

PROTECTING PROCESS, NORMS, AND THE RULE OF LAW

A. Mechele Dickerson*

INTRODUCTION

Few people in recent history have been as entangled in civil litigation as Donald John Trump. Over the last three decades, Trump and his business entities have been plaintiffs or defendants in over 3,500 federal and state court cases.¹ After his failed 2020 presidential re-election bid, his litigiousness intensified and he and his allies bombarded civil courts with frivolous lawsuits that claimed that the election was “rigged.”² Trump’s return to the White House has been marked by an increase in direct assaults on the rule of law and the independence of the judicial branch. For example, Trump (as private citizen and as President) has threatened or sued media outlets for defamation, arguing that their news coverage of him is unfair, unflattering, or constituted election interference,³ though virtually all lawsuits or Executive Orders that sought to punish the media or other entities for

* Arthur L. Moller Chair in Bankruptcy Law and Practice and University Distinguished Teaching Professor, University of Texas at Austin School of Law. I thank the students in my Spring 2023 “Procedure and Politics” class for helping me think through early iterations of some of the ideas in this Article. Michelle T. Nguyen provided valuable research assistance on earlier drafts, and the Article was greatly improved by detailed comments I received from my University of Texas colleagues, Bob Bone and Patrick Woolley, and from questions I received from colleagues at a faculty workshop.

1. Brian Bennett, *How Trump Survived Decades of Legal Trouble: Deny, Deflect, Delay, and Don’t Put Anything in Writing*, TIME: POL. (Sep. 21, 2022, at 14:58 ET), <https://time.com/6215419/trump-legal-trouble-key-strategies/>; Nick Penzenstadler & Susan Page, *Exclusive: Trump’s 3,500 Lawsuits Unprecedented for a Presidential Nominee*, USA TODAY (Oct. 23, 2017, at 13:24 ET), <https://www.usatoday.com/story/news/politics/elections/2016/06/01/donald-trump-lawsuits-legal-battles/84995854/>.

2. Federal district and appeals courts in multiple circuits ruled that the election lawsuits raised claims that had no legitimate basis in either fact or law and that the lawsuits were designed to disenfranchise voters who preferred Biden over Trump. *See, e.g.,* Kelly v. Pennsylvania, 141 S.Ct. 950, 950 (2020) (mem.); Texas v. Pennsylvania, 141 S.Ct. 1230, 1230 (2020); Wood v. Raffensperger, 501 F. Supp. 3d 1310, 1321-23 (N.D. Ga. 2020); Donald J. Trump for President, Inc. v. Sec’y of Pennsylvania, 830 F. App’x 377, 381 (3d Cir. 2020); Feehan v. Wisconsin Elections Comm’n, 506 F. Supp. 3d 596, 600 (E.D. Wis. 2020).

3. David Enrich, *Trump’s New Line of Attack Against the Media Gains Momentum*, N.Y. TIMES (Feb. 7, 2025), <https://www.nytimes.com/2025/02/07/business/media/trump-media-lawsuits.html>; Zolan Kanno-Youngs et al., *Trump Sues the Des Moines Register, Escalating Threats Against the Media*, N.Y. TIMES (Dec. 19, 2024), <https://www.nytimes.com/2024/12/17/us/politics/trump-sues-des-moines-register.html>.

disloyalty or for adopting policies Trump disliked have been challenged, stayed, or reversed by judges.⁴

Trump, his administration, and occasionally Republican members of Congress,⁵ have also threatened to have judges impeached, removed, or disqualified for issuing rulings that prevented his administration from implementing various policy or defunding agencies or departments.⁶ The Trump administration has also assailed lawyers, law firms, legal organizations, or non-profit organizations by threatening to revoke their security clearances⁷ or threatening to slash funding if they have diversity or pro bono practices he finds objectionable.⁸ Perhaps most concerning is that Trump and his administration have ignored, defied, or outright disobeyed court orders.⁹ This defiance includes refusing to comply with an order to unfreeze billions of dollars in federal grant funds,¹⁰ and an order to return an aircraft back to the United States that was being used to deport immigrants.¹¹

That the Trump administration is openly defying court orders is actually not surprising, given how Trump and his lawyers behaved in lawsuits after his 2020 election loss. Specifically, between his two presidential terms Trump (as private citizen) and his lawyers repeatedly violated civil procedural rules and norms, often

4. David Folkenflik, *Corporation for Public Broadcasting Sues Trump After He Tries to Fire Board Members*, NPR (Apr. 29, 2025, at 18:02 ET), <https://www.npr.org/2025/04/29/nx-s1-5381045/cpb-board-members-trump-lawsuit-npr-pbs>; Alan Blinder, *Harvard Adds to Legal Complaint Against Trump Administration*, N.Y. TIMES (May 13, 2025), <https://www.nytimes.com/2025/05/13/us/harvard-trump-lawsuit.html>.

5. Alan Feuer et al., *Judge in Deportation Case Draws Ire of Republicans as White House Pushes Back*, N.Y. TIMES (Mar. 18, 2025), <https://www.nytimes.com/2025/03/18/us/politics/trump-venezuela-deportations-doj-court-order.html>; H.R. Res. 246, 119th Cong. (2025) (enacted).

6. Elena Moore, *Federal Judge Who Drew Trump's Anger Picks up New Case Against Administration*, NPR (Mar. 26, 2025, at 14:49 ET), <https://www.npr.org/2025/03/26/nx-s1-5341540/boasberg-trump-signal-national-security-atlantic-lawsuit>; Karoun Demirjian, *Trump Administration Sees Bias in a Judge and Tries to Push Her off a Case*, N.Y. TIMES (Mar. 21, 2025), <https://www.nytimes.com/2025/03/21/us/politics/perkins-coie-howell.html>.

7. Zach Montague, *Law Firms Fighting Back Against Trump Report Security Clearance Suspensions*, N.Y. TIMES (May 15, 2025), <https://www.nytimes.com/2025/05/15/us/politics/law-firms-trump-security-clearance.html>; Benjamin Weiser, *What to Know About Paul Weiss, the Law Firm Bowing to Trump's Demands*, N.Y. TIMES (Mar. 21, 2025), <https://www.nytimes.com/2025/03/21/nyregion/what-is-paul-weiss.html>.

8. Lauren Hirsch, *The Nonprofit Caught in the Fray of Trump's Attacks on Big Law*, N.Y. TIMES (Mar. 28, 2025), <https://www.nytimes.com/2025/03/22/business/dealbook/trump-dei-seo-wall-street.html>.

9. Adam Liptak, *In Showdowns with the Courts, Trump Is Increasingly Combative*, N.Y. TIMES (Apr. 15, 2025), <https://www.nytimes.com/2025/04/15/us/politics/trump-defy-courts.html>.

10. Mattathias Schwartz, *White House Failed to Comply with Court Order, Judge Rules*, N.Y. TIMES (Feb. 12, 2025), <https://www.nytimes.com/2025/02/10/us/trump-unfreezing-federal-grants-judge-ruling.html>.

11. Alan Feuer & Aishvarya Kavi, *White House Continues Defiant Stance on Seeking Return of Deported Man*, N.Y. TIMES (Apr. 11, 2025), <https://www.nytimes.com/2025/04/11/us/politics/us-maryland-man-deportation-delay.html>; Katherine Faulders, *Trump Administration Ignores Judge's Order to Turn Deportation Planes Around: Sources*, ABC NEWS (Mar. 16, 2025, at 18:54 ET), <https://abcnews.go.com/US/trump-admin-ignores-judges-order-bring-deportation-planes/story?id=119857181>.

engaging in defiant or contemptuous conduct in or near courtrooms in civil cases. Few judges were willing to sanction Trump or his lawyers for behaving in ways that no doubt would have landed an ordinary litigant in jail.¹² One reason judges resisted “the nuclear option” of jailing Trump for ignoring court rules is that they feared doing so would trigger his fervent base of supporters. Judges also were concerned about the “logistical nightmare” of jailing a former president.¹³ Even assuming these concerns were valid, allowing Trump (as private citizen) to ignore procedural rules and norms and use the civil litigation system to amplify his political grievances provided a blueprint he and his administration are using to openly defy court orders and make a mockery of the rule of law.

This Article examines Trump’s prior civil litigation tactics and argues that the reticence of courts to sanction him or his lawyers for openly defying procedural rules and courtroom norms unleashed much of the chaos we are now witnessing. Part I describes the rules, principles, and norms typically associated with civil litigation, noting that courts are expected to neutrally apply and enforce litigation procedures regardless of the economic or political power of the parties involved in the case. This Part explains that the norms that govern civil litigation conduct are often unwritten, informal, and largely enforced by the parties’ sense of obligation, duty, and respect for the civil justice system. Given this, parties have incentives to brazenly violate rules and norms, or disrespect judges and other parties involved in the case, unless they have calculated that the consequences for violating rules and norms exceed any potential personal or financial gain from the violations.

Part II acknowledges that courts’ willingness to allow Trump and his lawyers to disregard rules and norms is not entirely unexpected, given that rich and powerful parties are *always* treated better in court cases than ordinary parties and historically have faced little risk of being sanctioned, even for contemptuous conduct. Part III stresses, however, that Trump and his lawyers received more than *just* favorable treatment in cases they sought to win in court or favorably settle out of court. Instead, Trump (as a private civil litigant) regularly used civil cases to score wins in the court of public opinion even when it was unlikely he would win inside a courtroom.

Part IV concludes by explaining why courts must apply and enforce existing procedural rules and litigation norms to prevent parties from exploiting civil cases in ways that undermine the rule of law and place the safety and security of other court participants at risk. Part IV stresses, however, that the behavior displayed in

12. For example, a judge recently held the lawyer who represented the rapper Young Thug (whose real name is Jeffery Williams) in contempt then sent the lawyer to jail when he refused to comply with the judge’s order to disclose a confidential source. See Joe Coscarelli, *Young Thug Lawyer Clashes with Judge in Chaotic Gang Case*, N.Y. TIMES (June 11, 2024), <https://www.nytimes.com/2024/06/11/arts/music/young-thug-brian-steel-trial.html>. Similarly, a judge sent a lawyer to jail in 2021 for arguing with the judge in a divorce proceeding. Ned Oliver, *Virginia Judge Jails Alleged Domestic Violence Victim for Smoking Pot on Day of Court Testimony*, VA. MERCURY (Sep. 17, 2021), <https://viriniamercury.com/2021/09/17/virginia-judge-jails-alleged-domestic-violence-victim-for-smoking-pot-on-day-of-court-testimony/>.

13. Jonah E. Bromwich et al., *How Judges Restrain Trump: Gag Orders, Fines and Possible Jail Time*, N.Y. TIMES (Oct. 26, 2023), <https://www.nytimes.com/2023/10/26/nyregion/trump-gag-orders-fines.html>.

the Trump-aligned civil and criminal cases demonstrates that existing rules and norms often cannot adequately control rich and powerful parties (especially repeat offenders) whose litigation goals are only tangentially related to a desire to obtain a legal victory in court. Given this, the Article recommends that courts be given stronger procedural rules to prevent parties from using civil cases in ways that undermine the integrity of the civil justice system and jeopardize the health and safety of others.

I. PROCESS, RULES, AND NORMS

Parties decide when, whether (and often where) civil lawsuits will be filed,¹⁴ and they can often avoid litigation altogether with pre-dispute mandatory arbitration agreements.¹⁵ Once a case is filed in court, though, the Federal Rules of Civil Procedure (FRCP) or comparable state procedural rules determine how the case will proceed.¹⁶ Procedural rules are meant to be transparent and easy for lawyers and parties to understand and, whether in the state or federal court system, judges are expected to apply civil procedural rules trans-substantively, i.e., without regard to the subject matter or size of the dispute.¹⁷ To protect the legitimacy and integrity of judicial proceedings and avoid the appearance that the civil justice system is unfair or biased, judges are also expected to apply procedural rules “trans-personally” to ensure that one party is not favored simply because of who (or what) they are.¹⁸

Although judges are tasked with applying and enforcing applicable procedural rules, most pre-trial activities do not occur in the judge’s presence. Moreover, the pre-trial activities that involve only lawyers and parties generally are governed by unwritten and informal patterns of behavior or practices (i.e., procedural norms), not formal, written procedural rules. Members of the Bar assume that other lawyers will comply with norms because of the sense of obligation they have to the judicial system and, as a result, lawyers use “social

14. Matthew A. Shapiro, *Delegating Procedure*, 118 COLUM. L. REV. 983, 999 (2018) (noting that plaintiffs have the absolute right to a summons that “hale[s] their opponents into court” even before they present facts that establish that the defendant has engaged in any wrongdoing).

15. Ronen Avraham & William H.J. Hubbard, *The Spectrum of Procedural Flexibility*, 87 U. CHI. L. REV. 883, 891-93 (2020) (discussing how parties can modify procedural rules). The Supreme Court has consistently approved of mandatory arbitration clauses or agreements based on its belief that private arbitration resolves disputes quickly, efficiently, and at less cost to the parties than litigating in court. *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 508-10 (2018).

16. See FED. R. CIV. P. 1.

17. David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 392-401 (2010) (discussing the role trans-substantivity played in developing the FRCP); Suzette Malveaux, *A Diamond in the Rough: Trans-Substantivity of the Federal Rules of Civil Procedure and Its Detrimental Impact on Civil Rights*, 92 WASH. U. L. REV. 455, 460 (2014); David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 BYU L. REV. 1191, 1194 (2013); Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the “One Size Fits All” Assumption*, 87 DENV. U. L. REV. 377, 377-78 (2010).

18. See Roger Michalski, *Trans-Personal Procedures*, 47 CONN. L. REV. 321, 323 (2014) (stressing that the rules that apply should not differ based on whether the party is a corporation or a human).

sanctions” to enforce norms.¹⁹ Courts rarely (and reluctantly) become involved when litigation norms are violated and generally will not intervene when lawyers violate procedural rules unless a lawyer requests the court’s assistance, asks the court to force a misbehaving party to comply, or seeks sanctions against a misbehaving party.²⁰ There is also an unwritten though understood norm that parties will not “bring trivial discovery matters to judges”²¹ or seek sanctions unless the offending party repeatedly refuses to comply with discovery rules or requests.²²

When asked to rule on a motion, judges apply FRCP 11 or comparable state statutes²³ to sanction lawyers or parties who submit court documents that violate applicable procedural rules. Thus, a lawyer or party can be sanctioned for presenting claims, defenses, and other legal contentions that do not (or will not) have evidentiary support and are not warranted by existing law or a meritorious argument for a change in existing law.²⁴ If requested by a party, judges can also sanction parties or lawyers who fail to comply with discovery rules,²⁵ and sanctions can range from entering a default judgment against the offending party, striking a pleading, or making adverse legal rulings against the offending party.²⁶ Judges also have the inherent authority to sanction parties or attorneys who engage in conduct that impedes the judge’s ability to efficiently manage the courtroom even if that conduct is not otherwise sanctionable by a specific procedural rule or statute.²⁷ Likewise, judges can sanction parties or lawyers who engage in bad faith conduct that “unreasonably and vexatiously” multiplies or prolongs cases or that intentionally increases their opponents’ litigation costs.²⁸

If a court chooses to enter a financial sanction, it can order parties to pay the fine directly to the court or to the opposing party to reimburse the non-offending

19. Diego A. Zambrano, *The Unwritten Norms of Civil Procedure*, 118 NW. U. L. REV. 853, 867-68 (2024) (explaining how procedural norms “regulate most acts that take place in civil litigation.”).

20. Although lawyers can be reprimanded, suspended, or disbarred by a state bar association if they engage in certain types of professional misconduct that threatens the integrity of the legal profession, they are rarely disciplined for violating informal, unwritten norms. See Sam Libby, *The Case for Proactive Bar Sanctions to Combat the Next Big Lie*, 102 TEX. L. REV. 1331, 1336-37 (2024) (discussing goals of state bar disciplinary proceedings).

21. Zambrano, *supra* note 19, at 869.

22. Likely because of this, judges sometimes express irritation (or outright anger) when forced to resolve discovery disputes. See Terry A. Maroney, *Angry Judges*, 65 VAND. L. REV. 1207, 1270 (2012) (discussing a judge whose frustration with a recalcitrant party produced an outburst where the judge asked the offending party “Now what the hell do you not understand? You must produce them. Jesus Christ, I don’t want any more ducking and weaving from you on those 58 documents.... I’m about ready to throw this thing out. When you tell me that you still haven’t produced those goddamn 58 documents after four times, four times I’ve ordered you to produce them. You are abusing this Court in a bad way.”).

23. See, e.g., OHIO REV. CODE ANN. § 2323.51 (West 2005).

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

25. FED. R. CIV. P. 37 (a)(1) (“On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery.”).

26. FED. R. CIV. P. 11 advisory committee’s note to 1993 amendment.

27. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-46 (1991) (discussing court’s inherent authority to sanction litigant misconduct notwithstanding other specific statutory sanctions).

28. 28 U.S.C. § 1927 (2025).

party's attorney fees.²⁹ If a court determines that a non-monetary sanction is more appropriate, sanctions can include public reprimands, an order for a lawyer to attend a continuing legal education course, or the court can make a referral to the applicable state bar disciplinary body.³⁰ Judges have almost complete discretion in deciding whether to impose sanctions and what sanctions to impose, but when deciding the nature and amount of a sanction they typically will impose only the minimal level needed to deter the offending party from continuing to engage in misconduct.³¹

II. POWERFUL PARTIES IN CIVIL LITIGATION

Although judges should apply procedural rules trans-substantively and trans-personally, there is a legitimate perception that rich and powerful parties receive better treatment and achieve better outcomes in court. One reason these powerful parties fare better in civil cases is because they are more likely to be "repeat players" who regularly appear in court rather than "one-shotters" who rarely are involved in court cases.³² Another reason powerful parties achieve better outcomes than ordinary parties is that they have the financial resources to hire expensive and experienced ("elite") lawyers, who themselves may be repeat players.³³ In general, elite lawyers are more skilled at maneuvering or manipulating applicable rules and norms and are often more knowledgeable about the legal issues at stake, particularly in complex civil or criminal litigation.³⁴

Even when courts apply procedural rules and norms neutrally, elite lawyers often find ways to minimize the adverse impact a "neutral" rule will have on their clients. For example, the Supreme Court's rulings in *Bell Atlantic Corp. v. Twombly*³⁵ and *Ashcroft v. Iqbal*³⁶ require trial courts to dismiss claims in a plaintiff's complaint if those claims are not plausible. Scholars almost uniformly criticize the interpretive challenges posed by the word plausible³⁷ and note that this pleading standard allows courts to dismiss cases even before the plaintiff has the opportunity to engage in discovery. Other scholars argue that the *Twiqbal* pleading

29. *Chambers*, 501 U.S. at 44-45.

30. FED. R. CIV. P. 11 advisory committee's note to 1993 amendment.

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

32. Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97-98 (1974).

33. *Id.* at 114-16 (concluding that lawyers for one-shotters are more likely "to be drawn from lower socio-economic origins, to have attended local, proprietary or part-time law schools, to practice alone rather than in large firms, and to possess low prestige within the profession.").

34. Avraham & Hubbard, *supra* note 15, at 947 ("[T]he truth is that the rich *already* have a huge advantage in our legal system. They can get more lawyers, more experts, more forum choice, more everything." (emphasis in original)).

35. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

36. *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009).

37. See Zambrano, *supra* note 19, at 887-88 ("District court judges have notoriously disagreed on how to apply these standards, allowing litigants to avoid early dismissal in front of some judges while facing the axe in front of others."); Malveaux, *supra* note 17, at 469 ("Without a more objective metric to apply pre-discovery, judges are vulnerable to relying on extra-pleading matters when evaluating complaints.").

standard, which is ostensibly objective and value-neutral, detrimentally harms individual plaintiffs who sue businesses in consumer credit, employment discrimination, or civil rights cases.³⁸ Indeed, some critics contend that the *Twiqbal* pleading standard is no longer an open “key to the courthouse door,”³⁹ but instead serves as a deterrent for lawyers to sue rich and powerful parties on behalf of poor, non-white, and politically weaker plaintiffs.⁴⁰

Rich and powerful clients with elite lawyers also have advantages over ordinary parties (and lawyers) because of the formal and informal relationships they develop as repeat players. For example, the shared backgrounds elite lawyers often have with judges (*particularly* federal judges who are former Big Law litigators)⁴¹ create a collegial and cozy relationship that may make judges less inclined to reprimand or sanction them or their clients.⁴² Personal relationships should have no effect on the outcome of litigation, of course. Nonetheless, repeat players (whether lawyers or clients) who regularly appear before particular judges or in particular courtrooms have strategic advantages because they are more likely to know which litigation tactics a judge will condone, particularly if the elite lawyer helped develop the local norms. Because of this insider knowledge, repeat players can adjust their litigation strategies based on their understanding of how far they can push a judge’s boundaries before they risk triggering a judicial reprimand or sanction.⁴³

38. Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1848 (2014). Judges who believe racial discrimination is rare, *particularly* if they are not the same race or social class as the plaintiffs, may be skeptical of these claims and deem them implausible. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1163 (2012) (discussing sample of cases that found that dismissal rates increased post-*Twiqbal* in Title VII cases and federal employment discrimination cases filed by Black plaintiffs); see Malveaux, *supra* note 17, at 469-83 (suggesting that the *Twiqbal* standard may be causing lawyers to avoid filing racial discrimination cases).

39. Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1294-95 (2010).

40. Matthew A. Shapiro, *Distributing Civil Justice*, 109 GEO. L.J. 1473, 1500 (2021) (noting that “even facially neutral procedural requirements can disproportionately burden certain categories of rights and, again, hinder the enforcement of those rights” as appears to be happening when courts apply the *Twiqbal* pleading standard in civil rights lawsuits).

41. Zambrano, *supra* note 19, at 873 (“[L]itigators and judges form natural close-knit groups because of repeated interactions...[and] while there are hundreds of thousands of practicing attorneys in the United States, the pool of repeat-player litigators in federal courts is considerably smaller.”).

42. Elected judges who depend on campaign contributions from businesses or lawyers at prestigious law firms have an economic incentive to avoid sanctioning the elite players who violate procedural rules or courtroom norms in their cases. An even more cynical reason state and federal trial judges may resist alienating elite lawyers is their understanding that, if they lose an election or choose to step down from the bench, they may want to join an elite law firm as a partner. See Dane Thorley, *The Failure of Judicial Recusal and Disclosure Rules: Evidence from a Field Experiment*, 117 NW. U. L. REV. 1277, 1282 (2023) (discussing inherent conflicts of interest and the acute dilemma elected judges face when they are assigned to a case in which one of the parties or attorneys has made financial contributions to the judge’s election campaign); see also Stuart Banner, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 STAN. L. REV. 449 (1988) (examining the issues arising from the appearance of a judicial campaign contributor in court as a litigant or an attorney).

43. Zambrano, *supra* note 19, at 903-07 (describing empirical evidence that indicates an unwritten norm that judges will issue sanctions only in extreme cases); *id.* at 872 (“[C]lose-knit

III. THE NON-ENFORCEMENT OF RULES AND NORMS IN TRUMP-ALIGNED CIVIL LITIGATION

As this section will show, Trump, his lawyers, and his political allies repeatedly violated procedural rules and norms in civil cases, particularly in-between his presidential terms.⁴⁴ A primary reason they engaged in wildly non-traditional conduct in civil (and often criminal)⁴⁵ cases is that their litigation goals often had little to do with a desire to win in court or favorably settle cases out of court. Instead, Trump and many of his political allies routinely used civil litigation to advance business or personal causes⁴⁶ and, particularly after his failed 2020 re-election bid, to energize, enrage, and raise enormous sums from political supporters.⁴⁷

groups create norms to govern cooperation and day-to-day tasks or social relations.”). *See generally* Louis S. Raveson, *Advocacy and Contempt: Constitutional Limitations on the Judicial Contempt Power—Part One: The Conflict Between Advocacy and Contempt*, 65 WASH. L. REV. 477, 483 (1990) (arguing that the justice system “requires identifying and formalizing appropriate variables for measuring the outermost limits of vigorous advocacy and the innermost reach of the contempt power, so both the bench and bar have sufficient understanding of the competing tensions to guide their behavior.”).

44. *See* Dareh Gregorian & Jasmine Cui, *Trump Ramps up Attacks on the Justice System When Trials and Key Rulings Loom, Analysis Shows*, NBC NEWS (Jan. 12, 2024, at 06:00 ET), <https://www.nbcnews.com/politics/donald-trump/trump-trials-attacks-judges-rcna131916>.

45. Trump monetized and capitalized on the notoriety as a criminal defendant. After he was booked at the Fulton County jail for Racketeer Influenced and Corrupt Organizations Act (RICO) charges, he placed the image of his mugshot on coffee mugs, t-shirts, and NFT cards, and even sold pieces of the suit he wore to the booking. Vanessa Friedman, *Trump Is Selling Pieces of His Mug Shot Suit*, N.Y. TIMES (Dec. 14, 2023), <https://www.nytimes.com/2023/12/14/style/trump-mug-shot-suit-nfts.html>.

46. For example, parents of children murdered at Sandy Hook Elementary School sued Trump ally Alex Jones, alleging that the unhinged conspiracy theories he espoused on his InfoWars podcast defamed them and caused his listeners to continuously harass and threaten them. Elizabeth Williamson & Emily Steel, *Conspiracy Theories Made Alex Jones Very Rich. They May Bring Him Down*, N.Y. TIMES (Sep. 7, 2018), <https://www.nytimes.com/2018/09/07/us/politics/alex-jones-business-infowars-conspiracy.html>; Jada Yuan, *‘The Truth vs. Alex Jones’: How Sandy Hook Lies Got Peddled for Profit*, WASH. POST (Mar. 26, 2024), <https://www.washingtonpost.com/entertainment/movies/2024/03/26/the-truth-vs-alex-jones>. Parents sued Jones in Connecticut and Texas and one presiding judge was forced to (1) remind Jones not to deliver infomercials about his dietary supplements and (2) stress that Jones was not hosting an Infowars broadcast when he was inside the courtroom. Jim Vertuno & Michael Tarm, *How Alex Jones’ Bombastic Behavior Impacts Him in Court*, ASSOC. PRESS NEWS (Aug. 5, 2022, at 20:06 ET), <https://apnews.com/article/shootings-austin-bae315601b623812f376fe3d38c1cf5c>. Despite the judge’s warnings, Jones monetized the circus-like trial atmosphere and the publicity he received from those cases increased sales for the dietary supplements.

47. *See* Sonam Sheth, *As Trump Racks up Indictments, His Supporters Are Getting Arrested and Threatening Violence Against a Judge and Jurors*, BUS. INSIDER (Aug. 17, 2023, at 13:19 ET), <https://www.businessinsider.com/trump-supporters-escalate-threats-as-he-racks-up-indictments-2023-8> (noting how Trump supporters had stepped up their rhetoric and escalated their threats against judges and jurors involved in Trump’s civil and criminal cases).

A. *Litigation Between Trump's Two Presidential Terms*

The audacious litigation tactics Trump used during both civil and criminal cases between 2020-2024 and his use of social media to attack his perceived foes⁴⁸ suggest that he and his legal team understood that they could “win” in the court of public opinion even as they mounted losses in court. Of course, Trump’s litigation behavior *even before* he was elected president in 2020 signaled that (1) he had little regard for courtroom rules or norms, (2) he was willing to flaunt or openly defy rules and norms, and (2) he would insult or disparage judges.⁴⁹ Trump’s litigation tactics in the lawsuits involving E. Jean Carroll best exemplify how he and his lawyers masterfully used civil litigation to achieve extralegal goals (like fundraising) and how they weaponized civil litigation in ways that increased safety risks for others.

Carroll published a memoir that accused Trump of sexually assaulting her in the 1990s.⁵⁰ Trump denied these allegations, (falsely) claimed he had never met her, and alleged that she fabricated the sexual assault accusations to generate book sales.⁵¹ Carroll sued Trump for defamation,⁵² but his lawyers successfully and repeatedly used litigation tactics to delay the trial.⁵³ When the case finally went to trial, the federal judge who presided over the case (Kaplan) largely kept the trial on schedule by promptly ruling on motions, creating expedited briefing schedules, and setting firm deadlines.⁵⁴ Because of the pre-trial delays, though, Trump was able to use the case to engage and enrage his supporters who—predictably—ruthlessly harassed and threatened both Carroll and her lawyer.⁵⁵

48. An NBC analysis of more than 14,000 of Trump’s social media postings from April 2022 to January 2024 documents how Trump used social media “as a megaphone to attack people and agencies” including opposing parties, lawyers, witnesses and judges. Gregorian & Cui, *supra* note 44.

49. Just days before the 2016 election, Trump agreed to settle (for \$25 million) a class action lawsuit which former students who attended Trump University filed against him for fraud. Cohen v. Trump, 303 F.R.D. 376 (S.D. Cal. 2014); Daniel Siegal, *Trump U’s \$25M Fraud Settlement Gets Final Nod*, LAW360 (Mar. 31, 2017, at 04:57 ET), <https://www.law360.com/articles/908615>. Trump called the presiding judge in that case biased and unfair, but because he had not solidified his fervent and dedicated base of political supporters, his litigation tactics did not increase security risks for the judge or others involved in the case. Bennett, *supra* note 1; Penzenstadler & Page, *supra* note 1.

50. E. JEAN CARROLL, *WHAT DO WE NEED MEN FOR? A MODEST PROPOSAL* (ST. MARTIN’S PRESS 2019).

51. Becky Sullivan, *E. Jean Carroll Aims to Expand Defamation Lawsuit Against Trump, Seeking \$10 Million*, NPR (May 23, 2023, at 14:43 ET), <https://www.npr.org/2023/05/23/1177709860/e-jean-carroll-defamation-lawsuit-trump-10-million>.

52. Carroll v. Trump, 650 F. Supp. 3d 213, 219 (S.D.N.Y. 2023).

53. See Letter addressed to Judge Lewis A. Kaplan from Alina Habba at 1-2, Carroll v. Trump, 650 F. Supp. 3d 213 (S.D.N.Y. 2023), <https://storage.courtlistener.com/recap/gov.uscourts.nysd.543790/gov.uscourts.nysd.543790.90.0.pdf>.

54. Larry Neumeister & Jill Colvin, *Trump Angrily Lashes Out After His Deposition is Ordered*, ASSOCIATED PRESS NEWS (Oct. 12, 2022, at 21:47 ET), <https://apnews.com/article/new-york-lawsuit-s-manchattan-donald-trump-lewis-a-kaplan-ce7b11f1f0e3ea1bec35e8f1f1b929d9>.

55. Larry Neumeister et al., *Donald Trump Must Pay an Additional \$83.3 Million to E. Jean Carroll in Defamation Case, Jury Says*, ASSOCIATED PRESS NEWS (Jan. 26, 2024, at 20:59 ET), <https://apnews.com/article/trump-carroll-defamation-trial-e4ea8b93cdeb29857864ffd8d14be888>. Even an

Although Judge Kaplan generally kept control of the courtroom proceedings, Trump nonetheless engaged in inappropriate conduct during the trial, including making audible and negative comments while witnesses testified and even arguing with the judge *in open court*.⁵⁶ Judge Kaplan admonished Trump to be quiet (which Trump ignored), suggested that he *might* have Trump removed from court,⁵⁷ and threatened to place one of Trump's lawyer in lockup because of her courtroom antics.⁵⁸ Despite the judge's threats, neither Trump nor his lawyer were held in contempt or removed from court.⁵⁹ Moreover, even though he lost both lawsuits and was ordered to pay Carroll more than \$90 million in damages,⁶⁰ he could claim "victory" despite these in-court losses. Trump won in the court of public opinion, though he lost in the actual courtroom, because his performative behavior in court

elite repeat player like Carroll's lawyer (Roberta Kaplan) was not immune from Trump's supporters. Kaplan—who previously represented the Minnesota Vikings and Goldman Sachs, and who self-characterizes her litigation philosophy as like a "dog with a bone"—revealed that she, too, was harassed online and received death threats when she represented Carroll. Maria Cramer & Kate Christobek, *In Trump's Bitter, Yearslong Brawl with Roberta Kaplan, He Keeps Losing*, N.Y. TIMES (Jan. 27, 2024), <https://www.nytimes.com/2024/01/27/nyregion/roberta-kaplan-lawyer-carroll-trump-trial.html>; Karen Heller, *Attorney Roberta Kaplan is About to Make Trump's Life Extremely Difficult*, WASH. POST (Jan. 18, 2021), https://www.washingtonpost.com/lifestyle/style/roberta-kaplan-lawyer-attorney-trump/2021/01/17/ae8890f2-50f8-11eb-bda4-615aaefd0555_story.html.

56. See Clare Hymes et al., *Judge Warns Trump He Could Be Barred from E. Jean Carroll Trial*, CBS NEWS (Jan. 17, 2024, at 20:01 ET), <https://www.cbsnews.com/news/trump-e-jean-carroll-trial-judge/>.

57. Maggie Haberman & Kate Christobek, *At the Defense Table, Trump Uses the Courtroom as a Stage*, N.Y. TIMES (Jan. 28, 2024), <https://www.nytimes.com/2024/01/28/us/politics/trump-courtroom-stage.html>. Trump is reported to have told Judge Kaplan that he would "love it" if he was removed from court. Benjamin Weiser et al., *Muttered Insults, Stern Warnings: Inside Trump's Second Defamation Trial*, N.Y. TIMES (Jan. 18, 2024), <https://www.nytimes.com/2024/01/17/nyregion/judge-kaplan-trump-e-jean-carroll-trial.html>.

58. Kaplan was forced to repeatedly admonish one of Trump's lawyers to adhere to traditional litigation norms and courtroom conduct like rising when speaking to the judge. Shayna Jacobs, *Judge Threatens to Throw Trump out of E. Jean Carroll Defamation Trial*, WASH. POST (Jan. 17, 2024, at 14:45 ET), <https://www.washingtonpost.com/national-security/2024/01/17/trump-defamation-trial-carroll-new-york/>. Trump named this lawyer Interim U.S. Attorney for the District of New Jersey in his second term, though she was removed and replaced by another interim U.S. Attorney. Fritz Farrow, *Trump Appoints Former Personal Attorney Alina Habba as US Attorney for New Jersey*, ABC NEWS (Mar. 24, 2025, at 12:44 ET), <https://abcnews.go.com/Politics/trump-appoints-alina-habba-us-attorney-new-jersey/story?id=120099632>; Standing Order, *In re* Appointment of United States Attorney for the District of New Jersey (July 22, 2025), <https://www.njd.uscourts.gov/sites/njd/files/StandingOrder2025-03USAttyAppointment.pdf>.

59. See generally *Trump Sex Abuse Accuser E. Jean Carroll to Testify in Defamation Trial Over Former President's Verbal Attacks*, PBS (Jan. 17, 2024), <https://www.pbs.org/newshour/politics/trump-sex-abuse-accuser-e-jean-carroll-to-testify-in-defamation-trial-over-former-presidents-verbal-attacks> (while never reported that Trump was never held in contempt, there are no orders to prove that he was ever disciplined by the Court in this manner); see also Lauren Irwin, *Haberman Suggests Trump Wanted to Use Carroll Trial for Fundraising Blitz*, THE HILL (Jan. 16, 2024), <https://www.thehill.com/regulation/court-battles/4419585-haberman-trump-carroll-trial-fundraising-blitz/> (noting the times Trump has *almost* been thrown out of the courtroom).

60. The two juries awarded her a total of almost \$90 million in damages. Shayna Jacobs, *Trump Ordered to Pay E. Jean Carroll \$83.3M in Defamation Damages Trial*, WASH. POST (Jan. 26, 2024, at 18:37 ET), <https://www.washingtonpost.com/politics/2024/01/26/trump-verdict-e-jean-carroll-defamation-trial/>.

and during press conferences outside the courtroom allowed him to use the litigation to raise money from his supporters.⁶¹ Later, during his 2024 presidential campaign, he used the litigation to portray himself (not Carroll) as the victim.⁶²

Trump's in- and out-of-court behavior in the lawsuit New York Attorney General Leticia James filed against him likewise illustrates how he and his lawyers capitalized on the unwillingness of courts to neutrally and aggressively applying and enforcing procedural rules and norms. Specifically, both before and during the trial, Trump and his attorneys insulted and verbally attacked James, the trial judge (Engoron), members of Engoron's family, court staff, witnesses, and others involved in the case on social media and in press conferences.⁶³ Because of the vitriolic nature of these verbal attacks, Judge Engoron eventually issued a gag order⁶⁴ (which excluded the judge or opposing counsel) to protect the judge's family, court personnel, and trial participants.⁶⁵ Trump, predictably, violated the gag order which caused Judge Engoron to (finally) hold Trump in contempt.⁶⁶

While Trump refrained from attacking Engoron's family members and staff, he continued to engage in courtroom antics that would almost certainly have resulted in contempt sanctions or removal from court if an ordinary party had engaged in similar disruptive courtroom conduct. For example, despite repeated admonishments from the court, Trump regularly refused to answer questions on cross examination as a witness.⁶⁷ Then, at the end of trial, his lawyers asked the judge to permit Trump to deliver part of the closing argument, even though Trump is not a lawyer and, as a party, was represented by counsel throughout the trial.⁶⁸

61. Lauren Irwin, *Haberman Suggests Trump Wanted to Use Carroll Trial for Fundraising Blitz*, THE HILL (Jan. 16, 2024), <https://www.thehill.com/regulation/court-battles/4419585-haberman-trump-carroll-trial-fundraising-blitz/>.

62. *Trump Campaign Pleads for One Million Donations as Cash Crunch Looms*, REUTERS (Mar. 21, 2024, at 7:46 ET), <https://www.reuters.com/world/us/trump-campaign-pleads-one-million-donations-cash-crunch-looms-2024-03-20/>.

63. Tara Suter, *Trump Launches New Attacks on Engoron, James*, THE HILL (Dec. 19, 2023, at 14:05 ET), <https://thehill.com/regulation/court-battles/4367911-trump-launches-attacks-engoron-james/>; Rebecca Beitsch, *Court Upholds Trump Gag Order in Financial Fraud Case*, THE HILL (Dec. 14, 2023), <https://thehill.com/regulation/court-battles/4360305-court-upholds-trump-gag-order-new-york-fraud-case/>.

64. Non-Motion Order at 1-2, *People v. Trump*, No. 452564/2022 (N.Y. Sup. Ct. Feb. 16, 2024), <https://www.documentcloud.org/documents/24087287-judge-engoron-written-order-on-trump-gag-order/>.

65. *Id.* Special counsel Jack Smith also requested a limited gag order in Trump's DC election interference criminal trial to prevent Trump "from overtly politicizing his trial and from distracting the jury with unfounded political arguments that he has often made on both the campaign trail and in court papers related to the case." Alan Feuer, *Prosecutors Ask Judge to Keep Trump from Making 'Baseless Political Claims' in Trial*, N.Y. TIMES (Dec. 27, 2023), <https://www.nytimes.com/2023/12/27/us/politics/trump-election-trial.html>.

66. *Trump v. Engoron*, 200 N.Y.S.3d 373, 374 (N.Y. App. Div. 2023).

67. Jonathan Stempel, *Judge in Trump Fraud Case Would Not Back Down*, REUTERS (Feb. 16, 2024, at 16:20 ET), <https://www.reuters.com/legal/judge-trump-fraud-case-would-not-back-down-2024-02-16/>.

68. Jonah E. Bromwich & Ben Protess, *Trump Won't Give Closing Argument at Fraud Trial After Judge Sets Limits*, N.Y. TIMES (Jan. 10, 2024), <https://www.nytimes.com/2024/01/10/nyregion/trump-fraud-trial-closing-arguments.html>.

The judge considered and ultimately granted this unorthodox and unprecedented request on the condition that Trump's attorneys agree that Trump would not attack the judge and would generally comply with standard courtroom rules.⁶⁹

Trump's lawyers never acknowledged the judge's conditions and, instead, renewed their request on the day of closing argument, calculating (correctly) that the court would allow Trump to participate in the case as a "lawyer" even though he was represented by counsel and had already appeared in the case as a witness. At the start of Trump's "closing argument" he launched into an attack on the proceeding, calling the trial a witch hunt, insulting James, and suggesting that the N.Y. Attorney General's office should be forced to pay *him* damages.⁷⁰ Eventually, Judge Engoron interrupted Trump and instructed his lawyers to "control your client," before he finally brought the courtroom spectacle to a close by cutting off Trump's rant.⁷¹

The thing that the judge did *not* do, however, was exercise his authority to have Trump removed from court. Likewise, the judge never held Trump or his lawyers in contempt for blatantly violating common courtroom norms and decorum.⁷² Thus, while Trump "lost" his ability to deliver a closing argument and ultimately lost this case, he nonetheless scored victories in the court of public opinion because he essentially transformed the courtroom and adjacent areas into free venues he used to stage political rallies. Further, he achieved his main litigation goal: he raised money from his supporters.⁷³

Even when courts imposed significant sanctions when either Trump, his allies, or their lawyers ignored or outright violated procedural rules and norms, they almost always scored out-of-court victories. For example, between his first and second terms in office, Trump or his allies filed multiple unsuccessful "election fraud" cases.⁷⁴ These cases purportedly were filed on behalf of *all* 160 million registered U.S. voters and alleged that the defendants conspired to deny

69. *Id.*

70. Michael R. Sisak, *Trump Defies Judge, Gives Courtroom Speech on Tense Final Day of New York Civil Fraud Trial*, PBS NEWS (Jan. 11, 2024, at 14:18 ET), <https://www.pbs.org/newshour/politics/trump-defies-judge-gives-courtroom-speech-on-tense-final-day-of-new-york-civil-fraud-trial>.

71. Jonah E. Bromwich et al., *Trump's Fraud Trial Draws to an End with Closing Arguments*, N.Y. TIMES (Jan. 11, 2024), <https://www.nytimes.com/2024/01/11/nyregion/trump-fraud-trial-closing-arguments.html>.

72. As the Supreme Court has recognized a trial court's authority to banish a criminal defendant from their own trial, it is hard to imagine that a judge would have allowed an ordinary party and their lawyer to violate courtroom norms the way Trump did. *See Illinois v. Allen*, 397 U.S. 337, 343 (1970) ("It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case.").

73. Haberman & Christobek, *supra* note 57 (noting that Trump uses "courtrooms to get across his own message in the midst of his presidential campaign" though his tactics often create tension on the courtroom).

74. *King v. Whitmer*, 556 F. Supp. 3d 680, 690 (E.D. Mich. 2021); *O'Rourke v. Dominion Voting Sys. Inc.*, 552 F. Supp. 3d 1168, 1172 (D. Colo. 2021), *modified on reconsideration*, 2021 WL 5548129 (D. Colo. Oct. 5, 2021), *appeal dismissed*, 2021 WL 8317149 (10th Cir. Dec. 23, 2021).

their right to vote.⁷⁵ A federal judge in Florida who presided over a lawsuit Trump filed against Hillary Clinton and other Democratic officials excoriated Trump's lawyers, ultimately issuing a scathing 65-page opinion that found that the Complaint was filed in bad faith and for an improper *political* purpose.⁷⁶ This judge, along with a handful of others, ultimately sanctioned both Trump and his lawyer,⁷⁷ but the judges who presided over Trump's cases generally refused to use existing procedural rules (including tight scheduling deadlines or an early dismissal of the Complaint) to minimize the likelihood that his delay tactics would harm the court or others participants in the cases.

The judges who presided over the Trump cases either would (or could) not quickly resolve cases and were reluctant to issue gag orders or levy substantial sanctions when Trump or his lawyers engaged in inappropriate behavior inside or near courtrooms. This inaction emboldened Trump and his lawyers to persist in violating rules and norms, to spread baseless conspiratorial theories, and to raise money from supporters. Moreover, the courts' refusal or unwillingness to enforce procedural rules and norms allowed Trump, his allies, or their lawyers to engage in conduct that posed security risks to jurors, judges, opposing parties and counsel, court personnel, witnesses, and their families.

B. The Perils of Not Enforcing Rules and Norms

The dangers Trump and his allies posed to others involved in the pre-2025 civil cases are neither imaginary nor trivial. Lawyers, judges, parties and witnesses

75. *O'Rourke*, 552 F. Supp. 3d at 1174; *King*, 556 F. Supp. 3d at 690.

76. The court characterized the Complaint as a "two-hundred-page political manifesto outlining...grievances against those that have opposed him" and found that Trump and his lawyer were "unsuccessfully attempt[ing] to misconstrue, misstate, and misapply the law." *Trump v. Clinton*, 626 F. Supp. 3d 1264, 1319 (S.D. Fla. 2022). The court also characterized the claims as "political grievances masquerading as legal claims" and stated that the litigation strategies used in the case could not "be attributed to incompetent lawyering" and were instead "a deliberate use of the judicial system to pursue a political agenda." *Trump v. Clinton*, 640 F. Supp. 3d 1321, 1332 (S.D. Fla. 2022).

77. *Trump*, 640 F. Supp. 3d at 1325.

in criminal⁷⁸ and civil cases involving Trump,⁷⁹ his political allies,⁸⁰ or parties aligned with his political views⁸¹ repeatedly reported being harassed, doxed, or swatted online.⁸² In fact, the increased security risks for jurors who participated in lawsuits involving Trump caused one trial judge to implement safety measures that are more commonly associated with criminal trials involving violent criminal organizations.⁸³ That is, Judge Kaplan became so concerned about the potential security risks to jurors in the E. Jean Carroll trial that he instructed jurors to gather each morning at specified—but never disclosed—meeting places to wait for court employees to meet then drive them to court. Once at the courthouse, the jurors were escorted to the courtroom through an underground garage.⁸⁴ Judge Kaplan

78. Tori Otten, “We Will Kill You”: Trump Supporters Threaten Judge, Jurors Amid Indictments, THE NEW REPUBLIC (Aug. 17, 2023, at 09:58 ET), <https://newrepublic.com/post/175032/trump-supporters-threaten-judge-jurors-amid-indictments> (displaying that the judge (Chutkan) in Trump’s criminal case in D.C. was threatened by Trump supporters); Robert Legare et al., *Special Counsel Jack Smith and Judge Tanya Chutkan, Key Figures in Trump 2020 Election Case, Are Latest Victims of Apparent “Swatting” Attempts*, CBS NEWS (Jan. 9, 2024, at 13:12 ET), <https://www.cbsnews.com/news/special-counsel-jack-smith-judge-tanya-chutkan-trump-2020-election-swatting/> (reporting that the Judge Chutkan and the prosecutor in the criminal case were the victims of swatting, received bomb threats at their homes, or received death threats); Nia Prater, *Alvin Bragg Has Been Deluged with Threats Since Trump’s Conviction*, N.Y. MAG. (June 21, 2024), <https://nymag.com/intelligencer/article/bragg-has-been-deluged-with-threats-since-trumps-conviction.html> (showing that Manhattan District Attorney Alvin Bragg, his family, and his office staff received death threats, bomb threats, and more than 500 threatening emails and phone calls during and after Trump’s criminal trial and conviction on thirty-four felony counts in the Stormy Daniels “hush money” case).

79. Peter Eisler et al., *Trump Blasts His Trial Judges. Then His Fans Call for Violence*, REUTERS (May 14, 2024, at 11:00 MT), <https://www.reuters.com/investigates/special-report/usa-election-threats-courts/>; Ron Dicker, *Donald Trump Shares Link Revealing Letitia James’ Address While Raging Against Her*, YAHOO! NEWS; HUFFPOST (Oct. 18, 2023, at 14:35 ET), <https://www.yahoo.com/news/donald-trump-shares-revealing-letitia-170118552.html>.

80. Two Georgia poll workers sued Rudy Giuliani (one of Trump’s former lawyers) for defamation after he accused them of manipulating ballots to “steal” the 2020 election. The plaintiffs claimed that his vitriolic (and often racist) conspiracy theories destroyed their reputations and triggered a torrent of death threats and attacks that forced them to change their residences, their appearances, and their names. Jason Szep & Linda So, *Trump Campaign Demonized Two Georgia Election Workers – and Death Threats Followed*, REUTERS (Dec. 1, 2021, at 20:00 MT), <https://www.reuters.com/investigates/special-report/usa-election-threats-georgia/>.

81. A New Mexico state court judge and his family received threatening messages threats in a case even though Trump was *not* a party. The threats commenced after the judge ruled that a founder of “Cowboys for Trump” could not hold public office because of his participation in the 2021 Capitol riot. Eisler et al., *supra* note 79.

82. The disparaging comments Trump made about Clinton and other Democrats during his presidency (and between 2020 and 2024) led to his supporters creating an unhinged conspiracy theory that claimed that Clinton and her aides were operating a child sex ring in a pizzeria in D.C. Because of this “Pizzagate” conspiracy, one of Trump’s supporters went to the restaurant armed with a weapon and fired inside the restaurant. See Jessica Taylor, *‘Lives Are at Risk,’ Hillary Clinton Warns Over Fake News, ‘Pizzagate’*, NPR (Dec. 8, 2016, at 18:13 ET), <https://www.npr.org/2016/12/08/504881478/lives-are-at-risk-clinton-warns-over-fake-news-pizzagate>.

83. Jonathan Stempel, *Donald Trump to Face Anonymous Jury in Writer E. Jean Carroll’s Second Trial*, REUTERS (Nov. 3, 2023, at 17:14 ET), <https://www.reuters.com/legal/donald-trump-fake-anonymous-jury-writer-e-jean-carrolls-second-trial-2023-11-03/>.

84. Jennifer Peltz, *For History-Making Case Against a Former President, Manhattan Court Must First Find a Dozen Jurors*, PBS NEWS (Apr. 12, 2024, at 11:35 ET), <https://www.pbs.org/news>

also prohibited lawyers, witnesses, or individual jurors from knowing the names of any juror, told jurors to use fake names when they talked to each other, and urged jurors not to tell their *own families* about their jury service on the case.⁸⁵ When the second defamation trial ended in January 2024, he issued a final and ominously chilling warning, telling them to “never disclose that you were on this jury.”⁸⁶

It is possible that courts assumed that Trump, his allies, and their lawyers’ behavior in civil cases may have posed threats to people but posed no long-term threats to the integrity of the judicial system. Allowing Trump (as a private citizen) to violate procedural rules and norms but suffer minimal consequences did more, though, than just increase safety risks for others. As we are now seeing, however, Trump’s defiant conduct in pre-2025 cases as a private litigant in civil cases served as a blueprint and a precursor to the Trump administration’s willful defiance of court orders and rulings. Moreover, courts’ unwillingness or inability to enforce rules and norms confirmed to Trump (as President) that the rule of law is meaningless and signaled that courts will treat rich and powerful parties better than ordinary parties.

Americans already were questioning whether judges would treat all parties fairly,⁸⁷ and Gallup polling in December 2024 revealed that the decline in Americans’ confidence in courts since 2020 is the largest drop (24%) ever measured.⁸⁸ The Gallup study indicates that confidence in the courts has declined regardless of whether Americans support current elected leaders, yet notes that the “profound” seventeen-point drop in confidence in judges during the Biden administration is “atypical” and likely caused by “the various legal cases against Trump.”⁸⁹ As the Gallup study expressed, “[c]onfidence in the rule of law is foundation to a free society,” but “American’s faith in the embodiment of the rule of law—the judicial system—has fallen significantly in recent years.”⁹⁰ To restore confidence in the rule of law and to protect lawyers, judges, and others who

hour/politics/for-history-making-case-against-a-former-president-manhattan-court-must-first-find-a-dozen-jurors.

85. Aaron Katersky, *Judge Orders Anonymous Jury for E. Jean Carroll Case Against Trump*, ABC NEWS (Nov. 3, 2023, at 20:36 ET), <https://abcnews.go.com/Politics/judge-orders-anonymous-jury-jean-carroll-case-trump/story?id=104621651>.

86. Jacobs, *supra* note 60.

87. The American Bar Association has recently noted the “staggering declines in public confidence in federal courts. Public confidence in state courts likewise appears to be dropping to new lows, with substantially more individuals now viewing those courts unfavorably as providers of equal justice to all.” Carol Funk, *Public Confidence and the Courts: Pillars of the Rule of Law*, ABA: JUD. DIV. (Feb. 17, 2023), https://www.americanbar.org/groups/judicial/publications/appellate_issues/2023/winter/public-confidence-and-the-courts/. Confidence in the Supreme Court and respect for Supreme Court Justices have reached historic lows. See *Confidence in the Supreme Court Remains Low*, ASSOCIATED PRESS: NORC AT THE UNIV. OF CHI. (June 27, 2024), <https://apnorc.org/projects/confidence-in-the-supreme-court-remains-low/>; Joseph Copeland, *Favorable Views of Supreme Court Remain Near Historic Low*, PEW RSCH. CTR. (Sep. 3, 2025), <https://www.pewresearch.org/short-reads/2024/08/08/favorable-views-of-supreme-court-remain-near-historic-low/>.

88. Benedict Vigers & Lydia Saad, *Americans Pass Judgment on Their Courts*, GALLUP (Dec. 17, 2024), <https://news.gallup.com/poll/653897/americans-pass-judgment-courts.aspx>.

89. *Id.*

90. *Id.*

participate in cases involving powerful parties, courts can no longer allow powerful parties to ignore or flaunt procedural rules and courtroom norms.

IV. THE IMPERATIVE OF ENFORCING AND ENHANCING RULES AND NORMS

The judges in the cases discussed in Part III had to have understood the dangers the frivolous 2020-2024 civil cases and Trump's litigation behavior in those cases posed to the civil justice system and the safety of court participants. Nonetheless, the courts were unwilling or unable to enter orders or sanctions that were severe enough to deter Trump or powerful parties like him from using civil cases to achieve out-of-court victories. To restore confidence in courts, and to protect the safety of people who participate in civil cases, courts must strictly enforce and neutrally apply procedural rules and courtroom norms. Because it was unclear whether judges in the Trump cases would not or *could* not enforce rules and norms, this next section further maintains that judges may need greater authority to control parties who use civil litigation for reasons that have little to do with a desire to win in court or favorably settle outside of court.

A. *Enforcing Existing Rules*

In hindsight, it is clear that the reluctance or failure of courts to neutrally and aggressively enforce procedural rules and norms in cases involving Trump and his allies reinforced their belief that there are few significant consequences for openly defying or disregarding court orders. Giving them multiple (and unwarranted) opportunities to violate rules and norms also signaled that powerful parties will be treated better than ordinary civil litigants, even when they make inappropriate and often sanctionable statements to judges,⁹¹ or behave in ways in court or press conferences that pose security risks to others.

One reason Trump's lawyers either would (or could) not control him is that they may have calculated that there was little risk of being sanctioned, as judges rarely refer lawyers (especially elite lawyers) to state bar associations for disciplinary proceedings.⁹² To prevent lawyers from making such calculations in the future, judges must be willing to make bar referrals for lawyers who use civil cases for reasons unrelated to a desire to win in court or settle favorably out of court. If the offending lawyer is a repeat offender, the court should ask the state

91. For example, after the jury returned a verdict in the second Carroll defamation case, Trump's counsel (Alina Habba) sent a letter to the presiding Judge (Kaplan) that insinuated that the judge and Carroll's lawyer (Roberta Kaplan) had an improper and undisclosed mentor-mentee relationship when they worked at the same large New York law firm (Paul, Weiss) thirty years ago. Letter from Alina Habba, to the Honorable Lewis A. Kaplan (Jan. 29, 2024) (on file with author). The next day, Carroll's attorney (who is not related to Judge Kaplan) sent a written response that refuted Habba's allegations and warned that she (Kaplan) reserved her right to seek Rule 11 sanctions against Habba. Habba immediately sent another letter to the judge to retract those unsubstantiated allegations. Letter from Roberta A. Kaplan, to the Honorable Lewis A. Kaplan (Jan. 30, 2024) (on file with author).

92. Zambrano, *supra* note 19, at 911 (arguing that "a procedural norm shadows Rule 11 and creates a cultural aversion to sanctions.").

entity to conduct an expedited investigation, as this might encourage the lawyer to self-correct their behavior in the current litigation.

In addition to aggressively enforcing procedural rules and courtroom norms (including making bar referrals when lawyers have behaved inappropriately), courts must also be willing to increase the sanctions they levy against lawyers who help their clients improperly use civil litigation, particularly in cases that pose safety risks to others. For example, several courts presided over the election “fraud” class action lawsuits Trump or his allies filed. Trump and his allies lost these cases and some judges imposed monetary⁹³ or non-monetary sanctions.⁹⁴ Sanctions typically were limited to reimbursing the opposing party’s attorneys’ fees, and only at the billing rates in the judge’s district, *even if* the lawyer’s normal billing rate exceeds the local rate.⁹⁵ Minimal fees will not, however, sufficiently deter a party who uses court cases for reasons other than a desire to win in court or settle out of court, particularly if their litigation misconduct can be leveraged to raise funds from political supporters or business associates.

Judges should have the authority to require parties and lawyers to internalize the costs of misusing the civil justice system. For example, to ensure that a monetary sanction reflects the cost that the offending behavior imposes on the judicial system and others (including court personnel, jurors, and witnesses), courts should be allowed to award sanctions that *exceed* the amount of attorney’s fees. In addition, courts should have the authority to order the offending party or lawyer to pay part of the sanction to the court⁹⁶ to help offset any additional costs the court incurs when the party’s behavior increases security risks for judges, court personnel, and jurors (or their families).⁹⁷

93. Just over a month after Trump lost the 2020 election, plaintiffs in Michigan filed a class action purportedly on behalf of all 160 million registered U.S. voters, alleging that the defendants conspired to deny their right to vote. The judge wrote a scathing opinion dismissing the claims, granted monetary and non-monetary sanctions against the plaintiffs, and ordered them to reimburse the public officials “for the reasonable fees and costs incurred to defend this action.” *King v. Whitmer*, 556 F. Supp. 3d 680, 734 (E.D. Mich. 2021).

94. The Michigan judge ordered the plaintiffs’ attorneys to complete continuing legal education “in the subjects of pleading standards and election law.” The court also instructed the Clerk of the Court to send a copy of the court’s decision to the appropriate disciplinary authorities in the jurisdiction(s) where the attorneys were admitted to practice law “for investigation and possible suspension or disbarment.” *Id.* at 734-35. Even if these sanctions deterred individual lawyers, that referral did nothing to discourage some of those lawyers from misbehaving when they represented Trump in the subsequent Carroll cases.

95. The judge in the Colorado election fraud case emphasized that the requested fees must be reasonable and insisted that defense counsel submit fee requests that were consistent with local rates though those rates were lower than the lawyer’s typically billing rate. The court emphasized that “hourly rates in excess of \$1,000 per hour for an experienced litigator” were not the practice in Colorado, noting that the court’s sanction award would not be “excessive.” *O’Rourke v. Dominion Voting Sys. Inc.*, 552 F. Supp. 3d 1168, 1209 (D. Colo. 2021).

96. *See* Avraham & Hubbard, *supra* note 15, at 948 (“[C]ourts’ decision-making burdens are increased by the aggressive motion practice of heavily lawyered parties...who place greater burdens on courts and their adversaries” without being forced to “pay for that privilege.”).

97. *Id.* at 918 (proposing procedural innovations that charge “fees to parties that seek to increase the use of individual procedures” as an efficient way to “allow courts to regulate docket congestion...”

Likewise, to protect the integrity of the judicial system and the safety of others, courts must be willing to issue narrowly tailored gag orders once it becomes clear that a party is using civil litigation in ways that threaten or harass others involved in the civil case. A few judges in the Trump-aligned civil cases were willing to enter gag orders to prevent Trump or his lawyers from attacking court personnel, witnesses, and the family members of judges or opposing counsel. Because, however, gag orders generally are disfavored and often are viewed as an unconstitutional form of prior restraint on speech,⁹⁸ courts resisted requests to silence Trump or his lawyers, even if they had the authority to do so, and even if allowing the speech endangered others.

Courts have the authority to issue gag orders, and the United States Supreme Court held in *Gentile v. State Bar of Nevada*⁹⁹ that state bar associations can implement rules that prohibit attorneys from making statements that have a “substantial likelihood of material prejudice” to the fair administration of justice.¹⁰⁰ Courts’ unwillingness to automatically issue gag orders was appropriate, as all parties—whether rich and powerful, poor and powerless, large corporations or public interest organizations—have a constitutional right to free speech and should be allowed to comment on pending cases. Given the dangers parties, lawyers, or judges involved in the Trump-aligned cases faced and Trump’s lawyers’ inability to control their client, courts must be willing to use their authority to use narrowly tailored orders when needed to prevent one party from threatening or harassing (or causing others to threaten or harass) others involved in civil cases.

B. *Enhancing or Modifying Procedural Rules*

Many of the lawyers who represented Trump or participated in Trump-aligned litigation were criticized, reprimanded, sanctioned, or censured by courts, and some were even disbarred.¹⁰¹ These existing sanctions failed to control the recalcitrant litigants or lawyers involved in those cases and did not give them sufficient incentives to comply with rules or norms because the policymakers who enacted the sanctioning procedures did not anticipate that a civil litigant would use civil cases to accomplish goals unrelated to a desire to win in court or settle outside

akin to charging tolls only for certain lanes or for certain drivers who contribute the most to traffic congestion.”).

98. *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (“Any prior restraint on expression comes to this Court with a ‘heavy presumption’ against its constitutional validity.”); C. Thomas Dienes, *Trial Participants in the Newsgathering Process*, 34 U. RICH. L. REV. 1107, 1119-21 (2001).

99. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1074-75 (1991).

100. *Id.* at 1075.

101. David Thomas, *Lawyer for Sidney Powell Faces Disciplinary Charges over 2020 Election Case*, REUTERS (Jan. 18, 2024, at 15:56 ET), <https://www.reuters.com/legal/legalindustry/lawyer-sidney-powell-faces-disciplinary-charges-over-2020-election-case-2024-01-18/>; Alison Durkee, *Giuliani Disbarred in D.C.: Here Are All the Other Ex-Trump Lawyers Now Facing Legal Consequences*, FORBES: BUS. (Sep. 27, 2024, at 09:23 ET), <https://www.forbes.com/sites/alisondurkee/2024/08/06/kenneth-chesebro-charged-in-wisconsin-here-are-all-the-former-trump-lawyers-now-facing-legal-consequences/>.

of court. Similarly, drafters likely never contemplated that parties would intentionally violate rules and norms and knowingly risk sanctions because they calculated that the amount of monetary sanctions a court could impose would be less than the money they could raise outside of court *because* of the offending conduct. Given these design limitations, Congress and state legislative bodies should create, or authorize courts to create, additional procedures to protect the integrity of the civil justice system and the safety of others.

1. *Initial Screenings and Restrictions on Filing*

For more than a decade, Trump, his allies, and the lawyers who have enabled them have wasted scarce state and federal judicial resources with frivolous claims, defenses, and motions.¹⁰² Particularly after his failed 2020 re-election bid, Trump forced parties to spend money *in* court to defend themselves to respond to his frivolous claims and *out* of court to pay for private security to protect themselves. Likewise, Trump's litigation tactics forced courts to increase courthouse security because of threats from his supporters.¹⁰³ To preserve the integrity of the civil justice system and protect judges, parties, jurors, witnesses, court personnel, and their families, courts need additional ways to deter repeat offenders.

One way to prevent rich and powerful parties from filing frivolous lawsuits would be to increase pleading standards. However, heightened pleading standards likely will not deter rich and powerful plaintiffs who are represented by elite lawyers who can draft pleadings that satisfy the current plausibility standard. Instead, given information asymmetries, the plaintiffs who most likely would be harmed by a heightened pleading standard are poor and less powerful plaintiffs who lack access to the documents or witnesses' information they need to state a

102. Another example of a completely frivolous lawsuit that was filed for reasons that had nothing to do with a desire to prevail in court involves Trump's former lawyer and "fixer" Michael Cohen. Trump sued Cohen for \$500 million, claiming that Cohen violated the attorney-client privilege and breached the terms of a confidentiality agreement. Trump sued Cohen *not* to win \$500 million, but to tarnish Cohen's credibility as a witness in the criminal case that the Manhattan District Attorney's office filed against Trump for falsifying business records. Once he realized he would be forced to sit for a deposition in the Cohen civil case, Trump dismissed the lawsuit. Erin Doherty, *Trump Lawsuit Against Cohen Distracts from Criminal Case, Lawyers Say*, AXIOS: POL. & POL'Y (Apr. 12, 2023), <https://www.axios.com/2023/04/12/trump-michael-cohen-lawsuit-michael-cohen>.

103. For example, while Trump ultimately dismissed the frivolous claims he filed against Cohen rather than attend a scheduled deposition, filing this lawsuit allowed him to attack Cohen in the media, raise money while the case was pending, and encourage his supporters to continue to harass, threaten, and dox Cohen and Cohen's family. Ben Protess & Maggie Haberman, *Trump Drops Lawsuit Against Michael Cohen, His Former Fixer*, N.Y. TIMES (Oct. 5, 2023), <https://www.nytimes.com/2023/10/05/nyregion/trump-michael-cohen-lawsuit-dropped.html>; Ella Lee, *Cohen Airls Concern over Testifying in Trump Fraud Case: 'I Don't Have to Put My Life on the Line'*, THE HILL (Sep. 28, 2023, at 11:35 ET), <https://thehill.com/regulation/court-battles/4227883-cohen-air-concern-trump-fraud-case/>; Ryan J. Reilley, *Michael Cohen's Family Doxxed After Trump Guilty Verdict in Porn Star Hush Money Case*, NBC NEWS (June 4, 2024, at 14:04 ET), <https://www.nbcnews.com/politics/2024-election/michael-cohen-family-doxed-trump-guilty-verdict-porn-star-hush-money-r-cna155268>.

“plausible” claim.¹⁰⁴ Rather than create a pleading standard that will not deter rich and powerful parties, but might further increase the informational disadvantages poor and less powerful parties face, courts should be allowed to deem rich and power parties who repeatedly misuse civil cases to be vexatious litigants.¹⁰⁵

State and federal courts are required to screen complaints filed by incarcerated plaintiffs and to dismiss cases that are frivolous, malicious, or fail to state a claim.¹⁰⁶ To make it harder for rich and powerful parties to waste federal judicial resources with frivolous claims, defenses, and motions, courts should deem parties who have repeatedly violated procedural rules and norms to be vexatious litigants, *particularly if* it appears they are using the civil case to increase safety risks for others. Rich and powerful vexatious litigants should be treated no better than any other vexatious litigant and, for that reason, should be required to satisfy additional procedural safeguards before they can file a lawsuit just as poor or incarcerated plaintiffs currently are.¹⁰⁷ For example, to prevent rich and powerful parties from using civil litigation for reasons other than a desire to win in court (or favorably settle out of court), powerful vexatious litigants should not be allowed to file a pleading (or motion) or assert a defense, unless the court determines that the claim, defense, or motion is plausible, non-frivolous, and is not filed to delay the proceedings or allow the party to galvanize supporters and fundraise.

2. *Muting Dangerous Publicity*

The gag orders state and federal judges entered in the civil and criminal cases involving Trump and his allies reduced the volume of the vitriolic rhetoric they

104. Ordinary parties often struggle to state plausible claims because of information asymmetries, while rich and powerful entities typically have access to the documents and evidence they need to state a claim that will survive a motion to dismiss. The internet may have “given litigants a variety of options to reduce this asymmetry,” but many ordinary plaintiffs will still need to “sue to gain access to the information they need to determine whether their claims have merit.” Jessica Erickson, *Heightened Procedure*, 102 IOWA L. REV. 61, 68-69 (2016). Empirical data support the claim that *Twqbal*’s heightened pleading standard overly burdens poorer and smaller plaintiffs who cannot afford to hire an elite lawyer. Jonah B. Gelbach, Note, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270, 2288-95 (2012).

105. See *Braham v. Sony Music Publ’g*, 2023 WL 9375103, *3 (C.D. Cal. Dec. 19, 2023).

106. The Prisoner Litigation Reform Act (PLRA) requires plaintiffs to exhaust applicable administrative remedies before they can sue, requires judges to dismiss complaints they deem to be frivolous or malicious, and also can excuse defendants from filing a responsive pleading. 42 U.S.C. § 1997(e) (2013). Similarly, judges in state courts in Texas can label a *pro se* litigant as “vexatious” if they find that there is no reasonable probability that the plaintiff will prevail in the current litigation, that the litigant has filed at least five other frivolous suits in the past seven years, and that the litigant has repeatedly relitigated issues that have been resolved in prior litigation. See also IDAHO ADMIN. RULE 59(a) (2011) (defining actions of people who “habitually, persistently, and without reasonable grounds” engage in vexatious litigation).

107. A litigant deemed “vexatious” is placed on a public list and is subject to heightened standards including those involving sanctions and contempt of court. CIV. PRAC. & REM. § 11.051 (West 1997). New York state judges can also deem parties to be vexatious litigants and require them to obtain court approval before filing additional lawsuits. See *Seldon v. Lewis Brisbois Bisgaard & Smith*, 984 N.Y.S.2d 23, 23 (N.Y. App. Div. 2014).

spread in those cases. But because the primary goal in the 2020-2024 civil cases was to publicize—not win or settle—the cases and portray Trump as a “victim” outside of court, even neutral or balanced publicity helped him and enhanced his chances of being re-elected as President in 2024.¹⁰⁸ Since gaining publicity (whether sensational or neutral) in press conferences, interviews, and on social media is a (if not *the*) primary litigation goal in Trump-aligned cases, reasonably tailored gag orders did (and could) not deter him from continuing to publicize the cases.¹⁰⁹ For that reason, judges need the authority to implement additional procedural guardrails.

Allowing the public and the press to have access to courtrooms and court documents is viewed as a fundamental element of the American justice system. Both state legislatures and courts have concluded that having open and transparent court proceedings allows the community to express concerns about court cases and ensure that the judicial system operates fairly, honestly, and efficiently.¹¹⁰ Because state statutes and judicial opinions alike recognize that the First Amendment presumes there will be open access to civil and criminal trials, courts are reluctant to issue gag orders as they are disfavored and viewed as exceptional.¹¹¹ Given these concerns, courts generally find that the public has an almost unlimited First Amendment right to access records in criminal cases,¹¹² grand jury proceedings, and cases involving national security.¹¹³

Judges who preside over civil cases find that sealing filings or entering a gag order that prevents lawyers or parties from discussing a pending case conflicts with the civil justice goal of transparency *particularly* in cases involving current or former elected or appointed public officials.¹¹⁴ Likewise, allowing judges to create *ad hoc* procedures that make civil cases non-transparent is problematic, as this ostensibly inserts informality into what is designed to be a formal procedural

108. Judge Merchan (who presided over the criminal charges that resulted in Trump being convicted of thirty-four felonies) warned Trump not to make comments that were likely to incite violence or civil unrest. Almost immediately, Trump proceeded to call the Manhattan District Attorney a criminal, accused Judge Merchan of hating him, and suggested that members of the judge’s family also hated Trump. Jonah E. Bromwich et. al, *Dilemma for Judge in Trump Case: Whether to Muzzle the Former President*, N.Y. TIMES (Apr. 6, 2023), <https://www.nytimes.com/2023/04/06/nyregion/trump-case-judge-juan-merchan.html> (noting the “delicate balance” the presiding judge must strike to avoid being accused of bias against Trump or of infringing on Trump’s freedom of speech).

109. Devlin Barrett et. al., *Trump Held in Contempt After Violating Gag Order in Hush Money Trial*, WASH. POST (Apr. 30, 2024), <https://www.washingtonpost.com/politics/2024/04/30/trump-hush-money-trial-contempt/>.

110. Ronald D. May, *Public Access to Civil Court Records: A Common Law Approach*, 39 VAND. L. REV. 1465, 1497 (1986).

111. *Globe Newspaper Co. v. Super. Ct. for Norfolk*, 457 U.S. 596, 610 (1982); *Mosallam v. Berenson*, 905 N.Y.S.2d 575, 578 (N.Y. App. Div. 2010) (discussing state law that requires state court proceedings and records to be open to the public).

112. May, *supra* note 110, at 1479-80.

113. *Id.* at 1480.

114. Joseph F. Anderson Jr., *Hidden from the Public by Order of the Court: The Case Against Government-Enforced Secrecy*, 55 S.C. L. REV. 711, 740-41 (2004).

process.¹¹⁵ Moreover, given the perception that ordinary parties receive inferior treatment and outcomes in court, creating procedures that only apply in cases involving rich and powerful parties might further erode citizens' trust in the judiciary and exacerbate the perception that some litigants receive a superior form of justice in civil cases.¹¹⁶

Notwithstanding these legitimate concerns about transparency, courts nonetheless need more robust tools to prevent parties like Trump from misusing and exploiting civil cases or using civil litigation to engage and enrage political supporters and encourage them to harass or threaten others involved in civil cases. To protect the rule of law and the safety of others, judges should be given more power to modify existing procedural rules and norms to create an early and brief non-transparent phase of civil cases. The primary benefit of creating an early "private" phase that temporarily restricts the public's right to see all parts of a civil case involving rich and powerful parties is that this process would give judges time to evaluate claims, defenses, or motions in private before determining whether the case should proceed or be dismissed.

Admittedly, creating a process that temporarily restricts the public's right to see initial court filings conflicts with many of the goals of the civil justice system. However, courts already have the authority to shield information in business cases involving trade secrets or confidential financial information from the public.¹¹⁷ Likewise, the public does not always have access to all information filed in cases that seal criminal records involving juveniles,¹¹⁸ and courts can also seal some documents filed in family law proceedings, particularly if it involves a divorce, child custody dispute, adoption, or guardianship that involves physical or emotional abuse.¹¹⁹ Though a non-transparent phase is controversial, courts nonetheless should create this phase where appropriate as this is a narrowly tailored way to protect the integrity of the judicial system and the safety of opposing parties, attorneys, judges, and court staff. Likewise, giving judges time to privately assess the merits of a case that appears to be filed for reasons other than a desire to win would make it harder for rich and powerful parties to use civil litigation to incite supporters and raise money.

115. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 424-31 (1982) (suggesting that managerial judging has the potential of creating negative side effects); Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767, 784 (2017) (noting the concerns that *ad hoc* procedures only resolve problems "in the midst of a faltering pending litigation" rather than resolving systemic problems).

116. Avraham & Hubbard, *supra* note 15, at 945 (noting the concern "that greater procedural flexibility will undermine the perceived legitimacy of the civil litigation process."); Subrin, *supra* note 17, at 398 ("[J]udicial case-by-case management introduces additional largely uncontrolled discretion that is itself the subject of major criticism."); Shapiro, *supra* note 40, at 1489 ("[E]quality of party resources can be undermined not only when a poorer party must litigate against a wealthier one, but also when courts interpret or apply procedural rules in ways that restrict some parties' access to procedural opportunities.").

117. May, *supra* note 110, at 1480.

118. *In re Gault*, 387 U.S. 1, 32 (1967); Joy Radice, *The Juvenile Record Myth*, 106 GEO. L.J. 365, 368 (2018).

119. *Mosallem v. Berenson*, 905 N.Y.S.2d 575, 578 (N.Y. App. Div. 2010); Cynthia Godsoe, *Adopting the Gay Family*, 90 TUL. L. REV. 311, 355 (2015).

Letting judges privately consider pleadings and early motions is similar to a process that already occurs when public judges are required to enforce private arbitration clauses.¹²⁰ Specifically, when a party files a motion to compel arbitration, and the court concludes that the arbitration agreement is valid and enforceable, the Supreme Court has ruled that trial judges must force the non-moving party to participate in arbitration *even if* the dispute involves a matter of public interest or violations of state and federal statutes.¹²¹ Judges must also confirm an arbitration award *even though* they cannot disclose any of the privately-negotiated terms,¹²² and they cannot examine the merits or fairness of the arbitration proceeding or settlement that occurred in complete secrecy.¹²³ Because courts are already required to participate in civil cases that are resolved *totally* in private, as long as judges eventually disclose any decisions they render during an initial private phase of a civil case, any harm that results from this non-transparent phase is outweighed by the benefits of allowing judges to privately assess the merits of a potentially frivolous case before the facts or allegations in the litigation are publicized by a rich or powerful party.

3. *Calibrating Sanctions*

One reason existing procedural laws and norms often fail to adequately deter rich and powerful parties is that courts typically give them and their elite lawyers multiple opportunities to violate rules and norms before imposing sanctions. Likewise, as noted earlier, courts generally impose only the minimal level needed to deter parties who have violated procedural rules or norms, and they rarely award monetary sanctions that exceed the amount of the opposing parties' attorney's fees. Given these professional courtesies, rich and powerful parties and their attorneys have every incentive to violate rules or norms or engage in attention-grabbing—and often dangerous—behavior as they can reasonably assume that courts will not hold them in contempt or have them jailed or removed from court.¹²⁴

120. The Supreme Court has consistently approved of the use of private arbitration proceedings based on its conclusion that arbitration resolves disputes quickly, efficiently, and at less cost than judicial proceedings. Larry J. Pittman, *Arbitration and Federal Reform: Recalibrating the Separation of Powers Between Congress and the Court*, 80 WASH. & LEE L. REV. 893, 901 (2023).

121. *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 101 (2012).

122. While Congress has exempted some statutory claims from forced arbitration, employees are now forced to arbitrate claims that arise under federal statutes like the Age Discrimination in Employment Act. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); Fair Labor Standards Act, 29 U.S.C. §§ 201-19; *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 502-03 (2018). Moreover, until Congress revised the Forced Arbitration Act in 2022 in response to the #MeToo movement, plaintiffs could be forced to arbitrate employment claims involving sexual harassment and sexual abuse. Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat. 26 (2022) (codified as amended in scattered sections of 9 U.S.C.).

123. *Cortez Byrd Chips, Inc. v. Bill Harbert Const. Co.*, 529 U.S. 193, 197-99 (2000).

124. A federal judge held Rudy Giuliani in contempt for defaming two Georgia poll workers and for refusing to transfer assets to them after they won a \$148 million judgment against him. Rather than participate in discovery, he filed for bankruptcy. The bankruptcy case was dismissed but Giuliani, undeterred, continued to ignore court orders, was held in contempt for his misconduct, but was never ordered to be jailed. Eileen Sullivan, *Judge Finds Giuliani in Contempt for Continued*

When deciding whether to sanction and the type of sanctions to impose, the Rule 11 Advisory Committee noted that courts should consider whether the offending behavior was willful, negligent, and intended to injure; whether the conduct was “part of a pattern of activity, or an isolated event;” and, the effect the conduct had “on the litigation process in time or expense.”¹²⁵ Likewise, courts must assess whether the party or lawyer has engaged in similar misconduct in earlier litigation and the extent to which prior judicial admonitions or sanctions had any deterrent effect.¹²⁶ Rule 11(c)(4) also allows courts to order a party “to pay a penalty into court” in addition to the other side’s attorney’s fees and expenses.¹²⁷ Rule 11 is not, however, the “exclusive source for control of improper presentations of claims, defenses, or contentions,”¹²⁸ and does not “inhibit the court in punishing for contempt, in exercising its inherent powers, or in imposing sanctions, awarding expenses, or directing remedial action authorized under other rules.”¹²⁹

Courts should calibrate the monetary sanctions in cases involving powerful parties to discourage parties like Trump, Alex Jones, and Rudy Giuliani from using the civil justice system for reasons other than a desire to win in court or settle out of court. For example, courts who preside over civil cases involving parties who file clearly frivolous lawsuits (like the election “fraud” cases) that are used to raise money should consider the fundraising totals when determining the amount of the monetary sanction. Two Trump-related lawsuits illustrate why it may be appropriate for courts to award more than the opposing party’s legal fees in cases where the rich or powerful party is using the litigation to fundraise.

Trump’s political allies sued political officials (including governors, secretaries of state, and state election workers), Dominion Voting Systems Inc. (an election and voting technology supplier), and Facebook (and its founder and his wife) falsely claiming that they conspired to “steal” the 2020 election.¹³⁰ Although the court ultimately awarded Dominion Voting almost \$200,000 in attorney fees in these frivolous cases,¹³¹ Trump and Trump-aligned entities like the “Save America PAC” raised hundreds of millions from donors through fundraising appeals to help “prove” voting fraud.¹³² Thus, while the sanction in that case was far from negligible, because the court calculated it based on the amount of the defendants’

Defamation of Election Workers, N.Y. TIMES (Jan. 10, 2025), <https://www.nytimes.com/2025/01/10/us/politics/giuliani-contempt-defamation-election-workers.html>.

125. FED. R. CIV. P. 11 advisory committee’s note (Proposed Official Draft 1991).

126. *See Johnson v. 27th Ave. Caraf, Inc.*, 9 F.4th 1300, 1313-14 (11th Cir. 2021) (finding district court had “inherent power to investigate the scope and extent” of litigant’s misconduct that “threaten[ed] the integrity of the court.”); Libby, *supra* note 20, at 1334-35 (observing that many of the lawyers “exhibited no remorse for their conduct,” and many maintained their law licenses despite helping Trump and his allies undermine Biden’s election).

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

128. FED. R. CIV. P. 11 advisory committee’s note to 1993 amendment.

129. *Id.*

130. *O’Rourke v. Dominion Voting Sys. Inc.*, 2021 WL 1662742, (D. Colo. Nov. 22, 2021).

131. *O’Rourke v. Dominion Voting Sys. Inc.*, 571 F. Supp. 3d 1190, 1201 (D. Colo. 2021).

132. Alan Feuer et al., *Trump’s Post-Election Fund-Raising Comes Under Scrutiny by Justice Dept.*, N.Y. TIMES (Sep. 8, 2022), <https://www.nytimes.com/2022/09/08/us/politics/trump-save-america-pac-subpoenas.html?smid=url-share>.

attorney fees, the sanction was measurably smaller than the funds Trump and his allies raised from supporters because of the litigation.

Similarly, a court sanctioned former-Trump attorney, Sidney Powell, for filing frivolous elections fraud lawsuits and ordered her to pay \$175,250.37 and to participate in continuing legal education courses.¹³³ This, too, was not an insignificant sanction, but Powell's "Defending the Republic" group appears to have raised more than \$14 million because of the case.¹³⁴ Because the amount of the sanction was significantly lower than the funds she generated through fundraising, Powell had little financial incentive to comply with procedural rules and norms in future civil cases. Indeed, the sanctions and bar referrals in the election fraud case ultimately did not deter Powell (or her lawyers) from participating in subsequent meritless cases.¹³⁵

To protect the rule of law and the safety of others, courts should consider the policy goals of the remedy of disgorgement when calculating the amount of a financial sanction in cases where a rich and powerful party (1) has violated procedural rules or norms and (2) is using a civil case to fundraise outside of the courtroom. Specifically, if a court determines that there is a "profound need for deterrence not fulfilled by compensatory damages,"¹³⁶ the court should force the party to disgorge some of money it (wrongfully) earned in fundraising just as courts order wrongdoers to disgorge wrongfully acquired gains when there is a "need to create a stronger disincentive to wrongful conduct," because "the threat of liability for actual damages does not adequately deter."¹³⁷

Forcing Trump or his allies to disgorge fundraising gains rather than merely paying the other party's legal fees would have been a more effective sanction because the gains they earned from raising money from supporters exceeded their court losses, and sanctions did not give them an adequate incentive to comply with procedural rules or norms. Similarly, calibrating sanctions to reflect in-case fundraising or letting judges use the remedy of disgorgement to force parties to pay sanctions directly to the court would force parties to pay at least part of the additional security costs courts incur when a party's misconduct creates safety risks for the court or court personnel. Courts should not craft a disgorgement sanction in all cases nor should they require a party to disgorge *all* money they raise while their civil cases are pending as disgorgement is an extraordinary equitable remedy that

133. King v. Whitmer, 556 F. Supp. 3d 680 (E.D. Mich. 2021); King v. Whitmer, No. 2:20-cv-13134 (E.D. Mich. Aug. 25, 2021).

134. Emma Brown et al., *Sidney Powell Group Raised More Than \$14 Million Spreading Election Falsehoods*, WASH. POST (Dec. 6, 2021), https://www.washingtonpost.com/investigations/sidney-powell-defending-republic-donations/2021/12/06/61bdb004-53ef-11ec-8769-2f4ecdf7a2ad_story.html.

135. Blake W. Cowman, Current Development, *Cash Cow: The Futility of Monetary Sanctions as a Deterrent for Post-Election Litigation Abuse*, 35 GEO. J. OF LEGAL ETHICS 607, 622 (2022).

136. James J. Edelman, *Unjust Enrichment, Restitution, and Wrongs*, 79 TEX. L. REV. 1869, 1876 (2001); see also Avraham & Hubbard, *supra* note 15, at 924-25 (advocating in favor of "cap-and-trade and auction systems" that increase judicial efficiency and give parties "a disincentive to over-litigate, regardless of whether they are doing so because they fail to consider their effect on overall congestion, or because they are trying to impose burdens on their opponents.").

137. Andrew Kull, *Restitution's Outlaws*, 78 CHI.-KENT L. REV. 17, 19 (2003).

should be used sparingly. Nonetheless, courts should consider enhancing and potentially doubling, trebling, or otherwise escalating sanctions in cases involving repeat offenders to give them adequate incentives to avoid engaging in similar misconduct in the future.

V. CONCLUSION

It would be unrealistic to suggest that the *sole* reason Trump (as President) has openly defied court orders or threatened to have judges impeached is because judges who presided over 2020-2024 cases involving Trump (as private citizen) failed to enforce existing procedural rules and norms. Even if courts *had* neutrally applied and enforced existing procedural laws, it is quite likely that Trump and his allies would have continued to use vitriolic (and often violent) rhetoric in court, in press conferences, and on social media, because existing procedural rules and norms were never designed to regulate parties who use litigation to win political battles in the court of public opinion rather than the actual legal battle in court. To protect the integrity of courts and the safety of the people involved in civil cases, judges must enforce existing procedural rules and norms, but also need additional case management tools to prevent rich and powerful parties from placing opposing parties and counsel, judges, juries, court staff, and their families at risk and using civil cases for reasons other than a desire to win in court.