SMU Law Review Forum

Volume 77 Article 9

11-2024

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SMU Law Review Forum

Volume 77 2024 244-271

INSURRECTION-PROOFING THE COURTS: JUDICIAL TOOLS TO PROTECT THE LEGAL SYSTEM FROM LITIGATION ABUSE IN THE WAKE OF THE 2024 ELECTION

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INTRODUCTION

In the weeks following the presidential election of 2020, lawyers filed over sixty lawsuits that sought to challenge the results of that election: the loss, in the electoral college, by the then-incumbent President, Donald J. Trump.[1] As the nation holds another presidential election in 2024, it is not difficult to anticipate that some might take similar actions through the courts to seek to challenge, if not outright overturn, the results of that election. In fact, litigation is already underway in several states, in cases filed by lawyers working on behalf of the candidates of both parties, to challenge different aspects of the ballot-handling process.[2] This includes an effort to undermine the counting of

DOI: https://doi.org/10.25172/slrf.77.1.9

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1. For an overview of just some of these lawsuits and their results, see David F. Levi, Amelia Ashton Thorn & John Macy, *2020 Election Litigation: The Courts Held*, 105 JUDICATURE 9, 9 (2021) ("Across more than 60 cases in 12 states, judges found that the challenges to the election outcome came up short."). *See also* ABA Standing Comm. On Election Law, *Litigation in the 2020 Election*, ABA CTR. FOR PUB. INT. L. (Oct. 27, 2022) (describing lawsuits filed in the wake of the 2020 election), https://www.americanbar.org/groups/public_interest/election_law/litigation/?login [https://perma.cc/78GQ-JXXW].

2. Olivia Rubin, Will Steakin & Lucien Bruggeman, *'The Litigation Election': Trump and Harris Teams Head to Court in Flurry of Pre-Election Lawsuits*, ABC NEWS (Oct. 22, 2024, 4:01 AM) (describing plans for pre- and post-election lawsuits in 2024), https://abcnews.go.com/US/litigation-election-trump-harris-teams-head-court-flurry/story?id=114992499 [https://perma.cc/B9NL-HJ47].

overseas ballots,[3] or legislation that will require a count, by hand, of every ballot cast in the State of Georgia.[4]

Putting aside the merits of these newly filed cases and those that will certainly follow the results of the 2024 election—especially if the Republican nominee should once again lose as he did in 2020—the courts are likely to face a new onslaught of cases as they did in the wake of the last presidential contest.[5] Regarding the actions filed after that election, it is hard to find a collection of cases in an area of law that failed as miserably as that litigation did.[6] What is more, at least some of the lawyers who brought those cases have either been disbarred already, or are facing the last stages of disbarment proceedings, with that sanction likely to follow.[7] But meting out such penalties after the fact, long after the cases those lawyers filed had been dismissed (with many resulting in the lawyers being sanctioned for misconduct in asserting baseless claims[8]), may do little to deter lawyers committed to pressing a new round of claims, no matter whether they are as far-fetched as or more fantastical than those presented in the 2020 challenges.[9] Yet, on the eve of the next election, courts are not powerless to prepare themselves for this new onslaught of cases, to prevent them from fomenting the kind of mischief these lawyers explicitly sought to sow in the wake of the

3. Luc Cohen, *As Trump Woos Overseas Voters, Republicans Seek Restrictions in Court*, REUTERS (Oct. 11, 2024, 5:10 PM) https://www.reuters.com/world/us/trump-woos-overseas-voters-republicans-seek-restrictions-court-2024-10-11/ [https://perma.cc/P9XN-4XVT].

4. Jack Queen, *Georgia's Top Court Deals Setback to Trump Allies in Ballot Hand-Count Case*, REUTERS, Oct. 22, 2024, https://www.reuters.com/legal/georgias-top-court-wont-fast-track-appeal-blocked-election-rules-case-2024-10-22/ [https://perma.cc/4NQY-EZQ8]. In one recently filed case, it appears that former President Trump may be setting up a challenge to the results of the 2024 election by filing a case in a specific division in the U.S. District Court in Texas over alleged fraud by CBS News that, it is asserted, has negatively impacted Mr. Trump, allegedly warranting damages of $10 Billion. Robert Tait, *Trump Sues CBS News for $10bn, Claiming Kamala Harris Interview Was Edited*, THE GUARDIAN (Nov. 1, 2024, 9:55 AM), https://www.theguardian.com/us-news/2024/nov/01/trump-cbs-harris-interview-lawsuit [https://perma.cc/9BB7-9TP3]. It should shock no one that the location of the filing has become synonymous with judge shopping: the Amarillo Division of the Northern District of Texas. Filing a case there guarantees it will be before the one judge presently presiding in that division: Judge Matthew J. Kacsmaryk. It would also surprise no one if the Trump campaign filed a new case after the election and tried to file it as a "related case" to the one against CBS News in the hope of securing a favorable ruling, and even a nationwide injunction, from this judge. For previous examples of litigants bringing these sorts of cases in this forum, see Katherine A. Macfarlane, *Constitutional Case Assignment*, 102 N.C. L. REV. 977, 1022–25 (2024). On the issue of using the related-case mechanism to engage in judge shopping, *see* Marcel Kahan & Troy A. McKenzie, *Judge Shopping*, 13 J. LEGAL ANALYSIS 341, 349–53 (2021).

5. Lindsay Whitehurst, *Courts Could See a Wave of Election Lawsuits, But Experts Say the Bar to Change the Outcome is High*, AP (Oct. 8, 2024, 3:03 PM), https://apnews.com/article/election-supreme-court-lawsuits-trump-harris-1507df4e695ca13c5da00c22ef8e14e5 [https://perma.cc/43XG-HSJL].

6. *See, e.g.*, Michael S. Schwartz, *Trump's Legal Losses Come Fast and Furious*, NPR (Dec. 5, 2020, 8:04 PM) (describing loss of six cases in a single day in 2020), https://www.npr.org/2020/12/05/943535299/trumps-legal-losses-come-fast-and-furious [https://perma.cc/TM2S-9P9C].

7. *See infra* Part I.B.

8. *See infra* Part I.A.

9. Several of the more outrageous claims are detailed in Part I, *infra*.

last election.[10] This essay helps explain the tools at the disposal of courts to "Insurrection-Proof" their courtrooms, to prevent—and not merely punish after the fact—the act of using the courts to overturn the results of what should be a legitimate election and undermine the rule of law.

The tools already at courts' disposal to punish frivolous conduct that I will document here include: Rule 11 of the Federal Rules of Civil Procedure (FRCP),[11] 28 U.S.C. § 1927,[12] and the inherent powers of the court.[13] Since the first two of these options have some limitations to them by design—that they are intended to deter *future* conduct—I will stress the need for courts to flex their inherent authority to sanction misconduct by lawyers at the *outset* of litigation. Second, courts must scrutinize claims of fraudulent election results using the standard set forth by the Supreme Court in *Ashcroft v. Iqbal*[14] that requires all claims to be plausible. What is more, they should also not hesitate to hold lawyers claiming fraud to the higher standard set forth in FRCP 9(b), that such claims must be pled with particularity.[15] Third, should any lawsuit challenging the results of the election or any aspects of it seek injunctive relief, courts must hold litigants to the appropriate standard for such relief, and reject claims where the credible facts and legal arguments do not satisfy every element of the injunction standard.[16] Fourth, courts should not hesitate to give priority to claims that seek to challenge the results of the election and put such cases on an expedited schedule, requiring lawyers to establish the validity of their claims at the earliest possible moment.[17] Finally, courts can issue temporary standing orders, whether it is individual judges or court systems, reminding lawyers of their obligations under the rules to file only claims that have a good faith basis to them and that failure to do so will result in significant sanctions for such abuse.[18] After, in Part I, recounting the history of the post-2020-election litigation, and the consequences for some of the lawyers who brought frivolous actions and engaged in other unethical conduct, in Part II, this Essay will explore, in turn, each of these five

10. *See* Eastman v. Thompson, 594 F. Supp. 3d 1156, 1169–70 (C.D. Cal. 2022) (describing legal memoranda written by Eastman wherein he laid out a plan to disrupt the certification of the 2020 election on January 6, 2021, under a tortured reading of the Electoral Count Act).

11. FED. R. CIV. P. 11.

12. 28 U.S.C. § 1927.

13. For a description of courts' inherent powers, see Chambers v. NASCO, 501 U.S. 32, 43–45 (1991).

14. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556, 570 (2007)).

15. *See* FED. R. CIV. P. 9(b) (providing that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake").

16. *See infra* Part II.C.; Winter v. Nat'l Res. Def. Council, 555 U.S. 7, 20 (2008) (setting forth standard for preliminary injunction).

17. See *infra* Part II.D.

18. *See infra* Part II.E.

components of an insurrection-proofing approach to what is sure to be a tidal wave of legal challenges to the results of the 2024 election.

I. THE POST-2020-ELECTION LAWSUITS AND THE PROFESSIONAL CONSEQUENCES FOR THE LAWYERS THAT FILED THEM

A. POST-ELECTION LITIGATION

In the wake of the 2020 election, supporters filed over sixty cases in twelve different states seeking to challenge the results of that election; not one of them prevailed in any meaningful way.[19] Some of these cases were fairly straightforward election law challenges, and others made more far-fetched claims.[20] In the court of public opinion, lawyers and others made even more outrageous claims, suggesting, for instance, that former President of Venezuela, Hugo Chavez, dead since 2013, somehow had a hand in changing votes by controlling some of the voting machines.[21] While courts dismissed all of these cases, offering litigants little in terms of meaningful relief, at least some lawyers faced sanctions under Rule 11 of the Federal Rules of Civil Procedure and other mechanisms. For example, in *King v. Whitmer*,[22] the lawyers who filed that suit, who included prominent Trump lawyers Sidney Powell and Lin Wood, made some of the most wide-ranging allegations of fraud and election interference in the 2020 election. That suit focused on the election in the state of Michigan, a swing-state that proved essential to Joe Biden's victory. The plaintiffs sought to overturn the results of the state's 2020 presidential election, because of "an international 'collaboration'—with origins in Venezuela, extending to China and Iran, and including state actors in Michigan itself."[23] This collaboration succeeded, it was alleged, in "generating hundreds of thousands of fraudulent votes in Michigan, thereby swinging the state's electoral votes to Joseph Biden."[24] The district court had issued a sweeping sanctions order, because, as it was shown, at least some of the allegations were refuted by plaintiffs' own exhibits to their complaint.[25] The plaintiffs' attorneys had also supported their claims on "unreliable expert

19. *See* Levi et al., *supra* note 1, at 9 (describing results of litigation that sought to challenge results of the 2020 election).

20. *See infra* text accompanying notes 119–121 (describing allegations contained in complaint in *Latinos for Trump v. Sessions*, 6:21-CV-43 (W.D. Tex. Jan. 21, 2021)).

21. *See* US Dominion, Inc. v. Powell, 554 F. Supp. 3d 42, 51–52 (D.D.C. 2021) (describing Sidney Powell's allegations regarding manipulation of voting machines), *appeal dismissed sub nom*. US Dominion, Inc. v. My Pillow, Inc., No. 21-7103, 2022 WL 774080 (D.C. Cir. 2022), *cert. denied sub nom.* MyPillow, Inc. v. US Dominion, Inc., 143 S. Ct. 294 (2022).

22. King v. Whitmer, 71 F.4th 511 (6th Cir. 2023), *cert. denied sub nom.* Powell v. Whitmer, 144 S. Ct. (2024), *reh'g denied* 144 S. Ct. 1386 (2024). In separate actions, attorney Lin Wood sought a rehearing en banc of the Sixth Circuit ruling, which was rejected. *See* King v. Wood, Nos. 21-1785/21-1786, 2023 WL 5498746 (6th Cir. Aug. 8, 2023) (denying en banc rehearing), *cert. denied* 144 S. Ct. 1004 (2024).

23. 71 F.4th at 517.

24. *Id*.

25. *Id*. at 517.

reports" and "still others were simply baseless."[26] As the district court explained:

> The attorneys who filed the instant lawsuit abused the well-established rules applicable to the litigation process by proffering claims not backed by law; proffering claims not backed by evidence (but instead, speculation, conjecture, and unwarranted suspicion); proffering factual allegations and claims without engaging in the required prefiling inquiry; and dragging out these proceedings even after they acknowledged that it was too late to attain the relief sought.
>
> *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.*[27]

Although the appellate court affirmed much of the district court's ruling, finding the lawyers' conduct sanctionable, it also determined that the complaint contained some at least plausible claims about mistreatment of some Republican election workers in Detroit, Michigan.[28] Nevertheless, the Sixth Circuit upheld most aspects of the lower court's ruling, affirming the order finding Powell and other lawyers responsible for having violated both Rule 11 and 28 U.S.C. § 1927. Since the court found those other provisions had been violated, it determined that it was not necessary to also exercise the court's inherent authority to issue additional punishment.[29]

Still other lawyers faced referral to disciplinary authorities, as in *Wisconsin Voters Alliance v. Pence*, where litigants filed a complaint in the United States District Court for the District of Columbia together with a Temporary Restraining Order aimed at halting certification of the results of the 2020 election on January 6, 2021, by then-Vice President Mike Pence and the United States Congress.[30] The case was rife with weak claims, which, as Judge James Boasberg pointed out, would have required that he overturn decades of Supreme Court precedent to prevail.[31] He noted that the 116-page complaint was "replete with 310 footnotes," and to call it "prolix would be a gross understatement."[32] The pleading also "explicitly disclaimed any theory of fraud," saying "this lawsuit is not about voter fraud."[33] The plaintiffs nevertheless spent "scores of pages cataloguing every conceivable discrepancy or irregularity in the 2020 vote in the five relevant states, already

26. *Id*.
27. King v. Whitmer, 556 F. Supp. 3d 680, 689 (E.D. Mich. 2021) (emphasis in original).
28. King v. Whitmer, 71 F. 4th 511, 529 (6th Cir. 2023).
29. *Id*. at 530.
30. 514 F. Supp. 3d. 117, 119 (D.D.C. 2021).
31. *Id*. at 121.
32. *Id*. at 119.
33. *Id*. (internal citations omitted) (cleaned up).

debunked or not, most of which they nonetheless describe as a species of fraud."[34] On the merits of the plaintiffs' claims, the court noted that the lawyers had failed to "explain how this District Court has authority to disregard Supreme Court precedent,"[35] and neglected to "mention why they have waited until seven weeks after the election to bring this action and seek a preliminary injunction based on purportedly unconstitutional statutes that have existed for decades—since 1948 in the case of the federal ones."[36] For this reason, the court found that it was "not a stretch to find a serious lack of good faith here."[37]

In a subsequent ruling regarding whether to refer the lawyers who brought the case to federal disciplinary authorities,[38] Judge Boasberg also pointed out the fact that the litigants had not only delayed bringing the action, they had also insisted on an immediate hearing on their request for a temporary restraining order, even when the lawyers themselves had failed to serve some of the defendants with copies of the summons and complaint in the action.[39] The court described the lawyers' behavior as a further reflection of their bad faith in bringing the case in the first place:

> A suit that truly wished a merits opinion before January 6 would have given notice to all Defendants as soon as (or before) the Complaint and Motion were filed on December 22, 2020. See Fed. R. Civ. P. 65(a)(1). Plaintiffs never did this or ever contacted the Court about a hearing prior to its January 4 Opinion, leading the Court to conclude that they wished only to file a sweeping Complaint filled with baseless fraud allegations and tenuous legal claims to undermine a legitimate presidential election.[40]

The court also made clear that any sort of substantive or procedural improprieties, which some might consider minor violations of an attorney's obligations in a typical case, when viewed in light of the relief the plaintiffs sought in the case, become *more* important, not less:

> The Court ends by underlining that the relief requested in this lawsuit is staggering: to invalidate the election and prevent the electoral votes from being counted. When any counsel seeks to target processes at the heart of our democracy, the Committee

34. *Id.*
35. *Id*.
36. *Id*. at 121.
37. *Id*.
38. Wisconsin Voters Alliance v. Pence, No. CV-20-3791 (JEB), 2021 WL 686359, at *2 (D.D.C. Feb. 19, 2021).
39. *Id.*
40. *Id.*

> may well conclude that they are required to act with far more diligence and good faith than existed here.[41]

Judge Boasberg ultimately referred the matter to the Committee on Grievances for the District Court of the District of Columbia,[42] but "express[ed] no opinion on whether discipline should be imposed or, if so, what form that should take."[43]

B. THE MOST SERIOUS PROFESSIONAL CONSEQUENCES FOR SEVERAL OF THE LEAD LAWYERS SUPPORTING ELECTION-DENYING ACTIVITIES

In addition to at least some of the lawyers who brought a number of the cases described above having faced sanctions from courts and referrals to state disciplinary proceedings, a number of the more prominent lawyers engaged in some of the most egregious actions in the wake of the 2020 election have faced professional consequences for their actions. Kenneth Chesebro and Sidney Powell have pled guilty to criminal violations in the Georgia election interference case.[44] In addition, several lawyers have already faced, or will soon face, the loss of their ability to practice law. In July 2024, an appellate court in New York State adopted a disciplinary referee's report and recommendation that disbarred Rudy Giuliani from practice in the State of New York.[45] Soon thereafter, the District of Columbia followed suit, disbarring Giuliani from the practice of law there as well, based on the New York disciplinary ruling.[46]

Several other of the more prominent lawyers are also likely to face disbarment soon. In March 2024, a State Bar Court in California recommended the punishment of disbarment for John Eastman.[47] At first it appeared that the Central District of California endorsed that recommendation on June 7, 2024,[48] but a California federal court published a notice in June

41. *Id.*

42. United States District Court for the District of Columbia Local Rules, LCvR 83.12(b)(2019).

43. 2021 WL 686359, at *2.

44. Dennis Aftergut, *Opinion: Why the Kenneth Chesebro and Sidney Powell Guilty Pleas are so Dire for Donald Trump*, L.A. TIMES (Oct. 23, 2023, 2:58 PM) (describing plea agreements of Chesebro and Powell), https://www.latimes.com/opinion/story/2023-10-23/kenneth-chesebro-sidney-powell-guilty-pleas-donald-trump-georgia-fulton-racketeering [https://perma.cc/M9L9-QT2R].

45. Matter of Giuliani, 230 A.D.3d 101, 124–25 (N.Y. App. Div. 1st Dept. 2024).

46. *In re* Rudolph W. Giuliani, No. 21-BG-0423, 2024 WL 4294346 (D.C. App. Sept. 26, 2024).

47. Lauren Berg, *Eastman Should be Disbarred, Calif. State Bar Judge Rules*, LAW360 (Mar. 27, 2024, 7:58 PM), https://www.law360.com/articles/1817987/eastman-should-be-disbarred-calif-state-bar-judge-rules [https://perma.cc/9KZ4-NNWM] (linking to California order recommending Eastman's disbarment, available at https://perma.cc/77M6-E8QQ).

48. *See id*.

saying that the March decision and order was filed in mistake,[49] and Mr. Eastman's California bar status is in some degree of limbo at present. On August 1, 2024, the D.C. Board on Professional Responsibility recommended suspension for Mr. Clark's actions at the Department of Justice.[50] Soon thereafter, Clark sought to appeal that recommendation to the District of Columbia Court of Appeals.[51]

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The punishments imposed on the lawyers described above all happened long after the actions which justified such sanctions: nearly a full four years after the behavior that gave rise to that discipline occurred. What tools are available to courts to try to prevent, rather than punish after the fact, a repeat of what transpired in the American legal system in the wake of the 2020 election in the one taking place in November 2024? The next Part explores that question.

II. STRATEGIES FOR INSURRECTION-PROOFING COURTS BEFORE THE NEXT WAVE OF ELECTION-DENYING CASES REACHES THE LEGAL SYSTEM

A. COURTS SHOULD UTILIZE THE FULL ARRAY OF PUNISHMENTS AVAILABLE TO THEM, ESPECIALLY THEIR INHERENT POWERS

The most common tools courts have to restrain abuse of process and the courts themselves through the filing of frivolous civil lawsuits include Rule 11 of the Federal Rules of Civil Procedure, which requires litigants to have a good faith basis for their legal and factual contentions; 28 U.S.C. § 1927, which permits sanctions upon a lawyer who "multiplies the proceedings in any case unreasonably and vexatiously";[52] and the inherent powers of the court. I will describe each in turn, below, and assess their respective and relative effectiveness in any effort to discourage the filing of frivolous lawsuits should any have designs on overturning the 2024 presidential election.

49. Rachel Rippetoe, *Court Says Eastman Disbarment Order Filed in Error*, LAW360 (June 10, 2024, 4:23 PM), https://www.law360.com/articles/1846135/updated-court-says-eastman-disbarment-order-filed-in-error [https://perma.cc/X8TU-TZAF].

50. Report and Recommendation of Hearing Committee Number Twelve, Matter of Jeffrey B. Clark, Bd. Dkt. No. 22-BD-039, Disciplinary Dkt. No. 2021-D193 (D.C. Ct. App. Aug. 1, 2024), available at https://www.dcbar.org/ServeFile/GetDisciplinaryActionFile?fileName=HCJeffreyBClark22BD039.pdf [https://perma.cc/PK95-ZU6W].

51. *See, e.g.*, *Jeffrey Clark Seeks Court Review*, LEGAL PROF. BLOG (Aug. 7, 2024), https://lawprofessors.typepad.com/legal_profession/2024/08/jeffrey-clark-seeks-court-review.html [https://perma.cc/B2QR-KW34].

52. 28 U.S.C. § 1927. The statute covers not just lawyer misconduct but also that of any "other person admitted to conduct cases in any court of the United States or any Territory thereof."

1. Rule 11 of the Federal Rules of Civil Procedure

One of the strongest tools courts have to punish frivolous conduct is the sanctioning power, which can be found in such explicit sources like Rule 11 of the Federal Rules of Civil Procedure[53] and 28 U.S.C. § 1927.[54] The first of these requires all pleadings to be signed by lawyers or, in the case of pro se litigants, by the litigants themselves.[55] In turn, by "presenting to the court a pleading, written motion, or other paper . . . an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," that "it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation."[56] In addition, that certification includes assurances that the "claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law,"[57] and that "the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery."[58] It is no surprise, given the nature of the claims and far-fetched and baseless factual assertions, that courts sanctioned lawyers who filed at least some of the post-2020 election cases.[59]

At the same time, two elements of Rule 11 bear mentioning, and these make the Rule a relatively weak tool when it comes to preventing lawyers from filing cases that contain frivolous claims or factual contentions. The first of these is that there is a twenty-one day "safe harbor" provision in the Rule. This subpart of Rule 11 provides in relevant part as follows:

> A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.[60]

53. FED. R. CIV. P. 11.
54. 28 U.S.C. § 1927.
55. FED. R. CIV. P. 11(a).
56. *Id*. 11(b).
57. *Id*. 11(b)(2).
58. *Id*. 11(b)(3).
59. For a discussion of several cases in which courts issued sanctions in litigation in the wake of the 2020 election, see *supra* Part I.A.
60. FED. R. CIV. P. 11(c)(2).

What this means in the context of post-election litigation is that a lawyer or even pro se litigant could commence a lawsuit containing outrageous and baseless claims, achieve some modicum of press attention that helps to raise questions about the legitimacy of a particular state's or even the nation's election results, and then withdraw the claim long before the twenty-one day safe harbor expires. We saw this happen in at least one post-2020 election case, where the complaint was dismissed less than ten days after it was filed, and long before the period expired.[61] As described below, the court there utilized a separate mechanism available to it to sanction the lawyer in that case, but this safe harbor provision reveals one way in which Rule 11 is not especially effective in discouraging lawyers and pro se litigants from filing claims if they know they can simply withdraw their action prior to the expiration of the twenty-one day safe harbor provision with few consequences. And while under Rule 11 the court can, on its own motion, issue an order to show cause directing the litigants to defend a charge that their pleadings or motions violate Rule 11,[62] a claimant can also simply withdraw the action and likely avoid sanctions for their conduct.[63]

Another reason Rule 11 is not an effective tool for discouraging frivolous behavior by lawyers and litigants alike is that the purpose of any sanctions issued pursuant to Rule 11 is not to punish litigant behavior in the case before the court, but, rather, to deter future conduct. By its express terms, any sanction for a violation of Rule 11:

> must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.[64]

61. For example, in *Feehan v. Wisconsin Election Commission,* the plaintiffs filed a complaint alleging "massive election fraud" in the election of 2020 "based on 'dozens of eyewitnesses and the statistical anomalies and mathematical impossibilities detailed in the affidavits of expert witnesses.'" No. 20-cv-1771-pp, 2022 WL 3647882, at *1 (E.D. Wis. Aug. 24, 2022). The matter was filed on December 1, 2020, and dismissed on December 9, 2020, which, as the defendants pointed out, meant that they could not file Rule 11 sanctions against plaintiffs because the twenty-one day period set forth under Rule 11 had not run. *Id*. at *11. At the same time, the court would not issue sanctions under its inherent authority absent a separate hearing on the question. *Id*. at *12. This ruling was upheld on appeal. Feehan v. Evers, No. 22-2704, 2023 WL 4928520 (7th Cir. Aug 2, 2023), *cert. denied*, 144 S. Ct. 821 (2024).

62. *See* FED. R. CIV. P. 11(c)(3) (providing that "the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b)").

63. *See Feehan*, 2022 WL 3647882, at *11–12 (describing instance where case dismissed prior to expiration of the 21-day safe-harbor period under Rule 11).

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

At least some of the lawyers who filed post-2020 election litigation have faced both sanctions from the court, as well as referrals to state disciplinary committees to consider more general sanctions, like suspension and disbarment.[65] It is not clear that, apart from the lawyers who no longer have a license to practice law like former New York City Mayor Rudy Giuliani, we will not see lawyers coming forward to bring more litigation following the outcome of the 2024 election. Indeed, there seems to be no shortage of lawyers preparing to work to attack aspects of the election in the event it does not turn out in their preferred candidate's favor. Now, one certainly cannot say now that any challenge to the results of a particular aspect of the election will be frivolous, and perhaps some lawyers will think twice before filing frivolous claims. Still, it is apparent that lawyers are gearing up to file post-election cases and it is not clear the extent to which the so-called deterrent effect that sanctions imposed on the 2020-election challengers will in fact deter future frivolous conduct, as Rule 11 is supposed to do.

2. 28 U.S.C. § 1927

Similarly, 28 U.S.C. § 1927 is also supposed to operate in the same way as Rule 11: that is, sanctions under the statute are supposed to deter *future* conduct, although compensation for those impacted by a lawyer's violation of this provision can also factor into the court's imposition of penalties on the offending lawyer.[66] What is more, by its express terms, it does not necessarily get at conduct that is frivolous from the outset, and where a lawyer could simply withdraw such a case before they take any action that could violate its provisions. Under Section 1927:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof *who so multiplies the proceedings* . . . unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.[67]

A lawyer who files a single complaint, even one that is frivolous with respect to the factual contentions and the legal claims, is unlikely to face charges that they have "multiplied" a proceeding. Indeed, for 28 U.S.C. § 1927 to apply to a lawyer's conduct, it must clear a fairly high bar, and must involve extended actions, typically done with intent. Both Section 1927 and Rule 11 set an objective standard. The latter provides that the lawyer must conduct an investigation "reasonable under the circumstances" that they are

65. *See supra* Part I.B.

66. *See* Lamboy-Ortiz v. Ortiz-Vélez, 630 F.3d 228, 247 (1st Cir. 2010) (finding purpose of statute is to both deter abusive practices and ensure those who create additional litigation costs must bear their costs); Riddle & Assocs., P.C. v. Kelly, 414 F.3d 832, 835 (7th Cir. 2005) (same).

67. 28 U.S.C. § 1927 (emphasis added).

proceeding in good faith with respect to their legal claims and factual contentions.[68] In the context of a challenge to a lawyer's conduct as violative of Section 1927's prohibitions, an explicit finding of subjective bad faith is not required; still, the attorney conduct under review has to be so egregious that it is "tantamount to bad faith."[69] Even when a lawyer might run afoul of this provision, it tends not to happen at the outset of the case, because the lawyer has not had a chance to "multiply" the proceedings in a malicious or vexatious manner. In election-related litigation, time is often of the essence, and it is difficult to multiply a proceeding when it moves quickly through the court system with little discovery and limited motion practice at the outset.[70]

3. The Inherent Powers of the Court to Sanction Abuse of Judicial Process

The Supreme Court has long recognized that courts, in general, have certain powers inherent in their functioning as courts. The most important of which for our discussion is the power to sanction litigants for their misuse of the judicial system itself to advance fraudulent, abusive ends. The Court described the scope of these inherent powers as they have developed over two centuries of jurisprudence in *Chambers v. NASCO*.[71] According to the Court, "'certain implied powers must necessarily result to our Courts of justice from the nature of their institution,' powers 'which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.'"[72] As a result, "courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates."[73] Such inherent powers "are 'governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'"[74] Such powers include "the power to control admission to its bar and to discipline attorneys who appear before it."[75] As the Court also noted, although "this power 'ought to be exercised with great caution,' it is nevertheless 'incidental to all Courts.'"[76] The court also noted how the firmly established power "to punish for contempts is inherent in all courts."[77] Such power "reaches both conduct before the court and that beyond the court's confines, for 'the underlying concern that gave rise to the contempt power was

68. Chambers v NASCO, Inc., 501 U.S. 32, 47 (1991) (noting that Rule 11 "imposes an objective standard of reasonable inquiry which does not mandate a finding of bad faith").

69. Peer v. Lewis, 606 F.3d 1306, 1314 (11th Cir. 2010).

70. For a description of election lawyering, see David S. Turetsky, *The Crisis Comes Once a Year: Lawyering on Election Day*, in CRISIS LAWYERING: EFFECTIVE LEGAL ADVOCACY IN EMERGENCY SITUATIONS 249–266 (Raymond H. Brescia & Eric K. Stern eds., 2021).

71. Chambers v. NASCO, Inc., 501 U.S. 32, 47 (1991).

72. *Id*. at 43 (cleaned up).

73. *Id*. (cleaned up).

74. *Id.* (cleaned up).

75. *Id.* (cleaned up).

76. *Id*. (cleaned up).

77. *Id*. at 44 (cleaned up).

not merely the disruption of court proceedings. Rather, it is disobedience to the orders of the Judiciary, regardless of whether such disobedience interfered with the conduct of trial.'"[78]

The power also includes the authority of a court to "vacate its own judgment upon proof that a fraud has been perpetrated upon the court."[79] Such a "'historic power of equity to set aside fraudulently begotten judgments,' is necessary to the integrity of the courts, for 'tampering with the administration of justice in this manner . . . involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public.'"[80] The inherent power also extends to "the power to conduct an independent investigation in order to determine whether [the court] has been the victim of fraud."[81] While the power "should be exercised with restraint and discretion," because of its "potency,"[82] the Court in *Chambers* noted that "[a] primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process," including the "particularly severe sanction" of "outright dismissal" of an action.[83]

One of the sanctions available to courts when exercising their inherent powers is the power to assess attorney's fees against the losing party.[84] Should a court find that "'fraud has been practiced upon it, or that the very temple of justice has been defiled,' it may assess attorney's fees against the responsible party, as it may when a party 'shows bad faith by delaying or disrupting the litigation or by hampering enforcement of a court order.'" [85] One of the core functions of this sanctioning authority "reaches a court's inherent power to police itself, thus serving the dual purpose of 'vindicating judicial authority without resort to the more drastic sanctions available for contempt of court and making the prevailing party whole for expenses caused by his opponent's obstinacy.'"[86]

One of the advantages of courts' inherent powers over the previous two mechanisms described above is that these powers can help serve to deter behavior before it happens, and a court need not wait for a "cooling-off" period or safe harbor, nor does it have to await lawyers "multiplying" litigation in order to exercise it.[87] Indeed, in several of the post-2020 election

78. *Id*. (cleaned up).
79. *Id.*
80. *Id.* (cleaned up).
81. *Id.*
82. *Id*.
83. *Id*. at 44–45.
84. *Id*. at 45–46.
85. *Id*. at 46.
86. *Id*. (cleaned up).
87. Edward D. Cavanagh, *Rule 11 of the Federal Rules of Civil Procedure: The Case Against Turning Back the Clock*, 162 F.R.D. 383, 387, 399–400 (1995) (noting that there is no safe-harbor provision with respect to the court's exercise of its inherent powers).

cases, courts utilized their inherent powers to sanction frivolous conduct.[88] In at least one case, the court specifically noted that this inherent authority was needed where the plaintiffs had voluntarily dismissed claims against a particular set of defendants prior to the expiration of the twenty-one day safe-harbor provisions of Rule 11.[89] There, the plaintiffs, a purported class of 160 million voters in the 2020 election, had allegedly been harmed by the fraudulent acts of what the court described as an alleged "vast conspiracy" that included state officials in various states, a private foundation, and a voting machine company, among others.[90] They sought an injunction to prevent the Biden Administration from continuing to operate pursuant to this conspiracy as well as damages in the amount of $1,000 per member of the plaintiff class, or $160 billion.[91] As the court explained:

> [T]his was not a normal case in any sense. Plaintiffs purported to represent 160 million American registered voters and came seeking a determination from a federal court in Colorado that the actions of multiple state legislatures, municipalities, and state courts in the conduct of the 2020 election should be declared legal nullities.[92]

The court further elaborated that "this was no slip-and-fall at the local grocery store."[93] Rather, although it was "disorganized and fantastical, the Complaint's allegations are extraordinarily serious and, if accepted as true by

88. *See, e.g.*, King v. Whitmer, 556 F. Supp. 3d 680, 731–32 (E.D. Mich. 2021) (issuing sanctions based on various grounds, including the court's inherent authority), *aff'd in part, rev'd in part*, 71 F. 4th 511, 530 (6th Cir. 2023) (noting sanctions under inherent authority unnecessary given grounds existed under both FRCP 11 and 28 U.S.C. § 1927 to punish the misconduct that occurred in case).

89. O'Rourke v. Dominion Voting Sys., 552 F. Supp. 3d. 1168, 1174 (D. Colo. 2021). In *O'Rourke*, the court's sanctions order was later modified since some of the out-of-state defendants had only sought sanctions under § 1927 and the court's inherent authority. *See* No. 20-CV-03747-NRN, 2021 WL 5548129 (D. Colo. Oct. 5, 2021). The sanctions orders were ultimately upheld on appeal. *See* No. 21-1394, 2022 WL 17588344 (10th Cir. Dec. 23, 2021).

90. *Id*. at 1175. The court also noted that it used the term "vast conspiracy" to describe the allegations in the case "purposefully." Here is how the court summarized those allegations:

> The Complaint is one enormous conspiracy theory. And a conspiracy is what the original Complaint, all 84 pages and 409-plus paragraphs, alleged: that "the Defendants engaged in concerted action to interfere with the 2020 presidential election through a *coordinated effort* to, among other things, change voting laws without legislative approval, use unreliable voting machines, alter votes through an illegitimate adjudication process, provide illegal methods of voting, count illegal votes, suppress the speech of opposing voices, disproportionally and privately fund only certain municipalities and counties, and other methods, all prohibited by the Constitution."

Id. (cleaned up) (emphasis in original).

91. *Id*.

92. *Id*. at 1176.

93. *Id.*

large numbers of people, are the stuff of which violent insurrections are made."[94]

The case was originally filed prior to the certification of the result of the elections on January 6, 2021, but the interposition of some of the more far-fetched assertions did not occur until March of 2021.[95] Because of that, when considering the gravity of the lawyers' conduct, the court found it important to consider the circumstances of this case and to view it "against the backdrop of the numerous failed lawsuits alleging election illegality" and the "ominous refusal by the losing candidate or his supporters to concede defeat publicly, even weeks after the election."[96] This refusal was "linked arm-in-arm with the repeated and widespread assertions that the election was 'rigged' or 'stolen.'"[97] Furthermore, the "former President's pre- and post-election statements regarding the purportedly 'stolen' election also raised a substantial doubt about the continuation of what arguably is the United States' greatest political tradition—the unbroken two-century ritual of the peaceful transfer of power."[98] The court would add also note as follows:

> Horrifyingly, that two-century tradition arguably came to an end on January 6, 2021, when the United States Capitol was stormed during a violent attack against the United States Congress, with a mob attempting to overturn President Trump's defeat by disrupting the joint session of Congress assembled to formalize Joe Biden's victory. The Capitol complex was locked down and lawmakers and staff were evacuated while rioters occupied and vandalized the building for several hours. People died.[99]

Plaintiffs' lawyers filed the case in Colorado and added out-of-state defendants even though the lawyers knew such parties were not subject to personal jurisdiction in that state.[100] Counsel asserted that to do so was not frivolous because those defendants could have waived objections to personal jurisdiction.[101] Soon after filing the complaint, the plaintiffs' lawyers withdrew claims as against those out-of-state defendants; because they did so before the expiration of the 21-day safe-harbor period, at least some of those defendants sought to sanction the lawyers for their behavior through the court's inherent authority as opposed to Rule 11.[102] The court would ultimately conclude that "[f]iling a lawsuit against an out-of-state defendant

94. *Id*.
95. *Id*. at 1177 ("The proposed Amended Complaint would have added 152 additional registered voters as plaintiffs and upped the length to a total of 882 paragraphs and 114 pages.").
96. *Id*. at 1197.
97. *Id.*
98. *Id.* at 1198.
99. *Id*.
100. *Id*. at 1183–84.
101. *Id*. at 1184–85.
102. *Id*. at 1185.

with no plausible good faith justification for the assertion of personal jurisdiction or venue is sanctionable conduct."[103]

In terms of the general allegations of the complaint in the action, the court noted that, by the lawyers' own admissions, they did little more than compile claims filed in other cases and news reports while conducting no analysis of their own:

> Given the volatile political atmosphere and highly disputed contentions surrounding the election both before and after January 6, 2021, circumstances mandated that Plaintiffs' counsel perform heightened due diligence, research, and investigation before repeating in publicly filed documents the inflammatory, indisputably damaging, and potentially violence-provoking assertions about the election having been rigged or stolen.[104]

Instead of taking great care in asserting their claims, the court described the lawyer's "process for formulating the factual allegations" presented in the pleadings as consisting primarily of "compil[ing] all the allegations from all the lawsuits and media reports relating to alleged election fraud (and only the ones asserting fraud, not the ones refuting fraud), put[ting] it in one massive complaint, then fil[ing] it and 'see[ing] what happens.'"[105] The lawyers also accepted affidavits filed in other, failed lawsuits "at face value," reviewed interviews of experts in other cases in an effort to "connect the dots,"[106] which included accepting allegations of other lawyers who had made sworn statements under oath as well as the owner of My Pillow, Mike Lindell.[107] One of the lawyers expressed his belief these were "serious people," which justified the assertions of fraud.[108] As the court would note, "there was substantial public evidence that these were not serious people, and the numerous courts' rejection of the lawyers' arguments and factual claims should have put Plaintiffs' counsel on notice to be very cautious before repeating these damaging allegations via a massive cut-and-paste job, without additional strenuous verification efforts."[109]

The court not only found that the actions of the lawyers were frivolous, and subject to sanction under both Rule 11 and 28 U.S.C. § 1927, it also found the conduct worthy of punishment under its inherent authority.[110] One of the reasons for these orders was that the nature of the case, and the climate in which it was filed, warranted not less rigor on the part of plaintiffs' counsel, but more:

103. *Id*. at 1185 (internal citations omitted).
104. *Id*. at 1198.
105. *Id*. at 1202.
106. *Id*. at 1202–03 (internal citations omitted).
107. *Id*. at 1201.
108. *Id*.
109. *Id*. at 1201–02.
110. *Id*. at 1208–09.

> The unique circumstances of this case, including the volatile conditions surrounding the 2020 election, the extremely serious and potentially damaging allegations against public servants and private entities, the remarkable request to declare void and ineffective the certification of the electoral votes of several states, along with an extraordinary money demand of $160 billion and the lack of any time pressure, meant that any reasonable pre-filing investigation needed to involve extensive due diligence and the testing of the allegations, including actually talking to human beings, such as the lawyers who filed the failed lawsuits and the experts who submitted affidavits. Under the circumstances of this case, Plaintiffs' counsel did not fulfil this obligation.[111]

As the previous discussion shows, in the wake of the 2020 election, courts issued sanctions against lawyers using the powers available to them under FRCP 11, 28 U.S.C. § 1927, and their inherent powers. The inherent powers are particularly useful in this context, in that at least with respect to a case filed with little support a litigant could withdraw before the expiration of the twenty-one day safe harbor available under FRCP 11 in an effort to try to evade punishment. What is more, courts can also combine these authorities with the power to issue standing orders prior to the commencement of any litigation that cautions lawyers that a court will not hesitate to use these tools to punish practices that are contrary to the rule of law and designed to disrupt the functioning of democratic institutions.[112] In addition to the threat of sanctions, courts also have other tools to dispose of cases quickly when they have no merit, as the next discussion shows.

B. APPLY EXACTING PLEADING REQUIREMENTS

In addition to the power to sanction lawyers for frivolous or other unethical conduct, courts should also closely examine the allegations contained in plaintiffs' pleadings to ensure they satisfy the requirements of FRCP 8,[113] which, in recent years, the Supreme Court has strengthened as a tool for rejecting cases at the motion to dismiss phase, as described here.

1. Rule 8(a) and the Plausibility Standard

In the decisions of *Ashcroft v. Iqbal*,[114] and *Bell Atlantic Corp. v. Twombly*,[115] the Supreme Court concluded that, in order to satisfy the requirements of FRCP 8(a), allegations in filings in civil cases in the federal

111. *Id*. at 1204.
112. For a discussion of the authority to issue standing orders, see discussion *infra* Part II.E.
113. FED. R. CIV. P. 8.
114. 556 U.S. 662 (2009).
115. 550 U.S. 544 (2007).

courts had to meet a newfound "plausibility" standard.[116] In his dissent in *Iqbal*, however, Justice Souter, the author of the *Twombly* opinion, attempted to explain the import of the prior ruling, which, he argued, did not justify the extension of that holding in the manner in which the Court did in *Iqbal* as follows:

> *Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true. We made it clear, on the contrary, that a court must take the allegations as true, no matter how skeptical the court may be . . . The sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel.[117]

Putting aside claims of home thermostats changing votes or dead Latin American politicians controlling voting machines from the grave,[118] probably the most egregious example of a claim that most certainly meets even Justice Souter's version of the plausibility test is the complaint and emergency motion papers in the case *Latinos for Trump v. Sessions*.[119] There, the plaintiffs' lawyer asserted that there was fraud in the election of 2020, but, as for a remedy, that is where the advocate's arguments became truly epic. The lawyer for the plaintiffs asserted that the legislative and executive branches of the federal government should be placed "into a state of stewardship" as in Gondor, the land in J.R.R. Tolkien's *The Lord of the Rings* trilogy, where the line of kings was believed to have been broken, meaning a line of "stewards" would reign until a monarchy could be restored.[120] The relevant section of the amended motion for a temporary restraining order provides as follows:

> "Gondor has no King," to invoke a very appropriate quote from the J.R.R. Tolkien epic classic, "Lord of the Rings." The Judicial Branch is currently the only remaining legitimate branch of government and therefore has a duty uphold the checks and

116. As the Court found: "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atlantic Corp*., 550 U.S. at 570).

117. *Id.* at 696 (Souter, J., dissenting) (internal citations omitted).

118. Maggie Haberman, *Tears, Screaming and Insults: Inside an 'Unhinged' Meeting to Keep Trump in Power*, N.Y. TIMES (July 12, 2022), https://www.nytimes.com/2022/07/12/us/politics/jan-6-trump-meeting-screaming.html [https://perma.cc/BQK2-AZ84] (describing some of the more outlandish claims concerning the results of the 2020 election).

119. *See* Amended Motion for Temporary Restraining Order at 2 & n.2, Latinos for Trump v. Sessions, No. 6:21-cv-00043-ADA-JCM, Dkt. 6 (W.D. Tex. Jan. 21, 2021), https://www.courtlistener.com/recap/gov.uscourts.txwd.1120287/gov.uscourts.txwd.1120287.6.0_1.pdf [https://perma.cc/FKV7-944C] [hereinafter Amended Motion for TRO].

120. *See id*. Spoiler Alert: as teased by the title of the third book in the trilogy—*The Return of the King*—that line had not, in fact, been broken.

> balances in the Constitution to curb the unlawful power grab perpetrated on the electorate by Defendants. The Court must immediately act to check the power of the Legislative and Executive branches by placing them into a state of stewardship to preserve the status quo ante, pending a preliminary injunction and then until a trial on the merits. . . . This concept is similar to the concept of placing a corrupted business in receivership or in bankruptcy law, which places a "trustee" in charge of the "debtor-in-possession" during the bankruptcy case to rehabilitate the corrupted organization.[121]

In cases such as this, with claims as fantastical and demands as preposterous as those raised in this and other cases, courts should not hesitate to entertain motions to dismiss at the earliest possible stage in the litigation and deploy the plausibility standard liberally when the threat of otherwise frivolous litigation still casts a shadow of doubt on the results of the election, even where the court may deny emergency, provisional relief as the case is pending.

2. Rule 9(b)'s Heightened Pleading Requirement for Charging Fraud

In *Bowyer v. Ducey*, [122] a case brought by voters, Republican nominees for Arizona's presidential electors, and Republican county party chairs to set aside the results of the 2020 general election on basis of alleged fraud and election misconduct, Plaintiffs moved for temporary restraining order (TRO), but the case was dismissed soon after it was filed for the plaintiffs' failure to allege their claims of fraud with particularity under Rule 9(b). The court described some of these allegations as follows:

> Plaintiffs' expert Mr. William Briggs ("Briggs"), for example, concludes that "troublesome" errors by Arizona election officials "involving unreturned mail-in ballots are indicative of voter fraud" and that the election should consequently be overturned. Briggs relies on data provided by an unknown person named "Matt Braynard," a person who may or may not have tweeted a "Residency Analysis of ABS/EV Voters" on his Twitter account on November 20, 2020. Apart from a screenshot of Mr. Braynard's tweets that day, Plaintiffs offer nothing further about Mr. Braynard's identity, qualifications, or methodologies used in conducting his telephone "survey."[123]

Despite the lack of any rigor in the Braynard "study," the attorney apparently reached the conclusion that "there were 'clearly a large number of

121. *Id.*
122. 506 F. Supp. 3d 699 (D. Ariz. 2020).
123. *Id*. at 722 (cleaned up).

troublesome ballots in each state.'"[124] In turn, the attorney "assumed Mr. Braynard's 'survery [*sic*] respondents [were] representative and the data [was] accurate.'"[125]

The court would conclude that the lawyer's lack of scrutiny of the evidence presented before it was "cavalier" and to use such an approach "to establish[] that hundreds of thousands of Arizona votes were somehow cast in error is itself troublesome."[126] As a result, the court would find that the "sheer unreliability of the information underlying Mr. Briggs' 'analysis' of Mr. Braynard's 'data' cannot plausibly serve as a basis to overturn a presidential election, much less support plausible fraud claims against these Defendants."[127]

As with the plausibility standard, when plaintiffs allege fraud in any aspect of the election, courts must require that such allegations satisfy the higher pleadings standards set forth in FRCP 9(b). Some have argued, with good reason, that the plausibility standard under FRCP 8(a) is no different now than the heightened requirement for fraud.[128] Still, courts can and should ensure that when fraud is involved, greater particularity is required of complainants than even the plausibility standard set forth in *Twombly* and *Iqbal* requires.

C. APPLY EXACTING PRELIMINARY RELIEF STANDARDS

In a case filed on December 22, 2020, in the United States District Court for the District of Columbia, the plaintiffs, a voter-advocacy group and individual voters from the swing states of Wisconsin, Pennsylvania, Georgia, Michigan, and Arizona, brought an eleventh-hour action against Vice President Pence as well as both houses of Congress to halt the certification of the vote on January 6, 2021.[129] The court set forth the appropriate standard to apply in an application for a preliminary injunction, as clarified by the Supreme Court in the late 2000s.[130] There, in *Winter v. National Resources Defense Council*,[131] the Court noted that "a preliminary injunction is an extraordinary remedy never awarded as of right."[132] What is more, it set forth the standard that a party seeking such an injunction must establish:

> A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the

124. *Id*. at 723.
125. *Id.* (internal citation omitted).
126. *Id*. at 723.
127. *Id*.
128. A. Benjamin Spencer, *Pleadings Conditions of the Mind under Rule 9(b): Repairing the Damage Wrought by* Iqbal, 41 CARDOZO L. REV. 1015, 1042-48 (2020)
129. *See* Wisconsin Voters Alliance v. Harris, 28 F.4th 1282, 1282–83 (D.C. Cir. 2022) (reciting history of the case below).
130. Wisconsin Voters Alliance v. Pence, 514 F. Supp. 3d 117, 119 (D.D.C. 2021).
131. Winter v. Nat'l Res. Def. Council, 555 U.S. 7 (2008).
132. *Id*. at 24 (cleaned up).

> balance of equities tips in his favor, and that an injunction is in the public interest.[133]

The district court in *Wisconsin Voters Alliance* referenced the *Winter* standard, and noted that the Supreme Court in *Winter* had explicitly rejected a "sliding-scale" approach that some courts had adopted, one in which the court entertaining the motion for an injunction might lower the showing a moving party would have to make on some of the other elements of the preliminary injunction standard if the plaintiffs could establish at least one of the factors, like that they would suffer irreparable harm in the absence of the injunction.[134] As the *Wisconsin Voters Alliance* district court found, "before the Supreme Court's decision in *Winter*, courts weighed these factors on a 'sliding scale,' allowing 'an unusually strong showing on one of the factors to overcome a weaker showing on another.'"[135]

Given the serious issues raised by the plaintiffs in *Wisconsin Voters Alliance*, and the fact that, with days to go before the certification of the election, "time [was] short, and the legal errors underpinning this action manifold, the Court treat[ed] only the central ones and in the order of who, where, what, and why."[136] The court rejected the claim that plaintiffs had standing to raise what amounted to a "'generalized grievance' stemming from an attempt to have the Government act in accordance with their view of the law."[137] It also found that the plaintiffs' legal argument "lies somewhere between a willful misreading of the Constitution and fantasy,"[138] and they "readily acknowledge that their position also means that" several of the Supreme Court's decisions "'are in constitutional error.'"[139] At the same time, the plaintiffs failed to "explain how [the] District Court has authority to disregard Supreme Court precedent."[140] The court would ultimately deny the motion for a preliminary injunction that sought to halt the certification of the results of the election on January 6, 2020, and entertain further proceedings that addressed whether the lawyers for the plaintiffs should face sanctions for their conduct.[141]

At the same time, at least some courts still seem to rely on the sliding-scale approach in emergency litigation, including in election litigation. In a case filed prior to the 2020 election brought by the Arizona Democratic Party against the Arizona Secretary of State (also a Democrat) over her handling of mail-in ballots, the court there continued to utilize the sliding-scale approach

133. *Id*., at 20 (citations omitted).
134. *Wisconsin Voters Alliance*, 514 F. Supp. 3d at 119–120 (internal citations omitted).
135. *Id*. at 119.
136. *Id*. at 120.
137. *Id*. (cleaned up).
138. *Id*. at 121.
139. *Id*. (quoting Plaintiffs' Complaint).
140. *Id.*
141. *Id*. at 122.

when dealing with an appellate stay.[142] The court noted that in the Ninth Circuit (where the *Winter* case originated), courts still relied upon a methodology for ruling on emergency applications that incorporated that approach.[143] The court there would rely on this position from another Ninth Circuit opinion, *Al Otro Lado v. Wolf*,[144] where the court found as follows:

> Under the "sliding scale" approach we use [in the Ninth Circuit], "the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another." The same sliding scale approach applies to the consideration of stays pending appeal.[145]

The court there went on to find that, "'[i]f anything, a flexible approach is even *more* appropriate in the stay context.'"[146] Following *Al Otro Lado*, the court in *Arizona Democratic Party v. Hobbs* would continue to hold that the preliminary injunction factors "are balanced on a sliding-scale, whereby a weaker showing on the merits may be offset by a stronger showing of harm."[147]

It is easy to see how the application of such a sliding scale in the temporary-restraining-order or preliminary-injunction context could wreak havoc in the case of election litigation. In terms of political rights, the obligation to protect the sanctity of the vote is paramount. [148] A threat to that right certainly implicates irreparable harm.[149] A court deploying the sliding-scale approach, contrary to the Court's ruling in *Winter*, might find it hard to resist issuing a provisional remedy in a case in which that right appears compromised, even when a litigant fails to make a strong showing of a likelihood of success on the merits. But the Court's ruling in *Winter* makes clear that the sliding-scale approach to provisional remedies is not one courts should deploy. Accordingly, courts should only utilize the standard, four-part test when gauging the strength of a request for provisional remedies, even in election law cases, where theoretically strong claims about irreparable harm surrounding potential threats to the fundamental right to vote may not be accompanied by equally strong claims related to the merits of the action or other aspects of the preliminary injunction standard.

142. Arizona Democratic Party v. Hobbs, No. CV-20-01143-PHX-DLR, 2020 WL 6555219, at *1 (D. Ariz. Sept 18, 2020).

143. *Id*.

144. 952 F.3d 999, 1002 (9th Cir. 2020).

145. *Id*. at 1007 (internal citations omitted).

146. *Id.* (emphasis in original).

147. 2020 WL 6555219, at *1.

148. *See, e.g*., Obama for America v. Husted, 697 F.3d 423, 436 (6th Cir. 2012) ("A restriction on the fundamental right to vote therefore constitutes irreparable injury"); Williams v. Salerno, 792 F.2d 323, 326 (2d Cir. 1986) (finding denial of right to vote "irreparable harm").

149. *See, e.g*., Marchant v. New York City Bd. of Elections, 815 F. Supp. 2d 568, 578 (E.D.N.Y. 2011) (noting that "infringement on the right to vote necessarily causes irreparable harm") (internal citations omitted).

D. "FAST-TRACKING" MATTERS

In addition to requiring that parties seeking relief from the court to slow down or even halt the counting of votes, to prevent election officials from doing things like certify election results, or even overturn the outcome of an election must establish their right to relief, both under exacting pleading requirements as well as submitting sufficient evidence and strong legal arguments to satisfy the appropriate standard for preliminary relief, courts should also expedite all aspects of any election-related lawsuit and require that those seeking any extraordinary relief must do so on an expedited basis. Any challenge to the results of elections, or the procedures by which they are carried out (or both), necessarily places a degree of uncertainty over the outcome, placing the United States at risk from a national security standpoint, and presents the possibility of violence in the event doubts are sown by frivolous litigation about the legitimacy of an election. Accordingly, courts must act deliberately, but also with appropriate haste, to ensure that any effort to challenge the results of the election or any aspect of it receives a fair hearing in accordance with due process. But the procedures the court uses should not unnecessarily delay the requirement that the parties seeking relief from the court come forward with actual, credible, and plausible evidence that they are entitled to relief and that they have standing to seek such relief.

Given the time constraints related to election-law litigation, claimants typically file emergency applications for temporary restraining orders and preliminary injunctions both under FRCP 65.[150] That rule provides that a trial court:

> may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if: (A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and (B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.[151]

In turn, if that temporary restraining order is issued without notice, a motion for preliminary injunction must follow, and "must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character."[152] Once the hearing is underway, "the party who obtained the order must proceed with the motion; if the party does not, the court must dissolve the order."[153] Accordingly, courts must expedite

150. FED. R. CIV. P. 65.

151. *Id*. 65(b)(1).

152. *Id*. 65(b)(3).

153. *Id*. Similarly, FRCP 42(b) provides trial courts with the discretion to manage their dockets: "For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims." FED. R. CIV. P. 42(b).

challenges to the results of elections, their certification, or the processes by which votes are counted; give them priority on their dockets; and strive to reach decisions consistent with the factual and legal showing the respective parties are able to make. In the wake of the 2020 election, lawyers seemed incapable of making serious and credible showings that any sort of fraud or nefarious conduct undermined the legitimacy of the elections.[154] Courts must move as quickly as they can to consider the evidence parties are able to mount, if any, and ensure those seeking extraordinary relief from the courts are able to satisfy the appropriate and exacting standards when the stakes of such litigation are so high.

E. ISSUE STANDING ORDERS IN ADVANCE OF THE ELECTION.

Courts in the federal system operate under the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and related federal statutes, but also utilize rules that govern the operations of each of the circuit courts of appeal and district courts. Many individual judges also have their own standing orders that guide litigants in practice before such judges. These court systems and even individual judges can issue their own standing orders that address highly specific issues, like including word counts for briefs. One recent example of courts issuing standing orders even around emerging issues is the introduction of such standing orders through which judges and court systems are addressing litigant use of generative artificial intelligence.[155] Some of these standing orders warn litigants of the risk of use,[156] others require such litigants to disclose such use,[157] and at least one judge bans its use in the preparation of pleadings.[158] One final tactic courts and court systems can utilize in their efforts to deter frivolous litigation with designs on undermining democracy and the rule of law is to issue standing orders—even temporary ones—that remind attorneys and litigants of their obligations to bring only good faith claims, emphasizing that failure to do so will result in punishment commensurate with the offense.[159]

154. *See infra* Part I.

155. For a description of these orders, see generally Raymond H. Brescia, *New Governance and New Technologies: Creating a Regulatory Regime for the Use of Generative Artificial Intelligence in the Courts*, 26 N.C. J.L. & TECH. 1 (2024).

156. *See, e.g.*, Individual Practices in Civil Cases at 7 (S.D.N.Y. July 29, 2023) (Subramanian, J.), https://www.nysd.uscourts.gov/sites/default/files/practice_documents/AS%20Subramanian%20Civil%20Individual%20Practices.pdf [https://perma.cc/F554-ZS8D] (warning of risks of using generative artificial intelligence in court filings).

157. Standing Order for Civil Cases Before District Judge Araceli Martínez-Olguín at 5 (N.D. Cal. Nov. 22, 2023) (Martínez-Olguín, J.), https://www.cand.uscourts.gov/wp-content/uploads/2023/03/AMO-Civil-Standing-Order-11.22.2023-FINAL.pdf [https://perma.cc/VT93-KSAC] (requiring disclosure of use of generative artificial intelligence in the production of legal filings and certifying accuracy of such filings).

158. Standing Order Governing Civil Cases at 11 (S.D. Ohio Dec. 18, 2023) (Newman, J.), https://www.ohsd.uscourts.gov/sites/ohsd/files//MJN%20Standing%20Civil%20Order%20eff.%2012.18.23.pdf [https://perma.cc/82VZ-YG78] (banning use of generative artificial intelligence in the production of court filings).

159. A sample Standing Order to this effect is including here at Appendix A, *infra*.

CONCLUSION

In the weeks after the election of 2020, litigants inundated the courts with lawsuits that were designed to overturn the results of the election. None of those cases came close to succeeding in any meaningful way. What is more, by filing baseless cases in ways that were contrary to the rule of law, advocates also sought—wittingly or unwittingly—to undermine the American public's faith in democracy. Many of those who filed those cases who approached their professional obligations with such a cavalier attitude have since faced sanctions for their misconduct. Some of the worst offenders have been disbarred and several others face similar punishment soon. But as of this writing, the presidential election cycle has come around once again, and lawyers are lining up on both sides of the political aisle, gearing up to bring litigation in the event the results of the 2024 election do not go in their preferred candidate's favor. The powers courts have to rein in frivolous conduct are often deployed after someone has abused the court system, with good reason. This Essay has tried to lay out what courts can and should do when dealing with such frivolous conduct in the future and has even outlined some steps court can take in advance of efforts to abuse the legal system to gain an advantage in electoral politics. Certainly courts can still punish lawyers after the fact for failing to uphold their obligations to operate within the bounds of the law. To the extent courts have the ability to take preemptive measures that might reduce the likelihood that someone, somewhere might think twice before taking actions that might otherwise throw American democracy into chaos and constitutional crisis, courts should not hesitate to deploy them.

APPENDIX A

MODEL STANDING ORDER ON ELECTION-RELATED LAWSUITS

Nothing is more central to the continuation of our democratic institutions than the sanctity and legitimacy of the process by which Americans vote. There are times when legitimate disputes regarding that process will require adjudication in the nation's judicial system. The gravity and weight of questions related to the legitimacy of any election require that not only any court asked to adjudicate an effort to challenge the process or the outcome of any election must adhere to the strictest requirements of due process but also that counsel and litigants who may present such claims must only do so in good faith. This Court will afford all those who present such good faith claims their day in court according to the requirements of due process. At the same time, counsel and unrepresented parties alike must, at a minimum, only bring such claims after they have conducted an investigation, reasonable under the circumstances, to determine the basis for the factual assertions made in such a challenge and that the legal arguments supporting that challenge are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law. These requirements are more fully described here and all those who may assert these types of claims have a duty to remind themselves of these obligations.

No matter the nature of the case, all counsel and any unrepresented litigants must be aware of their obligations when commencing any lawsuit. These requirements are heightened when a party seeks redress through the courts that may challenge the legitimacy of any vote, voting procedure, or the acts of any election official or other government actor or agency with respect to the legitimacy of an election in any respect. Because of this, while the requirements set forth below apply to all cases, no matter the topic or substance, when the legitimacy of an election or the actions of any government official with respect to an election are called into question, all counsel and parties, represented or otherwise, have a special responsibility to only take actions that are consistent with the rule of law; their obligations to their adversaries, the legal system, and the general public; and this Court. As a result any counsel, represented party, and unrepresented litigant who may seek to vindicate what they believe are good-faith disputes regarding any aspect of an election, are reminded of their obligations with respect to any litigation commenced in and litigated before this court, including the following.

Under Rule 11 of the Federal Rules of Civil Procedure which governs all civil litigation before this Court, all litigants must adhere to the following obligations:

Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name--or by a party personally if the party is unrepresented.

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

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

A failure to adhere to these obligations will warrant the imposition of sanctions pursuant to this Rule. Should this Court issue a sanction under Rule 11, it will be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. Such sanctions may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

While a party may seek sanctions under this Rule for any alleged violations of it, and must afford a litigant the opportunity to withdraw any pleading or other filing that, that party believes, violated this Rule, within twenty-one days of receiving such notice, this Court may also proceed by issuing a notice to all parties requiring any counsel or litigant who this Court believes may have engaged in actions violating this Rule. That order will require such counsel or party to show cause why such sanctions should not be issued for the alleged violations.

Should this Court issue a sanction or sanctions for the violation of this Rule after affording the parties a reasonable opportunity to oppose or support such a request, these sanctions will be imposed on the persons—whether attorneys, law firms, or parties—who have violated the Rule or who may be determined to be responsible for the violation. The person signing, filing, submitting, or advocating a document has a nondelegable responsibility to this Court, and in most situations is the person to be sanctioned for a violation. Absent

exceptional circumstances, a law firm is to be held also responsible when one of its partners, associates, or employees is determined to have violated the rule.

In addition, sanctions may also be warranted under 28 U.S.C. § 1927, which provides as follows:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Finally, this Court has certain inherent powers to punish lawyers and litigants alike for a range of conduct that is designed to undermine the rule of law and exhibits a lack of respect for the judicial functions, the legitimacy of the legal system, and the requirements of due process. This includes the power to punish counsel and litigants for contempt of court and for violation of the Court's lawful mandates. The Court may also vacate its own rulings on a finding that a fraud has been perpetrated on the court. This Court also has the authority to fashion an appropriate sanction for conduct that abuses the judicial process, including the power to dismiss an action and award attorney's fees to the opposing party that has been the victim of any misconduct. In addition, should this Court suspect that a party has attempted to abuse the judicial process to advance a fraud upon the Court, it will not hesitate to investigate the matter in accordance with the requirements of due process. If it is found that, in the words of the U.S. Supreme Court, "fraud has been practiced upon [the court], or that the very temple of justice has been defiled," this Court will not hesitate to assess the entire cost of the proceedings against the guilty parties. *Universal Oil Prods. Co. v. Root Refining Co*., 328 U.S. 575, 580 (1946). In addition, such costs and fees may be assessed against a party responsible for misconduct when that party shows bad faith by delaying or disrupting the litigation or by hampering enforcement of a court order.

Counsel and parties are hereby reminded of these requirements for litigation generally and should know that in any lawsuit related to a challenge to any aspect of an election, this Court will not hesitate to tailor, where appropriate, any punishments for violations of these requirements that are warranted and such sanction will match the extent of the violation and the potential adverse consequences for the rule of law and democratic institutions implicated by such behavior.

Furthermore, counsel of record and any unrepresented parties must personally confirm the accuracy of any legal or factual claims submitted in any election-related litigation. At all times, counsel—and specifically designated Lead Trial Counsel—bears responsibility for any filings made by the party that counsel represents.