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# THE POLITICAL BRANDING OF THE BIG LIE

*Ciara Torres-Spelliscy\**

*This piece will argue that the Roberts Supreme Court's protection of lying and its choice to fence government speech as outside of First Amendment analysis have created a perfect storm for a figure like President Trump to do incredible damage to voting rights specifically and trust in American democracy more generally.*

*In my 2019 book, Political Brands, I explored how commercial branding techniques are being used in politics to sell American voters, politicians, ideas and ideals. Branding includes the targeted repetition of messages until they are accepted as true by an audience, even if the message is a lie, a myth or fantasy.*

*In the months before the 2020 election, experts predicted that because of the COVID-19 pandemic, millions more voters than normal would vote by mail. These experts put out a white paper entitled "Fair Elections During a Crisis" encouraging states to process mail-in votes as early as possible so that there would not be a delay in processing overall votes total. The white paper predicted what is now known as either the Blue Shift or the Red Mirage—that if Republicans voted in person and Democrats voted by mail, that Republicans would appear to "win" on election day, but that once all ballots were processed it was possible for Democrats to actually win.*

*This Blue Shift/Red Mirage indeed happened in the 2020 general election for president. At 2:00 a.m. after the election, President Trump prematurely and incorrectly declared victory. Key swing states like Nevada, Georgia and Pennsylvania took days after the election to process all of their votes. It was Saturday, November 7, 2020 when Biden's victory became clear. President Trump then spent every day since the 2020 election through Biden's inaugural claiming that there was massive voter fraud, voting machines cannot be trusted, and Republicans legislators should appoint pro-Trump electors. His campaign filed multiple lawsuits attempting*

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*to get states to throw out certain votes and, in a particularly bold suit, his campaign attempted to get all votes from Pennsylvania to be thrown out. The courts did not indulge him or his campaign.*

*Trump's failure to concede by itself likely would not cause lasting damage to the American political process. But the nonstop rhetoric during the 28 days (and counting) that his supporters should "stop the steal" of the election, while questioning whether the integrity of the 2020 election had been profoundly undermined by voter fraud or failed voting machines, Trump's rhetoric has the potential to undermine voting rights and trust in American democracy.*

*The longer-term damage that could be is that Trump's fantasy problems will be used as justifications for real voter suppression laws which make voting rules more restrictive.*

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## I. INTRODUCTION

In *Citizens United*, the majority of the U.S. Supreme Court asserted without proof that “[t]he appearance of influence or access [by wealthy political spenders] will not cause the electorate to lose faith in our democracy.”<sup>1</sup> This begs the question, what would make a significant portion of the electorate lose faith in our democracy? Unfortunately, our country would find out ten years after the Supreme Court dismissed the concern.<sup>2</sup> This piece will argue that calculated use of political branding techniques to devalue and cast doubt on the 2020 election was enough to make millions of Americans lose faith in the democratic process.

This piece is not about the ways in which American democracy was teetering on a knife’s edge during November 4, 2020 through January 20, 2021 (the “post-election period.”). Rather, this piece is about the ways that the judiciary facilitated such a series of events. The loss of faith in the democratic process for millions and the subsequent violent attack on the Capitol did not happen in a vacuum. The legal framework laid down by the Roberts Supreme Court enabled this outcome. The Court’s solicitude for lying, and its redefinition of political corruption, as well as its expansion of the government speech doctrine, were all contributing factors.

Scholar Helen Norton warned about the particular dangers posed by government officials using their bully pulpits to spread lies.<sup>3</sup> As she once wrote,

[t]he government’s falsehoods . . . inflict democratic harm when they deny the public the information necessary to hold the government accountable for its misconduct, undermine citizens’ ability to make informed voting choices, sabotage the policymaking process when participants cannot rely on others’ assertions, and foster public cynicism about (and disengagement from) democratic self-governance.<sup>4</sup>

This accurately describes precisely what happened in the immediate aftermath of the 2020 presidential election in the post-election period. During this time, the lame-duck president Donald Trump told a series of lies that cast such doubt on

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1. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 360 (2010).

2. Jim Rutenberg, Nick Corasaniti & Alan Feuer, *Trump’s Fraud Claims Died in Court, but the Myth of Stolen Elections Lives On*, N.Y. TIMES (Oct. 11, 2021), <https://www.nytimes.com/2020/12/26/us/politics/republicans-voter-fraud.html> [https://perma.cc/T2FG-L59T].

3. See generally Helen Norton, *Government Falsehoods, Democratic Harm, and the Constitution*, 82 OHIO ST. L.J. ONLINE 1, 3 (2021).

4. *Id.*

the legitimacy of his electoral loss, then hundreds of his followers stormed the Capitol on January 6, 2021 (“J6”) to try to stop the legal transfer of power to his successor, Joe Biden.<sup>5</sup>

In the waning days of the Trump administration, the mendacity that had characterized Donald Trump’s previous four years in political life returned to a familiar target: the integrity of the presidential electoral process. Throughout the 2020 election, President Trump attacked vote-by-mail, he attacked voting machines, he attacked ballot drop boxes, and he attacked elections officials.<sup>6</sup> Then, when he lost the election in November of 2020, he aggregated his criticisms into one big lie (that I will refer to here as the “Big Lie”) that he was the true victor of the 2020 election.<sup>7</sup> He was not.<sup>8</sup> Biden won the 2020 election with 306 electoral college votes to Trump’s 232.<sup>9</sup> Biden also won the popular vote 81,268,924 to Trump’s 74,216,154.<sup>10</sup>

Trump is clearly not the first president or politician to use lying to keep or gain power. Whenever those in power in a democracy lie, they risk undermining the entire democratic process. As Professor Norton opined: “the government’s intentional or reckless falsehoods can frustrate democratic self-governance when they deny the public the information it needs to hold the government accountable for its performance. Think, for example, of the government’s lies told to stymie political and legal accountability for its misconduct.”<sup>11</sup> Meanwhile, lies during an ongoing election can pack a particularly powerful punch. As Professor Joshua Sellers warned: “[L]ying in campaigns and elections is harmful to democracy. As

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5. Jim Rutenberg et. al., *77 Days: Trump’s Campaign to Subvert the Election*, N.Y. TIMES (June 15, 2021), <https://www.nytimes.com/2021/01/31/us/trump-election-lie.html> [https://perma.cc/V6JV-ZVMM].

6. William Cummings, *Fact Check: 5 Falsehoods Trump Repeated at CPAC, from Election Fraud to Texas’ Wind Power*, USA TODAY (Mar. 1, 2021, 4:06 PM), <https://www.usatoday.com/story/news/politics/2021/03/01/donald-trump-cpac-2021-speech-fact-check-election-texas-wind-turbines/6866838002/> [https://perma.cc/J8TJ-QZBC] (“Unfounded claims of election fraud are a staple of Trump’s politics.”).

7. Eric Lutz, *Lindsey Graham Takes His Trump Fealty To A New Level*, VANITY FAIR (Nov. 17, 2020), <https://www.vanityfair.com/news/2020/11/lindsey-graham-throw-out-ballots-georgia> [https://perma.cc/2WZ6-PNKS] (“Republicans have stubbornly avoided recognizing that reality, unwilling to gall Donald Trump, who won’t concede and publicly insists he was the victim of a massive voter fraud conspiracy.”); Ashley Collman, *Mary Trump Said That She Thinks That Her Uncle Genuinely Believes He Won the Election and That He’s the Only Person She Knows Who Can Gaslight Himself*, BUS. INSIDER (Dec. 3, 2020, 5:26 AM), <https://www.businessinsider.com/mary-trump-president-gaslighting-himself-thinks-he-won-election-2020-12> [https://perma.cc/2RF9-WH7K] (“The president has alleged that Biden stole the election through widespread voter fraud, but his own attorney general, Bill Barr, told The Associated Press on Tuesday that the Justice Department had uncovered no evidence of such fraud that would change the outcome of the election.”).

8. FED. ELECTION COMM’N, OFFICIAL 2020 PRESIDENTIAL GENERAL ELECTION RESULTS, <https://www.fec.gov/resources/cms-content/documents/2020presgeresults.pdf> (last visited Aug. 5, 2022) [https://perma.cc/MN7G-AX5A]. See Martin H. Redish & Julio Pereyra, *Resolving the First Amendment’s Civil War: Political Fraud and the Democratic Goals of Free Expression*, 62 ARIZ. L. REV. 451, 453–54 (2020) (“[E]xtending First Amendment protection to false speech in the political process may also encourage those who are intent on distorting the democratic process to defraud the voters into making misguided choices on the basis of factually inaccurate information.”).

9. FED. ELECTION COMM’N, *supra* note 8, at 1.

10. *Id.* at 2, 8.

11. Norton, *supra* note 3, at 2.

we now know all too well, people are often highly, and perhaps uniquely, susceptible to political lies.”<sup>12</sup>

Trump’s Big Lie was accomplished with a particularly savvy use of commercial branding techniques of repetition, reinforcement, and emotion. The results were stunning and unmistakable: not only had he convinced the hundreds of people who rioted at the Capitol on January 6th, he had also convinced millions of Americans as well.<sup>13</sup> Right after the January 6th insurrection at the Capitol, polling showed:

72 percent of likely Republican voters said they continue to question the presidential election results. Nearly three-quarters of Republicans, or 74 percent, said allegations of voter fraud have contributed to these concerns. Those are overwhelming majorities, but even among independents, 42 percent said they do not currently trust the election results.<sup>14</sup>

Months after the 2020 election, 88% of Trump’s followers believe the 2020 election was stolen.<sup>15</sup> As Pew reported with some dismay, “[d]espite scores of failed legal challenges, numerous recounts and Congress’ confirmation of Joe Biden’s Electoral College victory, a large majority of those who voted for Donald Trump incorrectly say their candidate received the most votes cast by eligible voters in enough states to win the election.”<sup>16</sup> And Pew added troublingly, “[o]nly 7% of Trump voters concede that Biden [the actual winner] definitely won the 2020 election.”<sup>17</sup> By October 2021, a poll revealed that “[s]ixty-one percent of Trump’s supporters believe[d] the presidential election results should be overturned, nearly the same percentage of Republicans who hold that view.”<sup>18</sup>

Trump didn’t lie alone. Rather, a whole cavalcade of lawyers, conservative media figures, and Republican elected officials amplified and repeated the Big Lie, thereby poisoning the perceptions of millions of their followers.<sup>19</sup> As the Senate Judiciary Committee would later conclude:

Trump’s efforts to lay the foundation of the ‘Big Lie’ preceded the general election by several months; Attorney General Barr inserted DOJ into that

12. Joshua S. Sellers, *Legislating Against Lying in Campaigns and Elections*, 71 OKLA. L. REV. 141, 164 (2018).

13. Li Zhou, *About Half of Republicans Don’t Think Joe Biden Should Be Sworn in as President*, VOX (Jan. 11, 2021, 6:50 PM), <https://www.vox.com/2021/1/11/22225531/joe-biden-trump-capitol-inauguration> [<https://perma.cc/BU49-3DBL>].

14. *Id.*

15. *Voters’ Reflections on the 2020 Election*, PEW RSCH. CTR. (Jan. 15, 2021), <https://www.pewresearch.org/politics/2021/01/15/voters-reflections-on-the-2020-election/> [<https://perma.cc/E47D-MLFB>] (“[W]hile 88% of very conservative Trump voters incorrectly say he definitely or probably won, including 56% who say he definitely won, so too do 77% of conservative Trump supporters and 65% of moderate and liberal Trump voters.”).

16. *Id.*

17. *Id.*

18. Jenni Fink, *A Third of Voters Think 2020 Election Should Be Overturned, but Fewer Think It Will Be*, NEWSWEEK (Oct. 27, 2021, 11:02 AM), <https://www.newsweek.com/third-voters-think-2020-election-should-overturned-fewer-think-it-will-1643093> [<https://perma.cc/ET64-GGJ6>].

19. *Id.; see also* Luke Broadwater, *Jan 6. Panel Subpoenas Lawyers Who Worked to Overturn Trump’s Loss*, N.Y. TIMES (Mar. 1, 2022), <https://www.nytimes.com/2022/03/01/us/politics/jan-6-subpoenas-trump.html> [<https://perma.cc/QVX5-LUDP>].

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initial effort through various public remarks and actions prior to November 3, 2020 that cast doubt on voting by mail procedures implemented to facilitate exercise of the franchise during the worst public health crisis in a century.<sup>20</sup>

The inability to hold fabulists liable under the law is lauded by some in the legal academy, who have argued that “where false statements have been provided First Amendment immunity [by the courts], most scholars seem to believe that the risk of increased circulation of falsehoods is worth the sacrifice to avoid the chilling effects that permitting sanctions for falsehoods would have on the circulation of true statements.”<sup>21</sup> This piece will argue the contrary, that the Roberts Supreme Court’s protection of lying and its choice to fence government speech as outside of First Amendment analysis have created a perfect storm for a figure like President Trump to do incredible damage to voting rights specifically, and to trust in American democracy more generally.<sup>22</sup> This piece will further argue that the events surrounding the 2020 election and the ensuing violent insurrection at the U.S. Capitol on January 6, 2021, demonstrates that all lies are not created equal and that the Supreme Court should do more to protect the integrity of the democratic process as it does to protect the integrity of the judiciary.<sup>23</sup> Just as the Court rightly realizes that perjury erodes the public’s faith in the judiciary, the Court should recognize that lies about elections harm the public’s faith in America’s democracy.<sup>24</sup>

This is how this piece will proceed. Part II will outline the legal landscape created by Supreme Court and circuit court decisions that demonstrate how the judiciary polices perjury and the ethics of lawyers while they simultaneously turn a blind eye to political lies and corruption. Part III explains what happened during the 2020 election, which took place during a pandemic, as well as what caused the Red Mirage. Part IV will cover the post-election period before the inauguration of Biden as the 46th president, including bad faith litigations by Trump’s

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20. *Subverting Justice: How the Former President and His Allies Pressured DOJ to Overturn the 2020 Election*, SENATE COMM. ON THE JUDICIARY 1, at 5 (Oct. 7, 2021), <https://www.judiciary.senate.gov/imo/media/doc/Interim%20Staff%20Report%20FINAL.pdf> [<https://perma.cc/L9D2-7BEQ>]; see also *Here’s Every Word of the First Jan. 6 Committee Hearing on Its Investigation*, NPR (June 10, 2022, 1:27 PM), <https://www.npr.org/2022/06/10/1104156949/jan-6-committee-hearing-transcript> [<https://perma.cc/SEGF-VUGG>] (quoting ex-Attorney General William Barr) (“[I] [r]epeatedly told the President in no uncertain terms that I did not see evidence of fraud. And—you know, that would have affected the outcome of the election.”).

21. Jonathan D. Varat, *Truth, Courage, and Other Human Dispositions: Reflections of Falsehoods and the First Amendment*, 71 OKLA. L. REV. 35, 37 (2018).

22. Hannah Jacobs Wiseman, Samuel Wiseman & David Landau, *Federalism, Democracy, and the 2020 Election*, 99 TEX. L. REV. ONLINE, 96, 99 (2020–2021) (“[I]n the wake of former President Trump’s determined effort to refute the election, experts have described recent events as ‘one of the gravest threats to democracy,’ noting that they ‘never would have imagined seeing something like this in America.’”).

23. Zoe Tillman, *Trump Gave Capitol Rioters the Language to Defend the Insurrection and Deny Reality*, BUZZFEED NEWS, (July 17, 2021, 11:01 AM), <https://www.buzzfeednews.com/article/zoeftillman/january-six-suspects-trump-statements> [<https://perma.cc/GY2N-AKM4>] (“The 500-plus criminal cases filed so far in connection with the insurrection are peppered with Trumpian turns of phrase going back to the 2016 campaign.”).

24. The Supreme Court should try to protect both institutions. See Helen Norton, *(At Least) Thirteen Ways of Looking at Election Lies*, 71 OKLA. L. REV. 117, 127 (2018) (“Some election lies seek not to persuade the listener that a particular false assertion is in fact true, but instead to inculcate listeners’ cynicism and doubt about the possibility of truth and thus undermine democratic institutions more generally.”).

side to overturn the electoral results of the 2020 election and the violent insurrection at the Capitol to accomplish the same goal. Part V will address the long-term consequences of these events including widespread changes to voting laws which restrict voting rights of Americans.

## II. THE LEGAL LANDSCAPE

### A. *The Judiciary: Where Lies Carry Consequences*

The judiciary is self-protective. One of the primary ways the judiciary protects itself is by allowing lies by litigants and witnesses to courts to be punished.<sup>25</sup> As will be explained below in Section II.B., everyday life (including elections) does not have this protection.

#### 1. *The Supreme Court's View of the Integrity of the Judiciary*

The need to defend the integrity of the judiciary has been present in American legal doctrine since the founding. Alexander Hamilton's conceptualization of the judiciary was articulated in *Federalist 78*:

The judiciary... has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment... [Thus,] the judiciary is beyond comparison the weakest of the three departments [or branches] of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks.<sup>26</sup>

Because “[t]he operations of the courts and the judicial conduct of judges are matters of utmost public concern[,]”<sup>27</sup> the Supreme Court frequently opines on the need to protect the integrity of the judiciary as well as to foster the public’s view that the judiciary is above reproach. The Supreme Court in the 1954 case

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25. See 18 U.S.C. § 1621 (describing the penalty for committing perjury).

26. See *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 445 (2015) (“The importance of public confidence in the integrity of judges stems from the place of the judiciary in the government. Unlike the executive or the legislature, the judiciary ‘has no influence over either the sword or the purse; . . . neither force nor will but merely judgment.’”) (quoting THE FEDERALIST NO. 78 [Alexander Hamilton]); see also *Evans v. Gore*, 253 U.S. 245, 249-50 (1920), *overruled by* *United States v. Hatter*, 532 U.S. 557 (2001) (“The particular need for making the judiciary independent was elaborately pointed out by Alexander Hamilton in the Federalist, No. 78, from which we excerpt the following: ‘The executive not only dispenses the honors, but holds the sword of the community. The Legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment . . . This simple view of the matter suggests several important consequences. It proves incontestably that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks.’”) (quoting THE FEDERALIST NO. 78 [Alexander Hamilton]).

27. *Landmark Commc’ns, Inc. v. Virginia.*, 435 U.S. 829, 839 (1978); see also *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) (“What transpires in the court room is public property.” (quoting *Craig v. Harney*, 331 U.S. 367, 374 (1947))).

about a lawyer's contempt, *Offutt v. United States*, stated that a separate judge from the trial judge should preside over contempt questions because "justice must satisfy the appearance of justice."<sup>28</sup>

In his concurrence in *Republican Party of Minnesota v. White*, Justice Kennedy stated in 2002,

[c]ourts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order.<sup>29</sup>

Writing for the majority in *Caperton v. Massey* in 2009, Justice Kennedy further stated that recusal by an elected judge when a major campaign contributor was a litigant was constitutionally required as a matter of procedural due process in circumstances "in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable."<sup>30</sup> Justice Kennedy added in *Caperton* that judicial rules and canons on recusal "serve to maintain the integrity of the judiciary and the rule of law."<sup>31</sup>

In other cases, the Supreme Court grounds its authority in its nonpartisanship. For example, in *Mistretta v. United States* in 1989, the Supreme Court noted that "[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."<sup>32</sup> Earlier in *Baker v. Carr*, the Court asserted (alluding to Hamilton once again) that,

[t]he Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.<sup>33</sup>

And in 1991 in *Gentile v. State Bar of Nevada*, the Court stated that the judiciary was a key aspect of American democracy noting that: "[t]he judicial system, and in particular our criminal justice courts, play a vital part in a democratic state, and the public has a legitimate interest in their operations."<sup>34</sup> Thus, the Court noted the importance of the press and the public having access to the courts: "[i]n *Sheppard v. Maxwell* . . . we reminded that '[t]he press . . . guards

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28. 348 U.S. 11, 14 (1954).

29. 536 U.S. 765, 793 (2002) (Kennedy, J., concurring).

30. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 877 (2009) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

31. *Id.* at 888–89 (discussing the ABA Model Code & West Virginia Code of Judicial Conduct).

32. 488 U.S. 361, 407 (1989).

33. 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).

34. 501 U.S. 1030, 1035 (1991); *see also id.* at 1035–36 ("Public awareness and criticism have even greater importance where, as here, they concern allegations of police corruption, . . . or where, as is also the present circumstance, the criticism questions the judgment of an elected public prosecutor.").

against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.”<sup>35</sup>

The Supreme Court has also tried to protect the judiciary from being infected by racism, not just because racism is inherently problematic, but rather because it makes the judiciary look unscrupulous in the eyes of a racially diverse public. As the Supreme Court concluded in *Buck v. Davis* in 2017, “[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.”<sup>36</sup> Moreover, the *Buck* Court noted that “[r]elying on race to impose a criminal sanction ‘poisons public confidence’ in the judicial process.”<sup>37</sup> And as a consequence, the use of race in a death penalty case “injures not just the defendant, but ‘the law as an institution, . . . the community at large, and . . . the democratic ideal reflected in the processes of our courts.’”<sup>38</sup> Thus, the courts have taken pains to reduce the incidence of the bias produced by racism to bolster the integrity of the courts in the minds of the public. Moreover, in *Buck*, the Supreme Court emphasized that unbiased courts are part of a “democratic ideal.”

The judiciary also has special campaign finance rules to keep money from negatively impacting the public view of elected judges. In *Williams-Yulee v. Florida Bar*, a 2015 case considering a personal solicitation ban on elected Florida judges, the Supreme Court stated that the purpose of the ban, which was enacted after a political scandal involving elected Florida Supreme Court Justices and dog racing, was to maintain public confidence in courts.<sup>39</sup> As the *Williams-Yulee* opinion written by Chief Justice Roberts stated, “[i]n an effort to preserve public confidence in the integrity of their judiciaries, many . . . States prohibit judges and judicial candidates from personally soliciting funds for their campaigns.”<sup>40</sup> Moreover that,

the [Florida Supreme C]ourt reasoned, prohibiting judicial candidates from personally soliciting funds furthers Florida’s compelling interest in “preserving the integrity of [its] judiciary and maintaining the public’s confidence in an impartial judiciary.” In the court’s view, “personal solicitation of campaign funds, even by mass mailing, raises an appearance of impropriety and calls into question, in the public’s mind, the judge’s impartiality.”<sup>41</sup>

The Supreme Court thus concluded in *Williams-Yulee*, “[j]udges, charged with exercising strict neutrality and independence, cannot supplicate campaign

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35. *Id.* at 1035 (internal citation omitted).

36. 137 S. Ct. 759, 778 (2017) (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979) (internal quotation marks omitted)).

37. *Id.* (quoting *Davis v. Ayala*, 576 U.S. 257, 285 (2015)).

38. *Id.* (quoting *Rose v. Mitchell*, 443 U.S. 545, 556 (1979)); *see also Hobby v. United States*, 468 U.S. 339, 352 (1984) (Marshall, J., dissenting) (“There is good reason why public confidence in the integrity of the judiciary is diminished whenever invidious prejudice seeps into its processes. This diminution of confidence largely stems from a recognition that the institutions of criminal justice serve purposes independent of accurate factfinding.”).

39. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 437 (2015).

40. *Id.*

41. *Id.* at 441.

donors without diminishing public confidence in judicial integrity[]”<sup>42</sup> and that “States have concluded that the public may lack confidence in a judge’s ability to administer justice without fear or favor if he comes to office by asking for favors.”<sup>43</sup> Taken as a whole, these cases evidence the Supreme Court’s ongoing concern with the public’s perception of the integrity of the judiciary.

## 2. *The Supreme Court’s View of Perjury*

One of the ways the federal judiciary and the Supreme Court maintain the integrity of its proceedings is by punishing and policing perjurious lies. The Supreme Court clearly does not want litigants lying to them. In 1986, the Supreme Court in *Nix v. Whiteside*, citing an older case called *Harris*, noted the importance of testifying truthfully in court:

Whatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying falsely. In *Harris v. New York*, we assumed the right of an accused to testify “in his own defense, or to refuse to do so” and went on to hold: “[T]hat privilege cannot be construed to include the right to commit perjury. . . . Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully.”<sup>44</sup>

The Supreme Court clarified in *U.S. v. Dunnigan* in 1993 that perjury could result in longer prison sentences.<sup>45</sup> The definition of perjury is found in 18 U.S.C. § 1621.<sup>46</sup> Thus,

[a] witness testifying under oath or affirmation violates this statute if she gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory. This federal definition of perjury by a witness has remained unchanged in its material respects for over a century.<sup>47</sup>

As the Court explained in *Dunnigan*, “[t]he commission of perjury is of obvious relevance . . . because it reflects on a defendant’s criminal history, on her willingness to accept the commands of the law and the authority of the court, and on her character in general.”<sup>48</sup>

And even in *Alvarez*, a case in which a plurality of the Supreme Court sided with a fabulist who had violated the federal Stolen Valor Act that will be discussed in more detail below, the Court made clear that holding was not meant to

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42. *Id.* at 445.

43. *Id.*

44. *Nix v. Whiteside*, 475 U.S. 157, 173 (1986) (cleaned up) (quoting *Harris v. New York*, 401 U.S. 222, 225 (1971)).

45. *United States v. Dunnigan*, 507 U.S. 87, 88–89 (1993) (“The question presented is whether the Constitution permits a court to enhance a defendant’s sentence under United States Sentencing Commission, Guidelines Manual § 3C1.1 (Nov.1989), if the court finds the defendant committed perjury at trial. We answer in the affirmative.”).

46. 18 U.S.C. § 1621.

47. *United States v. Dunnigan*, 507 U.S. 87, 94 (1993) (internal citations omitted).

48. *Id.* at 94.

curb the ability of courts to punish perjury consistent with the First Amendment. As the Supreme Court asserted in *Alvarez*,

[i]t is not simply because perjured statements are false that they lack First Amendment protection. Perjured testimony “is at war with justice” because it can cause a court to render a “judgment not resting on truth.” Perjury undermines the function and province of the law and threatens the integrity of judgments that are the basis of the legal system. Unlike speech in other contexts, testimony under oath has the formality and gravity necessary to remind the witness that his or her statements will be the basis for official governmental action, action that often affects the rights and liberties of others.<sup>49</sup>

Thus, the plurality of the Supreme Court in *Alvarez* reaffirmed *Dunnigan* and thereby reserved the ability of the judiciary to prohibit false speech in the very case that it limited Congress’s ability to do the very same thing through a statute like the Stolen Valor Act. Or, as Rodney A. Smolla noted in *Alvarez*, “[s]worn testimony, the plurality reasoned, is thus distinct from the ordinary lie ‘simply intended to puff up oneself.’”<sup>50</sup>

### 3. *Lawyers’ Ethics*

The judiciary also protects the honor of judicial proceedings by holding lawyers to high ethical standards and by sanctioning deceptive or abusive behavior by litigators. The Supreme Court in *Gentile* explained that lawyers during litigation have reduced First Amendment speech rights, thus they can be subject to bar rules that limit the lawyer’s speech, which are

designed to protect the integrity and fairness of a State’s judicial system, and it imposes only narrow and necessary limitations on lawyers’ speech. The limitations are aimed at two principal evils: (1) comments that are likely to influence the actual outcome of the trial, and (2) comments that are likely to prejudice the jury venire, even if an untainted panel can ultimately be found.<sup>51</sup>

In applying holdings from the Supreme Court case *Gentile v. State Bar of Nevada*, the Sixth Circuit stated that attorneys’ rights to free speech under the First Amendment while litigating an action “is extremely circumscribed.”<sup>52</sup> As the Sixth Circuit explained in *Mezibov*:

It is not surprising that courts have thus far been reluctant to allow the First Amendment to intrude into the courtroom. At first blush, the courtroom seems like the quintessential arena for public debate, but upon closer analysis, it is clear this is not, and never has been, an arena for free debate. . . . An attorney’s speech in court and in motion papers has always been tightly

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49. United States v. Alvarez, 567 U.S. 709, 720–21 (2012) (citations omitted).

50. Rodney A. Smolla, *Categories, Tiers of Review, and the Roiling Sea of Free Speech Doctrine and Principle: A Methodological Critique* of United States v. Alvarez, 76 ALB. L. REV. 499, 517 (2012) (quoting *Alvarez*, 567 U.S. at 721).

51. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075 (1991) (discussing Rule 177).

52. *Mezibov v. Allen*, 411 F.3d 712, 717 (6th Cir. 2005) (quoting *Gentile*, 501 U.S. at 1071).

cabinet by various procedural and evidentiary rules, along with the heavy hand of judicial discretion. . . . [and in] [t]he courtroom[,] . . . the First Amendment rights of everyone (attorneys included) are at their constitutional nadir.<sup>53</sup>

Thus, the Sixth Circuit has “see[n] no basis for concluding that . . . free speech rights are violated by a restriction on that expression.”<sup>54</sup> Holding lawyers to ethical norms helps ensure that justice is served.

### B. The Political Branches and the States Where Lying Is Alive and Well

Trump had an enabler in his mendacity that is under-appreciated—the Supreme Court and its recent jurisprudence allowing lies from public officials to carry zero legal consequences. The permissive way the Supreme Court treats lying to the general public is in stark contrast to the way the high court has treated lying to judges or courts. Perjury—or lying under oath—is still prosecutable and punishable.<sup>55</sup> As demonstrated above, the Supreme Court gets very flowery in its language about the importance of judicial integrity. But outside the context of courtrooms and perjury, the Supreme Court seems quite comfortable with elected officials, appointed government employees, and public servants lying directly to the public about their own corrupt or questionable actions. The Supreme Court has excused the lies of public servants in *Alvarez*, *McDonnell*, and *Kelly*.<sup>56</sup> And the Supreme Court and other federal courts also paved the way for lying in elections in *Susan B. Anthony List v. Driehaus*, *Care Committee v. Arneson*, *Commonwealth v. Lucas*, and *Rickert v. State Public Disclosure Commission*.<sup>57</sup>

#### I. Lying Public Servants

##### a. U.S. v. Alvarez

The law before *Alvarez* was quite different. As Professor Jonathan D. Varat noted, “until 2012 the Supreme Court had not extended First Amendment protection to lies—that is, false statements that the speaker knows to be false when uttered.”<sup>58</sup> In *U.S. v. Alvarez*, the Supreme Court considered the actions of one Xavier Alvarez, an elected official and seemingly a pathological liar.<sup>59</sup> Alvarez was an elected Three Valleys Municipal Water District board member. Among many of his lies was the false claim that he had won the Congressional Medal of

53. *Id.* at 717–18 (citations omitted).

54. *Id.* at 719.

55. See 18 U.S.C. § 1621. See also, e.g., *United States v. Alvarez*, 567 U.S. 709, 730 (2012).

56. See discussion *infra* Subsection II.B.1.

57. See *Susan B. Anthony List v. Ohio Elections Comm'n*, 45 F. Supp. 3d 765, 781 (S.D. Ohio 2014); 281 Care Comm. v. Arneson, 766 F.3d 774, 785 (8th Cir. 2014); see also *Commonwealth v. Lucas*, 34 N.E.3d 1242, 1257 (2015); *Rickert v. State, Pub. Disclosure Comm'n*, 168 P.3d 826, 832 (2007).

58. Varat, *supra* note 21, at 39.

59. *Alvarez*, 567 U.S. at 713.

Honor.<sup>60</sup> He had not.<sup>61</sup> And this particular lie ran afoul of a federal statute known as the Stolen Valor Act.<sup>62</sup> His lie was exposed by a woman who was a Marine veteran.<sup>63</sup> The Supreme Court sided with the liar Alvarez and said that he could not be penalized for his false speech about Congressional honor that he never earned.<sup>64</sup> Mr. Alvarez won at the Supreme Court not because he was sympathetic, but rather because the Court worried that having government rules against lying could chill truthful speech.<sup>65</sup> As Helen Norton wrote about *Alvarez*, “[a]ll of the Justices in *Alvarez* agreed that the government’s punishment even of intentional lies may sometimes unacceptably chill truthful, and thus valuable, speech.”<sup>66</sup> And for those who buy the marketplace of ideas as a workable model of reality, this construct fits right in. As David Han argued, “[t]he Court also endorsed, in a footnote, John Stuart Mill’s argument that ‘[e]ven a false statement may be deemed to make a valuable contribution to public debate,’ as a false statement can bring about ‘the clearer perception and livelier impression of truth, produced by its collision with error.’”<sup>67</sup>

Moreover, the Supreme Court distinguished the lies in *Alvarez* from other lies that the Supreme Court had not protected in other cases. As Professors Martin Redish and Julio Pereyra noted, “[r]ejecting the Government’s argument that ‘false statements have no value and hence no First Amendment protection,’ Justice Kennedy limited language in previous opinions expressing this view by noting that those statements ‘all derive[d] from cases discussing defamation, fraud, or some other legally cognizable harm associated with a false statement.’”<sup>68</sup> This seems to beg the question of why Mr. Alvarez’s lies are not considered a species of fraud.

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60. *Id.* at 714.

61. *Id.*

62. 18 U.S.C. § 704; see also Mark Tushnet, “*Telling Me Lies*: The Constitutionality of Regulating False Statements of Fact 20 (Harv. Pub. L., Working Paper No. 11-02, Jan. 23, 2011) (“Consider that argument that statements covered by the Stolen Valor Act are ideologically inflected: Not everyone would think that making a false statement about having won a military honor is a matter of any concern whatever; they would see it as roughly on a par with false statements about having finished first in a high school 100-meter race.”).

63. Jim McElhatton, *Exposer in Stolen Valor Case Fired 10-year Marine Heard Boasts as Corporate Host*, WASH. TIMES (Mar. 6, 2012), <https://www.washingtontimes.com/news/2012/mar/6/exposer-in-stolen-valor-case-fired/> [https://perma.cc/SMSK-62BK].

64. Alan K. Chen & Justin Marceau, *Developing a Taxonomy of Lies Under the First Amendment*, 89 U. COLO. L. REV. 655, 656 (2018) (“The decision rejected the government’s claim that lies are a form of speech that is categorically outside the scope of the First Amendment’s coverage.”); *id.* at 663 (“Instead of a general rule against speech protection for lies, *Alvarez* suggests a presumption that lies are covered by the First Amendment.”) (emphasis in original).

65. *Alvarez*, 567 U.S. at 723.

66. Helen Norton, *Lies and the Constitution*, 2012 SUP. CT. REV. 161, 170 (2012).

67. David S. Han, *Autobiographical Lies and the First Amendment’s Protection of Self-Defining Speech*, 87 N.Y.U. L. REV. 70, 75–76 (2012).

68. Martin H. Redish & Julio Pereyra, *Resolving the First Amendment’s Civil War: Political Fraud and the Democratic Goals of Free Expression*, 62 ARIZ. L. REV. 451, 466 (2020).

Certain scholars have criticized the *Alvarez* opinion for its opaqueness. As Rodney Smolla stated:

The plurality, in short, seemed to move back and forth between its “categorical” approach to the case, a methodology under which the government lost because the Stolen Valor Act did not fit into any existing categorical exception to First Amendment protection, and a not very clearly defined level of scrutiny, which it seemed to employ to determine whether a new category of unprotected speech should be recognized.<sup>69</sup>

Additionally, Professors Alan K. Chen and Justin Marceau complained that, “beyond historically clear examples that meet this standard, such as fraud, it is unclear after *Alvarez* precisely how to determine when a particular category of lie causes sufficient harm to the listener or produces enough benefit to the speaker such that its regulation is not subject to constitutional scrutiny.”<sup>70</sup> Finally, Professor Norton observed, “[i]n three separate opinions, all of the Justices agreed that the First Amendment permits the government to punish at least some lies, but no majority approach emerged for determining more specifically which lies can be prohibited consistent with the Constitution.”<sup>71</sup>

*Alvarez* leaves a mess for future courts and future litigants to navigate since “[a]fter *Alvarez*, lies may be presumptively covered by the First Amendment, but it is also clear that not all lies are covered.”<sup>72</sup> Some scholars posit that the way to read *Alvarez* is that: “[t]he Court’s reasoning in these cases therefore reflects an understanding that the interest in individual self-definition carries some constitutional weight under the First Amendment: At a certain point, the government cannot constitutionally interfere with an individual’s right to define himself by his own speech.”<sup>73</sup> The Big Lie, however, shows the dangerous limits to this approach. Donald Trump surely wishes he had won reelection. He did not, and no amount of lying can change that aspect of his autobiography.

The epilogue to *Alvarez* is he ended up in prison for a different fraud. In 2009, Xavier Alvarez was sentenced to five years in prison for defrauding the Three Valleys Municipal Water District where he was an elected member until his conviction.<sup>74</sup>

#### b. *McDonnell v. U.S.*

In *McDonnell v. U.S.*, the Supreme Court considered the conviction of Republican ex-Governor of Virginia Bob McDonnell.<sup>75</sup> The center of the *McDonnell* case was not lying per se, it was the allegation that a businessman named Jonnie Williams had given the governor, his wife, and his family expensive gifts

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69. Smolla, *supra* note 50, at 513.

70. Chen & Marceau, *supra* note 64, at 657.

71. Norton, *supra* note 66, at 162.

72. Chen & Marceau, *supra* note 64, at 674.

73. Han, *supra* note 67, at 107.

74. Wes Woods II, *Board to Discuss Replacing Alvarez*, DAILY NEWS, <https://www.dailynews.com/2009/10/04/board-to-discuss-replacing-alvarez/> (Aug. 8, 2017, 11:20 A.M.) [<https://perma.cc/E8GF-TVVM>].

75. *McDonnell v. United States*, 579 U.S. 550, 555–56 (2016).

and money in exchange for the governor's opening doors to Williams to sell a questionable tobacco-based pill called Anatabloc to employees of the Commonwealth of Virginia.<sup>76</sup> For many, this was a case of rank political corruption richly deserving of prosecution, and for others, it was prosecutorial overreach by the DOJ.<sup>77</sup> There was some lying and subterfuge in the McDonnells' story that led to their joint prosecution.<sup>78</sup> As Henry Chambers Jr. details, "the indictment states that the McDonnells attempted to conceal the nature and extent of their financial relationship with Williams."<sup>79</sup> Ms. McDonnell for example, as the First Lady of Virginia, "falsely stated in an interview with law enforcement officers that Governor McDonnell and Williams first met well before his gubernatorial campaign."<sup>80</sup> Additionally, "she drafted and sent a misleading note to Williams that was apparently meant to suggest that certain gifts of clothing were merely loans of clothing."<sup>81</sup>

The Governor and his wife were both convicted by a jury, the Governor's convictions affirmed by the Fourth Circuit, only to have his overturned at the Supreme Court.<sup>82</sup> The Court reasoned that the Governor would have set up meetings for any constituent, and thus, what the Governor had done for Williams was not an official act within the meaning of the bribery statutes, even if Williams had showered the Governor and his wife with cash and expensive gifts including a Rolex watch.<sup>83</sup> The Supreme Court rejected the government's justifications to prosecute Governor McDonnell.<sup>84</sup> As Professor Robert Roberts explained, "Chief Justice Roberts argued that 'in the Government's view, nearly anything a public official accepts—from a campaign contribution to lunch—counts as a

76. Philip Bump, *The Governor, His Wife, Their Cook, and the FBI*, ATLANTIC (Apr. 30, 2013), <https://www.theatlantic.com/national/archive/2013/04/bob-mcdonnell-fbi/315783/> [https://perma.cc/JB4X-7388] (outlining the alleged relationship among Williams and the McDonnell family); Jeffrey A. White, *McDonnell's Misapprehension of the Role of Access in Politics and Public Corruption*, 96 N.C. L. REV 1175, 1182 (2018) ("The public is likely to view *McDonnell* as the Supreme Court unanimously permitting—and implicitly supporting—a state's highest public officer maintaining distasteful and tawdry relationships like this.").

77. Henry L. Chambers Jr., *The McDonnell Case: A Clarification of Corruption Law or a Confusing Application of Corruption Law*, 50 U. RICH. L. REV. 237, 238 (2015) ("The indictment and subsequent convictions sent shockwaves through the Virginia political establishment, with some claiming that the government had sought to criminalize politics as usual, and others claiming that the government had merely aggressively pursued corruption."); Lynn Adelman, *The Supreme Court and the Corruption of Democracy*, 38 RARITAN 6, 12 (2019) ("*McDonnell* was also a victory for the criminalization-of-politics critique, the notion promoted by conservatives in recent years that federal prosecutors have too aggressively prosecuted normal political activity that should be left to the judgement of the electorate.").

78. Chambers, *supra* note 77, at 243–44.

79. *Id.* at 243.

80. *Id.* at 244.

81. *Id.*

82. *McDonnell v. United States*, 579 U.S. 550, 556, 580 (2016).

83. George D. Brown, *McDonnell and the Criminalization of Politics*, 5 VA J. CRIM. L. 1, 5 (2017) ("These are the sorts of things that politicians do for constituents all the time. Thus, to prosecute McDonnell and those like him is to criminalize politics itself."); Daniel P. Tokaji, *Bribery and Campaign Finance: McDonnell's Double-Edged Sword*, 14 OHIO ST. J. CRIM. L. AMICI BRIEFS 15, 15 (2017) ("*McDonnell* clarifies that making phone calls and arranging meetings aren't themselves official acts, but pressure or advice as to other public officials could be, so long as there's an agreement to exchange such acts for something of value.").

84. Robert Roberts, *The Search for Accountability: United States v. McDonnell and the Fundamental Right*, 20 PUB. INTEGRITY JAMES MADISON U. 13, 17–18 (2017).

quid; and nearly anything a public official does—from arranging a meeting to inviting a guest to an event—counts as a quo.”<sup>85</sup>

To many Court observers, the Supreme Court in *McDonnell* licensed bribery and dealt another blow to the efforts to stem corruption in government through criminal prosecutions.<sup>86</sup> As U.S. District Judge Lynn Adelman summed up *McDonnell*, “[u]nfortunately, the overall impression left by the opinion in *McDonnell* is of one group of powerful people, members of the Court [were] looking out for the interests of another group of powerful people, and paying little attention to the average citizen.”<sup>87</sup> And the case has lasting impact on the rights of citizens as “[t]he Supreme Court . . . [found] that the mail/wire fraud statute protected money and property rights, but not ‘the intangible right of the citizenry to good government.’”<sup>88</sup> The lies from the McDonnells covering up their true relationship with Williams were not even addressed in the opinion.<sup>89</sup> The Court sided with the powerful and the well-connected in the *McDonnell* case.<sup>90</sup> Thus, a consequence of the failed prosecution of Governor McDonnell is the loss of the public’s faith in the integrity of government itself<sup>91</sup> as well as representative democracy.<sup>92</sup>

c. *Kelly v. U.S.*

In *Kelly*, the Supreme Court considered the conviction of Bridget Anne Kelly, a then-aide to then-governor of New Jersey, Chris Christie, who, along with members of the Port Authority, closed lanes on the George Washington Bridge between New York and New Jersey—one of the busiest bridges in the

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85. *Id.* at 13, 15 (quoting *McDonnell*, 579 U.S. at 574–75 (internal emphasis omitted)).

86. The Hon. Stephen J. Murphy, II, *Reflections on McDonnell and Public Corruption Cases*, 32 NOTRE DAME J. L., ETHICS & PUB. POL’Y 457, 459 (2018) (“The Court’s opinion was a sweeping and broad rejection of the expansive view that the Government and the Justice Department had consistently taken of the Hobbs Act for decades of prosecutions of public corruption and white-collar fraud.”); Jacob Eisler, *McDonnell and Anti-Corruption’s Last Stand*, 50 U.C. DAVIS L. REV. 1619, 1622 (2017) (“[T]he Court has demonstrated surprising tolerance for sleazy political behavior and consistently overturned convictions of public servants charged with abusing their offices.”).

87. Adelman, *supra* note 77, at 21.

88. Chambers, *supra* note 77, at 246 (quoting *McNally v. United States*, 483 U.S. 350, 356 (1987)).

89. See *id.* at 240–44 (discussing the relationship between the McDonnells and Williams). But see generally *McDonnell*, 579 U.S. 550 (no mention of McDonnells’ lies related to Williams).

90. George D. Brown, *The Federal Anti-Corruption Enterprise After McDonnell—Lessons from the Symposium*, 121 DICK. L. REV. 989, 992 (2017) (“Particularly significant is the Court’s extensive citation to amicus briefs of former government officials who viewed McDonnell’s conviction as a ‘breathtaking expansion of public corruption law [that] would likely chill . . . officials’ interactions with the people they serve and thus damage their ability to effectively perform their duties.’”) (quoting *McDonnell*, 579 U.S. at 575.) (alteration in original); Adelman, *supra* note 77, at 6 (“The [C]ourt [sic] seems to regard representative government as little more than a series of reciprocal relationships between elected officials and well-heeled constituents.”).

91. Roberts, *supra* note 84, at 18 (“The prosecution of former Virginia governor Bob McDonnell and his wife on federal public corruption charges highlights . . . the inability of many states to regulate official conduct that clearly weakens public trust in government.”).

92. White, *supra* note 76, at 1181 (“Further, *McDonnell* hinders representative democracy. It protects an activity—fluencing public officials, at least subconsciously, by giving them lavish gifts—that is unnecessary and inappropriate in the American political process.”).

world—as political retribution.<sup>93</sup> The press called this scandal “Bridgegate.”<sup>94</sup> The effect of the closure was crushing traffic in Fort Lee, New Jersey.<sup>95</sup> The lane closure was political payback from the Christie team to the Democratic mayor of Fort Lee for his failure to endorse the governor for re-election.<sup>96</sup> The lane closure also cost the state money in the form of overtime pay.<sup>97</sup> Ms. Kelly lied to the public that the purpose of the lane closure was a nonexistent traffic study.<sup>98</sup> Ms. Kelly was prosecuted and convicted for essentially commandeering the public bridge for a private and petty political purpose.<sup>99</sup> Some, including her and her criminal co-defendant, have criticized the *Kelly* prosecution as an example of criminalizing ordinary politics.<sup>100</sup> She appealed her conviction to the Supreme Court, in part arguing that what happened in Bridgegate was merely political spin.<sup>101</sup> The Supreme Court reversed her conviction, declaring “not every corrupt act by state or local officials is a federal crime.”<sup>102</sup> The Supreme Court did not look at the case as Kelly’s purloining public property, but rather that she was using her regulatory power over the George Washington Bridge.<sup>103</sup>

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93. Sami Azhari & Sergio Lopez, *Guilty Until Proven Guilty: The Prosecution of Public Corruption and White Collar Crime*, CHAMPION, 32, 36 (2020) (“[T]he Supreme Court spared no words, calling the defendants’ behavior deceptive and corrupt, and saying they abused the power of their office.”).

94. Ciara Torres-Spelliscy, *Elegy for Anti-Corruption Law: How the Bridgegate Case Could Crush Corruption Prosecutions and Boost Liars*, 69 AM. U. L. REV. 1689, 1691 (2020).

95. *Id.* at 1705.

96. *Id.*

97. *Id.* at 1698 (“[T]his was not just a costless political prank; there were real-world consequences, including the outlay of extra public money.”).

98. *Id.* at 1699.

99. *Kelly v. United States—Supreme Court Overturns “Bridgegate” Convictions*, SULLIVAN & CROMWELL LLP 1, 2 (2020) (“The government argued that its prosecution was consistent with those precedents because Kelly and Baroni had in fact taken Port Authority property by ‘commandeering’ certain physical lanes of the Bridge entryway.”).

100. Torres-Spelliscy, *supra* note 94, at 1700 (“A brief from Baroni’s lawyers in favor of Kelly’s cert. petition argued, ‘the decision below [against Kelly and Baroni] criminalizes the ordinary activity of public officials, turning nearly every public official into a felon.’”); Nora V. Demleitner, *Can the Federal Government Use the Generic Wire Fraud Statute to Prosecute Public Officials for Corrupt Activities That Are Conducted for Political Rather Than Private Gain?*, PREVIEW U.S. SUP. CT. CASES 12, 14 (2020) (“The government’s theory of the case also violates every canon of construction. Its parsing of an official’s true motive will cast a pall over every local government decision and will allow federal prosecutors to become roving ambassadors of good government, leaving in their wake countless random and perhaps partisan-based criminal convictions.”).

101. Torres-Spelliscy, *supra* note 94, at 1701 (“The gravamen of Kelly’s claims to the Supreme Court is that she was allowed to use political ‘spin’ (e.g., her lies) without triggering criminal penalties.”).

102. *Kelly v. United States*, 140 S. Ct. 1565, 1574 (2020); *see also* Jonathan N. Halpern, *U.S. Supreme Court Shuts the Door of Bridgegate Prosecutions*, HOLLAND & KNIGHT (2020) (“Finally, the [C]ourt [sic] in *Kelly* made clear that the conduct at issue was fully condemnable—an ‘abuse of power,’ as Kelly’s own lawyer characterized it; ‘political payback’ and a scheme fraught with deception that ‘jeopardized the safety of the town’s residents.’”).

103. George D. Brown, *Defending Bridgegate*, 77 WASH. & LEE L. REV. ONLINE 141, 143 (2020) (“[Justice Kagan] viewed the lane realignment as a regulatory decision that did not involve the required gain or loss of property. The defendants had lied to Port Authority employees and the public to facilitate the scheme. . . . Their conduct may have been fraudulent, even ‘corrupt,’ but it did not constitute a violation of federal law.”).

*Kelly* follows the pattern of the Supreme Court making public corruption more difficult to prosecute.<sup>104</sup> The Supreme Court was well aware of her mendacity, noting that she acted “for bad reasons; and [Kelly and her co-defendants] did so by resorting to lies.”<sup>105</sup> Because the *Kelly* decision did not directly address the constitutionality of Ms. Kelly’s lies to the public covering up her use of the bridge, discerning how the Court will deal with the next lying public official is difficult to predict.<sup>106</sup> But nonetheless, at the end of the day, Ms. Kelly got away with lying and this is likely to embolden the next would-be Kelly to act just as cravenly.<sup>107</sup> Recall her lie about the bridge came in 2013, an election year in New Jersey when her boss Governor Christie was re-elected.<sup>108</sup> And the retribution was also political. These were all facts that the citizens of New Jersey deserved to know in real time when making electoral decisions. And, again, there is a catch-22 here. The Supreme Court in *Kelly* punted to electorates to fix public corruption stating: “[t]he upshot is that federal fraud law leaves much public corruption to the States (or their electorates) to rectify.”<sup>109</sup> But an electorate is disabled from holding a corrupt public official accountable at the ballot box if none of the electorate have a clue what the official has done while in power.

## 2. *Lying in Elections*

Lying while in power presents its own unique set of challenges ranging from the ability to warp the public’s view of reality to the problem of who will police the police and the powerful. But lying in elections also presents a panoply of dilemmas in the democratic context as electoral lies can skew how electorates act and who wins political power. As Helen Norton has asserted, “[e]lection lies understandably disturb us when they succeed in deceiving their targets, when they influence election outcomes, and when they degrade our public discourse.”<sup>110</sup>

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104. Jocelyn Strauber, Caroline Ferris White & Mary Ross, *Why ‘Bridgegate’ Ruling Could Allow for New Defenses in Future Fraud Cases*, NAT'L L.J. (May 14, 2020, 11:03 AM) (“The Supreme Court’s decision in *Kelly* is consistent with the [C]ourt’s [sic] long-standing narrow reading of federal fraud statutes, particularly as applied in public corruption prosecutions.”); Halpern, *supra* note 102 (“In so ruling, the [C]ourt [sic] emphasized decades-old precedent (*McNally*) that the federal fraud laws . . . do not ‘criminaliz[e] all acts of dishonesty by state and local officials’ and do not encompass an unfettered right to redress defrauded citizens ‘of their intangible rights to honest and impartial government.’” (internal citations omitted)).

105. *Kelly*, 140 S. Ct. at 1573.

106. Azhari & Lopez, *supra* note 93, at 36 (“Notwithstanding the highest court’s limitation in the prosecution of public officials for ‘honest services,’ prosecutors have recently been able to successfully utilize the honest services fraud statute for the prosecution of self-benefiting individuals.”).

107. Halpern, *supra* note 102, (“The decision is but the latest in a series of judicial rulings that have reined in attempts by federal prosecutors to ‘set[] standards of disclosure and good government for local and state officials.’”) (alteration in original) (quoting *Kelly*, 140 S. Ct. at 1571) (internal quotations omitted); Brown, *supra* note 103, at 143 (“[Defendants’] conduct may have been fraudulent, even ‘corrupt,’ but it did not constitute a violation of federal law.”).

108. See Brown, *supra* note 103, at 145–46.

109. *Kelly*, 140 S. Ct. at 1571.

110. Norton, *supra* note 24, at 118.

a. *Susan B. Anthony List v. Driehaus*

The Supreme Court has been tolerant of lying in political campaigns. In 2014, in *Susan B. Anthony List v. Driehaus*, the Supreme Court unanimously allowed a case to go forward which challenged the constitutionality of an Ohio law which made certain false statements illegal in a political campaign.<sup>111</sup> Violation of the Ohio false statement statute was a first-degree misdemeanor.<sup>112</sup> “A second conviction under the false statement statute [was] a fourth-degree felony that carrie[d] a mandatory penalty of disfranchisement.”<sup>113</sup>

The false statement at issue in the case involved a claim by a political non-profit called the Susan B. Anthony List that candidate Steven Driehaus had voted “to fund abortions with tax dollars” by voting for the Affordable Care Act (“ACA”).<sup>114</sup> This is patently false as the ACA specifically restricts the use of any federal funds for abortion.<sup>115</sup> Nonetheless—truth be damned—the high court remanded the case so that it could continue.<sup>116</sup> On remand, the district court went on to rule in *Susan B. Anthony List v. Ohio Elections Commission* that the Ohio prohibition on lying in political campaigns was unconstitutional because it left the government in the position of deciding what was true or false.<sup>117</sup> When this district court’s decision was appealed, the Sixth Circuit, citing the *Alvarez* case discussed above,<sup>118</sup> agreed that the law against lying in Ohio elections should be permanently enjoined.<sup>119</sup> These pro-lying cases from the Supreme Court can do real damage. As G. Edward White argued, “[i]f the truth/falsity distinction were to become obliterated in the Court’s First Amendment jurisprudence, that jurisprudence might not only become doctrinally incoherent, it would fail to signal what forms of speech Americans value and what forms they do not.”<sup>120</sup> Given its prior jurisprudence on mendacity outside of the courtroom,<sup>121</sup> it is no surprise that the Supreme Court has been tolerant of lying in political campaigns. The Supreme Court should rethink its constitutional protection of lies, especially lies

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111. Bradford C. Mank, *Data Breaches, Identity Theft and Article III Standing: Will the Supreme Court Resolve the Split in the Circuits?*, 92 NOTRE DAME L. REV. 1323, 1334 (2017) (“SBA then filed suit in federal district court challenging the constitutionality of the statute on First Amendment grounds, alleging that the statute chilled and burdened its right to comment on election candidates and that it planned to make similar comments in future elections.”).

112. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 153 (2014).

113. *Id.*

114. *Id.* at 155–56.

115. *Abortion Services*, HEALTHCARE.GOV, <https://www.healthcare.gov/glossary/abortion-services/> (last visited Aug. 5, 2022) [<https://perma.cc/4QWV-AKMN>].

116. *Susan B. Anthony List*, 573 U.S. at 168.

117. *Susan B. Anthony List v. Ohio Elections Comm’n*, 45 F. Supp. 3d 765, 769 (S.D. Ohio 2014).

118. Redish & Pereyra, *supra* note 8, at 464 (“Perhaps the clearest example of how *Alvarez* has shifted the conversation on political fraud is the Sixth Circuit’s decision in *Susan B. Anthony List v. Driehaus*. In that case, the Sixth Circuit reversed its position on the constitutionality of Ohio’s false speech law, finding that Alvarez ‘clearly abrogat[e] their prior reasoning.’”) (quoting *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 471 (6th Cir. 2016)).

119. *Id.* at 469 (“Because the laws are content-based restrictions that burden core protected political speech and are not narrowly tailored to achieve the state’s interest in promoting fair elections, we affirm.”).

120. G. Edward White, *Falsity and the First Amendment*, 72 SMU L. REV. 513, 531 (2019).

121. See *supra* Section II.B.

about election integrity that are issued from the White House, as a matter of First Amendment analysis.

### b. Other Circuit Courts Invalidated Rules Against Lying in Elections

Lower courts are required to follow the Supreme Court's lead on giving constitutional protection to lying. The Sixth Circuit during the remand from the *Susan B. Anthony List* noted that other false-statement laws have also been invalidated by courts around the nation:

Other courts [that have] evaluate[d] similar laws post-*Alvarez* have reached the same conclusion. See *281 Care Comm. v. Arneson*, 766 F.3d 774, 785 (8th Cir. 2014) ("[N]o amount of narrow tailoring succeeds because [Minnesota's political false-statements law] is not necessary, is simultaneously overbroad and underinclusive, and is not the least restrictive means of achieving any stated goal."), cert. denied, —U.S.—, 135 S.Ct. 1550, 191 L.Ed.2d 637 (2015); *Commonwealth v. Lucas*, 472 Mass. 387, 34 N.E.3d 1242, 1257 (2015) (striking down Massachusetts' law, which was similar to Ohio's); see also *Rickert v. State Pub. Disclosure Comm'n*, 161 Wash.2d 843, 168 P.3d 826, 829–31 (2007) (striking down Washington's political false-statements law, which required proof of actual malice, but not defamatory nature)[.]<sup>122</sup>

Thus, as Professor James Weinstein summed up the jurisprudence about lying in elections, "recent lower court decisions have uniformly found broad bans on lies in political campaigns to violate the First Amendment."<sup>123</sup> These two overlapping lines of cases from *Alvarez* to *Dreihaus* wrap lying in a warm layer of First Amendment protection that is likely to protect Trump's lies about the 2020 election in his post-presidency. If that were not bad enough, the government speech doctrine likely immunizes his lies when he was in office against any viewpoint discrimination objections.

### C. Government Speech Doctrine and the Big Lie

Trump's Big Lie that he won the 2020 election was enunciated by him from November 4, 2020 through January 20, 2021 while he was President of the United States.<sup>124</sup> And clearly, any speech after he left office is truly in his private capacity and does not implicate the government speech doctrine.<sup>125</sup> Thus, the

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122. *Susan B. Anthony List*, 814 F.3d at 476.

123. James Weinstein, *Free Speech and Domain Allocation: A Suggested Framework for Analyzing the Constitutionality of Prohibitions of Lies in Political Campaigns*, 71 OKLA. L. REV 167, 203 (2018).

124. Douglas B. McKechnie, *Government Tweets, Government Speech: The First Amendment Implications of Government Trolling*, 44 SEATTLE U. L. REV. 69, 92–93 (2020) ("In addition to being head of government, the President is the head of state and as such speaks for the U.S. government . . . In addition to being the singular spokesperson pursuant to both statute and inherent Article II authority, presidents have the power to bind the U.S. government, if not legally then at least politically, through executive agreements.").

125. Stephen K. Wirth, Note, *State Action, Government Speech, and the Narrowing Spectrum of Private, Protected Speech*, 99 CORNELL L. REV. 485, 485 (2014) ("In First Amendment jurisprudence, the Supreme Court has employed two doctrines—state action and government speech—to demarcate the boundaries between the public and private spheres.").

question of whether the Big Lie falls under the government speech doctrine only applies for a few months during the post-election period.

Arguably, every time President Trump repeated the Big Lie, his words would fall under the government speech doctrine since despite his at times conflicting litigation positions about whether he was ever acting in his private capacity while president, he was president from January 20, 2017 to January 20, 2021.<sup>126</sup>

Under the government speech doctrine, the government itself is not subject to the charge of viewpoint discrimination if it is the government speaking.<sup>127</sup> As Stephen K. Wirth explained, so long as the government does not establish a state religion or offend another part of the Constitution, it is free to speak how it wishes.<sup>128</sup>

The government speech doctrine has been criticized as muddled. As Mark Strasser has argued, “the government speech doctrine has been both confused and confusing.”<sup>129</sup> Further, it has also been lambasted for shrinking the spheres in which the First Amendment apply.<sup>130</sup> As Erwin Chemerinsky has written with some consternation, “[t]he reason I’m so upset about the government speech factor is I see no stopping point. The Supreme Court has said that the government can speak by adopting private speech as its own.”<sup>131</sup> And Professor Chemerinsky worries about the role of the courts in applying the government speech doctrine.<sup>132</sup> As he pointed out, “[t]he result is to give the courts far more latitude in deciding which government regulations of speech to allow and which to strike down. This discretion inherently risks the courts engaging in their own content-

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126. *Swart v. City of Chicago*, 440 F. Supp. 3d 926, 944 (N.D. Ill. 2020) (“Courts apply the government speech doctrine in two limited contexts: (1) when the government itself speaks; or (2) if the government appropriates public funds to transmit a message through private speakers.”).

127. Wirth, *supra* note 125, at 485–86 (“[W]hen the government itself speaks, it is not constrained by the Free Speech Clause, and it need not represent all viewpoints equally. The government-speech doctrine is a defense the government raises when it is accused of violating an individual’s freedom of speech or of viewpoint discrimination.”); Erwin Chemerinsky, *Private: The Troubling Government Speech Doctrine*, AM. CONST. SOC’Y (June 19, 2015), <https://www.acslaw.org/expertforum/the-troubling-government-speech-doctrine/> [https://perma.cc/X6FB-GG3G] (“The Court’s approach says that when the government is the speaker it cannot be challenged for violating the speech clause of the First Amendment.”).

128. Wirth, *supra* note 125, at 494 (“The core principle of the doctrine is that when the government speaks, its speech is not constrained by the Free Speech Clause’s requirement of viewpoint neutrality but by the Establishment Clause. So long as it does not run afoul of the Establishment Clause, the government can speak as it pleases. And it can also choose not to speak.”).

129. Mark Strasser, *Ignore the Man Behind the Curtain: On the Government Speech Doctrine and What It Licenses*, 21 B.U. PUB. INT. L.J. 85, 88 (2011).

130. David S. Day, *Government Speech: An Introduction to a Constitutional Dialogue*, 57 S.D. L. REV. 389, 390–91 (2012) (“In the new government speech doctrine, government speech is not controlled by Free Speech principles.”); Erwin Chemerinsky, *The First Amendment in the Era of President Trump*, 94 DENVER L. REV. 553, 554 (2017) (“[T]he Supreme Court . . . is very protective of freedom of speech except when the institutional interest of the government as government are implicated.”); Chemerinsky, *supra* note 127 (“More importantly, the Court’s approach gives the government the ability to avoid free speech challenges by declaring that something is government speech.”).

131. Chemerinsky, *supra* note 130, at 562.

132. Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court’s Application*, 74 S. CAL. L. REV. 49, 64 (2000).

based restrictions, upholding regulation of speech they dislike and protecting the speech they like.”<sup>133</sup>

Even the Supreme Court itself has cautioned that the government speech doctrine should be used sparingly. For instance, in *Matal v. Tam*, the Supreme Court admonished,

[b]ecause the “Free Speech Clause . . . does not regulate government speech,” *Pleasant Grove City v. Summum*, 555 U.S. 460, 467, . . . , the government is not required to maintain viewpoint neutrality on its own speech. This Court exercises great caution in extending its government-speech precedents, for if private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints.<sup>134</sup>

And in *Pleasant Grove* itself, the Court noted that the government speech doctrine “does not mean that there are no restraints on government speech. . . . The involvement of public officials in advocacy may be limited by law, regulation, or practice.”<sup>135</sup> Moreover, in 2015, the Supreme Court noted in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, concerning specialized license plates,<sup>136</sup> that:

Constitutional and statutory provisions outside of the Free Speech Clause may limit government speech. And the Free Speech Clause itself may constrain the government’s speech if, for example, the government seeks to compel private persons to convey the government’s speech. But, as a general matter, when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position. In doing so, it represents its citizens and it carries out its duties on their behalf.<sup>137</sup>

The Supreme Court has also acknowledged that the only check on government speech is the electoral process.<sup>138</sup> As the Court wrote in 2000 in *Board of Regents of University of Wisconsin System v. Southworth*, “[w]hen the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.”<sup>139</sup> But therein lies the rub. If only the electoral process can hold government speech accountable, government speech that

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133. *Id.*

134. *Matal v. Tam*, 137 S. Ct. 1744, 1748 (2017).

135. *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009).

136. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 219 (2015) (“But here, compelled private speech is not at issue. And just as Texas cannot require SCV to convey ‘the State’s ideological message,’ SCV cannot force Texas to include a Confederate battle flag on its specialty license plates.”) (citations omitted).

137. *Id.* at 208.

138. Day, *supra* note 130, at 391 (“After *Johanns* and *Summum*, the Government speech doctrine is subject only to the constraints of the political process.”).

139. Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000); see also Barry P. McDonald, *The Emerging Oversimplifications of the Government Speech Doctrine: From Substantive Content to a “Jurisprudence of Labels,”* 2010 BYU L. REV. 2071, 2076 (2010) (“In other words, one can only be sure that government speech is imbued with democratic legitimacy to the extent that the government speaker is subject to democratic accountability for its speech.”).

undermines an election is particularly pernicious because it short-circuits that accountability mechanism.

### III. THE 2020 ELECTION

#### A. How Political Branding Works

Before I can dive into what happened in the 2020 election and its aftermath, I need to explain how political branding works. In my 2019 book, *Political Brands*, I explored how commercial branding techniques are being used during elections to sell American voters, politicians, ideas, and ideals. Branding includes the targeted repetition of messages until they are accepted as true by an audience, even if the message is a lie, a myth, or fantasy.<sup>140</sup>

Branding works through repetition, repetition, repetition. “‘Branding’ is the process of purposefully repeating a word, concept or logo until it gets stuck in the minds of the public.”<sup>141</sup> As the data crunchers over at Nielsen have found, “[p]ractice (repetition) indeed makes perfect—and can help create durable memories.”<sup>142</sup> One of the oddities of advertising is that some customers associate repetitive ads with higher-quality products.<sup>143</sup> Objectively, this is somewhat absurd since a heavily advertised item could be poorly constructed, carcinogenic, or addictive. But, nonetheless, this is a measurable phenomenon:

Repetition of an ad may signal to consumers that the brand or product is a good buy, or a quality product. This is sometimes referred to as signaling theory. In 1975, University of Wyoming researchers Anthony McGann and Raymond Marquardt found that ads with high rates of repetition tended to also be rated as high quality in Consumer Reports.<sup>144</sup>

And even more disturbingly, the more an ad is repeated, the more viewers will believe it (even if the claim that is being repeated is not true).<sup>145</sup> “Studies suggest that repeated statements are perceived as more truthful than statements made less frequently, ‘presumably because repetition imbues the statement with familiarity.’ In simple terms: frequency breeds familiarity, and familiarity breed trust.”<sup>146</sup> Brands that are emotionally comforting are easier to sell.

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140. See generally CIARA TORRES-SPELLISCY, *POLITICAL BRANDS* (2019).

141. *Id.* at 1.

142. David Brandt, *Understanding Memory in Advertising*, NIELSEN (Feb. 22, 2017), <https://www.nielsen.com/insights/2017/understanding-memory-in-advertising/> [https://perma.cc/V7D2-WD3Y]; Sean H. K. Kang, *Spaced Repetition Promotes Efficient and Effective Learning: Policy Implications for Instruction*, 3 BEHAV. & BRAIN SCI. 12, 13 (2016) (“Massed repetition eliminates the retrieval process—there is no need to retrieve from memory because the same item was just presented.”).

143. Lisa Magloff, *Repetition as an Advertisement Technique*, CHRON (Feb. 1, 2019), <https://smallbusiness.chron.com/repetition-advertisement-technique-24437.html> [https://perma.cc/5UEL-R9M3].

144. *Id.*

145. Jeffry Pilcher, *Say It Again: Messages Are More Effective When Repeated*, FIN. BRAND (Sept. 23, 2014), <https://thefinancialbrand.com/42323/advertising-marketing-messages-effective-frequency/> [https://perma.cc/75LH-NQT5].

146. *Id.*; see also Linda A. Henkel & Mark E. Mattson, *Reading Is Believing: The Truth Effect and Source Credibility*, 20 CONSCIOUSNESS & COGNITION 1705, 1705 (2011) (“[F]amiliarity may create an illusion of truth for statements when people lack source-specifying cues, especially cues regarding the reliability of the source.”).

Typically, building up positive connotations for a brand is done through advertising using standard puffery. Old standbys for advertisers are the assertion (true or not) that if the customer buys this product, she will be more powerful, rich, intelligent, sexy, envied, or successful.<sup>147</sup> But the lies to sell products can get out of hand, as Vance Packard complained in his book *The Waste Makers*: “[m]illions of consumers are manipulated, razzle-dazzled, indoctrinated, mood-conditioned, and flimflammed.”<sup>148</sup> Ad man Nigel Hollis once explained: “engaging and memorable ads slip ideas past our defenses and seed memories that influence our behavior. You may not think advertising influences you. But marketers do. And in addition to millions of dollars, they have something else most people don’t have: Access to data that proves their point.”<sup>149</sup>

In short, branding has power. The most effective branding can get into our heads so deeply that it warps how we see ourselves and the world around us. As Amanda Hess observed: “[n]ow branding has taken over not just work but life itself, seizing control of our appearances, our social relationships, even our approach to civil society.”<sup>150</sup> Put another way, “[b]rands allow businesses to reach consumers directly with messages regarding emotion, identity, and self-worth . . .”<sup>151</sup> Branding often plays on our emotions and tries to fill deep psychological needs like wanting to be accepted.<sup>152</sup> Emotionally fulfilling brands are particularly potent.<sup>153</sup>

Ads—whether they are advertising a product or a candidate—are trying to shape our impression of what’s for sale and whether we want that in our lives. “As pollster Celinda Lake explained, ‘whether you’re Pepsi or Obama you have to run a campaign to get your brand out.’”<sup>154</sup>

Political branding played a crucial role in the 2016 election of Donald Trump, a man known for his commercial branding skills. As Trump’s ex-personal lawyer, Michael Cohen, testified before Congress on February 27, 2019:

Donald Trump is a man who ran for office to make his brand great, not to make our country great. He had no desire or intention to lead this nation—only to market himself and to build his wealth and power. Mr. Trump would often say, this campaign was going to be the “greatest infomercial

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147. Deven R. Desai, *From Trademarks to Brands*, 64 FLA. L. REV. 981, 990–91 (2012) (“Many companies encourage consumers to see a brand as having a personality and to accept the idea that owning a branded good connects the consumer to the brand in some deep, personal way. . . . Taken further, a consumer may use a brand to express herself.”) (internal citations omitted).

148. VANCE PACKARD, THE WASTE MAKERS 250 (1960).

149. Nigel Hollis, *Why Good Advertising Works (Even When You Think It Doesn’t)*, ATLANTIC (Aug. 31, 2011), <https://www.theatlantic.com/business/archive/2011/08/why-good-advertising-works-even-when-you-think-it-doesnt/244252/> [https://perma.cc/YW6J-3WWJ].

150. Amanda Hess, *What Happens When People and Companies Are Both Just ‘Brands’?*, N.Y. TIMES MAG. (May 1, 2018), <https://www.nytimes.com/2018/05/01/magazine/what-happens-when-people-and-companies-are-both-just-brands.html> [https://perma.cc/XPY5-8D5V].

151. Deven R. Desai & Spencer Waller, *Brands, Competition, and the Law*, 2010 BYU L. REV. 1425, 1427 (2010).

152. *See id.* at 1444.

153. *See id.* at 1449.

154. TORRES-SPELLISCY, *supra* note 140, at 11.

in political history.” He never expected to win the primary. He never expected to win the general election. The campaign—for him—was always a marketing opportunity.<sup>155</sup>

Branding has surely taken center stage with the Trump Presidency. Trump’s repetitive rhetoric can leave the impression that he has a limited vocabulary. But as a master brander, he knows that repetition of catchphrases or an image is the way to hammer a point home.<sup>156</sup> Often, Trump lies are emotionally comforting to his audience.

#### B. *The Bottomless Pinocchio President Faces Re-election*

A clear beneficiary of the Supreme Court’s (as well as other federal and state courts’) pro-lying jurisprudence was both candidate Trump and President Trump.<sup>157</sup> Some scholars like Jonathan D. Varat prognosticated that *Alvarez* would not cause an uptick in lying.<sup>158</sup> He predicted, “the *Alvarez* decision, despite its constitutional disapproval of laws that would restrict lies in the way the Stolen Valor Act did, is unlikely to increase the volume of harmful lies to which our society and polity will be subject.”<sup>159</sup> I beg to differ. The entire Trump presidency, post-presidency, and both the 2016 and 2020 elections, bore witness to a torrent of political lies. Thus, the Trump era, which is not yet finished, will be known for branding overtaking truth in American presidential discourse. When the most powerful person in the nation lies, they risk warping the public’s perception of reality.<sup>160</sup> As Helen Norton noted during the Trump presidency, “the government’s efforts to persuade the public on certain contested political matters pose threats of totalitarianism, [and] of the government’s thought control.”<sup>161</sup>

Branding has been an integral part of American elections since at least 1952, the first time television played a major role in a Presidential election.<sup>162</sup> But in the 2016 and 2020 elections (and during the entire Trump presidency),

155. Michael Cohen, *Full Transcript: Michael Cohen’s Opening Statement to Congress*, N.Y. TIMES (Feb. 27, 2019), <https://www.nytimes.com/2019/02/27/us/politics/cohen-documents-testimony.html> [<https://perma.cc/X5X5-9S4C>] (quoting Donald Trump).

156. See, e.g., Ashley Parker, *Trump’s Campaign Hat Becomes an Ironic Summer Accessory*, N.Y. TIMES (Sept. 11, 2015), <https://www.nytimes.com/2015/09/13/fashion/trumps-campaign-hat-becomes-an-ironic-summer-accessory.html> [<https://perma.cc/85BC-UFT6>].

157. Vera Bergengruen & Lissandra Villa, *How Donald Trump’s Misinformation Campaign Against Mail-In Voting Is Undermining Faith in Democracy*, TIME (Sept. 10, 2020, 6:36 AM), <https://time.com/5887438/trump-mail-in-voting/> [<https://perma.cc/84N4-HB9B>] (“Because of the constitutional right to free speech, it can be nearly impossible to police bad-faith claims, whether the speaker is an Internet troll or the Commander in Chief.”).

158. Varat, *supra* note 21, at 47.

159. *Id.*

160. Maggie Fox, *Some Experts Say Trump Team’s Falsehoods Are Classic ‘Gaslighting’*, NBC NEWS (Jan. 24, 2017, 10:18 AM), <https://www.nbcnews.com/better/wellness/some-experts-say-trump-team-s-falsehoods-are-classic-gaslighting-n711021> [<https://perma.cc/5VTB-YKYK>] (“The effect of deliberate and systematic lying can be to make some people give up trying to discern the truth . . . .”).

161. HELEN NORTON, *THE GOVERNMENT’S SPEECH AND THE CONSTITUTION* 184 (2019).

162. *The Presidency in the Television Era*, U. VA. MILLER CTR., <https://millercenter.org/the-presidency/teacher-resources/recasting-presidential-history/presidency-television-era> (last visited Aug. 5, 2022) [<https://perma.cc/ZYA2-S5V7>].

rebranding facts in politics to have alternative meanings took a particularly malevolent turn.

Both Trump campaigns<sup>163</sup> and much of the public relations from the Trump White House included “gaslighting” techniques of telling the public something patently untrue and then claiming those who questioned the false narrative to be unpatriotic or crazy.<sup>164</sup> These were techniques he had honed as a businessman.<sup>165</sup> During the campaign, Professor Nicole Hemmer warned American voters in an article that started, “[t]his is an intervention. America, you have a Trump problem.”<sup>166</sup> She posited that “Trump is a toxic blend of Barnum and bully. If you’re a good mark, he’s your best friend. But if you catch on to the con, then he starts to gaslight.”<sup>167</sup> Hemmer concluded that political journalists did not know what do to with Trump’s scale of prevarications:

[W]hen [journalists] confront Trump with his lies, he doesn’t behave like most people. He doesn’t blush or equivocate or argue. He steamrolls. He bullies. He lies some more. And the journalists don’t know what to do. They brought facts to an ego fight, and found them to be worthless weapons.<sup>168</sup>

Journalist Frida Ghitis agreed, noting that during the 2016 campaign, “Trump had already accumulated a long list of statements he made and then denied making; enough that fact-checkers could hardly keep up.”<sup>169</sup>

One measure of how problematic Donald Trump’s loose relationship with the truth was the decision by the fact checkers at the *Washington Post* to create a whole new scale for his lies called the “bottomless Pinocchio.”<sup>170</sup> Previous presidents had been rated on a zero to five Pinocchio scale, but that proved inadequate to capture the depth and repetition of lies coming from President

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163. Ron Fournier, *The Art of Deception*, ATLANTIC (July 21, 2016), <https://www.theatlantic.com/politics/archive/2016/07/the-art-of-deception/492554/> [<https://perma.cc/5BD8-6RTJ>] (“Trust me, said the man who has lied about the Iraq war, ISIS, immigrant terrorists, Mexican rapists, the birther movement, Vladimir Putin and . . . oh, hell: Trump’s lies are countless.”).

164. Stephanie Starkis, *You Were Gaslighted Last Night at Trump’s State of the Union*, FORBES (Feb. 6, 2019, 9:30 AM), <https://www.forbes.com/sites/stephaniesarkis/2019/02/06/you-were-gaslighted-last-night-at-trumps-state-of-the-union/?sh=6a4be4475fb0> [<https://perma.cc/5MMX-LD9J>] (“[A]nother technique of gaslighters [is] [s]et up imaginary quotes from created foes, and state how you have conquered these imaginary statements.” (quoting Jennifer Granholm of CNN)).

165. Fournier, *supra* note 163 (“People may not always think big themselves, but they can still get very excited by those who do. That’s why a little hyperbole never hurts. People want to believe that something is the biggest and the greatest and the most spectacular. I call it truthful hyperbole.”) (quoting DONALD J. TRUMP, ART OF THE DEAL 58 (1989)).

166. Nicole Hemmer, *Trump Is Gaslighting America*, U.S. NEWS (Mar. 15, 2016, 12:00 PM), <https://www.usnews.com/opinion/blogs/nicole-hemmer/articles/2016-03-15/donald-trump-is-conning-america-with-his-lies> [<https://perma.cc/FV8R-MLW4>].

167. *Id.*

168. *Id.*

169. Frida Ghitis, *Donald Trump Is ‘Gaslighting’ All of Us*, CNN (Jan. 16, 2017, 8:59 AM), <https://www.cnn.com/2017/01/10/opinions/donald-trump-is-gaslighting-america-ghitis/index.html> [<https://perma.cc/CA3JDNT9>].

170. Glenn Kessler, *Meet the Bottomless Pinocchio, a New Rating for a False Claim Repeated Over and Over Again*, WASH. POST (Dec. 10, 2018), <https://www.washingtonpost.com/politics/2018/12/10/meet-bottomless-pinocchio-new-rating-false-claim-repeated-over-over-again/> [<https://perma.cc/T7N9-S68K>].

Trump.<sup>171</sup> As the *Washington Post* continued to fact check President Trump, “Trumpian” became a synonym for lying.<sup>172</sup> By the last year of his presidency, Trump was up to fifty lies per day by one tally.<sup>173</sup> Indeed, the *Washington Post*’s fact checkers who kept a running tally of President Trump’s lies counted 30,573 of them in four years.<sup>174</sup>

The *Washington Post* has given the bottomless Pinocchio designation to Trump for his false claims about the U.S. trade deficit, his tax cuts, the border wall, the U.S. economy, NATO, drug trafficking, and the Mueller Special Counsel investigations, among many others.<sup>175</sup> Space constraints limit the number of these lies I can highlight here. He lied about things as various as lying to the United Nations about his environmental record<sup>176</sup> to lying to the American public about the COVID-19 pandemic.<sup>177</sup> But one of the most damaging sets of lies that he repeatedly said was about the mechanics of the American democratic process.<sup>178</sup> In 2020 in particular, he attacked the integrity of voting-by-mail, a voting method that millions of Americans utilized because of the COVID-19 pandemic.<sup>179</sup> As Maria Annala reported,

[t]he onset of the disinformation campaign can be traced back to April 3, 2020, when Trump claimed at a press conference that “a lot of people cheat with mail-in voting.” Early on, he also made statements that clearly show

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171. *Id.*

172. See Glenn Kessler & Michelle Ye Hee Lee, *26 Hours, 29 Trumpian False or Misleading Claims*, WASH. POST (July 26, 2017), <https://www.washingtonpost.com/news/fact-checker/wp/2017/07/26/26-hours-29-trumpian-false-or-misleading-claims/> [https://perma.cc/57WC-FPKH].

173. Taegan Goddard, *Trump Averaging More Than 50 Lies Each Day*, TAEGAN GODDARD’S POL. WIRE (Oct. 22, 2020, 7:30 AM), <https://politicalwire.com/2020/10/22/trump-averaging-more-than-50-lies-each-day/> [https://perma.cc/FJ7K-GZDY].

174. Glenn Kessler, Salvador Rizzo & Meg Kelly, *Trump’s False or Misleading Claims Total 30,573 Over 4 Years*, WASH. POST (Jan. 24, 2021), <https://www.washingtonpost.com/politics/2021/01/24/trumps-false-or-misleading-claims-total-30573-over-four-years/> [https://perma.cc/5UNL-89T7].

175. Glenn Kessler & Joe Fox, *The False Claims that Trump Keeps Repeating*, WASH. POST, <https://www.washingtonpost.com/graphics/politics/fact-checker-most-repeated-disinformation/> (Jan. 20, 2021) [https://perma.cc/LQC3-WV49].

176. Michael H. Fuchs, *Trump’s UN Speech Was a Bizarre Feat of Gaslighting and Fantasy*, GUARDIAN (Sept. 24, 2020, 1:33 PM), <https://www.theguardian.com/commentisfree/2020/sep/24/trumps-un-speech-was-a-bizarre-feat-of-gaslighting-and-fantasy> [https://perma.cc/2MBP-8VV7] (“Like much of Trump’s rants on Twitter or on stage, his speech to the UN only made sense if you see the world as Trump does—a world where he can do no wrong, and completely divorced from the facts . . . . Trump, amazingly, attempted to claim that he has a good record on the environment, while the reality is that his administration has intentionally reversed gains America has made in recent years in combating climate change.”).

177. Stephanie Sarkis, *Gaslighting the Public About COVID-19*, FORBES (Mar. 15, 2020, 6:47 PM), <https://www.forbes.com/sites/stephaniesarkis/2020/03/15/gaslighting-the-public-about-covid-19/?sh=6d9879d70b04> [https://perma.cc/E7B7-MJRX] (“Trump has shown time and time again that his speeches need to be on a time delay and fact-checked before being shown to the general public.”).

178. See Miles Parks, *Ignoring FBI and Fellow Republicans, Trump Continues Assault on Mail-In Voting*, NPR (Aug. 28, 2020, 12:46 PM), <https://www.npr.org/2020/08/28/906676695/ignoring-fbi-and-fellow-republicans-trump-continues-assault-on-mail-in-voting> [https://perma.cc/WX22-2KSF].

179. *Id.* (“In April [2020], Trump said any expansion of mail ballots would lead to widespread fraud.”).

he believed widespread mail-in voting was bad for his party, hence revealing his true motives.<sup>180</sup>

Trump did this even as he had enjoyed the convenience of voting by mail himself in the past and as he voted by mail during the 2020 election.<sup>181</sup> Trump spun many tall tales about the dangers of voting-by-mail including “[i]n a White House briefing in April, President Trump stated that if people vote-by-mail, ‘You get thousands and thousands of people sitting in somebody’s living room, signing ballots all over the place.’”<sup>182</sup> Trump also fantasized that vote-by-mail ballots would be counterfeited by foreign nations.<sup>183</sup> And to make matters even more convoluted, Trump often encouraged Republicans to vote-by-mail, while simultaneously casting aspersions on voting-by-mail when done by Democrats.<sup>184</sup>

Some observers saw Trump’s focus on particular voters as purposeful targeting. Reporters Clarissa-Jan Lim and Ryan Brooks argued during the 2020 election:

The shift in 2020 isn’t that Trump is undermining an entire election. It’s that he’s doing it in a very specific way: questioning the very act of casting a ballot, using the power of his office to help hinder how those ballots are delivered, and targeting people who have traditionally been disenfranchised.<sup>185</sup>

Trump’s lies about voting-by-mail alarmed many in real time who recognized the long-term threat it posed to the general electorate’s faith in democracy.

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180. Maria Annala, *Trump’s Attack on American Democracy*, 1, 7 (Finnish Inst. of Int’l Affs., Working Paper No. 124, 2021), [https://www.fiai.fi/wp-content/uploads/2021/02/wp124\\_trumps-attack-on-american-democracy\\_maria-annala.pdf](https://www.fiai.fi/wp-content/uploads/2021/02/wp124_trumps-attack-on-american-democracy_maria-annala.pdf) [https://perma.cc/U2YK-S44L].

181. Penny M. Venetis, *Opposition to Voting by Mail Is a Form of Voter Suppression That Disproportionately Impacts Communities of Color*, 72 RUTGERS U. L. REV. 1387, 1396 (2020) (“The President [Trump], and many other prominent opponents of vote-by-mail, hide that they have voted by mail in recent elections.”); see also *Trump Says Universal Mail-in-Voting Would Be ‘Catastrophic’*, BBC NEWS (Aug. 16, 2020), <https://www.bbc.com/news/world-us-canada-53795876> [https://perma.cc/G7VG-7EWG] (“The president has repeatedly said mail-in ballots will lead to voting fraud and give a boost to his rival Democrat Joe Biden. However, experts say the mail-in voting system, which Mr. Trump himself uses, is safe from tampering.”); Jacobs Wiseman, Wiseman & Landau, *supra* note 22, at 112 (“President Trump may have pinpointed such an element in attempting to radically undermine the U.S. Postal Service during an election in which voting would occur heavily by mail, and in which—because of his criticisms of mail-in ballots—it was virtually guaranteed that mail-in votes would tilt heavily against him.”).

182. Venetis, *supra* note 181, at 1396; see also Nicholas Riccardi, *AP FACT CHECK: Trump’s Big Distortions on Mail-In Voting*, ASSOCIATED PRESS (Sept. 17, 2020), <https://apnews.com/article/virus-outbreak-election-2020-ap-fact-check-elections-voting-fraud-and-irregularities-8c5db90960815f91f39fe115579570b4> [https://perma.cc/6MNC-T9ZA] (“Unsolicited Ballots are uncontrollable, totally open to ELECTION INTERFERENCE by foreign countries, and will lead to massive chaos and confusion!”).

183. Parks, *supra* note 178 (“‘MILLIONS OF MAIL-IN BALLOTS WILL BE PRINTED BY FOREIGN COUNTRIES, AND OTHERS,’ tweeted Trump in June. ‘IT WILL BE THE SCANDAL OF OUR TIMES!’”).

184. Sarah Niebler, *Vote-by-Mail: COVID-19 and the 2020 Presidential Primaries*, 57 SOC’Y 547, 547 (2020) (“Since May, Trump has continued to make inaccurate statements about the safety and security of VBM, all while encouraging his supporters to make use of it as a mechanism to cast their own ballots.”) (citation omitted); Riccardi, *supra* note 182 (“Trump frequently blasts mail-in voting as flawed and fraudulent while insisting that mail ballots in certain states such as Florida, a must-win state for him are fine and safe.”).

185. Clarissa-Jan Lim & Ryan Brooks, *Trump and the Republicans Are Doing Everything They Can to Confuse Voters Before the Election*, BUZZFEED NEWS, <https://www.buzzfeednews.com/article/clarissajanlim/trump-republicans-confuse-voters> (Sept. 24, 2020, 4:35 PM) [https://perma.cc/K5YY-ZTJ3].

For example, Reporters Vera Bergengruen and Lissandra Villa wrote during the 2020 election, “[n]o one has done more to sow suspicion or spread lies than President Donald Trump, whose aggressive attacks on mail-in voting and false allegations of widespread voter fraud have capitalized on fear and uncertainty about holding a presidential election in the midst of the COVID-19 pandemic.”<sup>186</sup> Having fewer voters vote could have been Trump’s goal all along since as Sam Levine reported, “Trump has openly talked about the political upside of having fewer people vote.”<sup>187</sup>

Trump’s making voting-by-mail a partisan issue had a negative impact on some voters who eschewed this method.<sup>188</sup> As political scientist Sarah Niebler found, “[a]mong Republican voters in Delaware, voters who did not support President Trump were more than twice as likely to vote by mail [in 2020] than supporters of the president.”<sup>189</sup> And troublingly, as *Time* reported during the election, “[t]he constant onslaught of misinformation about mail-in ballots led to a trend this summer where users who said they were Trump supporters posted videos of themselves throwing their absentee or mail-in ballot requests in the trash and encouraged others to do the same.”<sup>190</sup> In retrospect, he may have cost himself re-election by miscalculating the impact of denigrating a safe way of voting during a pandemic that his voters could have used but for his disinformation campaign.

Given the logistical challenges posed by the COVID-19 pandemic, the actual election went as smoothly as any other recent election. Voters were aided in thirty states by new rules that made voting-by-mail easier than it had been pre-pandemic.<sup>191</sup> States’ election law changes ranged from mailing ballots, to providing voters postage, to easing rules about witnesses for absentee voting.<sup>192</sup>

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186. Bergengruen & Villa, *supra* note 157.

187. Sam Levine, ‘It Could Have a Chilling Effect’: Why Trump Is Ramping Up Attacks on Mail-In Voting, GUARDIAN (Jun. 1, 2020, 6:00 AM), <https://www.theguardian.com/us-news/2020/jun/01/trump-mail-in-voting-election-2020-election-attacks> [<https://perma.cc/JJT7-W3A8>].

188. Niebler, *supra* note 184, at 549 (“More recently, Clinton et al. (2020) find that public support for VBM increased in April as lockdowns became more commonplace throughout the U.S., but then decreased in May as the issue became polarized.”); Kadia Goba, *Trump’s False Rhetoric About Mail-In Voting Is Spooking Voters in a Vital State*, BUZZFEED NEWS (Aug. 20, 2020, 2:12 PM), <https://www.buzzfeednews.com/article/kadiagoba/trump-usps-mail-in-vote-fear> [<https://perma.cc/5DGA-2EDY>] (“But for some, the controversy around mail-in voting is just too political to participate.”).

189. Niebler, *supra* note 184, at 551.

190. Bergengruen & Villa, *supra* note 157.

191. Quinn Scanlan, *Here’s How States Have Changed the Rules Around Voting Amid the Coronavirus Pandemic*, ABC NEWS (Sept. 22, 2020, 5:57 PM), <https://abcnews.go.com/Politics/states-changed-rules-voting-amid-coronavirus-pandemic/story?id=72309089> [<https://perma.cc/W2KY-WYCQ>] (“The states are: Alabama, Arkansas, California, Connecticut, Delaware, District of Columbia, Georgia, Illinois, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont, West Virginia and Wisconsin.”).

192. *Id.* (“For the general election, at least [thirty] states plus the District of Columbia have made at least some changes that will make it easier and more accessible for voters to cast their ballots from home. These changes include removing strict excuse requirements or allowing COVID-19 concerns to be a valid excuse to vote absentee, allowing ballot drop boxes, offering prepaid postage on election mail and proactively sending all

### C. *The Blue Shift/Red Mirage*

A phenomenon which came to be known as either the Blue Shift or the Red Mirage provided President Trump with an opening to falsely claim that there was fraud in the 2020 election.<sup>193</sup> He would repeat this claim ad nauseum thereby branding the 2020 election as stolen.<sup>194</sup> There was not fraud; there was only slow responses from states processing the tsunami of mailed-in ballots.<sup>195</sup>

Some of us saw this problem coming a mile away. In the months before the 2020 election, election law experts predicted that because of COVID-19 pandemic, millions more American voters than normal would vote-by-mail.<sup>196</sup> These election law scholars (including the author)—organized by Professor Richard Hasen of U.C. Irvine—put out a white paper making suggestions for how to improve the administration of the 2020 election, especially in light of the on-going COVID-19 pandemic entitled “Fair Elections During a Crisis.”<sup>197</sup>

The white paper predicted what is now known as either the Blue Shift or the Red Mirage—that if Republicans voted in person and Democrats voted by mail, then Republicans would appear to “win” on election day, but that once all ballots were processed it was possible for Democrats to actually win.<sup>198</sup> The Blue Shift/Red Mirage possibility was heavily covered by the press before election day in 2020.<sup>199</sup> CNN predicted: “with a historic pivot toward mail-in voting due to the coronavirus, this Election Night could mark the beginning, not the end, of the process, and giving voters a false sense of who is winning, according to a wide array of experts.”<sup>200</sup> As another press report noted: “[t]he red mirage refers to a phenomenon, predominantly in the northern states, where the initial rounds of vote count reflect a sizeable lead for Trump and the Republican party. The

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active registered voters applications to request an absentee ballot—with some even skipping that step and sending the actual ballots.”).

193. Sushovan Sircar, *What Are ‘Blue Shift’, ‘Red Mirage’ & Why They Give Biden the Edge*, QUINT (Nov. 5, 2020, 9:37 PM), <https://www.thequint.com/news/world/us-presidential-elections-2020-red-mirage-blue-shift-pennsylvania-georgia-trump-biden#read-more> [https://perma.cc/SX28-93L5] (“The red mirage refers to a phenomenon, predominantly in the northern states, where the initial rounds of vote count reflect a sizeable lead for Trump and the Republican party. The word ‘mirage’ is an obvious indication that this is a deceptive occurrence that isn’t what it appears to be.”).

194. See Marshall Cohen, *Deciphering the ‘Red Mirage,’ the ‘Blue Shift,’ and the Uncertainty Surrounding Election Results this November*, CNN (Sept. 1, 2020, 6:49 PM), <https://www.cnn.com/2020/09/01/politics/2020-election-count-red-mirage-blue-shift/index.html> [https://perma.cc/3P4M-YGDF].

195. Riccardi, *supra* note 182.

196. Cohen, *supra* note 194.

197. See generally AD HOC COMMITTEE FOR 2020 ELECTION FAIRNESS AND LEGITIMACY, FAIR ELECTIONS DURING A CRISIS: URGENT RECOMMENDATIONS IN LAW, MEDIA, POLITICS, AND TECH TO ADVANCE THE LEGITIMACY OF, AND THE PUBLIC’S CONFIDENCE IN, THE NOVEMBER 2020 U.S. ELECTIONS (2020), <https://electionlawblog.org/wp-content/uploads/2020/ElectionReport.pdf> [https://perma.cc/CV4Y-F3DW].

198. Cohen, *supra* note 194 (“Edward Foley . . . warned in an August 2019 paper, published long before the coronavirus pandemic, that these fluctuations in the tally could trigger a national meltdown over the results.”).

199. See David A. Graham, *The ‘Blue Shift’ Will Decide the Election*, ATLANTIC, <https://www.theatlantic.com/ideas/archive/2020/08/brace-blue-shift/615097/> (Nov. 3, 2020, 3:06 PM) [https://perma.cc/SM5S-RHLS] (“The hypothetical of a blue shift reversing the early projected winner is the ‘nightmare scenario,’ according to the election-law expert Rick Hasen.”).

200. Cohen, *supra* note 194.

word ‘mirage’ is an obvious indication that this is a deceptive occurrence that isn’t what it appears to be.”<sup>201</sup> And this report went on to prophesize: “[o]n election night, there’s a real possibility that the data will show Republicans leading early, before all the votes are counted. Then they can pretend something sinister is going on when the counts change in Democrats’ favor.”<sup>202</sup> Coupled with this was the risk that Trump would not concede an electoral loss and would cause a constitutional crisis.<sup>203</sup>

The number one suggestion in this “Fair Elections During a Crisis” white paper was encouraging states to process mail-in votes as early as possible so there would not be a delay in processing overall votes total. The white paper argued:

COVID-19 may increase both types of ballots in the November 2020 elections. States should examine mail ballots as soon as possible after they arrive to identify potential problems with mail ballot envelopes including signatures and missing voter information . . . . [S]tates should begin processing those ballots before election day, opening envelopes, and preparing the ballots to be scanned . . . .<sup>204</sup>

A key part of this expert advice was the suggestion that states open mail ballots earlier so that they could be processed in a timely fashion.<sup>205</sup> Unfortunately, many key swing states like Pennsylvania and Wisconsin did not listen to this expert advice and kept the timeline for opening ballots on election day.<sup>206</sup>

This Blue Shift/Red Mirage indeed happened in the 2020 Presidential Election, which took place on November 3, 2020.<sup>207</sup> At 2:00 a.m. Eastern on November 4 (what was still election night in Hawaii), President Donald Trump prematurely and inaccurately declared victory.<sup>208</sup> While votes were still being counted in key swing states, he stated: “[f]rankly, we did win this election. We did win this election. So our goal now is to ensure the integrity for the good of this nation.”<sup>209</sup> And in a moment of consummate psychological projection, Trump

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201. Sircar, *supra* note 193.

202. *Id.*

203. Levine, *supra* note 187 (“I’m concerned that we could have a constitutional crisis if we have the same president saying that the election was somehow tainted because people voted by mail,’ [Domingo] Garcia said. ‘That could lead to a possible huge crisis in America’s democracy.’”).

204. AD HOC COMMITTEE FOR 2020 ELECTION FAIRNESS AND LEGITIMACY, *supra* note 197, at 6.

205. *Id.*

206. Graham, *supra* note 199 (“If mailed ballots are disproportionately Democratic, and Republicans disproportionately vote on Election Day, then the blue shift could be huge—especially in states where officials are restricted from counting mailed ballots until Election Day, including Pennsylvania and Wisconsin.”).

207. Sircar, *supra* note 193.

208. Quint Forgey, *Trump’s Premature Victory Claim Prompts Quick Rebukes*, POLITICO (Nov. 04, 2020, 7:35 AM), <https://www.politico.com/news/2020/11/04/trump-premature-victory-claim-434024> [<https://perma.cc/N86L-WJ8Y>].

209. *Donald Trump 2020 Election Night Speech Transcript*, REV (Nov. 4, 2020), <https://www.rev.com/blog/transcripts/donald-trump-2020-election-night-speech-transcript> [<https://perma.cc/UW33-5LRW>]; see also Alana Wise, *FACT CHECK: Trump Falsely Claims Widespread Election Fraud In Latest Election Speech*, NPR (Nov. 5, 2020, 9:16 PM), <https://www.npr.org/2020/11/05/931930379/fact-check-trump-falsely-claims-widespread-fraud-in-latest-election-speech> [<https://perma.cc/63PF-FWXK>] (“He baselessly claimed that the process of counting mailed-in ballots had been tainted and complained that many of the absentee votes had been cast for Biden.”).

said of his Democratic opponents, “[t]hey said . . . either they were going to win or if they didn’t win, they’ll take us to court.”<sup>210</sup> In another ironic claim that night, he said, “[w]e want all voting to stop. We don’t want them to find any ballots at four o’clock in the morning and add them to the list. Okay? It’s a very sad moment.”<sup>211</sup> This was ironic because soon after this, before vote totals were officially certified, Trump would be caught trying to force elections officials in Georgia to find him enough new votes so that he could win the swing state.<sup>212</sup> As *USA Today* reported, Trump was caught on tape pressuring Georgia Secretary of State Brad Raffensperger, stating: “[s]o look. All I want to do is this: I just want to find 11,780 votes, which is one more than we have. Because we won the state . . .”<sup>213</sup> Raffensperger refused to conjure up fake votes for Trump and released the audio tape of the illegal request to the public,<sup>214</sup> which took some guts as he and his wife received death threats.<sup>215</sup> But as Mark Joseph Stern noted in *Slate*, Raffensperger would have risked criminal prosecution if he had bent to Trump’s unlawful request.<sup>216</sup> Senator Tim Kaine responded to the recording of the Trump/Raffensperger call with disgust, telling the press that Trump sounded like “a spoiled rich kid who’s talking about our democracy like it’s a real estate deal. . . . News flash to the current President: It’s not a negotiation, it’s an election. The voters decided—and you lost.”<sup>217</sup> What is unknown at the time of this writing is whether Trump or anyone else will face criminal charges for what appeared to be an illegal attempt to overturn the

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210. See Donald Trump 2020 Election Night Speech Transcript, *supra* note 209.

211. *Id.*

212. Matthew Brown, *Trump Is Heard on Audiotape Pressuring Georgia Secretary of State to ‘Find’ Votes to Overturn Biden’s Win*, *USA TODAY*, <https://www.usatoday.com/story/news/politics/elections/2021/01/03/trump-pressured-georgia-election-official-call-washington-post-report-says/4119948001/> (Jan. 4, 2021, 9:52 AM) [<https://perma.cc/Y5MK-MXK4>].

213. *Id.* (quoting President Trump’s discussion with Georgia’s election official).

214. *Id.* (“Erwin Chemerinsky . . . said if the audio is taken literally, ‘the president is asking the Georgia secretary of state to falsify election returns and come up with enough votes to have Trump carry Georgia.’”); see also Jeff Amy, Darlene Superville & Jonathan Lemire, *GA Election Officials Reject Trump Call to ‘Find’ More Votes*, *ASSOCIATED PRESS* (Jan. 4, 2021), <https://apnews.com/article/trump-raffensperger-phone-call-georgia-d503c8b4e58f7cd648fbfa746131ec9> [<https://perma.cc/3PWM-W6VZ>] (“The phone call with Secretary of State Brad Raffensperger on Saturday was the latest step in an unprecedented effort by a sitting president to press a state official to reverse the outcome of a free and fair election that he lost.”).

215. Kate Brumbach, *Georgia Official Says Sen. Lindsey Graham Asked Him About Tossing Ballots*, *STARTRIBUNE* (Nov. 17, 2020, 5:12 AM), <https://www.startribune.com/hand-tally-of-georgia-presidential-race-continues/573092151/> [<https://perma.cc/N33L-7EDL>] (“Raffensperger told the Post that he and his wife have received death threats in recent days.”).

216. Mark Joseph Stern, *Lindsey Graham’s Alleged Attempt to Toss Georgia Ballots Is Felony Election Fraud*, *SLATE* (Nov. 19, 2020, 4:55 PM), <https://slate.com/news-and-politics/2020/11/lindsey-graham-brad-raffensperger-georgia-election-fraud.html> [<https://perma.cc/V5MJ-MEG5>] (“In Georgia, it is a crime for anyone, including election officials, to destroy a ballot. It is also a crime for anyone to falsify any records or documents used in connection with an election, or to place any false entries in such records.”).

217. Ellie Hall, *Leaked Audio Reveals Trump Threatening a Georgia Official to Change the Election Results*, *BUZZFEED NEWS*, <https://www.buzzfeednews.com/article/ellievhall/trump-phone-call-georgia-overturn-election> (Jan. 3, 2021, 5:14 PM) [<https://perma.cc/ENM8-RCHE>] (quoting Sen. Tim Kaine).

election results in Georgia.<sup>218</sup> Trump's Big Lie that he won the election was a soothing fairy tale for his electorate.

As the white paper writers had predicted, key swing states like Nevada, Georgia and Pennsylvania took days to process all their mail-in votes. It was on Saturday, November 7, 2020, when Joe Biden's victory became clear as slow-counting states finalized their vote totals.

#### IV. FROM THE ELECTION TO INAUGURATION (A.K.A. THE POST-ELECTION PERIOD)

From election night through the time that this piece is being written in 2022, Trump has maintained the Big Lie that he won the 2020 election. But from a constitutional sense, the most fraught period was between election night 2020 and the inauguration of the new President on January 20, 2021.<sup>219</sup> This "post-election-pre-inauguration" period (referred herein as the post-election period) was crucial because it was during that time that states finalized and certified their election totals and when Congress counted the electoral college votes on January 6, 2021.<sup>220</sup> On the eve of Congress's meeting to certify the electoral college votes, Trump was urging his Vice President to illegally intervene in the Congressional count.<sup>221</sup> (In other words, if a coup was going to happen, it was most likely to happen in the confusion of the post-election period.) As the Senate Judiciary Committee would later conclude: "[c]oncurrent with Trump's post-election attempts to weaponize DOJ, Trump also reportedly engaged in a separate and equally aggressive pressure campaign on Vice President Mike Pence to set aside the electoral votes of contested states."<sup>222</sup>

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218. Tim Kephart, *Report: Fulton County D.A. Also Looking at Sen. Lindsey Graham's Call to Raffensperger*, CBS 46 (Feb. 12, 2021), [https://web.archive.org/web/20210213080842/https://www.cbs46.com/news/report-fulton-county-d-a-also-looking-at-sen-lindsey-grahams-call-to-raffensperger/article\\_3d0b15c0-6da0-11eb-be69-57eae6575903.html](https://web.archive.org/web/20210213080842/https://www.cbs46.com/news/report-fulton-county-d-a-also-looking-at-sen-lindsey-grahams-call-to-raffensperger/article_3d0b15c0-6da0-11eb-be69-57eae6575903.html) [https://perma.cc/4383-UTQ8] ("District Attorney Willis' office is also involved in a criminal investigation into then-President Trump's call to Raffensperger where he repeatedly asked the Secretary of State to help him 'find' votes.").

219. *Donald Trump Rally Speech Transcript Dalton, Georgia: Senate Runoff Election*, REV (Jan. 4, 2021), <https://www.rev.com/blog/transcripts/donald-trump-rally-speech-transcript-dalton-georgia-senate-runoff-election> [https://perma.cc/V3JH-5UTU] ("I've had two elections. I won both of them. It's amazing. I actually did much better on the second one."); see also Calvin Woodward, *AP FACT CHECK: Trump's False Claims, Fuel on a Day of Chaos*, ASSOCIATED PRESS (Jan. 6, 2021), <https://apnews.com/article/ap-fact-check-donald-trump-a98d72c0ccde16fa900e6053a4599cab> [https://perma.cc/HE2Y-4DKQ] ("Trump has been telling wildly false tales about the election outcome for two months in a flailing effort to upend Biden's win.").

220. See Grace Segers & Melissa Quinn, *How Does Congress Count Electoral Votes, and Can Results Be Challenged?*, CBS News (Dec. 23, 2020, 11:24 AM) <https://www.cbsnews.com/news/electoral-college-congress-counts-votes-january-6/> [https://perma.cc/4NT8-FQ34] ("On January 3, the first meeting of the 117th Congress, the archivist of the United States will transmit the certification of election results from each state governor to both houses of Congress. The date for counting electoral votes is fixed by law as January 6.").

221. See Woodward, *supra* note 219 ("TRUMP: 'All Mike Pence has to do is send them back to the States, AND WE WIN. Do it Mike, this is a time for extreme courage!'—tweet Wednesday.").

222. SENATE JUDICIARY COMMITTEE, *SUBVERTING JUSTICE: HOW THE FORMER PRESIDENT AND HIS ALLIES PRESSURED DOJ TO OVERTURN THE 2020 ELECTION* 1, 5 (2021).

#### A. *Litigation in Bad Faith*

After Trump lost the 2020 election, he spent the following months litigating the result in court in a vain attempt to overturn the election in his favor. His campaign, as well as sympathetic Republicans, filed sixty-five lawsuits in multiple states trying to either overturn the election or to cast aspersions on the legitimacy of the electoral processes.<sup>223</sup> In a particularly bold suit, a Republican congressman attempted to get all votes from Pennsylvania thrown out.<sup>224</sup>

The courts did not indulge Trump or his campaign. Judges uniformly rejected these attempts to overturn the 2020 election.<sup>225</sup> For one, judges are loathe to be put in a position where their legal opinions are used to interfere with an election. But they also found that Trump's lawyers and their allies had simply not proven in court what they claimed in public: that there had been massive voting fraud or flaws with voting machines during the 2020 election.<sup>226</sup>

The Supreme Court said very little about the challenges to the legitimacy of the 2020 election by the pro-Trump camp. They did issue a terse order dismissing an effort by Texas to challenge the 2020 presidential vote in Pennsylvania.<sup>227</sup> The Supreme Court ruled that "Texas's motion for leave to file a bill of complaint is denied for lack of standing under Article III of the Constitution. Texas has not demonstrated a judicially cognizable interest in the manner in which another State conducts its elections. All other pending motions are dismissed as moot."<sup>228</sup>

Because space is limited, I will not endeavor to pull quotes from all sixty-plus post-2020 election litigations. The Section below highlights the utter contempt that most of the judges felt for the flimsy merits of the cases brought by Trump, his campaign, and his loyal affiliates including Sidney Powell and Lin Wood.

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223. William Cummings, Joey Garrison & Jim Sergent, *By the Numbers: President Donald Trump's Failed Effort to Overturn the Election*, USA TODAY NEWS, <https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/> (Jan. 6, 2021, 9:50 AM) [<https://perma.cc/2LY5-DBG4>] ("The president and his allies filed 62 lawsuits in state and federal courts seeking to overturn election results in states the president lost, according to Marc Elias, a Democratic election lawyer who is tracking the outcomes.").

224. See Annala, *supra* note 180, at 9 ("The intent to disenfranchise voters was clear, for example in the case *Kelly v. Pennsylvania*, in which a Republican congressman from Pennsylvania requested all mail-in ballots cast in Pennsylvania be thrown out or the entire Pennsylvania presidential election be invalidated in order to allow the state legislature to choose Pennsylvanian electors.").

225. See Cummings, Garrison & Sergent, *supra* note 223 ("Out of the 62 lawsuits filed challenging the presidential election, 61 have failed, according to Elias.").

226. David Wickert, Patricia Murphy, & Mark Niesse, *Georgia Recount Confirms Biden Win, Again, but Trump Still Battling*, ATLANTA J. CONST. (Dec. 7, 2020), <https://www.ajc.com/politics/election/georgia-recount-confirms-biden-win-again-but-trump-still-battling/OZGAOQCMKVFG7G43L5PSF3BNHM/> [<https://perma.cc/LP8H-2B4V>] ("The results bring to a close an arduous process that included a hand audit of every ballot ordered by Secretary of State Brad Raffensperger. But they likely will not end the unproven cries of 'voter fraud' from Trump and his supporters.").

227. *Texas v. Pennsylvania*, 141 S. Ct. 1230, 1230 (2020).

228. *Id.*

The Arizona Supreme Court in *Ward v. Jackson* refused to revive an effort to allow inspection of ballots in Arizona requested by the pro-Trump side, stating:

The Court concludes, unanimously, that the trial judge did not abuse his discretion in denying the request to continue the hearing and permit additional inspection of the ballots. The November 9, 2020 hand count audit revealed no discrepancies in the tabulation of votes and the statistically negligible error presented in this case falls far short of warranting relief under A.R.S. § 16-672.<sup>229</sup>

The U.S. Supreme Court denied *certiorari* in this case in 2021.<sup>230</sup>

In Georgia, there was a case called *Wood v. Raffensperger* where attorney Lin Wood sought to throw out Georgia's electoral college votes. In that case, the judge refuted the plaintiffs, declaring, "Wood 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."<sup>231</sup> This case was appealed to the Supreme Court where *certiorari* was denied.<sup>232</sup>

In another audacious case, *Wisconsin Voters Alliance v. Pence*, Trump supporters sued Vice President Pence for his part in the certification process on January 6, 2021.<sup>233</sup> This case was litigated in federal district court in D.C.<sup>234</sup> The judge there was having none of it. Rejecting all the plaintiffs' off-the-wall theories, the judge stated plainly:

In addition to being filed on behalf of Plaintiffs without standing and (at least as to the state Defendants) in the wrong court and with no effort to even serve their adversaries, the suit rests on a fundamental and obvious misreading of the Constitution. It would be risible were its target not so grave: the undermining of a democratic election for President of the United States.<sup>235</sup>

The judge continued in throwing out the *Pence* suit by saying "[a]lthough they claim to have been 'disenfranchised,' this is plainly not true. Their votes have been counted and their electors certified pursuant to state-authorized procedures; indeed, any vote nullification would obtain only were their own suit to succeed."<sup>236</sup>

There were multiple lawsuits filed in Michigan on behalf of Trump and his supporters, likely because Michigan is a swing state with a Democratic Governor and Democratic Secretary of State: making it a state where Trump's side could

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229. *Ward v. Jackson*, No. CV-20-0343-AP/EL, 2020 WL 8617817, at \*2 (Ariz. Dec. 8, 2020), *cert. denied*, 141 S. Ct. 1381 (2021).

230. *Id.* at \*2–3, *cert. denied*, 141 S. Ct. 1381 (2021) ("Therefore, IT IS ORDERED affirming the trial court decision and confirming the election of the Biden Electors under A.R.S. § 16-676(B).").

231. *Wood v. Raffensperger*, 501 F. Supp. 3d 1310, 1331 (N.D. Ga. 2020), *aff'd*, 981 F.3d 1307 (11th Cir. 2020), *cert. denied*, 141 S. Ct. 1379 (2021).

232. *Wood v. Raffensperger*, *cert. denied*, 141 S. Ct. 1379, 1379 (2021).

233. *Wis. Voters All. v. Pence*, 514 F. Supp. 3d 117, 119 (D.D.C. 2021).

234. *Id.*

235. *Id.*

236. *Id.* at 120 (citations omitted).

play the partisan victim.<sup>237</sup> In one lawsuit, the Trump side only appeared to be objecting to votes from Detroit, a majority-Black city.<sup>238</sup> This, too, was rejected by Michigan state courts and eventually by the Michigan Supreme Court as well, who denied *certiorari* in the case.<sup>239</sup> The trial court noted the harm to the public if the plaintiffs succeeded in throwing out any of Michigan votes:

[T]he Court has to determine would there be harm to the public interest. This Court finds the answer is a resounding ‘yes.’ Granting Plaintiffs’ requested relief would interfere with Michigan’s selection of Presidential electors needed to vote on December 14, 2020. Delay past December 14, 2020 could disenfranchise Michigan voters from having their state electors participate in the Electoral College vote.<sup>240</sup>

And the court criticized the plaintiffs for their baseless claims: “sinister, fraudulent motives were ascribed to the process and the City of Detroit. Plaintiffs’ interpretation of events is incorrect and not credible.”<sup>241</sup>

In another Michigan suit in federal court, *King v. Whitmer*—sometimes referred to as the “Kraken” case because lawyer Sidney Powell said when filing it that she had “released the Kraken,”—the court tossed the case and rejected the plaintiffs’ arguments.<sup>242</sup> As the federal district judge in this case noted the motivation for the lawsuit appeared to be a wish to denigrate democracy itself:

[T]his lawsuit seems to be less about achieving the relief Plaintiffs seek—as much of that relief is beyond the power of this Court—and more about the impact of their allegations on People’s faith in the democratic process and their trust in our government. Plaintiffs ask this Court 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>243</sup>

*Certiorari* was denied in this case in 2021.<sup>244</sup>

A state judge in a Nevada post-2020 litigation also noted that the pro-Trump plaintiffs were undermining faith in American democracy, stating, “Plaintiffs have identified several thousand potentially improper votes. This is out of a total of over 1.4 million votes cast in Nevada. Rather than promote democracy, on this record devoid of concrete evidence of fraud, Plaintiffs’

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237. Pete Williams & Nicole Via y Rada, *Trump’s Election Fight Includes Over 50 Lawsuits. It’s Not Going Well.* NBC NEWS, <https://www.nbcnews.com/politics/2020-election/trump-s-election-fight-includes-over-30-lawsuits-it-s-n1248289> (Dec. 10, 2020, 11:42 AM) [https://perma.cc/V7S4-VT27].

238. *Costantino v. Detroit*, No. 20-014780-AW, at \*12 (Mich. Cir. Ct. Nov. 13, 2020).

239. *Costantino v. Detroit*, No. 20-014780-AW, at \*12 (Mich. Cir. Ct. Nov. 13, 2020), *aff’d*, No. 355443 (Mich. Ct. App. Nov. 16, 2020), *cert. denied*, 950 N.W.2d 707, 707 (Mich. Nov. 23, 2020).

240. *Costantino*, at \*12 (Mich. Cir. Ct. Nov. 13, 2020).

241. *Id.* at \*13.

242. *King v. Whitmer*, 505 F. Supp. 3d 720, 735 (E.D. Mich. 2020), *appeal dismissed*, No. 20-2205, 2021 WL 688804 (6th Cir. Jan. 26, 2021); Alison Durkee, *Sidney Powell, ‘Kraken’ Attorneys Sanctioned for Bringing Michigan Election Fraud Lawsuit*, FORBES (Aug. 25, 2021, 6:13 PM), <https://www.forbes.com/sites/alison-durkee/2021/08/25/sidney-powell-kraken-attorneys-sanctioned-for-bringing-michigan-election-fraud-lawsuit/?sh=7dcbbf621124> [https://perma.cc/FMM4-5KJS].

243. *King v. Whitmer*, 505 F. Supp. 3d 720, 739 (E.D. Mich. 2020).

244. *King v. Whitmer*, 141 S. Ct. 1449 (mem.) (2021) (*cert. denied*).

requested relief would undermine it instead.”<sup>245</sup> This judge noted that the plaintiffs were asking for the election in Nevada to be invalidated: “Plaintiffs have failed to meet their burden to be entitled to the truly extraordinary relief—the overturning of the Nevada 2020 general election—that they seek.”<sup>246</sup> Another Nevada state judge found that all the pro-Trump plaintiffs’ allegations of malfeasance lacked evidence and noted, “[c]ontestants did not prove that there was a ‘malfunction of any voting device or electronic tabulator, counting device or computer in a manner sufficient to raise reasonable doubt as to the outcome of the election.’”<sup>247</sup> And that,

Contestants did not prove that “[i]llegal or improper votes were cast and counted,” and/or “[l]egal and proper votes were not counted . . . in an amount that is equal to or greater than the margin between the contestant and the defendant, or otherwise in an amount sufficient to raise reasonable doubt as to the outcome of the election.”<sup>248</sup>

As several courts reviewing pro-Trump post-election claims noted, had the court granted the relief sought by Trump’s side, then millions of American votes in the 2020 presidential election would have been thrown out. As the Pennsylvania Supreme Court noted in *Kelly v. Commonwealth*, “it is beyond cavil that Petitioners failed to act with due diligence in presenting the instant claim. Equally clear is the substantial prejudice arising from Petitioners’ . . . inaction would result in the disenfranchisement of millions of Pennsylvania voters.”<sup>249</sup> The U.S. Supreme Court denied *certiorari* in this case.<sup>250</sup>

Many of the pro-Trump, post-election claims were thrown out because the issues were moot or because of the doctrine of laches since many of the issues that the suits raised could have been litigated before the election. For example, in *Trump v. Biden*, the Wisconsin Supreme Court stated:

Our laws allow the challenge flag to be thrown regarding various aspects of election administration. The challenges raised by the [Trump] Campaign in this case, however, come long after the last play or even the last game; the Campaign is challenging the rulebook adopted before the season began. Election claims of this type must be brought expeditiously. The Campaign waited until after the election to raise selective challenges that could have been raised long before the election. . . . [L]aches bars relief. . . . The Campaign is not entitled to relief, and therefore does not succeed in its effort to strike votes and alter the certified winner of the 2020 presidential election.<sup>251</sup>

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245. Election Integrity Project of Nev. v. Nevada *ex rel.* Cegavske, No. A-20-820510-C, at \*6 (Nev. Dist. Ct. Dec. 11, 2020).

246. *Id.* at \*5.

247. Law v. Whitmer, 20-OC-00163-1B, at \*28 (Carson City Dist. Ct. Dec. 4, 2020), *aff’d*, Law v. Whitmer, 477 P.3d 1124 (Nev. 2020).

248. *Id.* at \*29.

249. Kelly v. Commonwealth, 240 A.3d 1255, 1257 (Pa. 2020), *cert. denied sub nom.* Kelly v. Pennsylvania, 141 S. Ct. 1449 (2021).

250. *Id.*

251. Trump v. Biden, 951 N.W.2d 568, 577 (Wis. 2020), *cert. denied*, 141 S. Ct. 1387 (2021).

Thus, the claims were found to be meritless and not timely. The U.S. Supreme Court denied *certiorari* in this case as well.<sup>252</sup> Taken together, all of these litigations during the post-election period showed that the judiciary was not fooled by the Big Lie, perhaps in part because perjury is punishable during litigations. But this litigation kept the Big Lie alive in the public mind.

### B. Insurrection

Unsurprisingly, many who participated in the insurrection at the Capitol on January 6th (“J6”) believed the Big Lie. On January 6, 2021, the day that Congress was scheduled to count electoral votes from all fifty states and the District of Columbia, President Trump held a “Stop the Steal” rally in front of the White House—just a short walk from the Capitol where all Senators and all members of the House of Representatives were present to count the votes—riling up the crowd with repetitions of the Big Lie.<sup>253</sup>

Trump exhorted the crowd in front of the White House on January 6th to “march to the Capitol to ‘stop the steal,’ which necessarily meant stopping Congress from counting the electoral votes.”<sup>254</sup> He said during the speech that Republicans had been too “nice” and were instead “going to have to fight much harder,” and that “you’ll never take back our country with weakness. You have to show strength and you have to be strong.”<sup>255</sup> President Trump further said that “if you don’t fight like hell, you’re not going to have a country anymore” and that “they need to take back our country.”<sup>256</sup> At the end of his address Trump said, “And after this, we’re going to walk down and I’ll be there with you. We’re going to walk down . . . to the Capitol.” The crowd applauded. Later, wrapping up, he reiterated, ‘So we are going to walk down Pennsylvania Avenue . . . and we are going to the Capitol.’”<sup>257</sup>

Many scholars have concluded that the President’s speech that day amounted to textbook incitement of violence that later unfolded at the Capitol.<sup>258</sup> Professor Catherine J. Ross retold the events that day for *Slate*:

After Trump spoke, many of those who listened to him in person attacked the Capitol. Trump’s own behavior that afternoon also proves significant. He did nothing to stem the violence while he watched it unfold live on television. He never seriously exhorted the crowd to cease and desist.

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252. *Id.*

253. Einer Elhauge, *The First Amendment Doesn’t Protect Trump’s Incitement*, WASH. POST (Jan. 14, 2021), <https://www.washingtonpost.com/outlook/2021/01/14/trump-brandenburg-impeachment-first-amendment/> [<https://perma.cc/KDG3-PDMZ>] (“Trump riled up a mob a short walk from the Capitol right before Congress was scheduled to count the certified electoral votes. . . . In his remarks and tweets in the days before, he said the goal was to ‘stop the steal[.]’”).

254. *Id.*

255. *Id.*

256. *Id.*

257. Catherine J. Ross, *What the First Amendment Really Says About Whether Trump Incited the Capitol Riot*, SLATE (Jan. 19, 2021, 3:26 PM), <https://slate.com/technology/2021/01/trump-incitement-violence-brandenburg-first-amendment.html> [<https://perma.cc/BS2D-LKJW>].

258. Elhauge, *supra* note 253 (“Trump’s conduct clearly meets the legal standard that *Brandenburg* set.”).

When he finally spoke, he undercut his scripted law-and-order message by reiterating that “a sacred landslide victory” had been “viciously stripped away from great patriots.”<sup>259</sup>

Simultaneously, several Republicans in each House of Congress made it clear that they would object to the electoral college votes of several states, thus showing their displeasure with the outcome of the 2020 election.<sup>260</sup> Objections to electoral college votes have happened before. In 2005, a few Democrats from the Congressional Black Caucus objected to Ohio’s 2004 electoral college votes for George W. Bush given widespread reports of epically long lines and statistically odd undervotes for the president.<sup>261</sup> The objection was launched, it was briefly discussed by Congress, and then Congress counted the Ohio votes for Bush.<sup>262</sup> There was no violence at the Capitol in 2004.<sup>263</sup>

As Congress assembled for the 2020 electoral count, outside some of the attendees from Trump White House Rally surrounded the Capitol, fought with the Capitol police defending the building, and eventually pushed their way into the building where Members of Congress and Senators were hidden in secured locations for their safety.<sup>264</sup> The crowd overran the building including the Senate Chambers, which under normal circumstances would only be occupied by elected officials, a few staffers, and pages.<sup>265</sup> They also made it into the Speaker of the House’s office.<sup>266</sup> The public knows all this because several of the occupants took pictures, videos, and even live streamed the attack on social media.<sup>267</sup> Many participants in the riot talked to the press in the hours and days following the attack.<sup>268</sup>

A recurrent theme among many of the insurrectionists was that many of the January 6th participants repeated the Big Lie that the 2020 election was stolen.<sup>269</sup> Moreover, many individuals who were charged for their unlawful acts that day (“Capitol insurrection defendants” or “J6 defendants”) were defiant that they had

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259. Ross, *supra* note 257.

260. Derek T. Muller, *Democrats Have Been Shameless About Your Presidential Vote Too*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/2021/01/06/opinion/democrat-republican-electoral-votes.html> [https://perma.cc/JNC2-MPN2].

261. *Id.*

262. Ciara Torres-Spelliscy, *The Risks of Corporate Political Spending After the Jan. 6 Insurrection*, TAMPA BAY TIMES (Feb. 26, 2021), <https://www.tampabay.com/opinion/2021/02/26/the-risks-of-corporate-political-spending-after-the-jan-6-insurrection-column/> [https://perma.cc/PF9G-SLUB].

263. *Id.*

264. Kat Lonsdorf, Courtney Dorning, Amy Isackson, Mary Louise Kelly & Ailsa Chang, *A Timeline of How the Jan. 6 Attack Unfolded—Including Who Said What and When*, NPR, <https://www.npr.org/2022/01/05/1069977469/a-timeline-of-how-the-jan-6-attack-unfolded-including-who-said-what-and-when> (June 9, 2022, 9:11 AM), [https://perma.cc/52US-J8FP].

265. *Id.*

266. *Id.*

267. *See id.*

268. *See* David Klepper, *Defense for Some Capitol Rioters: Election Misinformation*, AP NEWS (May 29, 2021), <https://apnews.com/article/dc-wire-donald-trump-health-coronavirus-pandemic-election-2020-b7e929bb8d49b77d0922eae7ad3794b7> [https://perma.cc/6DJB-MSQ2].

269. *Id.* (“The [J6] defendants[‘] . . . arguments highlight the important role that the falsehoods played in inspiring the riot, especially as many top Republicans try to minimize the violence of Jan. 6 and millions of others still wrongly believe the election was stolen.”).

done nothing wrong by attacking the Capitol.<sup>270</sup> For example, NBC's D.C. affiliate reported, “[a] U.S. Capitol insurrection defendant who is charged with assaulting police on the frontlines said he has no regrets for his actions, has questions about the 2020 election and acknowledges he was seeking to confront lawmakers while in the crowd on Jan. 6.”<sup>271</sup> Another J6 defendant named Landon Copeland said he continues to question “the validity of the 2020 election” even after being arrested for his actions on January 6th.<sup>272</sup>

Several Capitol insurrection defendants repeated aspects of the Big Lie in court filings defending and contextualizing their actions.<sup>273</sup> Because there are literally hundreds of J6 defendants who have been charged with various federal crimes for their actions that day, I cannot capture what all of them have said or done. Below is a sample of statements and experiences from some of the first J6 defendants to be prosecuted. (Many other participants have yet to be arrested, and many of those who have been arrested have yet to have a trial.)

As journalist Zoe Tillman reported, J6 defendant Troy Anthony Smocks said in his court filing that “[Trump] said that our cause was a matter of national security, and that these people behind the massive fraud must be arrested and brought to justice. And that task, falls on the shoulders of We The People. . . . the American Patriots.”<sup>274</sup> Smocks was sentenced to fourteen months.<sup>275</sup>

Tillman noted that another Capitol insurrection defendant told the FBI that he acted on behalf of President Trump:

Robert Sanford, a Pennsylvania man charged with throwing a fire extinguisher at police officers at the Capitol, similarly told the FBI when he was interviewed on Jan. 12 that he was part of a group that “had gone to the White House and listened to President Donald J. Trump’s speech and then had followed the President’s instructions and gone to the Capitol.”<sup>276</sup>

Tillman concluded after reviewing multiple filings in Capitol insurrection defendant cases that “court filings in many cases showed that the former president’s supporters came to Washington spoiling for a fight and that they broadly took

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270. *See id.*

271. Scott MacFarlane, Rick Yarborough & Sophia Barnes, *US Capitol Insurrection Defendant Says He Has No Regrets, Sought to Confront Lawmakers*, NBC 4 WASH. (June 9, 2021, 8:00 AM), <https://www.nbcwashington.com/news/national-international/us-capitol-insurrection-defendant-says-he-has-no-regrets-was-seeking-to-confront-lawmakers/2692996/> [https://perma.cc/VR49-SCZQ].

272. *Id.*

273. Klepper, *supra* note 268 (“The defendants represent only a fraction of the more than 400 people charged in the failed attempt to disrupt the certification of Biden’s victory. But their arguments highlight the important role that the falsehoods played in inspiring the riot.”).

274. Zoe Tillman, *Trump Supporters’ Own Explanations for Assaulting the Capitol Are Undercutting His Impeachment Defense*, BUZZFEED NEWS (Feb. 2, 2021, 4:54 PM), <https://www.buzzfeednews.com/article/zoe-tillman/trump-impeachment-capitol-rioters-fight-like-hell> [https://perma.cc/X2T7-D43D].

275. Hannah Rabinowitz & Holmes Lybrand, *Toughest Sentence Yet Handed Down in January 6-Related Case for Man Who Threatened Lawmakers and Tech Executives*, CNN (Oct. 21, 2021, 6:59 PM), <https://www.cnn.com/2021/10/21/politics/troy-anthony-smocks-january-6-sentence/index.html> [https://perma.cc/PL36-NY7Q].

276. Tillman, *supra* note 274.

calls from Trump and his allies to ‘stop the steal’—a reference to baseless claims of widespread voter fraud—to be an appeal for violence.”<sup>277</sup>

Some Capitol insurrection defendants posted self-incriminating statements on social media, such as: “I’m there for the greatest celebration of all time after Pence leads the Senate flip!!” or “IM THERE IF TRUMP TELLS US TO STORM THE FUKIN CAPITAL IMA DO THAT THEN!” and “We don’t want any trouble but they are not going to steal this election that I guarantee bro!!”<sup>278</sup>

The power of the political branding of the Big Lie is also revealed in the statements of defense lawyers trying to rationalize and defend why their clients participated in the insurrection. For example, Albert Watkins, the lawyer of the “QAnon shaman” Jacob Chansley—who showed up on January bare-chested with red, white, and blue body paint and wearing a hat with bullhorns—told the AP that he “likened the process to brainwashing, or falling into the clutches of a cult. Repeated exposure to falsehood and incendiary rhetoric . . . ultimately overwhelmed his client’s ability to discern reality.”<sup>279</sup> Watkins turned more than a few heads when he told reporters at the *Talking Points Memo*:

A lot of these defendants . . . they’re all fucking short-bus people . . . These are people with brain damage, they’re fucking retarded . . . But they’re our brothers, our sisters, our neighbors, our coworkers—they’re part of our country. These aren’t bad people, they don’t have prior criminal history. Fuck, they were subjected to four-plus years of goddamn propaganda the likes of which the world has not seen since fucking Hitler.<sup>280</sup>

When asked whether he wanted to take back his comments, Watkins said no.<sup>281</sup>

Joseph Hurley, a lawyer for a J6 defendant Anthony Antonio, blamed his client’s participating in the January 6th storming of the Capitol on his watching too much *Fox News*, stating “[his client] became hooked with what I call ‘Foxitis’ or ‘Foxmania’ and became interested in the political aspect and started believing what was being fed to him.”<sup>282</sup> Hurley represented to the court hearing Antonio’s case that he thought he was following President Trump’s orders on January 6th.<sup>283</sup>

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277. *Id.*

278. *Id.*

279. Klepper, *supra* note 268 (quoting Albert Watkins).

280. McCaffrey Blauner, *QAnon Shaman’s Lawyer: Many Rioters Are ‘F\*cking Short-Bus People’*, DAILY BEAST (May 18, 2021, 2:01 PM), <https://www.thedailybeast.com/qanon-shaman-jacob-chansleys-lawyer-al-watkins-says-many-capitol-rioters-are-retarded> [https://perma.cc/7P6M-5NNH] (quoting Albert Watkins); see also Klepper, *supra* note 268 (“You can catch this disease,” [attorney Joseph] Hurley said. Misinformation, he said, ‘is not a defense. It’s not. But it will be brought up to say: This is why he was here. The reason he was there is because he was a dumbass and believed what he heard on Fox News.”).

281. Celine Castronuovo, *‘QAnon Shaman’ Attorney Refuses to Apologize for ‘Short-Bus People’ Comments*, HILL (May 19, 2021, 10:07 AM), <https://thehill.com/homenews/media/554290-qanon-shaman-attorney-refuses-to-apologize-for-short-bus-people-comments> [https://perma.cc/2SA6-G65N].

282. Jordan Williams, *Lawyer for Accused Capitol Rioter Says Client Had ‘Foxitis,’ ‘Foxmania’*, HILL (May 7, 2021, 8:05 AM), <https://thehill.com/homenews/media/552285-lawyer-for-accused-capitol-rioter-says-client-had-foxitis-foxiomania> [https://perma.cc/C6VT-DCNF].

283. *Id.* (“During the hearing, Hurley said that Antonio believed he was following Trump’s orders to march and thought he was participating in a patriotic movement, according to HuffPost.”).

An ex-girlfriend who turned in her ex-boyfriend, Richard Michetti, to the FBI for his participation in J6 told federal agents he believed the 2020 election had been stolen.<sup>284</sup> Another J6 defendant, Alan Hostetter, said on video before the events of J6: “[s]ome people, at the highest levels, need to be made an example of: an execution or two or three. Tyrants and traitors need to be executed as an example so nobody pulls this shit again.”<sup>285</sup>

## V. THE FALL OUT FROM 2020 ELECTION AND J6

### A. *Truth Revealed in Court Proceedings*

#### I. *Giuliani’s Disbarment*

Some of the lawyers who brought legal challenges to the results of the 2020 presidential election alluded to above during the post-election period later faced disciplinary action or referrals for disciplinary actions. The President’s personal lawyer Rudy Giuliani had his license to practice law in New York suspended for his actions in the post-2020 election litigations, which attempted to throw out election results.<sup>286</sup> The New York court reviewing Giuliani’s law license concluded that he deserved to lose the ability to practice law for his role in spreading the Big Lie in and out of court:

[T]here is uncontested evidence that [Giuliani] communicated demonstrably false and misleading statements to courts, lawmakers and the public at large in his capacity as lawyer for former President Donald J. Trump and the Trump campaign in connection with Trump’s failed effort at reelection in 2020. These false statements were made to improperly bolster respondent’s narrative that due to widespread voter fraud, victory in the 2020 United States presidential election was stolen from his client. We conclude that respondent’s conduct immediately threatens the public interest and warrants interim suspension from the practice of law. . . .<sup>287</sup>

While defending his law license, Giuliani argued that the First Amendment allowed him to make the misrepresentations he had during the post-election litigations as well as in the press.<sup>288</sup> Given the *Alvarez*, *Dreihaus*, and *Kelly* precedents, discussed above, Giuliani may well have thought the law was on his side. The court did not buy this argument, concluding:

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284. Zoe Tillman, *An Alleged Capitol Rioter Texted His Ex that She Was a “Moron.” Then She Turned Him In.*, BUZZFEED NEWS (Feb. 25, 2021, 9:43 AM), <https://www.buzzfeednews.com/article/zoetillman/an-alleged-capitol-rioters-ex-turned-him-in-next-day> [https://perma.cc/3S7F-M8P9].

285. Ryan J. Reilly, ‘Traitors Need to be Executed’: ‘Stop the Steal’ Organizer Indicted in Jan. 6 Conspiracy Case, HUFFPOST (June 11, 2021, 10:02 PM), [https://www.huffpost.com/entry/alan-hostetter-capitol-attack-arrest-fbi\\_n\\_60c27653e4b0e6bab7a5a0be](https://www.huffpost.com/entry/alan-hostetter-capitol-attack-arrest-fbi_n_60c27653e4b0e6bab7a5a0be) [https://perma.cc/8V2M-SGNM] (quoting Alan Hostetter); see also Here’s Every Word of the First Jan. 6 Committee Hearing on Its Investigation, *supra* note 20 (quoting J6 rioter) (“We were invited [to the Capitol] by the president of the United States.”).

286. Matter of Giuliani, 146 N.Y.S.3d 266, at \*\*1 (App. Div. 2021).

287. *Id.*

288. *Id.* at \*\*3.

We reject respondent's argument [that the investigation into his conduct violates his First Amendment right of free speech]. This disciplinary proceeding concerns the professional restrictions imposed on respondent as an attorney to not knowingly misrepresent facts and make false statements in connection with his representation of a client. It is long recognized that "speech by an attorney is subject to greater regulation than speech by others". . . . As officers of the court, attorneys are . . . perceived by the public to be in a position of knowledge, and therefore, "a crucial source of information and opinion" (*Gentile v State Bar of Nevada*, 501 US at 1056).<sup>289</sup>

The court was particularly galled by a particular lie from Giuliani when he was President Trump's attorney about there being more absentee votes than absentee ballots in Pennsylvania—a key swing state in the election.<sup>290</sup> As the court noted, [t]he factual "proof" he [Giuliani] claimed . . . Pennsylvania sent out only 1,823,148 absentee ballots before the election, [and] 2,589,242 million [sic] absentee ballots were then counted in the election. This factual statement regarding the number of ballots mailed out before the election was simply *untrue*. The true facts are that 3.08 million absentee ballots were mailed out before the general election, which more than accounted for the over 2.5 million mail-in ballots that were actually tallied.<sup>291</sup>

The court also held Giuliani responsible for lying about the dead voting in Philadelphia, stating:

[Giuliani] repeatedly stated that dead people "voted" in Philadelphia in order to discredit the results of the vote in that city. . . . he repeatedly stated that famous heavyweight boxer Joe Frazier continued to vote years after he was dead and stated on November 7, 2020 "he is still voting here." The public records submitted on this motion unequivocally show that respondent's statement is false.<sup>292</sup>

The court also noted that he had made similarly misleading statements about the elections in Georgia and Arizona litigations.<sup>293</sup>

The New York court also lambasted Giuliani for his role in undermining Americans' faith in elections while he was the lawyer for the President, stating:

The seriousness of respondent's uncontested misconduct cannot be overstated. This country is being torn apart by continued attacks on the legitimacy of the 2020 election and of our current president, Joseph R. Biden. The hallmark of our democracy is predicated on free and fair elections. False statements intended to foment a loss of confidence in our elections and resulting loss of confidence in government generally damage the proper functioning of a free society. When those false statements are made by an attorney, it also erodes the public's confidence in the integrity of attorneys admitted to our bar and damages the profession's role as a crucial source of reliable information. It tarnishes the reputation of the entire legal

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289. *Id.* (internal citation omitted).

290. *Id.* at \*\*5.

291. *Id.* (emphasis added).

292. *Id.* at \*\*8.

293. *Id.* at \*\*10, \*\*12.

profession and its mandate to act as a trusted and essential part of the machinery of justice.<sup>294</sup>

The court even pointed to the insurrection at the Capitol as evidence of the harm that Giuliani had wrought as the president's lawyer:

Where . . . the false statements are being made . . . using his large megaphone, the harm is magnified. One only has to look at the ongoing present public discord over the 2020 election, which erupted into violence, insurrection and death on January 6, 2021 at the U.S. Capitol, to understand the extent of the damage that can be done when the public is misled by false information about the elections. . . . [His] misconduct directly inflamed tensions that bubbled over into the events of January 6, 2021 in this nation's Capitol.<sup>295</sup>

In conclusion, the court linked the suspension of Giuliani's law license to the good of the Republic, stating that his "espousing false factual information to large segments of the public as a means of discrediting the rights of legitimate voters is so immediately harmful to it and warrants interim suspension from the practice of law."<sup>296</sup>

## 2. *The Kraken Sanctions*

*King v. Whitmer* (a.k.a. the "Kraken") was one of the many lawsuits in Michigan which tried to change or delay the result of Michigan's vote for Biden in the electoral college.<sup>297</sup> All nine lawyers on the pro-Trump side were sanctioned for their behavior during this post-election litigation.<sup>298</sup> As the federal judge in the *King* case noted, the lawyers lied to the American people and the court about the 2020 election:

It is one thing to take on the charge of vindicating the rights associated with an allegedly fraudulent election. It is another to take on the charge of deceiving a federal court and the American people into believing that rights were infringed, without regard to whether any laws or rights were in fact violated.<sup>299</sup>

The court concluded that they had abused their roles as lawyers and undercut faith in America's democracy<sup>300</sup> by relying on debunked myths as facts.<sup>301</sup>

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294. *Id.* at \*\*17 (citations omitted).

295. *Id.*

296. *Id.* at \*\*17–18; see also *Here's Every Word of the First Jan. 6 Committee Hearing on Its Investigation*, *supra* note 20 (quoting Rep. Liz Cheney) ("The President's claims in the election cases were so frivolous and unsupported that the President's lead lawyer, Rudy Giuliani, not only lost the lawsuits, his license to practice law was suspended.").

297. *King v. Whitmer*, 505 F. Supp. 3d 720, 739 (E.D. Mich. 2020).

298. Durkee, *supra* note 24.

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

300. *Id.* ("And this case was never about fraud – it was about undermining the People's faith in our democracy and debasing the judicial process to do so.").

301. *Id.* at \*15 ("The City wrote further: 'The key "factual" allegations from the supposed fact witnesses, some of whom attempt to cloak their identities while attacking democracy, have been debunked.'").

The Court concluded that the lawyers for the pro-Trump side were motivated by politics and not law.<sup>302</sup> The court also shut down the defense that the First Amendment somehow licensed what they had done in court, concluding “[p]laintiffs’ counsel’s politically motivated accusations, allegations, and gamesmanship may be protected by the First Amendment when posted on Twitter, shared on Telegram, or repeated on television. The nation’s courts, however, are reserved for hearing legitimate causes of action.”<sup>303</sup> The court argued that the lawyers were suffering from an acute case of confirmation bias.<sup>304</sup> The King Court may have even obliquely referenced the Big Lie when it wrote, “[a]s officers of the court, Plaintiffs’ counsel had an obligation to do more than repeat opinions and beliefs, even if shared by millions. Something does not become plausible simply because it is repeated many times by many people.”<sup>305</sup>

### 3. *Prosecutions for J6*

At the time of this writing, at least 884 persons have been arrested and charged for their roles in the January 6th insurrection.<sup>306</sup> Of those, 329 have pled guilty.<sup>307</sup> When pleading guilty and looking for leniency from courts, some January 6 insurrectionists returned to reality and often admitted they had been wrong about the 2020 election and/or their faith and belief in Trump’s Big Lie. Jacob Chansley, the “QAnon Shaman” mentioned above wrote a letter from jail apologizing for his actions.<sup>308</sup> Alise Cua, a mother who took her 18-year-old son Bruno Cua to the Capitol riot, had an abrupt change of heart once they were both arrested for their J6 activities.<sup>309</sup> Ms. Cua “testified during a hearing before a federal judge . . . she felt ‘stupid’ for believing what I believed.”<sup>310</sup> She added, “I really should’ve known better,’ . . . [and] that she and her son felt ‘ridiculous’

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302. *Id.* at \*34, \*36.

303. *Id.* at \*38.

304. *Id.* at \*36 (“[B]y failing to take the basic pre-filing steps that any reasonable attorney would have taken and by flouting well-established pleading standards—all while knowing the risk associated with failing to remain professionally skeptical, Plaintiffs’ counsel did everything in their power to ensure that their bias—that the election was fraudulent, as proclaimed by Former President Trump—was confirmed.”).

305. *Id.* at \*35.

306. Madison Hall et al., *At Least 884 People Have Been Charged in the Capitol Insurrection so Far. This Searchable Table Shows Them All.*, YAHOO! NEWS (July 25, 2022), <https://news.yahoo.com/most-arrests-capitol-riots-misdemeanor-225235647.html> [https://perma.cc/QEG4-EPV9].

307. *Id.*

308. *Dozens of Jan. 6 Rioters Have Apologized and Disowned Their ‘Stop the Steal’ Claims*, MARKETWATCH (Apr. 3, 2021, 10:08 AM), <https://www.marketwatch.com/story/dozens-of-jan-6-rioters-have-apologized-and-disowned-their-stop-the-steal-claims-01617410591> [https://perma.cc/DV6H-B329] (“Jacob Chansley . . . wrote an apology from jail, asking for understanding as he was coming to grips with his actions.”).

309. Ryan J. Reilly, *MAGA Mom Whose Son Stormed Capitol Feels ‘Stupid’ For Buying Trump’s Voter Fraud Lies*, HUFFPOST, [https://www.huffpost.com/entry/bruno-cua-trump-capitol-attack\\_n\\_603fb5f8c5b6d7794ae37145](https://www.huffpost.com/entry/bruno-cua-trump-capitol-attack_n_603fb5f8c5b6d7794ae37145) (Mar. 4, 2021) [https://perma.cc/NTR3-UPCV].

310. *Id.*

for believing the former president's lies about voter fraud.”<sup>311</sup> Another woman who participated in J6, Anna Morgan-Lloyd told a judge remorsefully,

I just would like to apologize the court, the American people and my family . . . I was there to show support for President Trump peacefully and I'm ashamed that it became a savage display of violence, and I would've never been there if I had a clue it would turn out that way.<sup>312</sup>

Paul Hodgkins, another J6 defendant who received a jail sentences of eight months, told the federal judge in his case that he “allowed himself to put his ‘passion’ before his ‘principles.’”<sup>313</sup> Hodgkins added moreover in his colloquy with the judge that “he recognizes that President Joe Biden is ‘rightfully and respectfully the president of the United States.’”<sup>314</sup> Defendant Anthony Antonio was quoted by the AP saying after his arrest and facing serious charges, “I kind of sound like an idiot now saying it, but my faith was in [Trump].”<sup>315</sup> Former federal prosecutor Jennifer Rodgers argued that Antonio’s change of heart is important because voices like his may be the only ones that can reach fellow Trump followers, writing for CNN:

For the same reason that former cult members can be the most persuasive advocates in convincing others to abandon those beliefs, it may be that participants in the insurrection who, like Antonio, now see that the Trump election claims amplified by Fox and others are false, are well positioned to convince the large percentage of Republicans who still believe that the election was stolen.<sup>316</sup>

### B. *The Persistence of the Big Lie Among the Public*

#### I. *Millions Still Believe the Big Lie*

A gargantuan problem with a president badmouthing democracy itself is that it could risk turning voters away from political engagement altogether, thereby undermining the legitimacy of the democracy itself. As Professor Norton warned after *Bush v. Gore*’s contested 2000 presidential election, “[u]nless folks are persuaded that voting is worth the effort and that their vote counts, the United

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311. *Id.* (“Alise Cua testified on Wednesday that she was similarly embarrassed by her belief that the election was stolen from Trump, who lost the popular vote by 7 million votes and the Electoral College vote by a wide margin.”).

312. Ryan J. Reilly, *Indiana Woman Is the First Capitol Defendant Sentenced*, HUFFPOST (June 23, 2021, 3:18 PM), [https://www.huffpost.com/entry/capitol-attack-defendant-sentenced\\_n\\_60d32d5ee4b0c101fc82f552](https://www.huffpost.com/entry/capitol-attack-defendant-sentenced_n_60d32d5ee4b0c101fc82f552) [<https://perma.cc/W8VK-YGZ2>].

313. Ryan J. Reilly, *Trump Fanatic Paul Hodgkins Sentenced to 8 Months in First Felony Capitol Riot Case*, YAHOO! NEWS (July 19, 2021), <https://sg.news.yahoo.com/trump-fanatic-paul-hodgkins-sentenced-162055221.html?guccounter=1> [<https://perma.cc/9X3E-MXYX>].

314. *Id.*

315. Klepper, *supra* note 268.

316. Jennifer Rodgers, *Capitol Riot Defendant’s ‘Foxitis’ Defense May Do Some Good*, CNN (May 11, 2021, 10:18 PM), <https://www.cnn.com/2021/05/11/opinions/capitol-riot-foxitis-defense-rodgers/index.html> [<https://perma.cc/G3WE-RCTG>].

States is unlikely to cultivate an engaged, informed electorate.”<sup>317</sup> A big difference between the contested 2000 election and the contested 2020 election is that while Al Gore graciously conceded that he lost after the Supreme Court ruled against him—which reinforced respect for the rule of law and democracy—Trump, by contrast, has never conceded that he lost a fair election, even after more than sixty courts stated that he had.<sup>318</sup>

In November 2020, polling showed that Trump’s lack of a concession had a negative impact on the public’s faith in democracy: “[t]he Nov. 13–17 opinion poll showed that Trump’s open defiance of Biden’s victory in both the popular vote and Electoral College appears to be affecting the public’s confidence in American democracy, especially among Republicans.”<sup>319</sup>

Because of Trump’s Big Lie, right before President-elect Biden was inaugurated, millions of Americans doubted that Biden’s electoral win was legitimate. *Vox* reported at the time, “[d]espite the congressional certification of the presidential election results last week, an overwhelming majority of Republicans still don’t trust the outcome—and almost half don’t think that President-elect Joe Biden should be inaugurated.”<sup>320</sup> Months after President Biden was in office, the doubts still festered among many Republicans.<sup>321</sup> Polling in March 2021 showed “[s]ix in 10 Republicans also believe the false claim put out by Trump that November’s presidential election ‘was stolen’ from him due to widespread voter fraud, and the same proportion of Republicans think he should run again in 2024 . . .”<sup>322</sup>

## 2. Voting Rules are Tightening Based on the Big Lie

Many Trump supporters still believe the Big Lie that something went gravely wrong during the 2020 election and cynical Republican lawmakers have capitalized on this doubt to pass restrictive voting laws in nineteen states.<sup>323</sup>

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317. Helen Norton, *What Bush v. Gore Means for Elections in the 21st Century*, 2 WYO. L. REV. 419, 422 (2002).

318. Harry Enten, *Al Gore Conceded on This Date. Trump Still Hasn’t*, CNN (Dec. 13, 2020, 10:21 AM), <https://www.cnn.com/2020/12/13/politics/trump-gore-concede/index.html> [https://perma.cc/2XVM-KCYU].

319. Chris Kahn, *Half of Republicans Say Biden Won Because of a ‘Rigged’ Election: Reuters/Ipsos Poll*, REUTERS (Nov. 18, 2020, 5:05 AM), <https://www.reuters.com/article/us-usa-election-poll/half-of-republicans-say-biden-won-because-of-a-rigged-election-reuters-ipsos-poll-idUSKBN27Y1AJ> [https://perma.cc/2DJX-99WC].

320. Li Zhou, *About Half of Republicans Don’t Think Joe Biden Should Be Sworn in as President*, VOX (Jan. 11, 2021, 6:50 PM), <https://www.vox.com/2021/1/11/22225531/joe-biden-trump-capitol-inauguration> [https://perma.cc/A223-T3GX].

321. James Oiphant & Chris Kahn, *Half of Republicans Believe False Accounts of Deadly U.S. Capitol Riot-Reuters/Ipsos Poll*, REUTERS (Apr. 5, 2021, 5:06 AM), <https://www.reuters.com/article/us-usa-politics-disinformation/half-of-republicans-believe-false-accounts-of-deadly-u-s-capitol-riot-reuters-ipsos-poll-idUSKBN2BS0RZ> [https://perma.cc/E22E-TB7K].

322. *Id.*

323. *Voting Laws Roundup: October 2021*, BRENNAN CTR. (Oct. 4, 2021), <https://www.brennan-center.org/our-work/research-reports/voting-laws-roundup-october-2021> [https://perma.cc/44PP-M9FV] (“In an unprecedented year so far for voting legislation, 19 states have enacted 33 laws that will make it harder for Americans to vote.”).

Of course, President Trump is not the first politician to lie about election administration. Long before Trump declared his candidacy in 2015 for the presidency, Republicans had been ginning up myths about voter fraud to justify voting restrictions like voter ID, reducing early voting hours, and limiting who could vote-by-mail.<sup>324</sup> As Professor Norton noted, “[I]ike many other election lies, deliberate or reckless falsehoods alleging widespread voter fraud have a long history. . . . If such lies lead to legal changes that effectively disenfranchise certain voters, they threaten especially pernicious harms.”<sup>325</sup> This pattern of touting voting fraud to justify restrictive laws appears to be precisely what happened in 2021 as nineteen states have enacted more restrictive voting rules.<sup>326</sup>

As Professor Penny Venetis explains, “any claims that efforts to stop vote-by-mail are attempts to root out fraud are completely unsubstantiated. They are not backed up by data or the experiences of thousands of elections administration officials across the nation.”<sup>327</sup> If anything, Trump simply took the old voter fraud myths and turned them up to eleven in the post-election period. Note, none of the lawsuits alleging voting fraud in the post-election period actually substantiated voter fraud.<sup>328</sup> And none of the audits of the 2020 vote revealed voter fraud other than a mere handful of unlawful votes among 158,383,403 ballots cast and none in amounts that would have changed a single electoral college vote.<sup>329</sup> And laws to make voting harder and partisan interference in elections easier have proliferated nationwide. According to the Brennan Center for Justice, which tracks such voting legislation, “[b]etween January 1 and May 4 [2022], six state legislatures—Alabama, Arizona, Florida, Georgia, Kentucky, and Oklahoma—have passed nine election interference laws. . . . In total, lawmakers in 27 states have proposed at least 148 election interference bills.”<sup>330</sup> And the Brennan Center adds that, “lawmakers in 39 states have considered at least 393 restrictive bills for the

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324. David Schultz, *A Costly, Unnecessary Abuse of the Constitution*, 69 BENCH & B. MINN. 17, 18 (2012) (“Nationally, the three most persistent claims of voter fraud come from the *Wall Street Journal*’s John Fund, a report from the Senate Republican Policy Committee in Congress, and the Carter-Baker Report. None of these studies have documented provable and significant voter fraud.”); Ciara Torres-Spelliscy, *What Edgar Allan Poe’s Death and Voter Fraud Myths Have in Common*, TALKING POINTS MEMO (Mar. 12, 2020, 7:00 AM), <https://talkingpointsmemo.com/cafe/cafe-edgar-allan-poe-death-voter-fraud-myth> [https://perma.cc/P8P5-PXUT].

325. Norton, *supra* note 24.

326. Sara Murray & Jason Morris, *Georgia’s GOP Lieutenant Governor Says Giuliani’s False Fraud Claims Helped Lead to Restrictive Voting Law*, CNN (Apr. 8, 2021, 12:47 AM), <https://www.cnn.com/2021/04/07/politics/geoff-duncan-voter-fraud-cnn/index.html> [https://perma.cc/5QAU-YCKN]; *Voting Laws Roundup: October 2021*, *supra* note 323.

327. Venetis, *supra* note 181, at 1401.

328. *Fact Check: Courts Have Dismissed Multiple Lawsuits of Alleged Electoral Fraud Presented by Trump Campaign*, REUTERS (Feb. 15, 2021, 9:41 AM), <https://www.reuters.com/article/uk-factcheck-courts-election-fact-check-courts-have-dismissed-multiple-lawsuits-of-alleged-electoral-fraud-presented-by-trump-campaign-idUSKBN2AF1G1> [https://perma.cc/Z8KS-CX74].

329. Christina A. Cassidy, *Far Too Little Vote Fraud to Tip Election to Trump, AP Finds*, AP NEWS (Dec. 14, 2021), <https://apnews.com/article/voter-fraud-election-2020-joe-biden-donald-trump-7fc6f134e528fee8237c7601db3328f> [https://perma.cc/HVN3-J4V8].

330. *Voting Laws Roundup: May 2022*, BRENNAN CTR. (May 26, 2022), [https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2022\[OK\]](https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2022[OK]) [https://perma.cc/57S3-ZVA4].

2022 legislative session. Since the beginning of 2021, 18 states have passed 34 restrictive voting laws[.]”<sup>331</sup>

## VI. CONCLUSION

If only all Americans lived in a courtroom, the public might get more truth out of elected officials. The federal courts robustly defend the integrity of their own branch in part by penalizing lies that litigants deploy in ongoing court cases. Meanwhile, outside of the courthouse doors, the political branches (Congress and the Executive) and the fifty States need integrity just as much as the judiciary does. The political branches and the States rely on Americans’ faith in how they reached power through free and fair elections. All three branches rely on the public’s faith that they will regularly act in the nation’s best interest and not just in the personal interests of those who are temporarily in charge. But by throwing up its hands and allowing unfettered lying about the electoral process itself, the Supreme Court has left the nation vulnerable to verbal attacks like the Big Lie and physical attacks like J6. As the Select Committee investigating January 6th concluded, “President Trump invested millions of dollars of campaign funds purposely spreading false information, running ads he knew were false, and convincing millions of Americans that the election was corrupt and that he was the true President. … [T]his misinformation campaign provoked the violence on January 6th.”<sup>332</sup>

The Supreme Court should step back from its pro-lying position in *Alvarez* in a future case. As Mark Tushnet once wrote, “when all is said and done, there really is no social value in the dissemination of falsehood, particularly knowing falsehood.”<sup>333</sup> And to the extent that law is one way that government incentivizes behavior, the Court should do its role to incentivize the best behavior from elected officials. As Judge Lynn Adelman argued, “[t]he court would do well to increase rather than decrease incentives for public officials to conduct themselves at a high level of integrity.”<sup>334</sup>

But as of the writing of this piece, the incentives are all pointing the wrong way. The Supreme Court has placed itself on the side of liars and cheats. President Trump and other White House organizers of J6 have not faced indictment or other forms of punishment.<sup>335</sup> And, finally, Trump has been able to make money off of the Big Lie.<sup>336</sup> As Aaron Rupar reminds us: “[n]evertheless, refusing to concede has resulted in a post-election fundraising bonanza for Trump

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331. *Id.*

332. *Here's Every Word of the First Jan. 6 Committee Hearing on Its Investigation*, *supra* note 20 (quoting Rep. Liz Cheney).

333. Tushnet, *supra* note 62.

334. Adelman, *supra* note 77.

335. Ryan Lucas, *Where the Jan. 6 Insurrection Investigation Stands, One Year Later*, NPR (Jan. 6, 2022, 5:00 AM), <https://www.npr.org/2022/01/06/1070736018/jan-6-anniversary-investigation-cases-defendants-justice> [<https://perma.cc/GP8P-H9L5>].

336. See Soo Rin Kim & Will Steakin, *How Trump, RNC Raised Hundreds of Millions Pushing Baseless Election Fraud Claims*, ABC NEWS (Feb. 2, 2021, 6:30 PM), <https://abcnews.go.com/US/trump-rnc-raised-hundreds-millions-pushing-baseless-election/story?id=75633798> [<https://perma.cc/VSA3-RASP>].

while providing him with a ready-made ‘stolen election’ narrative he could use for a campaign in 2024.”<sup>337</sup> Trump even made money off of the Big Lie. As the January 6th Select Committee would later reveal:

[T]he Trump campaign used these false claims of election fraud to raise hundreds of millions of dollars from supporters, who were told their donations were for the legal fight in the courts, but the Trump campaign didn’t use the money for that. The Big Lie was also a big rip off.<sup>338</sup>

Trump’s initial failure to concede by itself likely would not cause lasting damage to the American political process. But the nonstop claims during the seventy-eight days between the election and the inauguration of Joe Biden that his supporters should “stop the steal” has the potential to undermine voting rights and trust in American democracy in the long term.

Months after Joe Biden was sworn into office, Donald Trump still repeated the “Big Lie” that he won the 2020 election, including during a speech at CPAC on February 28, 2021.<sup>339</sup> At CPAC, he said, “how the hell is it possible that we lost? It’s not possible. I got more votes.”<sup>340</sup> And even in July of 2021 he repeated the claim at a rally in Arizona.<sup>341</sup> He stuck to the Big Lie in 2022 as well.<sup>342</sup>

This false narrative that there was voter fraud in the 2020 election has spawned over 300 pieces of legislation in the states to curb voting rights. Thus, the lasting legacy of Trump’s delusions in his last days in office will likely have a negative impact on voting rights for years to come. These new voting restrictions will make it harder for voters to dislodge the very politicians from power who enacted these awful election laws in 2021 and 2022. This was likely the intended result.

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337. Aaron Rupar, *Georgia Republicans Are Pleading with Trump to Stop Attacking Them. He Isn’t Listening.*, VOX (Dec. 7, 2020, 4:55 PM), <https://www.vox.com/2020/12/7/22159017/trump-attacks-georgia-republicans-kemp-raffensperger> [https://perma.cc/4TQS-TJNG].

338. *Here’s Every Word of the Second Jan. 6 Committee Hearing on Its Investigation*, NPR (June 13, 2022, 6:16 PM), <https://www.npr.org/2022/06/13/1104690690/heres-every-word-of-the-second-jan-6-committee-hearing-on-its-investigation> [https://perma.cc/7EAX-ECHQ].

339. Will Steakin & Libby Cathey, *Trump’s CPAC Speech Repeats False Election Fraud Claims, Teases 2024 Presidential Run*, ABC NEWS (Feb. 28, 2021, 8:22 PM), <https://abcnews.go.com/Politics/trumps-cpac-speech-repeats-false-election-fraud-claims/story?id=76173257> [https://perma.cc/3763-AU9H].

340. *Donald Trump CPAC 2021 Speech Transcript*, REV (Feb. 28, 2021), <https://www.rev.com/blog/transcripts/donald-trump-cpac-2021-speech-transcript> [https://perma.cc/A9ZG-DXZG].

341. *Donald Trump Phoenix, Arizona Rally Speech Transcript July 24*, REV (July 24, 2021), <https://www.rev.com/blog/transcripts/donald-trump-phoenix-arizona-rally-speech-transcript-july-24> [https://perma.cc/9E3F-PLH8] (“It was the most corrupt, dishonest, and unfair election in the history of our country. The Democrats know it. The corrupt media, right back there lot of people, they know it.”).

342. Aaron Blake, *Trump’s Voter Fraud Claims Are Growing More Outlandish*, WASH. POST (May 31, 2022, 2:28 PM), <https://www.washingtonpost.com/politics/2022/05/31/trumps-voter-fraud-claims-are-growing-more-outlandish/> [https://perma.cc/FN58-2R66]; *Former Pres. Trump Speaks about Investigation at Faith & Freedom Conference*, C-SPAN (June 17, 2022), <https://www.c-span.org/video/?521049-1/president-trump-calls-select-committee-a-witch-hunt&event=521049&playEvent> [https://perma.cc/P32L-4986] (Trump referred to the 2020 election as “rigged” and “stolen.”).