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In Defense of the Foundation Stone: Deterring Post-Election Abuse of the Legal Process

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IN DEFENSE OF THE FOUNDATION STONE: DETERRING POST-ELECTION ABUSE OF THE LEGAL PROCESS

Joyce Gist Lewis & Adam M. Sparks[*]

The COVID-19 pandemic has upended the American way of life and revolutionized the way we vote. Record voter turnout in 2020, including among first-time voters and voters of color, was met with unprecedented legal challenges seeking to nullify millions of votes. A coordinated effort to amplify groundless accusations of voting fraud, shorthanded as "the Big Lie," was advanced in multiple states through scores of lawsuits. Although the cases themselves were dismissed as lacking merit and as failing to state actionable claims, their impact upon public confidence in free and fair elections was palpable and the resources of the courts and defending parties were severely taxed. As a self-regulating profession, lawyers and courts have both the tools and the duty to hold litigants and their counsel accountable for unethical and unfounded attacks on votes after they have been cast. Rule 11 sanctions, statutory remedies, and other consequences must be employed when litigants baselessly challenge election results, or the courts will find themselves regularly enlisted in efforts to confer false legitimacy on misinformation campaigns. Firm, fair accountability in the present is crucial to deter those who would use litigation to poison the democratic well in the future.

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I. INTRODUCTION

The COVID-19 pandemic has been a tragedy for millions and has upended the American way of life in multiple respects, including forcing voting rights advocates, attorneys, and experts to get creative about how votes can be cast safely and to rethink assumptions about who votes and when. The overwhelming success of absentee-by-mail and early, in-person voting in the November 2020 elections gave America a preview of what is possible for the future of voting. Historic levels of engagement and turnout, during a once-in-a-century pandemic,[1] showed that voters were eager to make their voices heard. In the November 2020 election, nearly 2.7 million Georgians, including a high percentage of first-time voters and voters of color, voted early in person, and more than 1.3 million cast accepted absentee ballots by mail or by using secure absentee ballot drop boxes.[2]

The success of absentee voting, despite the pandemic and a collapse in the reliability of the U.S. Postal Service,[3] is a testament to the understanding of visionaries—like former Georgia gubernatorial candidate Stacey Abrams—that people will vote if they are not prevented from casting a ballot that they believe will matter because "[p]eople don't necessarily care about politicians,

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[1] Jacob Fabina, *Despite Pandemic Challenges, 2020 Election Had Largest Increase in Voting Between Presidential Elections on Record*, U.S. CENSUS BUREAU (Apr. 29, 2021), https://www.census.gov/library/stories/2021/04/record-high-turnout-in-2020-general-election.html.

[2] Michael McDonald, *Georgia Early Voting Statistics*, U.S. ELECTIONS PROJECT (Nov. 5, 2020), https://electproject.github.io/Early-Vote-2020G/GA.html.

[3] *See e.g.*, Jacob Bogage and Christopher Ingraham, *Swing-State Voters Face Major Mail Delays in Returning Ballots on Time, USPS Data Shows*, WASH. POST (Oct. 30, 2020, 1:15 PM), https://www.washingtonpost.com/business/2020/10/30/postal-service-absentee-ballots-2020-election/ ("Absentee ballots are taking longer to reach election offices in key swing states than in the rest of the country, new data shows, as the U.S. Postal Service rushes to deliver votes ahead of strict state deadlines."); Erik Larson, *USPS Misses Court's Deadline for Sweep of Mail-In Ballots (1)*, BLOOMBERG LAW (Nov. 3, 2020, 6:52 PM), https://news.bloomberglaw.com/us-law-week/usps-ordered-to-sweep-swing-state-facilities-for-ballots-1 (providing a brief overview of USPS delays and resulting litigation); Memorandum Opinion at 6–8, 38–40, NAACP v. U.S. Postal Serv., No. 20-cv-2295 (D.D.C. Oct. 10, 2020), ECF No. 32 (granting a preliminary injunction and finding that changes by USPS inhibited timely mail delivery).

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but they do care about their own lives."[4] It is also owed to the work election lawyers and voting rights organizations put in during the months and years leading up to the 2020 election to ensure that voting would not be burdensome.[5] Unfortunately, these same lawyers will now face months, and possibly years, of litigation to deal with the backlash against their success: a concerted effort has reemerged to reduce access to absentee balloting, restrict and reduce voter registration, and remove opportunities for the poor and working class to vote, other than on election day.[6]

Worse, 2020 gave rise to a new front in this effort: a multitude of lawsuits demanding that courts overturn election results and reject

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[4] Stacey Abrams, Opinion, *I Know Voting Feels Inadequate Right Now*, N.Y. TIMES (June 4, 2020), https://www.nytimes.com/2020/06/04/opinion/stacey-abrams-voting-floyd-protests.html.

[5] In her book, *One Person, No Vote*, Emory Professor Carol Anderson has outlined in detail the history that underlies efforts to make it difficult to qualify as an eligible voter; difficult to register; difficult to cast a ballot; and, ultimately, difficult for many poor, Black, or brown citizens to believe that voting actually has an impact. *See generally* CAROL ANDERSON, ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY (2018). She argues that access enables these voters to have a voice and to see the results of using their voice. *Id.* It builds confidence in the American system of government and makes it possible for those who consider themselves powerless to buy in to the proposition that their communities can change for the better. Further, without that kind of buy-in and participation from the elderly, the young, people of color, and the working class, our democracy cannot meaningfully (and peacefully) function in a way that is responsive to the needs of those groups. *Id.* at 96. In short, voter access is the "linchpin of the American experiment." Kent Huntington, *Skin in the Game -- a Vote for Election Integrity*, FORBES (June 20, 2017, 10:29 AM), https://www.forbes.com/sites/realspin/2017/06/20/skin-in-the-game-a-vote-for-election-integrity/?sh=359ea78e7cc5.

[6] *See Voting Laws Roundup: May 2021*, BRENNAN CTR. FOR JUSTICE (May 28, 2021), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021 ("As of June 21, 17 states enacted 28 new laws that restrict access to the vote. . . . [A]t least 61 bills with restrictive provisions are moving through 18 state legislatures."); Ashley Lopez, *Texas Lawmakers Take Another Shot at Passing New Voting Laws*, NPR (July 9, 2021, 5:00 AM), https://www.npr.org/2021/07/09/1014512234/texas-lawmakers-take-another-shot-at-passing-new-voting-laws ("[Texas Republicans are] proposing bans on drive-through voting, bans on 24-hour voting centers. And they also want to create some new ID requirements for ballot by mail . . . . [They] also want to prohibit election officials from giving a vote-by-mail applications to anyone who didn't ask for one first. Beyond that, these bills literally create, like, a slew of criminal penalties related to voting. So voters could get in some serious legal trouble for making some innocent mistakes while voting.").

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millions of votes after they were cast.[7] This rash of litigation has sought unprecedented relief—to discard legally cast votes[8]—based on the thinnest of rationales and has continued even as court after court summarily dismissed these suits as meritless.[9] These suits have illuminated the unique role that lawyers and judges have in safeguarding the future of voting: the responsibility to ensure that the resources of the justice system are not used to subvert the foundation stone of American democracy, the vote.[10] To protect the courts from being conscripted into the service of a propaganda machine that seeks to undermine confidence in our elections, litigants and counsel must be held accountable for filing meritless claims to toss out millions (or even hundreds) of presumptively legal votes. Lawyers and judges should examine whether Rule 11 and other statutory sanctions are warranted for those who would abuse the courts' resources to advance an explicitly anti-voting and anti-democratic agenda.

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[7] *See* William Cummings, Joey Garrison & Jim Sergent, *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/ ("The president and his allies filed 62 lawsuits in state and federal courts seeking to overturn election results in states the president lost . . . .").

[8] *See* Transcript of Motions Hearing Before the Honorable Timothy C. Batten, Sr. United States District Judge at 43, Pearson v. Kemp, No. 1:20-CV-4809 (N.D. Ga. Dec. 7, 2020) ("[T]he Plaintiffs essentially ask the Court for perhaps the most extraordinary relief ever sought in any Federal Court in connection with an election. They want this Court to substitute its judgment for that of two-and-a-half million Georgia voters who voted for Joe Biden, and this I am unwilling to do.").

[9] *See* Cummings et al., *supra* note 7 ("Out of the 62 lawsuits filed challenging the presidential election, 61 have failed . . . .").

[10] "Voting is the foundation stone for political action." Dr. Martin Luther King, Jr., *Civil Right No. 1—The Right to Vote*, N.Y. TIMES (Mar. 14, 1965), https://timesmachine.nytimes.com/timesmachine/1965/03/14/96699925.pdf?pdf_redirect=true&ip=0.

II. "YOUR VOTE IS PRECIOUS, ALMOST SACRED. IT IS THE MOST POWERFUL NONVIOLENT TOOL WE HAVE TO CREATE A MORE PERFECT UNION."

– JOHN LEWIS[11]

Fear of the power of meaningful, accessible, popular voting was laid bare in efforts to limit voting following *Shelby County v. Holder*.[12] This has proven true in states like Georgia and others that were previously subject to the preclearance requirements set forth in Section 5 of the Voting Rights Act of 1965,[13] which *Shelby County* paralyzed.[14] States throughout the Deep South announced that they would seek to implement, or would begin enforcing, strict voter identification laws—including some previously rejected under Section 5 requirements—within a day of *Shelby County*'s issuance.[15] In the absence of the VRA's Section 5 preclearance requirements,[16] voting rights advocates have had the burden of persuading state and federal courts to enjoin laws limiting the ability to register, vote, and have one's vote counted.[17]

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[11] Associated Press, *From Rep. John Lewis, Quotes in a Long Life of Activism*, WASH. POST (July 18, 2020, 12:38 AM), https://www.washingtonpost.com/national/from-rep-john-lewis-quotes-in-a-long-life-of-activism/2020/07/18/7ee684d8-c8b0-11ea-a825-8722004e4150_story.html.

[12] 570 U.S. 529 (2013).

[13] *See id.* at 537 ("Section 5 provided that no change in voting procedures could take effect until it was approved by federal authorities in Washington, D.C.—either the Attorney General or a court of three judges.").

[14] *See id.* at 556–57 (striking down the coverage formula in the Voting Rights Act that enabled Section 5 preclearance).

[15] *See The Effects of Shelby County v. Holder*, BRENNAN CTR. FOR JUSTICE (Aug. 6, 2018), https://www.brennancenter.org/our-work/policy-solutions/effects-shelby-county-v-holder ("The decision in *Shelby County* opened the floodgates to laws restricting voting . . . . The effects were immediate. Within 24 hours of the ruling, Texas announced that it would implement a strict photo ID law. . . . Mississippi and Alabama[] also began to enforce photo ID laws that had previously been barred because of federal preclearance.").

[16] *Shelby Cnty.*, 570 U.S. at 537.

[17] *See* Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After* Shelby County, 115 COLUM. L. REV. 2143, 2155 (2015) (noting that, under Section 2, "the burden of proof falls on the party challenging the election law at issue rather than the party defending it").

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Having learned their lessons from the litigation they were required to file after *Shelby County*, a nationwide corps of election law attorneys leapt into action before the 2020 presidential election cycle to lay the groundwork for as free and fair an election as could be obtained.[18] In Georgia, subjects of pre-election litigation ranged from long wait times at polling places[19] to notification of absentee ballot rejection,[20] which were both related to the ability of voters to cast their ballots without the burden of waiting for hours and with the assurance that their vote would indeed be counted.[21]

In *Anderson v. Raffensperger*, political committees and Georgia voters, who were forced to wait up to eight hours in the hot sun and late into the night during the June 9 primary, filed suit against state and county election officials.[22] Expert analyses filed in connection with a motion for preliminary injunction demonstrated that Georgia voters had faced some of the longest average wait times to vote in the country since at least 2008, growing to the very longest wait time in 2018 (and the largest increase in wait time from 2014, just after *Shelby County*, to 2018).[23] What is more, these burdens varied widely with the share of racial and ethnic minorities on the voter rolls:

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[18] *See Voting Rights Litigation Tracker 2020*, BRENNAN CTR. FOR JUSTICE, https://www.brennancenter.org/our-work/court-cases/voting-rights-litigation-2020 (last updated May 28, 2021) (providing a tracker that "aggregate[s] all active and recently disposed of litigation in both state and federal courts pertaining to voters' ability to cast their ballots in 2020").

[19] *See* Anderson v. Raffensperger, 497 F. Supp. 3d 1300, 1333 (N.D. Ga 2020) ("Plaintiffs lack standing because they have not shown long lines are certainly impending in November.").

[20] *See* Compromise Settlement Agreement and Release, Democratic Party of Ga. v. Raffensperger, No. 1:19-cv-05028 (N.D. Ga. Mar. 6, 2020), ECF No. 56-1; Mark Niesse, *Lawsuit Settled, Giving Georgia Voters Time to Fix Rejected Ballots*, ATLANTA J.-CONST. (Mar. 7, 2020), https://www.ajc.com/news/state--regional-govt--politics/lawsuit-settled-giving-georgia-voters-time-fix-rejected-ballots/oJcZ4eCXf8J197AEdGfsSM/ ("Georgia voters must be quickly notified when election officials reject their absentee ballots, allowing them time to correct problems and have their ballots counted, according to a settlement . . . .").

[21] Of course, the need to secure accessible voting procedures intensified with the onset of the global COVID-19 pandemic. Some courts understood this well, and along with it the accompanying need for emergency injunctive relief. *See, e.g.*, New Ga. Project v. Raffensperger, 484 F. Supp. 3d 1265, 1307 (N.D. Ga. 2020) (extending the receipt deadline for absentee ballots), *rev'd*, 976 F.3d 1278 (11th Cir. 2020).

[22] *Anderson*, 497 F. Supp. 3d at 1304–05.

[23] *See* Expert Report of Jonathan Rodden at 24, *Anderson*, 497 F. Supp. 3d 1300 (No. 1:20-cv-03263), ECF No. 93-61 (describing the survey data).

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> Among polling places where *minorities* made up over 90 percent of registered voters, 36 percent were forced to stay open over one hour past the specified closing time in order to accommodate long lines. In the Atlanta metro area, 45 percent of such polling places were forced to do so. Among polling places where *whites* made up over 90 percent of registered voters, less than 3 percent of polling places were required to stay open late in order to accommodate long lines.
>
> In polling places where minorities constituted more than 90 percent of active registered voters, the average minimum wait time in the evening was 51 minutes. When whites constituted more than 90 percent of registered voters, the average was around six minutes.[24]

The complaint attributed these burdens to election officials' closure and consolidation of polling locations and failure to provide sufficient training and equipment,[25] such that these failures violated the First and Fourteenth Amendments to the U.S. Constitution.[26] Plaintiffs offered additional expert testimony to provide county election officials with concrete strategies for improving the efficiency of equipment allocation to reduce voter wait times.[27] Ultimately, the court dismissed this complaint for lack of standing in light of recent federal appellate case law.[28]

Other litigation resulted in tangible election administration improvements for voters, which came to fruition with the record turnout in November 2020.[29] In *Democratic Party of Georgia v.*

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[24] *Id.* at 4.

[25] Complaint for Injunctive and Declaratory Relief at 6, *Anderson*, 497 F. Supp. 3d 1300 (No. 1:20-cv-03263), ECF No. 1.

[26] *Id.* at 72.

[27] *See Anderson*, 497 F. Supp. 3d at 1305–06 (summarizing the specific remedies plaintiffs requested the court to provide with a preliminary injunction).

[28] *See id.* at 1306–07 (finding that the plaintiffs lacked standing because they failed to show that "long lines at the November 2020 Election" were "sufficiently likely to occur").

[29] *See Secretary of State Reports Record Breaking Turnout*, GA. SEC'Y STATE, https://sos.ga.gov/index.php/elections/secretary_of_state_reports_record_breaking_turnout (last visited June 17, 2021).

Raffensperger, the parties negotiated a settlement agreement and release of claims, filed with the court, clarifying the amount of time under O.C.G.A. § 21-2-386(a)(1)(C) county election officials were permitted to take to promptly notify a voter applying for or casting an absentee ballot that officials perceived a defect on the application or ballot envelope.[30] State election officials considered the plaintiffs' claims, along with the fact that the state legislature had amended this provision of the law the previous spring,[31] and so issued both a more detailed rule and nonbinding guidance to county election officials in advance of "all statewide elections in 2020."[32] The state election officials "agree[d] to promulgate and enforce" a rule that interpreted "prompt" notification to mean notifying the voter by letter, telephone, and email within three business days of receipt of the rejected application or ballot.[33] Election officials later took additional emergency measures previously used in other states—such as permitting counties to erect secure, public drop boxes for voters to return paper ballots—to increase the safety and security of voting in the midst of the ongoing global pandemic.[34] Although

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[30] Compromise Settlement Agreement and Release, *supra* note 20, at 3–4; *see also* Niesse, *supra* note 20 (describing the settlement agreement). Some might know this better as the "Consent Decree" which the Trump Campaign and its supporters decried in the aftermath of the 2020 general election. *See, e.g.*, Glenn Kessler, *Trump's Day on Twitter: Living in an Immaterial World*, WASH. POST (Nov. 17, 2020, 3:00 AM), https://www.washingtonpost.com/politics/2020/11/17/trumps-day-twitter-living-an-immaterial-world/ (quoting Donald Trump's tweets about the "unconstitutional Consent Decree" which he believed rendered the Georgia recount "fake"); Jonathan Raymond, *Georgia Election Official Says Trump Is 'Flat Out, 100 Percent, Four Square Wrong' About Consent Decree*, 11ALIVE (Nov. 17, 2020, 6:04 PM), https://www.11alive.com/article/news/politics/elections/georgia-consent-decree-election-official-says-trump-wrong/85-db462666-11d4-46c1-97e4-18d9bf79e365 ("The suit brought by Wood is arguing the consent decree amounted to a unconstitutional change of election law . . . .").

[31] 2019 Ga. Laws 7.

[32] Compromise Settlement Agreement and Release, *supra* note 20, at 3–6.

[33] *Id.* at 3.

[34] *See, e.g.*, *Raffensperger Takes Unprecedented Steps to Protect Safety and Voter Integrity in Georgia*, GA. SEC'Y STATE, https://sos.ga.gov/index.php/elections/raffensperger_takes_unprecedented_steps_to_protect_safety_and_voter_integrity_in_georgia (last visited June 17, 2021) (explaining the changes adopted by Secretary of State Raffensperger to "protect the public health of Georgia voters"); *Secretary of State Raffensperger Reopens Grants for Absentee Ballot Drop Boxes*, GA. SEC'Y STATE, https://sos.ga.gov/index.php/elections/secretary_of_state_raffensperger_reopens_grants_for_absentee_ballot_drop_boxes (last visited June 17, 2021) (discussing the installation of absentee drop boxes for the November general

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significant challenges, including long wait times and other delays, continued to occur during the early voting period, Election Day 2020 in Georgia came to a close without the spectacle of mile-long lines and under-resourced polling locations headlining the national news.[35]

There was little time for voting rights advocates or Georgia election officials to enjoy a respite once the polls closed, however, as they confronted a shared challenge in the immediate aftermath of the election: a coordinated nationwide movement to have the courts throw out votes after they were cast.[36] These suits argued that, because of alleged "irregularities" and "suspected" fraud, votes from majority-minority counties—including those in the Metropolitan Atlanta region—should not be included in presidential vote counts[37] or, alternatively, that the courts should stay or disregard Electoral College votes from certain states entirely.[38] As with the post-election legislation that has sought to limit access to the ballot box in at least forty-three states,[39] the argument that the nation's courts

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election). They also ultimately opposed others, such as extending the receipt deadline for paper ballots returned by voters via the U.S. mail. *See* New Ga. Project v. Raffensperger, 976 F.3d 1278, 1284 (11th Cir. 2020) (rejecting challenges to "Georgia's decades-old Election Day deadline for absentee ballots").

[35] *Compare* Dareh Gregorian, Matteo Moschella & Jane C. Timm, *Early Voting Begins in Georgia With Long Lines, High Turnout*, NBC NEWS (Oct. 12, 2020, 4:06 PM), https://www.nbcnews.com/politics/2020-election/early-voting-begins-georgia-long-lines-high-turnout-n1242995 (noting the "hourslong waits at some polling locations" during early voting), *with* Mark Niesse, David Wickert & Alexis Stevens, *Georgia Votes: Last Minute Voters Find No Lines at Many Metro Polls*, ATLANTA J.-CONST., https://www.ajc.com/politics/voting-begins-as-polls-open-on-crucial-georgia-election-day/5GCC2BW54JFTZDFB4C23AIZHE4/ (last updated Nov. 3, 2020) (noting that "[t]he secretary of state said wait times [on Election Day] averaged 3 minutes across Georgia").

[36] *See supra* notes 7–9.

[37] *See, e.g.*, Trump v. Kemp, No. 1:20-CV-5310, 2021 WL 49935, at *2 (N.D. Ga. Jan. 5, 2021) ("Plaintiff's motion . . . asks this Court to take the unprecedented action of decertifying the results of the presidential election in Georgia and directing the Georgia General Assembly to appoint presidential electors.").

[38] *See* Cummings et al., *supra* note 7 ("[A] Trump-appointed federal judge in Texas dismissed a lawsuit from Rep. Louie Gohmert, R-Texas, that argued Vice President Mike Pence has the conditional power to decide which states' Electoral College votes to count.").

[39] *See* Amy Gardner, Kate Rabinowitz & Harry Stevens, *How GOP-Backed Voting Measures Could Create Hurdles for Tens of Millions of Voters*, WASH. POST (Mar. 11, 2021), https://www.washingtonpost.com/politics/interactive/2021/voting-restrictions-republicans-states/ ("In 43 states across the country, Republican lawmakers have proposed at least 250

should throw out millions of legally cast ballots was predicated on the demonstrably false assertions that voting fraud runs rampant in U.S. elections, generally, and the "Big Lie" that systemic fraud affected the outcome of the 2020 presidential election, specifically.[40]

Ultimately, post-election challenges to Georgia's vote count led to bipartisan validation of pro-vote lawyers' long-held position that absentee voting is reliable and not subject to fraud.[41] Following multiple recounts of Georgia's presidential votes, including an audit by hand and a machine count of just over five million ballots, Georgia's Republican Secretary of State declared that there was no evidence of systemic fraud or irregularity, and certainly no evidence to support changing the outcome of the presidential election in the state.[42] Notwithstanding this reassurance and the dearth of competent evidence of systemic fraud or error in the 2020 presidential general election, the lesson learned by some legislators in Georgia and elsewhere is that safe and convenient access to absentee voting for all but a few populations is a threat to their political power.[43]

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laws that would limit mail, early in-person and Election Day voting with such constraints as stricter ID requirements, limited hours or narrower eligibility to vote absentee . . . .").

[40] Political actors from social media bots to conservative media figures to U.S. Senators have advanced the Big Lie as a reason for swift legislative action to restrict the franchise and shrink America's table, rather than expand it. *See* Robin Abcarian, *Voter Suppression Will Be the Lasting Effect of Trump's Big Lie*, L.A. TIMES (Apr. 11, 2021, 3:00 AM), https://www.latimes.com/opinion/story/2021-04-11/voter-suppression-is-the-lasting-effect-of-trumps-big-lie (describing how "the Big Lie that the election was stolen produced a failed series of lawsuits" and new wave of voter suppression).

[41] *See It's Official: The Election Was Secure*, BRENNAN CTR. FOR JUSTICE (Dec. 11, 2020), https://www.brennancenter.org/our-work/research-reports/its-official-election-was-secure (quoting bipartisan persons and groups affirming that "[b]y all measures, the 2020 general election was one of the most secure elections in our history").

[42] *See* GA. SEC'Y STATE, RISK-LIMITING AUDIT REPORT (2020), https://sos.ga.gov/admin/uploads/11.19_.20_Risk_Limiting_Audit_Report_Memo_1.pdf (summarizing the results of Georgia's audit of the November 2020 General Election, which "confirmed the original result of the election"); Quinn Scanlan, *'We've Never Found Systemic Fraud, Not Enough to Overturn the Election': Georgia Secretary of State Raffensperger Says*, ABC NEWS (Dec. 6, 2020, 12:29 PM), https://abcnews.go.com/Politics/weve-found-systemic-fraud-overturn-election-georgia-secretary/story?id=74560956 ("[W]hile [the Secretary of State's office] have more than 250 investigations underway, so far, his office has yet to find evidence supporting 'systemic fraud' that would change the outcome.").

[43] *See* Abcarian, *supra* note 40 ("In Georgia, voters will now have less time to request absentee ballots, which have strict new ID requirements. It will be illegal for state election

III. "WHEN YOU KNOW BETTER, YOU DO BETTER."

– MAYA ANGELOU[44]

Georgia Court of Appeals Senior Judge Herbert Phipps is often asked to address bar groups on his experiences as a boy growing up under an oppressive system of Jim Crow in rural Baker County, Georgia, and as a young lawyer who returned to South Georgia to practice law at the side of the legendary civil rights attorney C.B. King.[45] A theme Judge Phipps often touches on is "the importance of courage in lawyers."[46] He shares an incident that occurred in the early 1960s, after Mr. King, as defense counsel, presented compelling evidence to support the dismissal of criminal charges against a young Black protester.[47] In the retelling, a young Phipps follows Mr. King and the prosecutor into the judge's chambers, where Phipps hears the judge freely acknowledge that the law requires him to dismiss the charges against the young defendant, but that he will not do so because "I have to live in this little town."[48] As Phipps observes, it was more important to the judge in the story that he be "popular" among his peers than for justice to be done.

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officials to mail out absentee ballot applications to all voters. The number of ballot drop boxes has been cut back . . . . The Legislature has given itself the power to suspend county election officials. And, infamously, it will become a crime for anyone to offer food and water to voters waiting in line . . . .").

[44] *The Powerful Lesson Maya Angelou Taught Oprah* (aired Oct. 19, 2011), https://www.oprah.com/oprahs-lifeclass/the-powerful-lesson-maya-angelou-taught-oprah-video.

[45] *See* Katheryn Tucker, *Judge Herb Phipps Calls Lawyers to Action, Urges 'Guts to Speak Out,'* DAILY REP. (Nov. 9, 2018), https://www.law.com/dailyreportonline/2018/11/09/judge-herb-phipps-calls-lawyers-to-action-urges-guts-to-speak-out/ (recounting Judge Herbert Phipps's story from "a farm in southwest Georgia's Baker County on land purchased by his great-grandfather, who was born a slave" to serving on the Court of Appeals).

[46] *See* Jonathan Ringel, *Lifetime Achievement Award: Senior Judge Herbert Phipps, Georgia Court of Appeals*, DAILY REP. (June 28, 2018), https://www.law.com/dailyreportonline/2018/06/28/lifetime-achievement-award-senior-judge-herbert-phipps-georgia-court-of-appeals/ ("Courage may be the most important ingredient of temperament. A judge with the proper judicial temperament has the courage to do the right thing when the whole world is watching, no matter how difficult the social situation, and the character to do the right thing when no one is watching.").

[47] Tucker, *supra* note 45.

[48] *Id.*

The anecdote can evoke a visceral reaction in an audience of lawyers and judges. It illustrates what is at risk when they fail to hold themselves and their peers to the oaths taken upon entering the profession, in which lawyers swear to uphold the U.S. Constitution and the law.[49] Yet in Georgia courthouse chambers at the beginning of the Civil Rights Movement, a judge chose to prioritize his personal interests over the freedom of a fellow human being and, indeed, over the interests of the law itself. Cynical students of human nature can agree that the decision to elevate personal interests over the interests of one's fellow man is common—tragically, it happens every day. But they can also agree that when a lawyer or judge exercises his or her influence in the service of personal gain and contrary to the requirements of the law, there is a special harm. When attorneys who should "know better" fail to "do better," they betray the trust that lawyers and judges are privileged to enjoy. They can also run afoul of the rules that have evolved to protect litigants and the courts against frivolous and resource-wasting litigation.[50]

As the Big Lie was disseminated in November and December, and beyond, social media platforms found themselves at the center of a public debate about whether they had facilitated the spread of misinformation and undermined confidence in the election's outcome.[51] Some platforms chose to attach warnings to posts alleging fraud, and—following the Capitol riots on January 6, 2021—some chose to terminate access to their platforms for serial offenders.[52] But lawyers and judges also have a responsibility for

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[49] *See, e.g.*, SUP. CT. OF GA., RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW 13 (2018), https://www.gabaradmissions.org/rules-governing-admission (requiring attorneys to swear to "support and defend the Constitution of the United States and the Constitution of the State of Georgia").

[50] *See, e.g.*, FED. R. CIV. P. 11(b)(1) (requiring attorneys to sign pleadings as confirmation that the pleading "is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation").

[51] *See, e.g.*, Shannon Bond, *Twitter Says Steps to Curb Election Misinformation Worked*, NPR, (Nov. 12, 2020, 4:26 PM), https://www.npr.org/sections/live-updates-2020-election-results/2020/11/12/934267731/twitter-says-steps-to-curb-election-misinformation-worked (describing Twitter's use of "warning labels on misleading or disputed claims and limiting how such claims can be shared" after the 2020 election).

[52] *See, e.g.*, Yelena Dzhanova, *Here Are the Most Prominent People Who Got Banned From Social Media Platforms After the Capitol Riots*, BUS. INSIDER (Jan. 10, 2021, 2:25 PM), https://www.businessinsider.com/people-banned-social-media-platforms-after-capitol-riots-

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countering false narratives of voter fraud and so called "illegal votes" when the courts themselves are used as the setting for advancing baseless claims. Just as crucial as having lawyers engaged in the fight to secure affirmative relief from oppressive laws enacted to suppress the vote is ensuring that courts are not used as vehicles to grab attention for destructive and antidemocratic conspiracy theories.

2021-1 (naming Donald Trump, Sidney Powell, Steve Bannon, and Michael Flynn among the most influential social media users that platforms banned after the January 6 riots); Elizabeth Dwoskin, *Trump Is Suspended From Facebook for 2 Years and Can't Return Until 'Risk to Public Safety Is Receded*,*'* WASH. POST (June 9, 2021, 12:36 AM), https://www.washingtonpost.com/technology/2021/06/03/trump-facebook-oversight-board/.

https://digitalcommons.law.uga.edu/glr/vol55/iss4/7

Between November 3, 2020, and January 6, 2021, dozens of lawsuits were filed in the states of Arizona,[53] Georgia,[54] Michigan,[55]

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[53] *See* Verified Petition for Rule 27 Discovery, Ward v. Jackson, No. CV2020-015285 (Super. Ct. Maricopa Cnty., Ariz. Nov. 24, 2020) (seeking an order that Biden's win in Arizona was void); Verified Complaint, Ariz. Republican Party v. Fontes, No. CV 2020-014553 (Super. Ct. Maricopa Cnty., Ariz. Nov. 12, 2020) (seeking injunction to prevent the defendants from certifying Arizona's election results).

[54] *See, e.g.*, Order on Petition to Command Enforcement of Election Laws, *In re* Enforcement of Election Laws and Securing Ballots Cast or Received After 7:00 P.M. on November 3, 2020, No. SPCV2000982-J3 (Super. Ct. Chatham Cnty., Ga. Nov. 5, 2020) (rejecting a petition seeking to disqualify absentee ballots); Trump v. Kemp, No. 1:20-cv-5310, 2021 WL 49935, at *2 (N.D. Ga. Jan. 5, 2021) (seeking an injunction decertifying Georgia's election results); Verified Petition for Emergency Injunctive and Declaratory Relief at 13, Still v. Raffensperger, No. 2020CV343711 (Super. Ct. Fulton Cnty., Ga. Dec. 12, 2020) (same); Verified Petition to Contest Georgia's Presidential Election Results for Violations of the Constitution and Laws of the State of Georgia, and Request for Emergency Declaratory and Injunctive Relief at 50, Trump v. Raffensperger, No. 2020CV343255 (Super. Ct. Fulton Cnty., Ga. Dec. 7, 2020) (contesting Georgia's presidential election results based on purported fraud); Emergency Direct Appeal, or Alternatively, Emergency Petition to Seek a Writ of Certiorari to the Supreme Court of Georgia at 5, Boland v. Raffensperger, No. S21M0565 (Ga. Dec. 14, 2020) (same); Election Contest Complaint at 1, Della Polla v. Raffensperger, No. 20-1-7490 (Super. Ct. Cobb Cnty., Ga. Nov. 23, 2020) (same); Reeves v. Kemp, No. 1:20-cv-172, 2021 WL 123392, at *1 (S.D. Ga. Jan. 12, 2021) (dismissing a complaint to invalidate all mail-in ballots in Georgia); Wood v. Raffensperger, No. 2020CV342959 (Super. Ct. Fulton Cnty. Ga. Dec. 8, 2020) (dismissing an election contest); Verified Complaint for Declaratory and Injunctive Relief at *4, Brooks v. Mahoney, No. 4:20-cv-281, 2020 WL 6710317 (S.D. Ga. Nov. 11, 2020) (seeking to exclude presidential election results from challenged counties as a remedy); Wood v. Raffensperger, 501 F. Supp. 3d 1310, 1317 (N.D. Ga. 2020) (rejecting a voter's request for a temporary restraining order seeking "a second recount prior to the certification of the election results"), *aff'd*, 981 F.3d 1307 (11th Cir. 2020); Twelfth Cong. Dist. Republican Comm. v. Raffensperger, No. 1:20-cv-180, 2020 WL 8255193 (S.D. Ga. Dec. 17, 2020) (same); Complaint for Declaratory, Injunctive and/or Mandamus Relief at 2–3, Republican Nat'l Comm. v. Raffensperger, No. 2020CV343319 (Super. Ct. Fulton Cnty., Ga. Dec. 7, 2020) (challenging the use of drop boxes and lack of poll watchers); Order at 1, Ga. Republican Party v. Raffensperger, No. 2:20-cv-135 (S.D. Ga. Dec. 18, 2020) (rejecting plaintiffs request for a temporary restraining order to halt the counting of unlawful ballots); Wood v. Raffensperger, No. 1:20-cv-5155, 2020 WL 7706833, at *1 (N.D. Ga. Dec. 28, 2020) (denying complaint for lack of standing); Petition for Election Contest at 1, Daugherty v. Fulton Cnty. Bd. of Registration & Elections, No. 2021CV344953 (Super. Ct. Fulton Cnty., Ga. Jan. 24, 2021) (contesting the results of the elections in Georgia for the U.S. Senate).

[55] *See* Opinion and Order at 5, Donald J. Trump for President, Inc. v. Benson, No. 20-000225-MZ (Mich. Ct. Cl. Nov. 6, 2020) (rejecting petition seeking to enjoin the counting of absentee ballots); Opinion & Order at 12–13, Constantino v. City of Detroit, No. 20-014780-AW (Cir. Ct. Wayne Cnty., Mich. Nov. 13, 2020) (rejecting an injunction seeking to stop the

Minnesota,[56] Nevada,[57] Pennsylvania,[58] and Wisconsin,[59] alleging that the votes cast by millions of registered voters in those states should not be counted, or that the votes of entire states should be thrown out.[60] To support the request that millions of registered voters be disenfranchised after submitting their ballots, the petitioners came armed not with evidence of widespread and systemic fraud, but with slapdash affidavits, scientifically unsound assumptions, hysterical speculation, and the ghost of Hugo Chavez.[61] In Georgia alone, at least fifteen such suits were filed, almost all of them seeking "emergency relief" that claimed to require an immediate hearing before a state or federal judge.[62] Georgia's judges reviewed thousands of pages of briefs, affidavits, and exhibits and entertained dozens of hours of oral argument in fulfilling their duty to hear these cases, yet every single judge was able to summarily dispose of these claims within a matter of hours

certification process for Detroit's votes); Opinion & Order at 4, Stoddard v. City Election Comm'n of Detroit, No. 20-014604-CZ (Cir. Ct. Wayne Cnty., Mich. Nov. 6, 2020) (same).

[56] *See* Kistner v. Simon, No. A20-1486 (Minn. Dec. 4, 2020) (dismissing a petition seeking to block Minnesota's State Canvassing Board from certifying votes).

[57] *See* Order Granting Motion to Dismiss Statement of Contest at 1–2, 34, Law v. Whitmer, No. 20 OC 00163 1B (Dist. Ct. Carson City, Nev. Dec. 4, 2020) (rejecting request for an order declaring President Trump as the winner of Nevada).

[58] *See* Donald J. Trump for President, Inc. v. Sec'y of Pa., 830 F. App'x 377, 382 (3d Cir. 2020) (rejecting allegations of fraud and an attempt to undo Pennsylvania's vote certification and to "toss[] out millions of mail-in ballots").

[59] *See* Trump v. Wis. Elections Comm'n, No. 20-cv-1785, 2020 WL 7318940, at *1 (E.D. Wis. Dec. 12, 2020) (dismissing a suit in which Trump sought a court order directing the Wisconsin governor to discard the state election results and appoint presidential electors in an alternative manner); Order at 1–2, Wis. Voters All. v. Wis. Elections Comm'n, No. 2020AP1930-OA (Wis. Dec. 4, 2020) (seeking to nullify the election results and disenfranchise every Wisconsin voter because election officials received private grant funds).

[60] The U.S. Supreme Court swiftly and summarily declined to hear all cases seeking such relief. *See, e.g.*, *In re* Bowyer, 141 S. Ct. 1509 (2021) (mem.) (denying petition for writ of mandamus); Wood v. Raffensperger, 141 S. Ct. 1379 (2021) (mem.) (denying certiorari); *In re* Pearson, 141 S. Ct. 1291 (2021) (mem.) (same); King v. Whitmer, 141 S. Ct. 1044 (2021) (mem.) (same); Kelly v. Pennsylvania, 141 S. Ct. 950 (2020) (mem.) (denying application for injunctive relief); Texas v. Pennsylvania, 141 S. Ct. 1230 (2020) (mem.) (denying Texas's motion to file a bill of complaint for lack of standing); Gohmert v. Pence, 141 S. Ct. 972 (2021) (mem.) (rejecting application for interim relief); *In re* Feehan, 141 S. Ct. 1510 (2021) (mem.) (denying petition for writ of mandamus); Trump v. Biden, 141 S. Ct. 1045 (2021) (mem.) (denying certiorari); Trump v. Wis. Elections Comm'n, 141 S. Ct. 1516 (2021) (mem.) (same).

[61] *See* cases cited *supra* notes 53–59.

[62] *See supra* note 54.

of the hearing (and, in several instances, from the bench). These election challenges, on their face, failed to meet even the basic requirements to state a legal claim for relief,[63] as shown by the excerpts below.

- November 20, 2020:

> The Court finds that the threatened injury to Defendants as state officials and the public at large far outweigh any minimal burden on [Plaintiff]. To reiterate, [Plaintiff] seeks an extraordinary remedy: to prevent Georgia's certification of the votes cast in the General Election, after millions of people had lawfully cast their ballots. To interfere with the result of an election that has already concluded would be unprecedented and harm the public in countless ways.[64]

- December 5, 2020:

> Because Georgia has already certified its results, [Plaintiff's] requests to delay certification and commence a new recount are moot. "We cannot turn back the clock and create a world in which" the 2020 election results are not certified. . . .
>
> [Plaintiff's] arguments reflect a basic misunderstanding of what mootness is. He argues that the certification does not moot anything "because this litigation is ongoing" and he remains injured. But mootness concerns the availability of relief, not the existence of a lawsuit or an injury.[65]

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[63] *See* FED. R. CIV. P. 8(a)(2) (requiring pleadings to state "a short and plain statement of the claim showing that the pleader is entitled to relief").

[64] Wood v. Raffensperger, 501 F. Supp. 3d 1310, 1331 (N.D. Ga. 2020).

[65] Wood v. Raffensperger, 981 F.3d 1307, 1317 (11th Cir. 2020) (quoting Fleming v. Gutierrez, 785 F.3d 442, 445 (10th Cir. 2015)).

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- December 7, 2020:

> The relief that the Plaintiffs seek, this Court cannot grant. They ask the Court to order the Secretary of State to decertify the election results as if such a mechanism even exists, and I find that it does not. The 11th Circuit said as much . . . on Saturday.[66]

- December 8, 2020:

> Plaintiff's claims are also barred by the equitable doctrines of laches, which bars a claim when (1) the lapse of time and (2) the claimant's neglect in asserting rights (3) prejudiced the adverse party. All three elements are satisfied here, where Plaintiff challenges the validity of the presidential election after it has already been conducted based on procedures which were adopted long before the election and upon which elections officials and voters alike relied.[67]

- December 8, 2020:

> Even if Plaintiff's Complaint could be brought under O.C.G.A. § 21-2-521, it also fails to state a claim upon which relief can be granted because it is based on the premise that the election is in doubt because the voter rolls were not properly maintained, and because election officials did not properly verify voter signatures. Even if credited, the Complaint's factual allegations do not plausibly support his claims. The allegations in the Complaint rest on speculation rather than duly pled facts. They cannot, as a matter of law, sustain this contest.
>
> Count I, which alleges that 20,312 people may have voted illegally in Georgia, relies upon a YouTube video

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[66] Transcript of Motions Hearing, *supra* note 8, at 43.

[67] Final Order at 3, Boland v. Raffensperger, No. 2020CV343018 (Super. Ct. Fulton Cnty., Ga. Dec. 8, 2020) (citation omitted).

> which purportedly is based upon United States Postal Service mail forwarding information.[68]

- December 28, 2020:

> [Plaintiff] hazards that "there is actual harm imminent to [him]" because "Dominion w[as] founded by foreign oligarchs and dictators . . . to make sure [that] Venezuelan dictator Hugo Chavez never lost another election."
>
> Not only is this allegation astonishingly speculative, but it also presumes that because independent bad actors allegedly fixed the election of a now-deceased Venezuelan president, fraud will recur during Georgia's runoff. Again, past harm does not sufficiently show a risk of future harm to confer standing.[69]

Georgia's state and federal judges performed ably in the days and weeks following the November 3, 2020, elections. They were thoughtful and sober in their review of the parties' written submissions, and respectful in the delivery of their rulings. But there was never a close question as to what the law required in any of these cases—so why were litigants and their counsel undeterred in continuing to file lawsuits and motions seeking relief that "would breed confusion, undermine the public's trust in the election, and potentially disenfranchise of over one million Georgia voters"?[70] After multiple orders explaining that the law did not support the unprecedented relief sought in these cases, the lawyers signing these pleadings could not credibly claim that they expected a different outcome when they filed the next suit. Rather, the choice to continue filing suit suggested ideological, rather than legal, considerations, specifically: (1) a recognition that, in the eyes of the public, the existence of a lawsuit—even one that is destined to be

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[68] *Id.* at 5.

[69] Wood v. Raffensperger, No. 1:20-CV-5155, 2020 WL 7706833, at *5 (N.D. Ga. Dec. 28, 2020) (last three alterations in original) (citations omitted). The complaint that gave rise to this order sought to prevent the January 5, 2021, senatorial runoff election from proceeding. *Id.* at *1.

[70] Wood v. Raffensperger, 501 F. Supp. 3d 1310, 1331 (N.D. Ga. 2020).

summarily dismissed—makes it more likely than not that a legitimate dispute exists and (2) a calculation that the professional and reputational risk to the lawyers signing on to such suits is low. These calculations appear to have paid off: rather than endure a hearing at which the former president's counsel would have been compelled to explain publicly why his election contest filings were not believable or substantially justified, in at least one of the Georgia matters, counsel voluntarily paid all litigation expenses demanded by defendants.[71]

The profession of law is intended to be self-regulating. The Preamble to the American Bar Association's Model Rules of Professional Conduct provide, in pertinent part:

> [6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. *In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority*. . . .
>
> . . . .
>
> [10] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government

[71] *See* Jay Bookman, *Trump Quits Court Battle but Recklessly Urges Followers to Fight*, GA. RECORDER (June 24, 2021), https://georgiarecorder.com/2021/06/24/bookman-trump-quits-court-battle-as-he-recklessly-urges-followers-to-fight/ ("Trump could have resisted. He could have demanded his day in court, insisting to a judge that he and his lawyers had been acting in good faith. . . . Instead he quit. He gave up. Rather than defend the suits, he and his camp quietly agreed to pay $15,554 to the Cobb County Elections Board to cover its costs, and another $6,000 to DeKalb County.").

> and law enforcement. This connection is manifested in the fact that *ultimate authority over the legal profession is vested largely in the courts*.
> . . . .
> [12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.
> [13] *Lawyers play a vital role in the preservation of society*. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.[72]

Attorneys who fail in their obligations under the ethical and professional rules by which they have agreed to be governed can and should be held accountable under those rules.[73] In accord with this principle, court rules and statutes provide a remedy to protect against those who would abuse the litigation process for illegitimate purposes. For example, Federal Rule of Civil Procedure 11(b) provides:

> Representations to the Court. By presenting to the court a pleading, written motion, or other paper--whether by

[72] MODEL RULES OF PRO. CONDUCT pmbl. (AM. BAR ASS'N 2020), Westlaw MRPC (emphasis added).

[73] *See e.g.*, GEORGIA RULES OF PRO. CONDUCT r. 4-102, RPC r. 3.1 (West, Westlaw through Apr. 1, 2021) ("In the representation of a client, a lawyer shall not: (a) file a suit, assert a position, . . . or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another; (b) knowingly advance a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification or reversal of existing law.").

> 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.[74]

The U.S. Supreme Court has held that "the central purpose of Rule 11 is to deter baseless filings in district court and . . . streamline the administration and procedure of the federal courts."[75] Subsection c of Rule 11 contemplates sanctions against "any attorney, law firm, or party that violated [Rule 11(b)] or is responsible for the violation,"[76] and further provides that a court on its own initiative "may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b)."[77]

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[74] FED. R. CIV. P. 11(b).

[75] Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393 (1990).

[76] FED. R. CIV. P. 11(c)(1).

[77] FED. R. CIV. P. 11(c)(3). In Georgia, O.C.G.A. § 9-15-14(b) provides:

> The court may assess reasonable and necessary attorney's fees and expenses of litigation in any civil action in any court of record if, upon the motion of any party or the court itself, it finds that an attorney or party brought or defended an action, or any part thereof, that lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment, or if it finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures available under

When evaluating Rule 11 violations, courts use the objective standard, which "is 'reasonableness under the circumstances' and 'what was reasonable to believe at the time' the pleading was submitted."[78] The Eleventh Circuit "requires a two-step inquiry as to (1) whether the party's claims are objectively frivolous; and (2) whether the person who signed the pleadings should have been aware that they were frivolous."[79] Accordingly, courts are vested with an inherent authority to prevent abusive litigation, including the right to issue targeted pre-filing orders to reduce abuse of the courts by serial litigants (and counsel) with a history of filing frivolous claims. Such disincentives have a benefit beyond the obvious savings in time and resources that the courts, the states, and other impacted parties are required to invest when dealing with such claims. They send a clear message to petitioners, their counsel, and the public at large that the nation's courts will not afford a presumption of legitimacy when the relief sought is undoing the will of the voters and undermining the "public's understanding of and confidence in the rule of law."[80]

To date, a few parties that opposed motions seeking to overturn the 2020 election results have filed motions for sanctions for abusive litigation.[81] At least one court, *sua sponte*, referred an attorney who demanded the "staggering" relief of "invalidat[ing] the election and prevent[ing] the electoral votes from being counted" to the United States District Court Committee on Grievances, which observed that, "When any counsel seeks to target processes at the heart of our democracy, the Committee may well conclude that they are

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Chapter 11 of this title, the "Georgia Civil Practice Act." As used in this Code section, "lacked substantial justification" means substantially frivolous, substantially groundless, or substantially vexatious.

[78] Baker v. Alderman, 158 F.3d 516, 524 (11th Cir. 1998).

[79] *Id.*

[80] MODEL RULES OF PRO. CONDUCT pmbl. para. [6] (AM. BAR ASS'N 2020), Westlaw MRPC.

[81] *See* Brent Kendall & Alexa Corse, *Trump 2020 Election Lawsuits Lead to Requests to Discipline Lawyers*, WALL ST. J. (May 9, 2021, 10:00 AM), https://www.wsj.com/articles/trump-2020-election-lawsuits-lead-to-requests-to-discipline-lawyers-11620568801 ("Courts are weighing whether some of the failed legal challenges to the 2020 presidential election were frivolous or improper and warrant punishment for the lawyers who filed them.").

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required to act with far more diligence and good faith than existed here."[82]

Other orders that have been issued in response to motions for sanctions have been unequivocal in their condemnation of the abuse of the legal process for political purposes:

> These were flimsy excuses for a lawsuit. The hand count is not meant to create data points for political parties to "cross-check with other voter registration data." "The purpose of the hand count audit is to compare the results of the machine count to the hand count to assure that the machines are working properly and accurately counting votes." . . .
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> . . . .
>
> . . . The plaintiff goes on to say that "[p]ublic mistrust following this election motivated this lawsuit." . . .
>
> . . . .
>
> . . . [The plaintiff] is saying that it filed this lawsuit for political reasons. "Public mistrust" is a political issue, not a legal or factual basis for litigation.[83]

The court order went on to note,

> In the petition the plaintiff said this:
>
> > Given the importance of this election, and of doing everything with respect to this election "by the book," there are also powerful public-policy reasons to grant this injunction. If an injunction is not granted, then there will be lingering questions about the legitimacy of these results which could otherwise be answered through a

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[82] Wis. Voters All. v. Pence, No. 20-3791, 2021 WL 686359, at *2 (D.D.C. Feb. 19, 2021). Notably, this same counsel was designated as of record in multiple post-election suits filed in Georgia.

[83] Ruling at 6, Ariz. Republican Party v. Fontes, No. CV 2020-014553 (Super. Ct. Maricopa Cnty., Ariz. Mar. 12, 2021) (quoting ARIZ. SEC'Y OF STATE'S OFFICE, ARIZONA ELECTIONS PROCEDURES MANUAL (2019), https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf).

> proper hand count. This is also the basic prejudice that Plaintiff and the voting public will suffer if the Court declines to grant an injunction – it will create a cloud over the legitimacy of this election and its results.
>
> *This* is why the Court raised the question whether the plaintiff brought suit in order to "cast false shadows on the election's legitimacy." Undercutting the election's legitimacy by raising "questions" *is exactly what the plaintiff did in this passage*. It is what the plaintiff does again when it suggests that an adverse ruling on the secretary of state's fee application will cause the public to question the Court's impartiality and undermine respect for the courts. It is a threat to the rule of law posing as an expression of concern. It is direct evidence of bad faith.[84]

Authorities have estimated that lawsuits filed to cast doubt on the 2020 election results cost taxpayers at least $2.2 million nationwide.[85] This amounts to well over $1 million in Georgia alone when including the cost of the hand-count audit and machine recount demanded by the Trump Campaign.[86] Neither estimate includes litigation expense to political entities or private parties, or the effects on productivity and labor of government workers and concerned citizens. The time and treasure poured into efforts to restrict voting before the election and to deem entire counties' or states' votes illegitimate after they had been cast demonstrates that the vote is, to paraphrase the late Congressman John Lewis, a "powerful nonviolent tool" for effecting change in our policies and

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[84] *Id.* at 9 (citations omitted).

[85] Toluse Olorunnipa & Michelle Ye Hee Lee, *Trump's Lie that the Election Was Stolen Has Cost $519 Million (and Counting) as Taxpayers Fund Enhanced Security, Legal Fees, Property Repairs and More*, WASH. POST (Feb. 6, 2021), https://www.washingtonpost.com/politics/interactive/2021/cost-trump-election-fraud/.

[86] David Wickert, Tyler Estep & Meris Lutz, *Georgia Recount Costs Some Counties Hundreds of Thousands of Dollars*, ATLANTA J.-CONST. (Nov. 25, 2020), https://www.ajc.com/politics/election/georgia-recount-costs-some-counties-hundreds-of-thousands-of-dollars/YRMXKBAMTVG3ZMMQ4PW347B5S4/.

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our politics.[87] The 2020 election showed what can happen when the poor, the young, the Black, and other marginalized groups are able to exercise the franchise conveniently and consistently. States such as Georgia and Arizona—long deemed Republican strongholds with Republican governors and majority-Republican legislatures—are now considered "swing states" based largely on the increase in voter participation among the young (18–25) and people of color.[88] As these constituencies become more energized and influential, efforts to suppress their voices and diminish the impact of their votes are likely to become more aggressive. The 2020 election was the first time the nation's courts were petitioned to throw out millions of votes following an election, but unless attorneys and judges are vigilant in employing the rules that are meant to protect the courts from groundless lawsuits, it will not be the last.

IV. CONCLUSION

Chief Justice Roberts recently signaled in *Rucho v. Common Cause* that the federal courts should avoid wading into political waters.[89] But viewed in context, the choice not to weigh in on matters merely because they involve political parties or partisan aims has, itself, a significant policy impact. A state legislature that decides it is in the political interests of the party in control to design districts that dilute the votes of people of color has little incentive to refrain from doing so when preclearance is no longer a concern.[90]

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[87] *John Lewis – Get in the Way: The Right to Vote* (PBS aired Feb. 10, 2017), https://video.wgcu.org/video/john-lewis-get-way-right-vote/.

[88] *Cf.* William H. Frey, *Turnout in 2020 Election Spiked Among Both Democratic and Republican Voting Groups, New Census Data Shows*, BROOKINGS (May 5, 2021), https://www.brookings.edu/research/turnout-in-2020-spiked-among-both-democratic-and-republican-voting-groups-new-census-data-shows/ (analyzing the effect of demographic changes in swing states).

[89] 139 S. Ct. 2484, 2494 (2019) ("The question here is whether there is an 'appropriate role for the Federal Judiciary' in remedying the problem of partisan gerrymandering—whether such claims are claims of *legal* right, resolvable according to legal principles, or political questions that must find their resolution elsewhere." (quoting Gill v. Whitford, 138 S. Ct. 1916, 1926 (2018))).

[90] Indeed, the recent holding in *Brnovich v. Democratic National Committee*, 594 U.S. ____, No. 19-1257, slip op. (July 1, 2021), suggests to these same legislatures that restrictions on the franchise will be upheld by the Court absent direct evidence of intent to discriminate on the basis of race. *See also* Richard L. Hasen, *The Supreme Court's Latest Voting Rights*

Likewise, attorneys who have no expectation of being held accountable for utilizing the courts as a tool to advance corrosive and unfounded conspiracy theories can be expected to continue on that path.

Judges swear an oath to be fair and impartial,[91] but this obligation does not demand complicity in a "both sides" narrative. The courts need not sacrifice their resources or their integrity on the altar of false equivalency or political perception. Parties have a right to counsel, but Rule 11 and similar state court rules require those same attorneys to review potential claims for merit and to make good faith determinations of whether the relief sought is attainable and warranted before signing a pleading. When, as in 2020, parties seeking to advance a political narrative premise claims for unprecedented relief on legal theories that fail to meet minimum standards of good faith and justiciability, their counsel should be held to the legal and professional standards by which they agreed to be bound upon joining the Bar. As a profession, we must enforce the rules enacted to protect the resources and integrity of our courts, or risk having them yoked to anti-voting and anti-democracy narratives undermining free and fair elections for the foreseeable future.

Opinion Is Even Worse Than It Seems, SLATE (July 8, 2021, 10:16 AM) https://slate.com/news-and-politics/2021/07/supreme-court-sam-alito-brnovich-angry.html ("[*Brnovich*] reopens the door to a United States in which states can put up roadblocks to minority voting and engage in voter suppression with few legal consequences once a state has raised tenuous and unsupported concerns about the risk of voter fraud.").

[91] *See Code of Conduct for United States Judges*, U.S. CTS., https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges (last revised Mar. 12, 2019) ("An independent and honorable judiciary is indispensable to justice in our society. A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved."); GEORGIA CODE OF JUDICIAL CONDUCT at 13, https://www.gabar.org/upload/FINAL-CJC-Draft-to-publish-for-comment.pdf (last visited June 21, 2021) (same).

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