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New York City Bar Association Calls on American Lawyers to Support the Rule of Law

EXECUTIVE SUMMARY

Among the greatest tragedies of the last four years has been the continuing actions of Trump Administration officials to undermine the rule of law in our nation. Many of these actions have the potential to cause lasting damage to our democratic institutions and our nation. Repairing that damage and rebuilding those institutions must be an urgent priority of the Biden Administration. The New York City Bar Association is heartened to see President-elect Biden's announced commitment to the rule of law, both in the White House and throughout the Executive Branch of our federal government.

But the new Administration cannot be expected to do this critical job alone. This bar association, its Rule of Law Task Force and other Committees within the Association have spoken out against the individual abuses and broader pattern to undermine law within the Trump Administration. We have also sponsored a comprehensive Forum on the Rule of Law for both lawyers and the public in which we surveyed the broad pattern of recent governmental actions threatening the impartial administration of justice and identified specific actions that our profession can take to repair the significant breaches in the fabric of justice in our society.¹

¹ Sheila S. Boston, *Election Day Message from New York City Bar City Bar President Sheila S. Boston*, NEW YORK CITY BAR (Nov. 3, 2020), <https://www.nycbar.org/media-listing/media/detail/election-day-message-from-city-bar-president-sheila-s-boston> (all websites last visited Dec. 24, 2020); *Request for Prompt Investigation into the Events of June 1, 2020 at Lafayette Square Park*, NEW YORK CITY BAR (June 9, 2020), <https://www.nycbar.org/media-listing/media/detail/lafayette-square-protests-city-bar-asks-congressional-leaders-to-investigate>; *New York City Bar City Bar Sends Letter to Congressional Leaders and Department of Justice Inspector General Regarding the Prosecution of Roger Stone and Related Actions by the Department of Justice*, NEW YORK CITY BAR (Feb. 12, 2020), <https://www.nycbar.org/media-listing/media/detail/prosecution-of-roger-stone-and-related-actions-by-the-department-of-justice>; *Brief of the New York City Bar City Bar as Amicus Curiae in Opposition to the Petition For a Writ of Mandamus, In re: Michael T. Flynn (2020)(No. 20-5143)*, <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/in-re-michael-t-flynn-amicus-brief>; *Request for Formal Congressional Inquiries into Conduct of Attorney General William P. Barr*, NEW YORK CITY BAR (Jan. 8, 2020), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/request-for-formal-congressional-inquiries-into-conduct-of-attorney-general-william-p-barr>; *Concern over the Attorney General's Conduct: Removal of Mr. Geoffrey Berman as U.S. Attorney for the Southern District of New York*, NEW YORK CITY BAR ASSOCIATION (June 23, 2020), <https://www.nycbar.org/member-and-career->

We speak today because we believe all members of our profession have an indispensable role to play in restoring the rule of law and renewing our nation's commitment to compliance with law by those entrusted with governmental power. We also speak to encourage civil discourse, the peaceful resolution of disputes within our society, and respect for the diversity, dignity and rights of all members of our dynamic nation. Because the active commitment of our entire profession is essential for these tasks, we urge our fellow lawyers across the United States to speak and act, now and in the coming days and months, to help our nation realize these goals.

A CALL TO ACTION

Prompt and visible action by our profession is necessary because lawyers have been prominently involved in causing the damage to our community's respect for law and our Constitutional government. We have all witnessed the extraordinary number of frivolous lawsuits attacking election results with entirely unsupported or outright false claims of systemic fraud, an apparently coordinated campaign that consciously sought to sow public suspicion of the democratic process itself despite the unprecedented level of public participation in the recent Presidential election.² When dozens of cases were promptly dismissed by state and federal trial courts, 18 state attorneys general, joined by 126 members of the House of Representatives, sought to overturn election results in four states by invalidating 20 million votes based upon nothing more than unsubstantiated claims of massive voter fraud.³ This was a brazenly improper attempt to abuse

[services/committees/reports-listing/reports/detail/geoffrey-berman-removal-attorney-general-barrs-conduct; Concerns Regarding Recent U.S. Postal Service Operational Changes That Could Impact Voting By Mail-In Ballot](#), NEW YORK CITY BAR ASSOCIATION (Sept. 25, 2020), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/us-postal-service-operational-changes-mail-in-ballots>; [Letter Requesting a Prompt Investigation of Potential Hatch Act and State Department Policy Violations by Secretary of State Mike Pompeo](#), NEW YORK CITY BAR ASSOCIATION (Sept. 3, 2020), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/investigation-of-mike-pompeos-apparent-hatch-act-violation>; [Statement Opposing U.S. Sanctions on Persons Working with or for the International Criminal Court](#), NEW YORK CITY BAR ASSOCIATION (July 29, 2020), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/opposing-sanctions-on-international-criminal-court>; [Protecting the Independence of the Federal Inspector General Offices: Call for Congressional Oversight and Hearings](#), NEW YORK CITY BAR ASSOCIATION (Apr. 25, 2020), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/protect-independence-of-federal-inspector-general-offices>.

² See e.g., *Donald J. Trump for President, Inc., et al. v. Boockvar, et al*, 4:20-CV-02078 (M.D.Pa Nov. 21, 2020) (“this Court has been presented with strained legal arguments without merit and speculative accusations, unpled in the operative complaint and unsupported by evidence. In the United States of America, this cannot justify the disenfranchisement of a single voter, let alone all the voters of its sixth most populated state. Our people, laws, and institutions demand more.”); *Donald J. Trump for President, Inc., et al. v. Secretary Commonwealth of Pennsylvania et al.*, No. 20-3371 (3d Cir. Nov. 27, 2020) (“Free and fair elections are the lifeblood of our democracy. Charges of unfairness are serious. But calling an election unfair does not make it so. Charges require specific allegations and then proof. We have neither here.”); *Wood v. Raffensperger*, No. 20-4651 (N.D. Ga. Nov. 19, 2020) (“To halt the certification at literally the 11th hour would breed confusion and disenfranchisement that I find have no basis in fact and law”); *Donald J. Trump for President, Inc. et al. v. Benson*, 20-000225-MZ (Mi Ct. Cl., Nov. 6, 2020) (judge describes case as “inadmissible hearsay within hearsay”).

³ Jeremy W. Peters and Maggie Haberman, *17 Republican Attorneys General Back Trump in Far-Fetched Election Lawsuit*, N.Y. Times (Dec. 9, 2020) (17 Attorneys General join lawsuit commenced by Attorney General of Texas), <https://www.nytimes.com/2020/12/09/us/politics/trump-texas-supreme-court-lawsuit.html>; Andrew Solender, *126 House Republicans Now Support Lawsuit To Overturn Election In Updated Brief*, Forbes (Dec. 11, 2020),

the Supreme Court's original jurisdiction in an effort to invalidate an election that was declared to be "the most secure in American history" by the Director of the Department of Homeland Security's Cybersecurity and Infrastructure Security Agency⁴ and that even Attorney General Barr had declared to be free of any widespread fraud.⁵ Following the Supreme Court's immediate rejection of that effort, a number of Trump supporters, with the President's apparent acquiescence, continued to urge the Electoral College to disregard state election results in a continuing attempt to undermine our nation's history of and commitment to democracy, the rule of law and the peaceful transition of power. When those efforts failed last week, those who would subvert our democracy turned their attention to Congress to subvert the will of the voters.⁶

To call these lawsuits (and similar schemes to derail the Electoral College vote) frivolous is to understate their danger. The effect of filing these meritless lawsuits has potentially devastating effects on public understanding and acceptance of our democratic system. If those who are disappointed with the outcome of an election are free to challenge the result without any factual basis for doing so, the public is encouraged to think that compliance with legal standards is optional. The widespread repetition by high government officials (including the President and his several counsel) of misstatements of fact and baseless conspiracy theories, while unsuccessful in court, has apparently succeeded in undermining trust in a Presidential election that had a record number of voters, with the result that, according to one poll, some 70% of Republican voters did not believe (at least before the Electoral college vote on December 14) that President-elect Biden actually won the election.⁷

The constant baseless claims of a "stolen election" have also spawned threats of violence and death against election officials of both parties and their families.⁸ Such incidents included the

<https://www.forbes.com/sites/andrewsolender/2020/12/11/126-house-republicans-now-support-lawsuit-to-overturn-election-in-updated-brief/?sh=62d3e7e8e5db>; Jess Braven and Deanna Paul, *Supreme Court Rejects Texas Challenge to Biden's Victory in Presidential Election*, WSJ (Dec. 12, 2020), <https://www.wsj.com/articles/trump-campaign-loses-wisconsin-election-lawsuit-11607713668>.

⁴ *Joint Statement From Elections Infrastructure Government Coordinating Council & the Election Infrastructure Section Coordinating Executive Committees*, CYBERSECURITY & INFRASTRUCTURE SECURITY AGENCY (Nov. 12, 2020), <https://www.cisa.gov/news/2020/11/12/joint-statement-elections-infrastructure-government-coordinating-council-election>.

⁵ Michael Balsamo, *Disputing Trump, Barr says no widespread election fraud*, AP NEWS (Dec. 1, 2020), <https://apnews.com/article/barr-no-widespread-election-fraud-b1f1488796c9a98c4b1a9061a6c7f49d>.

⁶ Manu Raju and Jeremy Herb, *House conservatives urge Trump not to concede and press for floor fight over election loss*, CNN (Dec. 7, 2020), <https://www.cnn.com/2020/12/07/politics/house-republicans-trump-biden/index.html>.

⁷ Catherine Kim, *Poll: 70 percent of Republicans don't think the election was "free and fair"*, POLITICO (Nov. 9, 2020) (citing POLITICO/Morning Consult survey of Nov. 6-9, 2020), <https://www.politico.com/news/2020/11/09/republicans-free-fair-elections-435488>.

⁸ Ed Pilkington and Sam Levine, *'It's surreal': the US officials facing violent threats as Trump claims voter fraud*, THE GUARDIAN (Dec. 10 2020), <https://www.theguardian.com/us-news/2020/dec/09/trump-voter-fraud-threats-violence-militia>.

demonstration by protesters armed with rifles outside the home of Michigan’s secretary of state⁹, threats to Georgia election officials and workers whose recount confirmed the Biden victory in Georgia¹⁰ and, most recently, violent confrontations in the District of Columbia, in which four people were stabbed and critically injured, and two historically Black churches were vandalized¹¹. On December 14, electors chosen to represent Michigan and other states had to be given police escorts to attend the meeting of the Electoral College, which in at least one state had to be relocated for the safety of the electors.¹² Indeed, in Arizona groups of Trump supporters attempted to submit falsified Electoral College “certifications” claiming that their states’ Electors had voted for President Trump notwithstanding the public’s vote for President-elect Biden and the actual vote of that state’s Electors.¹³ Most shockingly, following the Supreme Court’s dismissal of the Texas original jurisdiction attempt, the head of the Texas Republican Party called for that state and its 17 amici states to secede from the Union.¹⁴ These and other less publicized attempts to repudiate the results and basic fairness of the recent national election can leave—and are likely intended to leave—lasting doubt about the legitimacy of our democracy.

It is in this context that the actions of the state and federal courts, including the Supreme Court, are so important, not just to the Biden victory but to the rule of law itself. Many of those federal court decisions were issued by judges who were appointed by either President Trump or previous Republican Presidents. Similarly, many of the state court decisions were issued by judges who were either elected as or appointed by Republicans.¹⁵ In each of these cases, the courts recognized the primacy of our nation’s electoral process and its foundational role in our Constitutional democracy. They deserve our respect and gratitude for performing their functions with principle, integrity and speed at a time when all three were required.

We also commend the many principled election officials, only some of whom are lawyers, who, without regard to their party or candidate preferences, worked so diligently to carry out the

⁹ Bill Chappell, *Michigan Secretary Of State Says Armed Protesters Descended On Her Home Saturday*, NPR (Dec. 7, 2020), <https://www.npr.org/sections/biden-transition-updates/2020/12/07/943820889/michigan-secretary-of-state-says-armed-protesters-descended-on-her-home-saturday>.

¹⁰ Alexa Corse, *Georgia Again Certifies Biden’s Win*, THE WALL STREET JOURNAL (Dec. 7, 2020), <https://www.wsj.com/articles/georgia-again-certifies-bidens-win-11607372810>.

¹¹ Associated Press, *Vandals hit Black churches in D.C. during pro-Trump rallies*, POLITICO (Dec. 13, 2020), <https://www.politico.com/news/2020/12/13/vandals-black-churches-washington-dc-444940>.

¹² Lisa Lerer and Reid J. Epstein, *Electoral College Voter: Long an Honor, and Now Also a Headache*, N.Y. Times (Dec. 14, 2020), <https://www.nytimes.com/2020/12/14/us/politics/electoral-college-biden-trump.html>.

¹³ Jeffery Martin, *Pro-Trump Group Sends Fake Documents in Attempt to Reassign Arizona’s Electoral Votes*, Newsweek (Dec. 14, 2020) <https://www.newsweek.com/pro-trump-group-sends-fake-documents-attempt-reassign-arizonas-electoral-votes-1554704>

¹⁴ Daniel Politi, *Texas GOP Chair Suggests Secession After Supreme Court Shoots Down Election Lawsuit*, Slate (Dec. 12, 2020), <https://slate.com/news-and-politics/2020/12/texas-gop-chair-allen-west-secession-supreme-court.html>.

¹⁵ Adam Liptak, *Supreme Court Rejects Republican Challenge to Pennsylvania Vote*, N.Y. Times (Dec. 8, 2020), <https://www.nytimes.com/2020/12/08/us/supreme-court-republican-challenge-pennsylvania-vote.html?auth=login-email&login=email>.

Presidential election in 50 states (plus Washington DC). In many cases, those same officials were asked to recount, sometimes twice, the results of those elections and to endure threats to themselves and their families by Trump supporters encouraged in their zeal by the Trump campaign or by President Trump himself. Even after the Electoral College vote, public officials simply trying to perform their statutory duties have continued to receive threats from those continuing to claim that President Trump somehow won the November 3 election.

But the rule of law is too important to be left solely to principled judges and courageous public officials for its defense. The legal profession must be heard from, and promptly. Some lawyers are already setting an example for our profession, including a non-partisan group known as “Lawyers Defending American Democracy.” More than 3,500 lawyers signed a letter noting that the conduct of President Trump’s lawyers “demeans the legal profession and . . . grossly deviates from the bar’s deep commitment to democratic institutions and the fact processes that maintain our democracy’s vitality.”¹⁶ Nineteen Republican-appointed former United States Attorneys wrote a letter days after the election condemning President Trump’s “reckless” and “unfounded” allegations.¹⁷ A lawyer who served in the DOJ’s Office of Legal Counsel published an op-ed issuing, in essence, a public apology and a warning that lawyers not be complicit in “giving voice to those trying to destroy the rule of law and dignifying their efforts with our talents and even our basic competence.”¹⁸ And, twenty-five former D.C. Bar Presidents issued the same warning, writing “lawyers have willingly agreed to become the instruments of a wholesale attack on the integrity of the democratic process, which is the framework for binding together a peaceful, civil society under law. The harmful consequences of this campaign will survive long after the courts formally have dismissed the lawsuits.”¹⁹

As guardians of the rule of law, lawyers bear a unique duty to educate our fellow citizens on the foundational role of law in our constitutional democracy, a message we can convey both by our words and our deeds, not simply (or even primarily) in court, but in our advice to clients, in our public statements and in the myriad ways that lawyers contribute to our society by serving on boards of directors, assisting non-profit organizations or holding positions of leadership in communities across our nation.

¹⁶ Lawyers Defending American Democracy, *Call for Bar Condemnation and Investigation of President Trump’s Campaign Lawyers for Subverting American Democracy*, (Dec. 3, 2020), <https://lawyersdefendingdemocracy.org/call-for-bar-condemnation-and-investigation-of-president-trumps-campaign-lawyers-for-subverting-american-democracy/>.

¹⁷ *Statement of Former U.S. Attorneys Who Served Under Republican Presidents Concerning the Electoral Process*, <https://drive.google.com/file/d/1pXb0wmlNngP-fRL1rEJefE-Hnr3-wuE/view>.

¹⁸ Erica Newland, *I’m Haunted by What I Did as a Lawyer in the Trump Justice Department*, N.Y. Times (Dec. 20, 2020), <https://www.nytimes.com/2020/12/20/opinion/trump-justice-department-lawyer.html?smid=em-share>. In a clarion call to the legal profession, Ms. Newland, who served in the OLC from 2016-2018, wrote, “No matter our intentions, we were complicit. We collectively perpetuated an anti-democratic leader by conforming to his assault on reality. We may have been victims of the system, but we were also its instruments.”

¹⁹ *25 former D.C. Bar presidents: Lawyers should not be complicit in Trump’s attack on democracy*, Washington Post (Dec. 1, 2020), <https://www.washingtonpost.com/opinions/2020/12/01/dc-bar-presidents-lawyers-trump-election/>.

Recognizing this, the recent election sparked an enormous outpouring of volunteer activity by thousands of lawyers who helped provide reliable non-partisan information and assistance to voters facing the highly unusual circumstances of the 2020 election. Many other lawyers volunteered to help people facing severe hardship caused by the pandemic and resulting economic loss. This energy must now be harnessed for an additional purpose: to protect our democratic institutions and judicial system and underscore the integrity of our national commitment to government under law.

We call upon our fellow members of the bar to step up, to speak out and to act responsibly in the best traditions of our profession. If we fail to do so, there is no guarantee that our democracy, based upon the rule of law, will endure for future generations.

Respectfully,

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