court-alito-amy-coney-barrett-laser-eyes.html>.

<sup>112</sup> Texas v. Pennsylvania, No. 155, 2020 U.S. LEXIS 5994, at \*1 (Dec. 11, 2020). The perplexing nature of the Texas claims are perhaps revealed best by one example: the assertion that there was a “less than one in a quadrillion statistical improbability of Mr. Biden winning the popular vote in the four Defendant States—Georgia, Michigan, Pennsylvania, and Wisconsin” and that this improbability “independently exists when Mr. Biden’s performance in each of those Defendant States is compared to former Secretary of State Hilary [sic] Clinton’s performance in the 2016 general election and President Trump’s performance in the 2016 and 2020 general elections. Again, the statistical improbability of Mr. Biden winning the popular vote in these four States collectively is 1 in 1,000,000,000,000,000.” Motion for Leave to File Bill of Complaint at 7, Texas v. Pennsylvania, No. 155, 2020 U.S. LEXIS 5994

Republicans, including House Republican leader Rep. Kevin McCarthy, R-Calif.”<sup>113</sup>

On the day of the December 11, 2020 decision, Trump tweeted: “The Supreme Court really let us down. No Wisdom, No Courage!”<sup>114</sup> Obviously discontented, on December 11, 2020 Trump tweeted: “The U.S. Supreme Court has been totally incompetent and weak on the massive Election Fraud that took place in the 2020 Presidential Election. We have absolute PROOF, but they don’t want to see it - No ‘standing’, they say. If we have corrupt elections, we have no country!”<sup>115</sup>

### III. A MOCKERY OF THE LEGAL SYSTEM

That the litigation brought on Trump’s behalf was frivolous is reinforced by the fact that many federal judges forcefully ruling against Trump’s efforts to overturn the 2020 presidential election had been appointed by Trump himself.<sup>116</sup>

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(Dec. 11, 2020) (footnote omitted). “The lawsuit’s statistical case comes down to this question: How many zeros will it take for you to be sufficiently impressed that you’ll ignore basic logic?” Philip Bump, *Trump’s Effort to Steal the Election Comes Down to Some Utterly Ridiculous Statistical Claims*, WASH. POST (Dec. 9, 2020, 2:49 PM), <https://www.washingtonpost.com/politics/2020/12/09/trumps-effort-steal-election-comes-down-some-utterly-ridiculous-statistical-claims/>.

<sup>113</sup> Williams & Via y Rada, *supra* note 28. In an odd postscript to the Texas lawsuit, three cases of alleged voter fraud were discovered in Pennsylvania—but each involved a Trump voter—prompting Pennsylvania’s Democratic lieutenant governor, John Fetterman, to troll the Trump-supporting lieutenant governor of Texas, Dan Patrick, by seeking to collect a reward Patrick offered for proof of election fraud. *See* Steve Benen, *Is Texas’ Dan Patrick Prepared to Part with His \$1 Million Reward?*, MSNBC (Dec. 28, 2020, 10:20 AM), <https://www.msnbc.com/rachel-maddow-show/texas-dan-patrick-prepared-part-his-1-million-reward-n1252419>.

<sup>114</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 11, 2020, 11:50 PM), <https://twitter.com/realDonaldTrump/status/1337620892139081728>, [<https://web.archive.org/web/20201212045102/https://twitter.com/realDonaldTrump/status/1337620892139081728>]; *Trump Lashes Out at Supreme Court after Texas Election Lawsuit Rejected*, CBS NEWS (Dec. 12, 2020, 9:16 AM), <https://www.cbsnews.com/news/trump-supreme-court-texas-lawsuit-election/>.

<sup>115</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 26, 2020, 8:51 AM), <https://twitter.com/realDonaldTrump/status/1342830505163706369>, [<https://web.archive.org/web/20201226135159/https://twitter.com/realDonaldTrump/status/1342830505163706369>]; Evan Semones, *Trump Rails at Justice Dept., Supreme Court as Stimulus Bill Deadline Nears*, POLITICO (Dec. 26, 2020, 11:01 AM), <https://www.politico.com/news/2020/12/26/trump-stimulus-bill-doj-supreme-court-450497>.

<sup>116</sup> *See* Aaron Blake, *The Most Remarkable Rebukes of Trump’s Legal Case: From the Judges He Hand-picked*, WASH. POST (Dec. 14, 2020, 10:37 AM), <https://www.washingtonpost.com/politics/2020/12/14/most-remarkable-rebukes-trumps-legal-case-judges-he-hand-picked/>.

The irony, however, was lost on Trump and his campaign, who have “repeatedly blamed its overwhelmingly awful court record on ‘activist’ judges.”<sup>117</sup>

Yet the litigation itself made a mockery of the legal system. Although the performance of Rudy Giuliani opened him up to parody,<sup>118</sup> the cases themselves were the stuff of satire. As characterized by the *Associated Press*, Giuliani, “representing a client inside a courtroom for the first time in nearly three decades, showed some rust.”<sup>119</sup> The *Associated Press* report continues: “[H]e fiddled with his Twitter account, forgot which judge he was talking to and threw around unsupported accusations about a nationwide conspiracy by Democrats to steal the election.”<sup>120</sup> Elaborating further on this comedy of errors:

[H]e tripped himself up over the meaning of “opacity.”

“In the plaintiffs’ counties, they were denied the opportunity to have an unobstructed observation and ensure opacity,” Giuliani said. “I’m not quite sure I know what opacity means. It probably means you can see, right?”

“It means you can’t,” said U.S. District Judge Matthew Brann.

“Big words, your honor,” Giuliani said.<sup>121</sup>

At times “Giuliani struggled to answer Brann’s questions” and, “while still in court, Giuliani retweeted someone who said he did a great job in his opening remarks.”<sup>122</sup>

Courtrooms are not playgrounds for the unprepared and those who do not take legal proceedings seriously. Ethically, an attorney owes a duty of competence to a client: “Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”<sup>123</sup> To elaborate: “Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation.”<sup>124</sup> One cannot simply “wing it” in court, nor make statements before a court that an attorney knows to be false or even unproven.<sup>125</sup> For example, “an assertion purporting to be on the lawyer’s own

<sup>117</sup> *Id.*

<sup>118</sup> See ‘Your Honor, I’m Ready To Present,’ Says Giuliani Pulling Rotted Melon, Stray Cat out of Old Burlap Sack, THE ONION (Nov. 19, 2020, 4:20 PM), <https://politics.theonion.com/your-honor-i-m-ready-to-present-says-giuliani-pulli-1845716203>.

<sup>119</sup> Marc Levy & Mark Scolforo, *A Rusty Giuliani Returns to the Courtroom on Trump’s Behalf*, AP NEWS (Nov. 18, 2020), <https://apnews.com/article/rudy-giuliani-returns-courtroom-trump-b81328c5a74ab348d8b7e21f93eed3f9>.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> MODEL RULES OF PROF’L CONDUCT r. 1.1 (AM. BAR ASS’N 1983).

<sup>124</sup> *Id.* r. 1.1 cmt. 5.

<sup>125</sup> *Id.* r. 3.3.

knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only *when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry.*"<sup>126</sup> Wild allegations about voter fraud do not meet that standard.<sup>127</sup>

As bizarre as the conduct of Wood or Giuliani was, it arguably paled next to that of another attorney representing Trump: Sidney Powell. Controverting even the norms of Trump's administration with her conspiracy theories, Powell was formally removed from Trump's legal team, but Trump himself still considered making her a special counsel to investigate alleged election fraud.<sup>128</sup> Powell was legal counsel to former national security adviser Michael Flynn, and, as Politico reported, she "amplified calls for Trump to invoke the Insurrection Act, an 1807 law that enables the president to deploy troops to suppress domestic uprisings."<sup>129</sup>

Like Flynn, Powell is associated with the far-right QAnon conspiracy movement.<sup>130</sup> "[I]n the apocalyptic QAnon community, the final blow is 'The Storm,' a long-predicted day of reckoning when Trump institutes martial law and the elites are arrested, tried in front of military tribunals and executed."<sup>131</sup>

After Giuliani and Powell alleged that Dominion Voting Systems' voting machines had been tampered with,<sup>132</sup> a top employee of Dominion—who had become the center of conspiracies and gone into hiding to avoid threats—sued

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<sup>126</sup> *Id.* r. 3.3 cmt. 3 (emphasis added).

<sup>127</sup> See *Bowyer v. Ducey*, No. CV-20-02321-PHX-DJH, 2020 U.S. Dist. LEXIS 231093, at \*49 (D. Ariz. Dec. 11, 2020) ("[G]ossip and innuendo cannot be a substitute for earnest pleadings and procedure in federal court.").

<sup>128</sup> See Kyle Cheney & Josh Gerstein, *Trump Sought to Tap Sidney Powell as Special Counsel for Election Fraud*, POLITICO (Dec. 20, 2020), <https://www.politico.com/news/2020/12/19/sidney-powell-trump-special-counsel-448694>.

<sup>129</sup> *Id.* This astonishing, terrifying suggestion from Flynn and Powell could arguably constitute seditious conspiracy. See 18 U.S.C. § 2384 (2018).

<sup>130</sup> Tina Nguyen, *Trump Leans on QAnon Figures in Flailing Effort to Overturn Election*, POLITICO (Dec. 23, 2020), <https://www.politico.com/news/2020/12/23/trump-qanon-effort-overturn-election-450301> ("[W]hen Trump brought in Flynn, who took the QAnon pledge and has argued he is a deep state target, and Powell, who represented Flynn in his fight against government prosecutors, it sent waves of excitement through QAnon followers.").

<sup>131</sup> *Id.*

<sup>132</sup> In a press conference with Giuliani, Powell alleged the "influence of communist money through Venezuela, Cuba, and likely China and the interference with our elections here in the United States. The Dominion voting systems . . . were created in Venezuela at the direction of Hugo Chavez to make sure he never lost an election after one constitutional referendum came out the way he didn't want it to come out." Bess Levin, *Rudy Giuliani's Hair Dye Melting Off His Face Was the Least Crazy Part of His Batshit-Crazy Press Conference*, VANITY FAIR (Nov. 19, 2020), <https://www.vanityfair.com/news/2020/11/rudy-giuliani-hair-dye-press-conference>. The assertion that the voting machines were manipulated was at the heart of *Bowyer v. Ducey*, No. CV-20-02321-PHX-DJH, 2020 U.S. Dist. LEXIS 231093, at \*4–5, \*28 (D. Ariz. Dec. 11, 2020).

the two attorneys for defamation, as well as other right-wing figures who had repeated their falsehoods.<sup>133</sup>

Powell's off-base allegations became enough of a problem for Dominion that the voting technology company, in a November 26, 2020 press release rebutting her claims, felt compelled to clarify that "Dominion was not 'founded by oligarchs and dictators.'"<sup>134</sup> The press release further noted that "Dominion has no ties to the Venezuelan government, nor any other foreign government, including China and Iran. Dominion has never participated in any elections in Venezuela and has no connection or relationship with the now deceased former Venezuelan dictator Hugo Chavez."<sup>135</sup> The company closed by stating that:

Sidney Powell's wild and reckless allegations are not only demonstrably false, they have led to stalking, harassment, and death threats to Dominion employees. This criminal activity has been duly reported to the appropriate law enforcement agencies, and we intend to hold Ms. Powell, and those aiding and abetting her fraudulent actions, accountable for any harm that may occur as a result.<sup>136</sup>

On December 17, 2020, Dominion publicized a demand letter to Powell, asserting that "[i]n spreading false conspiracy theories, undermining confidence in the election process, and putting election officials in harm's way, Powell acted with malice in her defamatory accusations about Dominion. The letter demands a retraction of her most serious falsehoods."<sup>137</sup>

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<sup>133</sup> See Bente Birkeland, *Dominion Voting Systems Employee Sues Trump Campaign and Allies, Alleging Defamation*, NPR (Dec. 23, 2020), <https://www.npr.org/2020/12/22/949294173/dominion-voting-systems-employee-sues-trump-campaign-and-allies-for-defamation>. Powell and Giuliani did not make such allegations in a vacuum, as one computer science professor noted: "Fox News, One America News and Newsmax have allowed Powell and Trump lawyer Rudy Giuliani to repeat myths about a company that makes voting machines and software, Dominion Voting Systems, and another software firm, Smartmatic." Douglas W. Jones, *Five Myths About Voting Machines*, WASH. POST (Dec. 24, 2020), [https://www.washingtonpost.com/outlook/five-myths/five-myths-about-voting-machines/2020/12/24/ac2e02a2-453f-11eb-b0e4-0f182923a025\\_story.html](https://www.washingtonpost.com/outlook/five-myths/five-myths-about-voting-machines/2020/12/24/ac2e02a2-453f-11eb-b0e4-0f182923a025_story.html).

<sup>134</sup> Press Release, Dominion Voting, Statement from Dominion on Sidney Powell's Charges (Nov. 17, 2020), <https://www.dominionvoting.com/dominion-statement-on-sidney-powell-charges/>.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> Press Release, Dominion Voting, Dominion Demands Retraction of Sidney Powell's Defamatory Falsehoods (Dec. 17, 2020), <https://www.dominionvoting.com/dominion-demands-retraction-of-sidney-powells-defamatory-falsehoods/>. Trump himself made similar allegations in his recorded phone call with Georgia's secretary of state: "Do you think it's possible that they shredded ballots in Fulton County? 'Cause that's what the rumor is. And also that Dominion took out machines. That Dominion is really moving fast to get rid of their, uh, machinery. Do you know anything about that? Because that's illegal." Gardner, *I Just Want to Find 11,780 Votes*, *supra* note 17. He then asked if Dominion "moved the inner parts of the machines and replaced them with other parts?" *Id.*

Finally, on January 8, 2021, Dominion filed a defamation lawsuit against Powell seeking damages of more than \$1.3 billion.<sup>138</sup> Perhaps inevitably, it was reported that Lin Wood was going to defend her.<sup>139</sup> Two weeks later, Dominion filed a lawsuit against Rudy Giuliani, seeking over \$1.3 billion in damages, reportedly “based on more than 50 statements Mr. Giuliani made at legislative hearings, on Twitter, on his podcast and in the conservative news media, where he spun a fictitious narrative of a plot by one of the biggest voting machine manufacturers in the country to flip votes to President Biden.”<sup>140</sup> Giuliani and Sidney Powell were also named in a \$2.7 billion lawsuit filed in February of 2021 against FOX News by Smartmatic, another election technology company.<sup>141</sup> In March of 2021 Dominion filed its own \$1.6 billion lawsuit against FOX News.<sup>142</sup> As one account reported:

Dominion attorney Stephen Shackelford said that Fox “took a small flame and turned it into a raging fire” by amplifying false statements about the election and Dominion and that the media company did so with “reckless disregard” for the truth — alluding to the high legal standard that the courts have maintained for prominent figures suing for defamation.”<sup>143</sup>

In a risible defense against Dominion’s lawsuit, Sidney Powell argued that no reasonable person would have believed her claims, which fill forty-five pages of Dominion’s complaint.<sup>144</sup> That sort of “just kidding” defense may, or may not, succeed in defeating a defamation lawsuit, but consider its implications in the litigation on Trump’s behalf that that Powell and others were involved with.<sup>145</sup>

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<sup>138</sup> See Emma Brown, *Dominion Sues Pro-Trump Lawyer Sidney Powell, Seeking More than \$1.3 Billion*, WASH. POST (Jan. 8, 2021, 9:08 AM), [https://www.washingtonpost.com/politics/dominion-sues-pro-trump-lawyer-sidney-powell-seeking-more-than-13-billion/2021/01/08/ebe5dbe0-5106-11eb-b96e-0e54447b23a1\\_story.html](https://www.washingtonpost.com/politics/dominion-sues-pro-trump-lawyer-sidney-powell-seeking-more-than-13-billion/2021/01/08/ebe5dbe0-5106-11eb-b96e-0e54447b23a1_story.html).

<sup>139</sup> See *id.*

<sup>140</sup> Nick Corasaniti, *Rudy Giuliani Sued by Dominion Voting Systems over False Election Claims*, N.Y. TIMES (Feb. 10, 2021), <https://www.nytimes.com/2021/01/25/us/politics/rudy-giuliani-dominion-trump.html>.

<sup>141</sup> Jeremy Barr & Elahe Izadi, *Smartmatic Files \$2.7 Billion Defamation Suit Against Fox News over Election-Fraud Claims*, WASH. POST (Feb. 4, 2021, 5:54 PM), <https://www.washingtonpost.com/media/2021/02/04/smartmatic-fox-lawsuit/> (“Mr. Giuliani and Ms. Powell needed a platform to use to spread their story,” the lawsuit states. “They found a willing partner in Fox News.”).

<sup>142</sup> Elahe Izadi & Paul Fardi, *Fox News Sued by Dominion in \$1.6 Billion Defamation Case That Could Set New Guardrails for Broadcasters*, WASH. POST (Mar. 26, 2021, 4:10 PM), <https://www.washingtonpost.com/media/2021/03/26/fox-dominion-lawsuit-defamation/>.

<sup>143</sup> *Id.*

<sup>144</sup> See Erik Wemple, *Opinion: Sidney Powell Will Never Live Down Her No-Reasonable-Person Defense*, WASH. POST (Mar. 24, 2021), <https://www.washingtonpost.com/opinions/2021/03/24/sidney-powell-will-never-live-down-her-no-reasonable-person-defense/>.

<sup>145</sup> Indeed, Powell may evade one trap just to walk into another. See Ariane de Vogue, *Sidney Powell’s Defense in Defamation Suit Could Put Her in Legal Jeopardy*, CNN (Mar. 24, 2021, 4:14 PM) (“The initial court filing statement stunned David Fink, a lawyer who is

The same unsupported claims that have drawn defamation litigation from private actors were also made in courtrooms. Should the unsupported claims made in court proceedings by attorneys acting on Trump's behalf be permitted without sanctions? Lin Wood, for example, in a court affidavit claimed Chief Justice John Roberts was "involved in a sex trafficking ring and was involved in the death of the late Justice Antonin Scalia"—which resulted in the State Bar of Georgia urging Wood to undergo a mental health evaluation.<sup>146</sup>

Even without a motion, a judge can, *sua sponte*, sanction an attorney for violating Civil Rule 11.<sup>147</sup> However, sanctions have become encumbered by an insinuation of partisanship in a society so polarized that, following the 2020 election, seventy-seven percent of Republicans, according to one poll, believed there was widespread election fraud.<sup>148</sup> According to one account:

Charles Gardner Geyh, a law professor at the Indiana University Maurer School of Law, said he found it distressing to see the president "export this post-truth environment" to the courtroom. But he has doubts that courts will go so far as to sanction lawyers bringing election challenges, no matter how thin the evidence.

Judges "don't want to be perceived as openly political," Geyh said. "If they come down on lawyers who represent the president like a ton of bricks, they are aware of how that will be perceived."<sup>149</sup>

And yet what if what is "perceived" is that attorney misconduct goes unsanctioned simply because one's client is the *president*? How would such a perception have elevated justice in the estimation of the public?

Certain principles should be so immutable as to not be susceptible to partisanship. If one has license to freely lie in a courtroom about the outcome of a presidential election, why not lie in a divorce case? Or a contract dispute?

And it is indisputable that Trump's attorneys openly lied. After all, President Trump's own attorney general, William Barr, declared that there was no

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asking a federal judge in Michigan on behalf of the city of Detroit to sanction Powell and others for not telling the truth.").

<sup>146</sup> Josh Gerstein, *Lin Wood Doubles Down on Attacking Pence, Roberts*, POLITICO (Feb. 9, 2021, 4:38 PM), <https://www.politico.com/news/2021/02/09/lin-wood-attacks-pence-roberts-468027>.

<sup>147</sup> See FED. R. CIV. P. 11(c)(3).

<sup>148</sup> See Christopher Keating, *Quinnipiac Poll: 77% of Republicans Believe There Was Widespread Fraud in the Presidential Election*, HARTFORD COURANT (Dec. 10, 2020, 3:18 PM), <https://www.courant.com/politics/hc-pol-q-poll-republicans-believe-fraud-20201210-pcie3uqqvrhyvnt7geohhsyepe-story.html>.

<sup>149</sup> Olivia Rubin & Matthew Mosk, *As Lawyers Keep Pushing Trump Election Challenges, Calls for Sanctions Mount*, ABC NEWS (Dec. 5, 2020, 5:00 AM), <https://abcnews.go.com/Politics/lawyers-pushing-trump-election-challenges-calls-sanctions-mount/story?id=74544823>.

widespread election fraud that would have affected the outcome.<sup>150</sup> Barr also contradicted Trump and his legal representatives by stating there were no grounds to seize voting machines, per Trump's suggestion, or to appoint a special counsel to investigate election fraud.<sup>151</sup> "Republican superlawyer Ben Ginsberg"—who formerly worked at a firm that represented Trump and played key roles for the Republican Party in *Bush v. Gore*—was among those labeling Trump's election fraud claims as baseless, even prior to the election.<sup>152</sup>

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<sup>150</sup> See Michael Balsamo, *Disputing Trump, Barr Says No Widespread Election Fraud*, ASSOCIATED PRESS (Dec. 1, 2020), <https://apnews.com/article/barr-no-widespread-election-fraud-b1f1488796c9a98c4b1a9061a6c7f49d>.

<sup>151</sup> See Matt Zapotosky, *Undercutting Trump, Barr Says There's No Basis for Seizing Voting Machines, Using Special Counsels for Election Fraud, Hunter Biden*, WASH. POST (Dec. 21, 2020, 12:13 PM), [https://www.washingtonpost.com/national-security/barr-trump-special-counsel-voter-fraud-hunter-biden/2020/12/21/4d85f060-439c-11eb-b0e4-0f182923a025\\_story.html](https://www.washingtonpost.com/national-security/barr-trump-special-counsel-voter-fraud-hunter-biden/2020/12/21/4d85f060-439c-11eb-b0e4-0f182923a025_story.html). After Barr departed from his role early, Trump reportedly sought to replace the acting attorney general with an obscure Department of Justice attorney willing to pursue baseless election fraud claims, and willing to seek to have the U.S. Supreme Court block Biden's election. See Katie Benner, *Trump and Justice Dept. Lawyer Said to Have Plotted to Oust Acting Attorney General*, N.Y. TIMES (Jan. 22, 2021), <https://www.nytimes.com/2021/01/22/us/politics/jeffrey-clark-trump-justice-department-election.html> ("The Justice Department's top leaders listened in stunned silence this month: One of their peers, they were told, had devised a plan with President Donald J. Trump to oust Jeffrey A. Rosen as acting attorney general and wield the department's power to force Georgia state lawmakers to overturn its presidential election results.").

<sup>152</sup> Michael Kranish, *Why GOP Superlawyer Ben Ginsberg Is Bucking His Party and Blasting Trump's Baseless Election Claims*, WASH. POST (Nov. 10, 2020, 8:03PM), [https://www.washingtonpost.com/politics/why-gop-superlawyer-ben-ginsberg-is-bucking-his-party-and-blasting-trumps-baseless-election-claims/2020/11/10/f2aa7056-236d-11eb-8599-406466ad1b8e\\_story.html](https://www.washingtonpost.com/politics/why-gop-superlawyer-ben-ginsberg-is-bucking-his-party-and-blasting-trumps-baseless-election-claims/2020/11/10/f2aa7056-236d-11eb-8599-406466ad1b8e_story.html) ("In addition to his role in George W. Bush's 2000 victory, he advised a group that Democrats say falsely accused their 2004 nominee, John F. Kerry, a decorated Vietnam veteran, of lying about his military record and was widely seen as a decisive factor in Bush's reelection victory."). *Bush v. Gore* was the decision that ended the 2000 Florida presidential election recount and effectively secured George W. Bush's win over then-Vice President Al Gore. 531 U.S. 98, 122 (2000). In what may be a harbinger of how many Trump supporters will feel about the 2020 election judicial decisions, Justice Stevens, in dissent, wrote:

It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.

*Id.* at 128–29 (Stevens, J., dissenting). Yet, in conceding, Gore stated that "the U.S. Supreme Court has spoken. Let there be no doubt, while I strongly disagree with the court's decision, I accept it. I accept the finality of this outcome which will be ratified next Monday in the Electoral College. And tonight, for the sake of our unity of the people and the strength of our democracy, I offer my concession." *Text: Vice President Gore Concedes Election*, WASH.



A number of parties have sought legal sanctions against Giuliani, Powell, and Wood, and they may have judicial company: “Delaware Superior Court Judge Craig Karsnitz took Wood to task . . . for alleged unprofessional behavior in lawsuits aimed at overturning election results in Wisconsin and Georgia. The judge identified various alleged ethical breaches, including Wood having filed a suit in a plaintiff’s name without permission, and submitting a false affidavit.”<sup>153</sup> Perhaps realizing their peril, some prominent law firms withdrew from representing Trump.<sup>154</sup> But even in withdrawing a Georgia lawsuit, one Trump attorney allegedly violated ethics rules by falsely claiming the withdrawal was part of a “settlement.”<sup>155</sup>

Will there be repercussions for those attorneys involved in the legal melodramas that played out nationally? Blaming “leftist” pressure, one attorney involved with Trump’s untoward phone call with Georgia Secretary of State Raffensperger resigned from her prestigious law firm after the tape was revealed.<sup>156</sup> John Eastman, a Chapman University law professor and attorney for Trump, was compelled to retire from Chapman after addressing the rally that preceded the Capitol insurrection.<sup>157</sup> Giuliani faced removal from the New York

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POST (Dec. 13, 2000), <https://www.washingtonpost.com/wp-srv/onpolitics/elections/goretext121300.html/>.

<sup>153</sup> See John Kruzel, *Trump Attorneys Risk Disciplinary Action over Wave of Election Suits*, THE HILL (Dec. 24, 2020, 6:00 AM), <https://thehill.com/regulation/court-battles/531537-trump-attorneys-risk-disciplinary-action-over-wave-of-election-suits>.

<sup>154</sup> See Aaron Blake, *Timeline: Trump’s Revolving Door of Lawyers*, WASH. POST (Nov. 23, 2020, 8:55 AM), <https://www.washingtonpost.com/politics/2020/11/17/trump-keeps-losing-court-he-keeps-losing-his-lawyers-too/>.

<sup>155</sup> Erik Larson, *Georgia Denies Trump Claim of Settling Election-Fraud Suit*, BLOOMBERG (Jan. 7, 2021, 8:07 PM), <https://www.bloomberg.com/news/articles/2021-01-07/trump-drops-georgia-lawsuit-seeking-to-invalidate-biden-s-win> (“‘The letter was not a settlement offer, as you characterize it,’ Carr’s office said in the email to Trump’s lawyer, Kurt Hilbert. Hilbert went on to tell the judge that Trump had reached a settlement with the state anyway.”).

<sup>156</sup> See Katelyn Polantz & Caroline Kelly, *Attorney Who Assisted Trump on Call with Georgia Officials Resigns from Law Firm*, CNN (Jan. 5, 2021, 11:04 PM), <https://www.cnn.com/2021/01/05/politics/cleta-mitchell-resigns-trump-georgia/index.html> (“National law firm Foley & Lardner previously said it was ‘concerned’ with Mitchell’s involvement in Trump’s call with Georgia Secretary of State Brad Raffensperger, and said the firm wasn’t engaged in any legal work challenging the election results. Tuesday, it announced Mitchell was no longer with the firm.”).

<sup>157</sup> See Andrea Salcedo, *Law Professor John Eastman Spoke at Rally Before Capitol Riots. Facing Outrage, He Won’t Return to His University*, WASH. POST (Jan. 14, 2021, 7:14 AM), <https://www.washingtonpost.com/nation/2021/01/14/john-eastman-chapman-university-departure/> (“Eastman confirmed his retirement ‘with mixed feeling,’ while continuing to echo Trump’s unfounded fraud claims and defending his appearance at the rally.”). During the 2020 campaign, Eastman had questioned the U.S. citizenship of vice-presidential candidate Kamala Harris and after the election he “represented the president in a failed lawsuit requesting the Supreme Court to block four states from certifying Biden’s victory.” *Id.*

State Bar Association, although any expulsion from the voluntary bar association would not be tantamount to disbarment.<sup>158</sup> An attorney for Trump withdrew from representing the president after reporting to a U.S. District Court judge that his client, President Trump, had used his “services to perpetuate a crime”; i.e., the violent Capitol insurrection that the attorney acknowledged the court cases had inspired.<sup>159</sup>

#### IV. CONGRESS AND THE INSURRECTION

One must also question the ethics of the attorneys serving as members of Congress who supported the baseless effort to overturn the Electoral College result. Initially, a judicial ruling was sought by some members of Congress—led by U.S. Representative Louie Gohmert (R., Tex.)—to empower Vice President Mike Pence to decide the election as he saw fit.<sup>160</sup> However, the legal

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<sup>158</sup> See Rebecca Rosenberg, *New York State Bar Association May Remove Rudy Giuliani after Capitol Riots*, N.Y. POST (Jan. 11, 2021, 12:38 PM), <https://nypost.com/2021/01/11/nysba-may-remove-rudy-giuliani-as-member-after-capitol-riots/>. Following President Trump’s second impeachment, Giuliani even faced the disapproval of his client, who reportedly “privately expressed concern with some of Giuliani’s moves and did not appreciate a demand from Giuliani for \$20,000 a day in fees for his work attempting to overturn the election.” Philip Rucker et al., *Trump Is Isolated and Angry at Aides for Failing to Defend Him as He Is Impeached Again*, WASH. POST (Jan. 13, 2021, 9:39 PM) (emphasis added), [https://www.washingtonpost.com/politics/trump-isolated-impeachment/2021/01/13/0595675a-55b6-11eb-a931-5b162d0d033d\\_story.html](https://www.washingtonpost.com/politics/trump-isolated-impeachment/2021/01/13/0595675a-55b6-11eb-a931-5b162d0d033d_story.html). Ethically, “[a] lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.” MODEL RULES OF PROF’L CONDUCT r. 1.5(a) (AM. BAR ASS’N 1983). Given Giuliani’s abject record of failure on Trump’s behalf, one wonders how Giuliani justified his fee.

<sup>159</sup> See Katelyn Polantz, *Lawyer for Trump Campaign Withdraws after Saying Election Cases Were Used to Commit Crime*, CNN (Jan. 7, 2021, 6:42 PM), <https://www.cnn.com/2021/01/07/politics/lawyer-trump-campaign-crime/index.html>. It is impossible to disconnect the involvement of attorneys like Giuliani, Powell, and Wood from the violence that occurred at the Capitol. Even the organization representing state Republican attorneys general had thrown fuel on the fire and issued a robocall urging people to march on the Capitol to “stop the steal.” Laura Strickler & Lisa Cavazuti, *Republican AGs Group Sent Robocalls Urging March to the Capitol*, NBC NEWS (Jan. 8, 2021, 8:36 PM), <https://www.nbcnews.com/news/us-news/republican-ags-group-sent-robocalls-urging-march-capitol-n1253581>.

<sup>160</sup> See Kyle Cheney, *Gohmert Suit May Force Pence’s Hand in Effort to Overturn Trump’s Defeat*, POLITICO (Dec. 28, 2020), <https://www.politico.com/news/2020/12/28/gohmert-suit-pence-overturn-trumps-defeat-451485>; Devlin Barrett, *Judge Dismisses Gohmert Lawsuit Seeking to Stymie Biden Electoral College Count*, WASH. POST (Jan. 1, 2021, 11:18 PM), [https://www.washingtonpost.com/national-security/gohmert-court-filing-claims-pence-is-not-a-glorified-envelope-opener/2021/01/01/eeb6b222-4c51-11eb-839a-cf4ba7b7c48c\\_story.html](https://www.washingtonpost.com/national-security/gohmert-court-filing-claims-pence-is-not-a-glorified-envelope-opener/2021/01/01/eeb6b222-4c51-11eb-839a-cf4ba7b7c48c_story.html).

effort was dismissed by Judge Jeremy Kernodle, another of Trump's appointees.<sup>161</sup>

As Judge Kernodle wrote, "The problem for Plaintiffs here is that they lack standing. Plaintiff Louie Gohmert . . . alleges at most an institutional injury to the House of Representatives."<sup>162</sup> The other plaintiffs were prospective Republican Electors from the state of Arizona, who complained that their Republican governor certified Biden's win, but the judge noted "[t]his alleged injury . . . is not fairly traceable to any act of the Vice President."<sup>163</sup> As the judge noted: "The Vice President's anticipated actions on January 6 will not affect the decision of Governor Ducey regarding the certification of presidential electors—which occurred more than two weeks ago on December 14."<sup>164</sup>

A disappointed Gohmert appeared to call for street violence.<sup>165</sup> As the *Dallas Morning News* noted, "It's not the first time Gohmert—a former state trial court judge who just won his ninth term in Congress—has expressed admiration for the use of violence to overturn an election."<sup>166</sup>

That violence would occur. On December 19, 2020 on Twitter, President Trump touted a "[b]ig protest in D.C. on January 6th. Be there, will be wild!"<sup>167</sup> Trump and other speakers used the White House rally to incite supporters to

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<sup>161</sup> Gohmert v. Pence, No. 6:20-cv-660-JDK, 2021 U.S. Dist. LEXIS 3, at \*16 (E.D. Tex. Jan. 1, 2021). The decision was upheld on appeal. Gohmert v. Pence, No. 21-40001, 2021 U.S. App. LEXIS 9, at \*2 (5th Cir. Jan. 2, 2021).

<sup>162</sup> Gohmert, 2021 U.S. Dist. LEXIS 3, at \*2.

<sup>163</sup> *Id.* at \*12–13.

<sup>164</sup> *Id.* at \*14.

<sup>165</sup> See Elizabeth Thompson, *Gohmert Suggests 'Violence in the Streets' after Judge Rejects Bid to Force VP Pence to Overturn Biden's Win*, DALL. MORNING NEWS (Jan. 2, 2021, 8:07 PM), <https://www.dallasnews.com/news/politics/2021/01/02/gohmert-suggests-violence-in-the-streets-after-judge-rejects-bid-to-force-vp-pence-to-overturn-bidens-win/>.

<sup>166</sup> *Id.*

<sup>167</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 19, 2020, 1:42 AM), <https://twitter.com/realDonaldTrump/status/1340185773220515840>, [<https://web.archive.org/web/20201219064257/https://twitter.com/realDonaldTrump/status/1340185773220515840>]; Greg Miller et al., *A Mob Insurrection Stoked by False Claims of Election Fraud and Promises of Violent Restoration*, WASH. POST (Jan. 9, 2021, 8:49 PM), [https://www.washingtonpost.com/national-security/trump-capitol-mob-attack-origins/2021/01/09/0cb2cf5e-51d4-11eb-83e3-322644d82356\\_story.html](https://www.washingtonpost.com/national-security/trump-capitol-mob-attack-origins/2021/01/09/0cb2cf5e-51d4-11eb-83e3-322644d82356_story.html) ("By Dec. 19, Trump was, as he so often does, feeding these flames with accelerant."). In a typical diversion, Trump had, on January 5, ominously warned against "terrorist" liberal activists coming into Washington, D.C., even as he lauded his own supporters who had already "inundated" the city "with people who don't want to see an election victory stolen by emboldened Radical Left Democrats. Our Country has had enough, they won't take it anymore!" Luke Barr, *Law Enforcement Braces for Protests as Trump Supporters Gather in Capital*, ABC NEWS (Jan. 5, 2021, 7:12 PM), <https://abcnews.go.com/Politics/law-enforcement-braces-protests-trump-supporters-gather-capital/story?id=75057898>.

storm the U.S. Capitol.<sup>168</sup> Pushing past police, and smashing through doors and windows to gain entry, a mob of Trump supporters forced lawmakers to seek shelter, vandalized their offices, and stopped the legislative debate regarding the election certification.<sup>169</sup> As the *Washington Post* reported, “Canisters of tear gas were fired across the Rotunda’s white marble floor, and on the steps outside the building, rioters flew Confederate flags.”<sup>170</sup>

Declaring the rioters “very special” and expressing his “love” for them,<sup>171</sup> Trump celebrated the riot on social media in posts that were later removed by the platforms.<sup>172</sup> He justified the vandalism and violence as resulting from “a sacred landslide election victory” that was “so unceremoniously & viciously stripped away” and exhorted the rioters to “[r]emember this day forever!”<sup>173</sup> Even the efforts by Republican allies to get Trump to respond to the violence had been complicated by the fact that the avid TV-watcher reportedly “was busy enjoying the spectacle.”<sup>174</sup>

For his role in “incitement of insurrection” President Trump was impeached one week after the Capitol siege.<sup>175</sup>

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<sup>168</sup> Rebecca Tan et al., *Trump Supporters Storm U.S. Capitol, with One Woman Killed and Tear Gas Fired*, WASH. POST (Jan. 7, 2021, 12:30 AM), [https://www.washingtonpost.com/local/trump-supporters-storm-capitol-dc/2021/01/06/58afc0b8-504b-11eb-83e3-322644d82356\\_story.html](https://www.washingtonpost.com/local/trump-supporters-storm-capitol-dc/2021/01/06/58afc0b8-504b-11eb-83e3-322644d82356_story.html).

<sup>169</sup> *See id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> Cristiano Lima, *Twitter, Facebook Lock Trump’s Accounts in Confrontation over Capitol Breach Posts*, POLITICO (Jan. 6, 2021, 10:39 PM), <https://www.politico.com/news/2021/01/06/twitter-trump-tweet-capitol-violence-455630>.

<sup>173</sup> *Id.*

<sup>174</sup> Ashley Parker et al., *Six Hours of Paralysis: Inside Trump’s Failure to Act after a Mob Stormed the Capitol*, WASH. POST (Jan. 11, 2021, 11:21 PM), [https://www.washingtonpost.com/politics/trump-mob-failure/2021/01/11/36a46e2e-542e-11eb-a817-e5e7f8a406d6\\_story.html](https://www.washingtonpost.com/politics/trump-mob-failure/2021/01/11/36a46e2e-542e-11eb-a817-e5e7f8a406d6_story.html).

<sup>175</sup> H.R. Res. 24, 117th Cong. (2021) (“Donald John Trump engaged in high Crimes and Misdemeanors by inciting violence against the Government of the United States”); Mike DeBonis & Paul Kane, *House Hands Trump a Second Impeachment, This Time with GOP Support*, WASH. POST (Jan. 13, 2021, 7:47 PM), [https://www.washingtonpost.com/politics/house-impeachment-trump/2021/01/13/05fe731c-55c5-11eb-a931-5b162d0d033d\\_story.html](https://www.washingtonpost.com/politics/house-impeachment-trump/2021/01/13/05fe731c-55c5-11eb-a931-5b162d0d033d_story.html). Even after his impeachment, Trump continued to welcome to the White House friends urging him to invoke martial law. Philip Bump, *A Pillow Salesman Apparently Has Some Ideas about Declaring Martial Law*, WASH. POST (Jan. 15, 2021, 9:00 PM), <https://www.washingtonpost.com/politics/2021/01/15/pillow-salesman-apparently-has-some-ideas-about-declaring-martial-law/> (“The CEO of MyPillow has a strategy for shuffling around administration staffers to gather up the evidence of electoral fraud he thinks exists—and to use military resources in an effort to keep Trump in power, or, as he apparently puts it, to protect the Constitution.”).

This was Trump's second impeachment while in office—with the third-ranking House Republican leader, U.S. Rep. Liz Cheney (R., Wyo.), joining a handful of House Republicans in support.<sup>176</sup> Trump's entire first legal team for his second Senate impeachment trial—five attorneys—quit before the trial, reportedly because “Trump wanted the attorneys to argue there was mass election fraud and that the election was stolen from him rather than focus on the legality of convicting a president after he's left office.”<sup>177</sup> Given attorney-client privilege, we may not know for sure what the basis of disagreement was, but it appeared the attorneys did not wish to argue Trump's baseless election conspiracy, though, at the time, Trump also reportedly “insisted that the case is ‘simple’ and has told advisers he could argue it himself and save the money on lawyers.”<sup>178</sup>

Trump found new attorneys, yet, in a stranger-than-fiction development, one had previously sued Trump for making false claims about election fraud.<sup>179</sup> Trump was again acquitted by the Senate, even though a historic number of members of his party defected and voted to convict him.<sup>180</sup> The House managers for Trump's second impeachment expressly made the case that the lies about election fraud, litigated in courts and publicized innumerable times in the media, lit the fuse of the Capitol insurrection.<sup>181</sup>

For his part, Rudy Giuliani condemned the violence despite having encouraged “trial by combat” at the rally preceding it.<sup>182</sup> Yet, even amidst the

<sup>176</sup> *Id.*

<sup>177</sup> Gloria Borger et al., *First on CNN: Trump's Impeachment Defense Team Leaves Less Than Two Weeks Before Trial*, CNN (Jan. 31, 2021, 7:34 AM), <https://www.cnn.com/2021/01/30/politics/butch-bowers-deborah-barbier-trump-impeachment-team/index.html>.

<sup>178</sup> Maggie Haberman, *Trump Parts Ways With Five Lawyers Handling Impeachment Defense*, N.Y. TIMES (Feb. 28, 2021), <https://www.nytimes.com/2021/01/30/us/politics/trump-butch-bowers-impeachment.html?action=click&module=Spotlight&pgtype=Homepage>.

<sup>179</sup> See Amy Gardner, *One of Trump's Impeachment Lawyers Sued Him Last Year*, WASH. POST (Feb. 9, 2021, 3:23 PM), [https://www.washingtonpost.com/politics/trump-lawyer-suit-fraud/2021/02/09/50f0769e-6ae3-11eb-ba56-d7e2c8defa31\\_story.html](https://www.washingtonpost.com/politics/trump-lawyer-suit-fraud/2021/02/09/50f0769e-6ae3-11eb-ba56-d7e2c8defa31_story.html).

<sup>180</sup> See Nicolas Fandos, *Trump Acquitted of Inciting Insurrection, Even as Bipartisan Majority Votes ‘Guilty’*, N.Y. TIMES (Feb. 13, 2021), <https://www.nytimes.com/2021/02/13/us/politics/trump-impeachment.html?searchResultPosition=3>.

<sup>181</sup> See Peter Baker & Nicholas Fandos, *House Managers Rest Their Case Against Trump, but Most Republicans Are Not Swayed*, N.Y. TIMES (Feb. 11, 2021), <https://www.nytimes.com/2021/02/11/us/politics/trump-impeachment-trial.html> (“[T]he managers argued that the president's actions posed a threat to democratic institutions, the culmination of months of incendiary lies about election fraud meant to generate support for his effort to hang onto power despite the will of the voters.”).

<sup>182</sup> Yaron Steinbuch, *Rudy Giuliani Condemns Capitol Violence after Calling for ‘Trial by Combat’*, N.Y. POST (Jan. 7, 2021, 9:19 AM), <https://nypost.com/2021/01/07/giuliani-condemns-capitol-violence-after-calling-for-trial-by-combat/> (“So let's have trial by

violence, he and Trump were trying to lobby senators to stop the election certification—each mistakenly calling a Republican opponent in their efforts.<sup>183</sup> At least 140 police officers were injured and there were five deaths—including a rioter who was shot by police, and a Capitol Police officer who died of injuries—caused by the riot.<sup>184</sup>

In addition to rioters causing the death of Capitol Police Officer Brian D. Sicknick, two other responding police officers later committed suicide, 140 police officers were physically injured in the riot, and 38 Capitol Police personnel, “almost entirely officers and supervisors who responded to the riot,” contracted COVID-19.<sup>185</sup>

The violence would almost certainly have been worse had any elected officials been caught by the mob.<sup>186</sup> Trump’s attorney Lin Wood had a post removed from a far-right social media site in which Wood urged Pence’s death by firing squad.<sup>187</sup>

Upon Congress reassembling after rioters were cleared from the Capitol, Gohmert was one of the U.S. House members and U.S. senators who then voted

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combat,’ [Giuliani stated,] a term from ancient Germanic law in which people settle disputes through armed duels.”).

<sup>183</sup> Sunlen Serfaty et al., *As Riot Raged at Capitol, Trump Tried to Call Senators to Overturn Election*, CNN (Jan. 8, 2021, 9:30 PM), <https://www.cnn.com/2021/01/08/politics/mike-lee-tommy-tuberville-trump-misdialed-capitol-riot/index.html>.

<sup>184</sup> See Jennifer Elias et al., *More than 50 Police Officers Were Injured at the Pro-Trump Riot at the Capitol That Also Killed 4*, CNBC (Jan. 7, 2021, 12:58 PM), <https://www.cnbc.com/2021/01/07/four-dead-after-pro-trump-rioters-storm-capitol.html>; Evan Perez & Paul LeBlanc, *Federal Murder Investigation to Be Opened in Capitol Police Officer’s Death*, CNN (Jan. 8, 2021, 5:51 PM), <https://www.cnn.com/2021/01/08/politics/capitol-police-officer-killed/index.html>.

<sup>185</sup> Tom Jackman, *Police Union Says 140 Officers Injured in Capitol Riot*, WASH. POST (Jan. 27, 2021, 7:47 PM), [https://www.washingtonpost.com/local/public-safety/police-union-says-140-officers-injured-in-capitol-riot/2021/01/27/60743642-60e2-11eb-9430-e7c77b5b0297\\_story.html](https://www.washingtonpost.com/local/public-safety/police-union-says-140-officers-injured-in-capitol-riot/2021/01/27/60743642-60e2-11eb-9430-e7c77b5b0297_story.html).

<sup>186</sup> See Elaine Godfrey, *It Was Supposed to Be So Much Worse*, THE ATLANTIC (Jan. 9, 2021), <https://www.theatlantic.com/politics/archive/2021/01/trump-rioters-wanted-more-violence-worse/617614/> (“Before the protest, pro-Trump radicals had posted online about their intentions to kill Vice President Mike Pence.”); Sonam Sheth, *A Reuters Photographer Says He Overheard Pro-Trump Insurrectionists Saying They Wanted to Hang Mike Pence at the Capitol*, BUS. INSIDER (Jan. 8, 2021, 3:52 AM), <https://www.businessinsider.in/politics/world/news/a-reuters-photographer-says-he-overheard-pro-trump-insurrectionists-saying-they-wanted-to-hang-mike-pence-at-the-capitol/articleshow/80175839.cms> (“A Reuters photographer said Friday that he overheard at least three pro-Trump insurrectionists at the US Capitol this week say they wanted to find Vice President Mike Pence and hang him.”).

<sup>187</sup> Kate Sullivan, *Mediaite: Parler CEO Says it Took Down Post from Lin Wood Calling for Mike Pence’s Execution*, CNN (Jan. 10, 2021, 5:06 PM), <https://www.cnn.com/2021/01/09/politics/parler-lin-wood-mike-pence/index.html> (“Wood was permanently banned from Twitter this week after promoting the riots at the US Capitol . . .”).

against accepting the Arizona and Pennsylvania results of the election.<sup>188</sup> The challenge to the Arizona results was rejected 93–6 in the Senate and 303–121 in the House, and the Pennsylvania challenge was rejected 92–7 in the Senate and 282–138 in the House.<sup>189</sup> An effort, abetted by attorneys, to disenfranchise millions of Americans—especially Black voters in Atlanta, Detroit, and Philadelphia<sup>190</sup>—had finally failed.

In trying to overturn the election, Rep. Gohmert was joined by another Texas attorney: U.S. Senator Ted Cruz (R., Tex.).<sup>191</sup> Had the U.S. Supreme Court not dismissed the cases before it, President Trump wanted Cruz to argue them.<sup>192</sup> Yet any Texas attorney admitted to practice is obligated to “*honestly* demean oneself in the practice of law” and to act “with *integrity* and civility in dealing and communicating with the court and all parties.”<sup>193</sup> Knowingly pursuing baseless claims does not meet those standards, and Cruz would have been violating his oath had he made such arguments before the Court.

In fighting the election results, Cruz was joined by Senator Josh Hawley (R., Mo.), who, like Cruz, is a former U.S. Supreme Court law clerk.<sup>194</sup> It is hard to

<sup>188</sup> See Karen Yourish et al., *The 147 Republicans Who Voted to Overturn Election Results*, N.Y. TIMES (Jan. 7, 2021), <https://www.nytimes.com/interactive/2021/01/07/us/elections/electoral-college-biden-objectors.html>; Rosalind S. Helderman et al., *Congress Affirms Biden's Presidential Win Following Riot at U.S. Capitol*, WASH. POST (Jan. 7, 2021, 4:23 AM), [https://www.washingtonpost.com/politics/congress-resumes-work-to-confirm-biden-win-on-historic-day-marred-by-riot/2021/01/06/4c3729dc-5039-11eb-b96e-0e54447b23a1\\_story.html](https://www.washingtonpost.com/politics/congress-resumes-work-to-confirm-biden-win-on-historic-day-marred-by-riot/2021/01/06/4c3729dc-5039-11eb-b96e-0e54447b23a1_story.html).

<sup>189</sup> *Id.* At least one attorney who participated in the riot will likely remember it forever. See Domingo Ramirez, Jr., *North Texas Lawyer who Videoed, Participated in Capitol Riot Fired From his Job*, FORT WORTH STAR TELEGRAM (Jan. 7, 2021, 1:09 PM), <https://www.star-telegram.com/news/local/article248339210.html>.

<sup>190</sup> See Jim Rutenberg & Nick Corasaniti, *Republicans Rewrite an Old Playbook on Disenfranchising Black Americans*, N.Y. TIMES (Nov. 22, 2020), <https://www.nytimes.com/2020/11/22/us/politics/trump-republicans-black-voters.html>. One Oklahoma Republican senator who had backed Trump's efforts expressed contrition to Black voters. See Randy Krehbiel, *Sen. James Lankford Apologizes to Black Tulsans for Questioning Presidential Election Results*, TULSA WORLD (Feb. 21, 2021), [https://tulsaworld.com/news/local/govt-and-politics/sen-james-lankford-apologizes-to-black-tulsans-for-questioning-presidential-election-results/article\\_6f0c2d1a-56bd-11eb-a6cb-bfb64a69f21e.html](https://tulsaworld.com/news/local/govt-and-politics/sen-james-lankford-apologizes-to-black-tulsans-for-questioning-presidential-election-results/article_6f0c2d1a-56bd-11eb-a6cb-bfb64a69f21e.html).

<sup>191</sup> David Cohen, *Ted Cruz Urges Critics of Presidential Election Challenge to Calm Down*, POLITICO (Jan. 3, 2021, 4:01 PM), <https://www.politico.com/news/2021/01/03/ted-cruz-presidential-election-challenge-calm-down-453842>.

<sup>192</sup> See *id.* A paradox is that, among many other insults, Trump referred to Cruz as “Lyn’ Ted” during their 2016 presidential primary battle. See Chris Cillizza, *Why the ‘Lyn’ Ted’ Attack Works So Well for Donald Trump*, WASH. POST (May 3, 2016, 1:07 PM), <https://www.washingtonpost.com/news/the-fix/wp/2016/05/03/ted-cruz-is-mad-as-hell-at-donald-trump-he-should-be-angry-at-himself/>.

<sup>193</sup> TEX. GOV’T CODE § 82.037 (2020) (emphasis added).

<sup>194</sup> See George F. Will, *Hawley, Cruz and Their Senate Cohort Are the Constitution’s Most Dangerous Domestic Enemies*, WASH. POST (Jan. 4, 2021, 4:39 PM),

differentiate their legislative misconduct from courtroom misconduct,<sup>195</sup> and it was expressly argued by John Dean, the former White House counsel for President Richard Nixon, that, having promulgated the “Big Lie” about voter fraud, Cruz and Hawley were complicit in precipitating the insurrection.<sup>196</sup>

Even outside the courtroom, attorneys are bound to a higher standard. It is professional misconduct for an attorney to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”<sup>197</sup> As the comment to that rule notes, “Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer’s abuse of public office can suggest an inability to fulfill the professional role of lawyers.”<sup>198</sup> As one analysis noted, the fact that Trump was “caught on tape trying to steal the election” made his Republican congressional allies—including attorneys like Cruz, Gohmert, and Hawley—even more “complicit in his bid to thwart the will of voters.”<sup>199</sup>

#### CONCLUSION: IS RULE 11 DEAD?

In response to news that Michigan’s Attorney General, Dana Nessel, was seeking sanctions against attorneys acting on Trump’s behalf for intentional misrepresentations of fact,<sup>200</sup> President Trump tweeted: “These lawyers are true

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[https://www.washingtonpost.com/opinions/hawley-cruz-and-their-senate-cohort-are-the-constitutions-most-dangerous-domestic-enemies/2021/01/04/912d2530-4ebf-11eb-83e3-322644d82356\\_story.html](https://www.washingtonpost.com/opinions/hawley-cruz-and-their-senate-cohort-are-the-constitutions-most-dangerous-domestic-enemies/2021/01/04/912d2530-4ebf-11eb-83e3-322644d82356_story.html). Students at the University of Missouri School of Law, where Hawley had been a professor, called for his resignation, and the dean of the law school declared his association with the school “terminated.” Fairiona Magee, *MU Law Students Call for Hawley’s Resignation*, MISSOURIAN (Jan. 7, 2021), [https://www.columbiamissourian.com/news/local/mu-law-students-call-for-hawleys-resignation/article\\_14bf8c36-5112-11eb-b6b2-8ff2b1b164b5.html](https://www.columbiamissourian.com/news/local/mu-law-students-call-for-hawleys-resignation/article_14bf8c36-5112-11eb-b6b2-8ff2b1b164b5.html).

<sup>195</sup> See Jason Lemon, *Ted Cruz and Josh Hawley Should Be Disbarred, Over 8,000 Lawyers and Law Students Say*, NEWSWEEK (Jan. 11, 2021, 11:19 AM), <https://www.newsweek.com/ted-cruz-josh-hawley-should-disbarred-over-5700-lawyers-law-students-say-1560537>.

<sup>196</sup> See John W. Dean (@JohnWDean), TWITTER (Jan. 23, 2021, 1:25 PM), <https://twitter.com/johnwdean/status/1353046106020560896> (“Americans cannot get a fair Senate Impeachment trial of Trump’s insurrection with insurrectionists on the jury. Senators Hawley, Cruz, Graham, Johnson and others who pushed the big lie are co-conspirators and should not sit in judgment of Trump, rather they MUST BE DISQUALIFIED!”).

<sup>197</sup> MODEL RULES OF PROF’L CONDUCT r. 8.4(c) (AM. BAR ASS’N 1983).

<sup>198</sup> *Id.* r. 8.4(c) cmt. 7.

<sup>199</sup> Stephen Collinson, *Trump’s Bid to Steal Georgia Exposes GOP Election Ruse*, CNN (Jan. 4, 2021, 9:09 AM), <https://www.cnn.com/2021/01/04/politics/donald-trump-georgia-election-joe-biden-congress/index.html>.

<sup>200</sup> Beth LeBlanc & Craig Mauger, *Sanctions Sought against Lawyers Who Pushed to Overturn Michigan’s Election*, DETROIT NEWS (Dec. 22, 2020, 7:25 PM), <https://www.detroitnews.com/story/news/local/michigan/2020/12/22/nessel-seek-sanctions-against-lawyers-challenging-election-results/4009929001/> (“Attorney General Dana Nessel



patriots who are fighting for the truth and, obviously, getting very close. AG should be sanctioned. Fight on!”<sup>201</sup> Nessel responded on Twitter: “A patriot is a person who vigorously defends their country against its enemies and detractors. History will reveal which you were. I wish you loved your country half as much as you love yourself. Also, time to stop obsessing about those women from Michigan. You’re not our type.”<sup>202</sup>

Attorneys and law student alike are familiar with the expression “capable of repetition, yet evading review” that arose from a 1911 U.S. Supreme Court case.<sup>203</sup> To file lawsuits seeking over a billion dollars in damages over egregious, unsanctioned, legal misconduct is not an option available to everyone, and yet our democracy was attacked in a way that makes us all victims. Without court punishment as deterrence, what reason would we have to believe that the type of legal misconduct that occurred in President Trump’s election litigation would not recur? And of what value are Rule 11 or the ethical standards that govern attorneys?

As Henry Litman wrote in the *Los Angeles Times*, “the courts have been extraordinarily indulgent with claims that reasonable observers on all sides know are bogus, a sideshow for other political ends. Perhaps the judges reason that sanctioning Team Trump would insert them too far into the political fray.”<sup>204</sup> Yet it was “Team Trump” itself that needlessly interjected those judges into the “political fray” and that cannot go unpunished lest such a travesty recur.

Garret Epps, the legal affairs editor for the *Washington Monthly* and a law professor emeritus, suggested Texas Attorney General Ken Paxton should at least be disbarred for bringing the U.S. Supreme Court litigation seeking to invalidate the results in four states.<sup>205</sup> As Epps wrote a month after the election: “What we are witnessing during this endless post-election period is a coordinated attempt to murder the American system of government. This crime is being carried out in public by lawyers who have taken an oath to uphold the Constitution they seek to destroy.”<sup>206</sup> He could not think of a penalty too severe:

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said she plans to seek sanctions against lawyers who filed lawsuits against the state’s election results with claims that featured ‘intentional misrepresentations.’”).

<sup>201</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 27, 2020, 12:28 AM), <https://twitter.com/realDonaldTrump/status/1343066231222448130>, [\[https://web.archive.org/web/20201227052848/https://twitter.com/realDonaldTrump/status/1343066231222448130\]](https://web.archive.org/web/20201227052848/https://twitter.com/realDonaldTrump/status/1343066231222448130); Brandon Champion, *Michigan AG to Trump: ‘Stop Obsessing About Those Women From Michigan. You’re Not Our Type’*, MLIVE.COM (Dec. 28, 2020), <https://www.mlive.com/politics/2020/12/michigan-ag-to-trump-stop-obsessing-about-those-women-from-michigan-youre-not-our-type.html>.

<sup>202</sup> Dana Nessel (@dananessel), TWITTER (Dec. 27, 2020, 9:21 AM), <https://twitter.com/dananessel/status/1343200383624208385>.

<sup>203</sup> S. Pac. Terminal Co. v. Interstate Commerce Comm’n, 219 U.S. 498, 515 (1911).

<sup>204</sup> Litman, *supra* note 41.

<sup>205</sup> Garret Epps, *Disbar Ken Paxton—And Then Some*, WASH. MONTHLY (Dec. 9, 2020), <https://washingtonmonthly.com/2020/12/09/disbar-ken-paxton-and-then-some/>.

<sup>206</sup> *Id.*

“Monetary sanctions? Disbarment? Hardly enough. I can’t quite figure out the right charge to bring against a public official who seeks to prostitute the federal courts in order to destroy the nation.”<sup>207</sup>

Attorneys representing Donald Trump were complicit in conjuring an alternate universe that precipitated a Capitol insurrection—an alternate universe in which Trump, just ten weeks after this unprecedented violence, could publicly claim that his followers were just “hugging and kissing the police and the guards” in the Capitol.<sup>208</sup> And why shouldn’t he so brazenly lie, if his lies were given succor by our judicial process?<sup>209</sup>

In conclusion, the lasting question of the Trump election litigation, which sought to subvert our democracy without any legal backing for doing so, is this: Will the courts, faced with this dangerous and unprecedented affront to legal standards—one that inspired a violent, fatal insurrection at the U.S. Capitol—act to defend the integrity of the judicial process? If not, then the purpose behind Rule 11 has effectively been read out of existence and the rule serves as no deterrent to future frivolities and perhaps even more outrageous legal claims.

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<sup>207</sup> *Id.*

<sup>208</sup> Colby Itkowitz, *Trump Falsely Claims Jan. 6 Rioters Were ‘Hugging and Kissing’ Police*, WASH. POST (Mar. 26, 2021, 11:54 AM).

<sup>209</sup> The chaos that Trump’s lies unleashed is still swirling, with Republicans in 2021 pushing voting rights restrictions across the nation and raging against corporations that oppose these restrictions. *See* Amy Gardner, *As the Voting-Rights Fight Moves to Texas, Defiant Republicans Test the Resolve of Corporations that Oppose Restrictions*, WASH. POST (Apr. 22, 2021, 3:36 PM), [https://www.washingtonpost.com/politics/texas-voting-restrictions-gop-corporations/2021/04/21/a2746b8c-a1e4-11eb-a774-7b47ceb36ee8\\_story.html](https://www.washingtonpost.com/politics/texas-voting-restrictions-gop-corporations/2021/04/21/a2746b8c-a1e4-11eb-a774-7b47ceb36ee8_story.html) (“Gov. Greg Abbott angrily declined to throw the first pitch at the Texas Rangers’ home opener, accusing Major League Baseball, which had announced plans to pull its All-Star Game from Atlanta, of buying into a ‘false narrative’ about Georgia’s new law.”). In addition, even after Biden’s inauguration, Senate Republicans continue to challenge the 2020 election results. Over five months after the election, the Republican majority in the Arizona State Senate hired a private firm, headed by an election fraud conspiracist, to recount ballots in the state’s largest county, Maricopa County, under conditions of secrecy that excluded observers and reporters. *See* Rosalind S. Helderman, *GOP-backed Recount of Maricopa County Ballots Appears on Track to Move Forward after Initial Pause Ordered by Arizona Judge*, WASH. POST (Apr. 24, 2021, 10:28 AM), [https://www.washingtonpost.com/politics/arizona-recount-trump-fraud-claims/2021/04/23/2f320b72-a3a4-11eb-a774-7b47ceb36ee8\\_story.html](https://www.washingtonpost.com/politics/arizona-recount-trump-fraud-claims/2021/04/23/2f320b72-a3a4-11eb-a774-7b47ceb36ee8_story.html). Attorney Lin Wood, who unsuccessfully challenged Georgia’s election results, had close ties to the chief executive of the private firm given access to voters’ ballots and Lin was among those raising money for the recount. *See id.* Trump has expressed his enthusiastic support of the recount. *See id.*