

The Perils of Fundraising Using the Disinformation of the Big Lie

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8.1 INTRODUCTION

Many legal and political commentators dubbed Donald Trump's false claim that he was the actual victor of the 2020 American presidential election, 'the Big Lie'.¹ No matter how he complained and dissembled, he lost. After losing the 2020 election, Trump went on a fundraising binge, asking his supporters to give to his legal defense fund so that he could litigate the results of the 2020 election, which he fraudulently claimed he had won.² According to the House of Representatives' January 6 Select Committee, this fund did not exist.³ As Select Committee member Congresswoman Zoe Lofgren put it, 'the Big Lie was also a big rip-off'.⁴ Because the 2020 presidential election was not stolen,⁵ and the legal defense fund he touted was

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¹ Melissa Block, "The Clear and Present Danger of Trump's Enduring "Big Lie"", NPR, 23 December 2021, www.npr.org/2021/12/23/1065277246/trump-big-lie-jan-6-election.

² Shanna Ports, "Trump's Abuse of Recount Funds Shows the Need for Clear Regulations", Campaign Legal Center, 31 January 2023, <https://campaignlegal.org/update/trumps-abuse-recount-funds-shows-need-clear-regulations>.

³ Final Report before the Select Committee to Investigate the January 6th Attack on the United States Capitol of the House of Representatives One Hundred Seventeenth Congress Second Session, H.R. Rep. No. 117-663, 117th Cong. (2023) [hereinafter Final Report], www.govinfo.gov/content/pkg/GPO-J6-REPORT/pdf/GPO-J6-REPORT.pdf, at 770.

⁴ "Big Lie "Big Rip-Off"", Marketplace, 13 June 2022, www.marketplace.org/shows/make-me-smart/big-lie-big-rip-off.

⁵ John Danforth et al., 'Lost, Not Stolen: The Conservative Case That Trump Lost and Biden Won the 2020 Presidential Election', July 2022, <https://drive.google.com/file/d/1aqorZ6iAYFqZU-EDQBzjqfvAoC5nKcB/view>, at 1-67.

nonexistent, Trump's post-2020 election fundraising was a fraud within a fraud⁶ – giving rise to a reasonable argument that it violated the federal wire fraud statute and also constituted common law fraud.⁷

Wire fraud involves 'any scheme to defraud another person that uses electronic communications, either across state lines or internationally'.⁸ Since most solicitations for funds in the digital age are done with email or texts to mobile phones using telecommunications infrastructure, the federal wire fraud statute is triggered when such solicitations contain fraud. As Tyler Yeargain once described wire fraud, '[p]ut simply, lies were communicated over the Internet in an attempt to yield a financial return for the liars.'⁹ Common law fraud includes that the 'main purpose of fraud is to gain something of value by misleading or deceiving someone into thinking something which the fraud perpetrator knows to be false. Criminal fraud requires criminal intent on the part of the perpetrator, and is punishable by fines or imprisonment'.¹⁰

Legal accountability for the attempts to overturn the 2020 election is finally coming home to roost with an indictment for federal crimes from Special Counsel Jack Smith against ex-President Trump and an indictment for Georgia crimes against Trump and eighteen co-conspirators from Fulton County District Attorney.¹¹ Both indictments cover expansive ground, ranging from the crimes of pressuring state officials to illegally overturn the 2020 election, to fabricating fake electors, to interfering with Congress's electoral count. But one charge seemed to be conspicuously absent from both indictments: any charge of fraud for fundraising from the Big Lie (that Trump was the true victor of the 2020 election) and for the Big Rip Off (raising money for an election defense fund which did not exist).

⁶ Ed Pilkington, 'The "Big Rip-Off": How Trump Exploited His Fans with "Election Defense" Fund. The Former President Used Donations to a Nonexistent Legal Defense Fund for His Hotels and the January 6 Ellipse Rally', *The Guardian*, 18 June 2022, www.theguardian.com/us-news/2022/jun/18/donald-trump-election-defense-fundraising-defrauded-fans.

⁷ Jordan Rubin, 'Why Jack Smith's Reported Wire Fraud Probe into Trump Campaign Could Be a Big Deal', MSNBC, 14 April 2023, www.msnbc.com/deadline-white-house/deadline-legal-blog/trump-wire-fraud-probe-2020-election-rcna79620.

⁸ Wire Fraud Law, Justia, www.justia.com/criminal/offenses/white-collar-crimes/wire-fraud; 18 U.S.C. 1343; but see *Neder v. United States*, 527 US 1, 4 (1999) ('We also hold that materiality is an element of the federal mail fraud, wire fraud, and bank fraud').

⁹ Tyler Yeargain, 'Fake Polls, Real Consequences: The Rise of Fake Polls and the Case for Criminal Liability' (2020) 85 *Missouri Law Review* 129, at 168.

¹⁰ Fraud, Civil or Criminal, Florida Bar, 12 December 2022, www.floridabar.org/practice-areas/fraud-civil-or-criminal/; see also Fraud, Legal Information Institute Cornell Law School, www.law.cornell.edu/wex/fraud.

¹¹ *United States of America v. Trump*, Case No. 1:23-cr-00257-TSC (1 August 2023), <https://int.nyt.com/data/documenttools/trump-jan-6-indictment-2020-election/hfic76972b25c802/full.pdf>, Indictment; *The State of Georgia v. Trump and Others*, No. 23SC188947 EJ15 McAffee (14 August 2023), <https://s3.documentcloud.org/documents/23909543/23sc188947-criminal-indictment.pdf>, Indictment.

The question of whether to prosecute Trump, his campaign, or his fundraising team for pushing this aspect of the Big Lie is up to Special Counsel Smith, who was assigned by US Attorney General Merrick Garland to look into Trump's handling of classified and military documents at Mar-a-Lago as well Trump's actions related to January 6.¹² The Special Counsel may not pursue these charges because there are easier cases to make, including violations related to conspiracy to have fake electors submit paperwork purporting to be real electors.¹³ But this chapter argues that there were real violations of federal wire fraud statutes surrounding the fundraising after the 3 November 2020 election by Trump and his fundraisers, who were trafficking in disinformation about the outcome of the 2020 election as well as the uses of the money. (Another possible source of accountability is state prosecutors in Fulton County, Georgia, who could prosecute this as common law fraud.) In this chapter, I will outline why Trump's deceptive fundraising after the 2020 election (including some fundraising that is ongoing while this chapter was written in 2024), is legally fraught.¹⁴

The chapter argues that when Trump (and his allies) used the Big Lie after the 2020 election to raise money from unsuspecting supporters who trusted him, he (and his allies) likely stepped across the line from protected free speech into criminal fraud, which enjoys no First Amendment protection.¹⁵ It will proceed as follows: Section 8.2 will explain why this Big Lie that Trump was the true victor of the 2020 election was disinformation. Section 8.3 will demonstrate how federal courts, including the Supreme Court conceptualize fraud as being outside the protection of the First Amendment. Section 8.4 will show that the Department of Justice (DOJ) often uses wire fraud as a charge in cases involving campaign funds. Section 8.5 will argue that Trump, the head of his political action committees (PACs), and even the Republican Party – all of whom used the Big Lie to fundraise – have exposed themselves to possible prosecution for wire fraud. Finally Section 8.6 will follow the money trail, showing where money from the Big Lie was used.

¹² Appointment of a Special Counsel, DOJ, 18 November 2022, www.justice.gov/opa/pr/appointment-special-counsel-o (announcing the appointment of Jack Smith).

¹³ See 18 U.S.C. § 1001; Diamond Brown, 'What Trump's Federal Indictment for Attacks on the 2020 Election Could Look Like', Citizens for Responsibility and Ethics in Washington, 17 July 2023, www.citizensforethics.org/reports-investigations/crew-reports/what-trumps-federal-indictment-for-attacks-on-the-2020-election-could-look-like.

¹⁴ Alex Woodward, 'Trump's Campaign Is Selling \$47 T-Shirts Commemorating His Latest Indictment', *The Independent*, 2 August 2023, www.independent.co.uk/news/world/americas/us-politics/trump-indictment-shirts-campaign-donations-b2386497.html; Betsy Woodruff Swan and Kyle Cheney, 'Special Counsel Still Scrutinizing Finances of Trump's PAC', *Politico*, 8 August 2023, www.politico.com/news/2023/08/08/jack-smith-donald-trump-pac-00110279.

¹⁵ *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 US 600, 612 (2003) ('the First Amendment does not shield fraud'); *United States v. Hansen*, 143 S.Ct. 1932, 1939 (2023) (same).

8.2 THE BIG LIE WAS DISINFORMATION

After Trump lost the 2020 election, he, some of his lawyers and certain members of his campaign staff all pushed the disinformation known as the ‘Big Lie’ that Trump was the true victor of the 2020 election.¹⁶ He was not.¹⁷ This Big Lie was deployed unsuccessfully in over sixty lawsuits that challenged the legitimacy of the 2020 election in court.¹⁸ The lawyers who brought these frivolous suits have been subject to sanctions,¹⁹ calls for disbarment,²⁰ as well as withering disapproval from fellow lawyers.²¹ As I explained in a law review article, happily the American judiciary

¹⁶ Eric Lutz, ‘Lindsey Graham Takes His Trump Fealty to a New Level’, *Vanity Fair*, 17 November 2020, www.vanityfair.com/news/2020/11/lindsey-graham-throw-out-ballots-georgia; David Landau, Hannah J. Wiseman and Samuel Wiseman, ‘Federalism, Democracy, and the 2020 Election’ (2020–2021) 99 *Texas Law Review*, online ed., 96, at 99 (‘in the wake of former President Trump’s determined effort to refute the election, experts have described recent events as “one of the gravest threats to democracy”, noting that they “never would have imagined seeing something like this in America”’).

¹⁷ Official 2020 Presidential General Election Results, Federal Election Commission, www.fec.gov/resources/cms-content/documents/2020presgeresults.pdf.

¹⁸ ‘Here’s Every Word of the First Jan. 6 Committee Hearing on Its Investigation’, NPR, 10 June 2022, www.npr.org/2022/06/10/1104156949/jan-6-committee-hearing-transcript (quoting Liz Cheney: ‘the President had every right to litigate his campaign claims, but he ultimately lost more than 60 cases in state and federal courts. The President’s claims in the election cases were so frivolous and unsupported that the President’s lead lawyer, Rudy Giuliani, not only lost the lawsuits, his license to practice law was suspended’).

¹⁹ *King v. Whitmer*, No. 20-13134, 2021 WL 3771875, at *1 (E.D. Mich. 25 August 2021) (sanctioning the ‘Kraken’ lawyers); David Eggert, ‘Lawyers Allied with Trump Ordered to Pay \$175K in Sanctions’, Associated Press, 2 December 2021, <https://apnews.com/article/donald-trump-joe-biden-michigan-detroit-election-2020-4fd2ba9b84e9d9a6bcddd51872ba3f97>.

²⁰ *Matter of Giuliani*, No. 2021-00506, at *30–31 (N.Y. App. Div. 3 May 2021) (suspending Rudolph W. Giuliani’s ability to practice law in New York).

²¹ ‘25 Former D.C. Bar Presidents: Lawyers should Not Be Complicit in Trump’s Attack on Democracy’, *The Washington Post*, 1 December 2020, www.washingtonpost.com/opinions/2020/12/01/dc-bar-presidents-lawyers-trump-election/ (‘that these lawsuits were filed on behalf of the incumbent president . . . makes matters even worse. Here, 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’); Mary Papenfuss, ‘1,500 Attorneys Call on Bar Associations to Condemn Trump Campaign Lawyers’, *HuffPost*, 8 December 2020, www.huffpost.com/entry/lawyers-condemn-trump-campaign-lawsuits_n_5fcef25f5b626e08a2c7d4e (‘“Our profession needs to affirm that this behavior grossly deviates from the bar’s deep commitment to democratic institutions and the fact-based processes that maintain our democracy’s vitality”, the letter concludes’); Matt Naham, ‘Former American Bar Association Presidents, 1,000-Plus Lawyers Call for Bar Investigations of Trump Campaign Attorneys’, *Law & Crime*, 7 December 2020, <https://lawandcrime.com/2020-election/former-american-bar-association-presidents-1000-plus-lawyers-call-for-bar-investigations-of-trump-campaign-attorneys/> (Former ABA President Bellows, also a former president of the Chicago Bar Association, said that bar associations should “disavow” Trump campaign lawyers’).

was not deceived by the Big Lie.²² But tragically, thousands of Republican donors, including many small donors, did fall for the Big Lie.²³

While most campaign fundraising activities are enrobed in a thick blanket of First Amendment protections,²⁴ the fundraising by Trump and his allies that relied on the Big Lie arguably falls outside of the free speech protections, landing squarely in the category of both common law fraud and federal wire fraud.²⁵ While no one has yet been prosecuted for this activity, there are hints in press reporting that Special Counsel Smith may be investigating this aspect of the run-up to January 6.²⁶ And press reports indicate that he is looking not just at Trump, but at the Save America PAC, the Make America Great Again PAC, as well as other campaign finance entities such as a Trump lawyer and Georgia co-defendant named Sidney Powell's group Defend Our Republic.²⁷ In Trump's federal indictment regarding January 6,

²² Ciara Torres-Spelliscy, 'The Political Branding of the Big Lie' (2022) (5) *University of Illinois Law Review* 1711.

²³ Philip Bump, 'More than Half the Money Given to Trump's PAC Was from Retirees', *The Washington Post*, 14 June 2022, www.washingtonpost.com/politics/2022/06/14/more-than-half-money-given-trumps-pac-was-retirees.

²⁴ *Buckley v. Valeo*, 424 US 1, 48–49 (1976) ('the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment'); *Davis v. Federal Election Commission*, 128 S.Ct. 2759, 2770 (2008) (the so-called Millionaire's Amendment was held to violate the First Amendment); *Citizens United v. Federal Election Commission*, 130 S.Ct. 876, 913 (2010) (striking down restrictions on corporate independent expenditures and electioneering communications on First Amendment grounds); *McCutcheon v. Federal Election Commission*, 572 US 185, 191 (2014) ('The right to participate in democracy through political contributions is protected by the First Amendment'); *Williams-Yulee v. Florida Bar*, 575 US 433, 443 (2015) ('As we have long recognized, speech about public issues and the qualifications of candidates for elected office commands the highest level of First Amendment protection'; *ibid.* at 446: 'nobody argues that solicitation of campaign funds by judicial candidates is a category of unprotected speech'); but see the *Federal Election Commission v. Beaumont*, 539 US 146 (2003) (direct contribution ban from nonprofit corporation is consistent with the First Amendment).

²⁵ *Barr v. American Association of Political Consultants*, 140 S.Ct. 2335, 2381 (2020) ('The Court has held that entire categories are speech – for example, obscenity, fraud, and speech integral to criminal conduct – are generally unprotected by the First Amendment entirely because of their content'); Alan Feuer, Maggie Haberman and Jonathan Swan, 'Prosecutors in Jan. 6 Case Step up Inquiry into Trump Fund-Raising', *The New York Times*, 28 April 2023, www.nytimes.com/2023/04/28/us/politics/jan-6-prosecutors-trump-fund-raising.html ('prosecutors are trying to determine whether Mr. Trump ... violated federal wire fraud statutes as they raised as much as \$250 million through a political action committee by saying they needed the money to fight to reverse election fraud even though ... there was no evidence to back up those fraud claims').

²⁶ Alan Feuer et al., 'Trump's Post-Election Fund-Raising Comes under Scrutiny by Justice Dept.', *The New York Times*, 8 September 2022, www.nytimes.com/2022/09/08/us/politics/trump-save-america-pac-subpoenas.html ('According to subpoenas issued by the grand jury, the contents of which were described to *The New York Times*, the Justice Department is interested in the inner workings of Save America PAC, Mr. Trump's main fund-raising vehicle after the election').

²⁷ Josh Dawsey, Devlin Barrett and Rosalind S. Helderman, 'Trump Campaign Officials Got Subpoena Asking New Questions about Jan. 6', *The Washington Post*, 11 January 2023, www.washingtonpost.com/news/energy-environment/wp/2023/01/11/trump-campaign-officials-got-subpoena-asking-new-questions-about-jan-6/

there are no charges related to fundraising,²⁸ but there could yet be a superseding indictment that adds such charges, just as happened in the Mar-a-Lago documents case where additional criminal charges were added later.²⁹

Here I use Andrew Guess' and Benjamin Lyons' definitions of misinformation and disinformation. Misinformation is false information that 'contradicts or distorts common understandings of verifiable facts'.³⁰ Meanwhile, 'disinformation is the subset of misinformation that is deliberately propagated. This is a question of intent: Disinformation is meant to deceive, while misinformation may be inadvertent or unintentional.'³¹ The Big Lie as propagated by Trump, his lawyers and his political committees was not just misinformation, rather the Big Lie was a particularly potent and virulent form of disinformation. As scholars and advocates have found, such disinformation can be particularly corrosive in a democracy.³²

The Special Counsel's 1 August 2023 indictment against Trump focused on his actions leading up to and on January 6, and mentioned six unindicted co-conspirators, five of whom were lawyers. As the indictment recited:

The Defendant [Trump] lost the 2020 presidential election . . . Despite having lost, the Defendant was determined to remain in power. So for more than two months following election day on November 3, 2020, the Defendant spread lies that there

[.washingtonpost.com/national-security/2023/01/11/trump-subpoena-jan6-campaign-officials](https://www.washingtonpost.com/national-security/2023/01/11/trump-subpoena-jan6-campaign-officials)

(“The subpoena shows the Justice Department is interested in other Trump entities besides the Save America PAC . . . It seeks “all documents and communications” related to a panoply of other Trump-affiliated groups, including the Make America Great Again PAC, the Save America Joint Fundraising Committee and the Trump Make America Great Again Committee”); Zachary Cohen and Paula Reid, ‘CNN Exclusive: Special Counsel Election Probe Continues with Focus on Fundraising, Voting Equipment Breaches’, CNN, 5 September 2023, www.cnn.com/2023/09/05/politics/special-counsel-election-probe-continues-fundraising-voting-equipment-breaches-sidney-powell/index.html.

²⁸ *United States of America v. Trump and Others*, Indictment.

²⁹ *United States of America v. Trump*, Case No. 9:23-cr-80101-AMC (8 June 2023), https://storage.courtlistener.com/recap/gov.uscourts.flsd.648653/gov.uscourts.flsd.648653.3.o_2.pdf, Indictment; *United States of America v. Trump and Others*, Case No. 23-CR-80101-CANNON (27 July 2023), www.justice.gov/storage/US-v-Trump-Nauta-De-Oliveira-23-80101.pdf, Superseding Indictment.

³⁰ Andrew M. Guess and Benjamin A. Lyons, ‘Misinformation, Disinformation, and Online Propaganda’ in Nathaniel Persily and Joshua A. Tucker (eds.), *Social Media and Democracy: The State of the Field and Prospects for Reform* (Cambridge: Cambridge University Press, 2020) p. 10.

³¹ *Ibid.* p. 11.

³² Katie Couric, Chris Krebs and Rashad Robinson, ‘Commission on Information Disorder Final Report’, Aspen Institute, 15 November 2021, www.aspeninstitute.org/publications/commission-on-information-disorder-final-report (at 1: ‘Information disorder . . . undermines democracy’); Martin H. Redish and Juilo Pereyra, ‘Resolving the First Amendment’s Civil War: Political Fraud and the Democratic Goals of Free Expression’ (2020) 62 *Arizona Law Review* 451, at 453–54 (‘extending First Amendment protection to false speech in the political process may also encourage those who are intent on distorting the democratic process to defraud the voters into making misguided choices on the basis of factually inaccurate information’).

had been outcome-determinative fraud in the election and that he had actually won. These claims were false, and the Defendant knew that they were false.³³

The Big Lie was condemned in real time, in November 2020, in “[a]n open letter signed by retired federal and state judges, former state attorneys general who served under Republican and Democratic governors, and law professors condemned Trump’s claims of fraud as being presented “without evidence and false”, singling out Republican officials who have publicly supported the president’s efforts to have thousands of ballots thrown out.”³⁴ And in 2023 the former assistant director of the FBI Frank Figliuzzi asserted about Trump’s fundraising that “[w]hen you raise millions based on a fraudulent claim, you’ve committed a crime. And, you just might have to give those millions back.”³⁵ Meanwhile former federal prosecutor Andrew Weissmann indicated that he anticipates ‘a criminal case about the Trump PAC and forfeiture allegations/seizures’.³⁶ In other words, if the Special Counsel alleges that the money in Trump PAC(s) are the fruit of a crime, then he could move for pre-trial seizure of those funds.³⁷

8.3 THE COURTS’ VIEWS OF FRAUD

Trump’s criminal lawyers are already relying heavily on the First Amendment as defense for his actions that are charged in the Special Counsel’s 1 August 2023 indictment about January 6.³⁸ But although the Supreme Court has been very lenient on liars, even in the context of elections,³⁹ it still maintains that fraud is

³³ *United States of America v. Trump and Others*, Indictment, at 1.

³⁴ Julia Conley, ‘1,000 Legal Experts Sign Letter Condemning “Shameful Attack” on Democracy as Trump Continues Baseless Election Lies’, *Common Dreams*, 13 November 2020, www.commondreams.org/news/2020/11/13/1000-legal-experts-sign-letter-condemning-shameful-attack-democracy-trump-continues.

³⁵ Shweta Sharma, ‘Jack Smith May Force Trump to Pay Back Millions in Donations, Ex-FBI Official Says’, *The Independent*, 9 August 2023, www.the-independent.com/news/world/americas/us-politics/trump-jack-smith-donations-election-campaign-b2389994.html.

³⁶ Gabriella Ferrigine, ‘“Might Have to Give Those Millions Back”: Legal Experts Say Jack Smith could “Seize” Trump PAC Cash’, *Salon*, 9 August 2023, www.salon.com/2023/08/09/might-have-to-give-those-millions-back-legal-experts-say-jack-smith-could-seize-pac-cash.

³⁷ Vance Cariaga, ‘Donald Trump’s Election Money to Be Seized “If Obtained by Fraud” – Where Do Frozen Campaign Funds Go?’, *Yahoo Finance*, 10 September 2023, <https://finance.yahoo.com/news/donald-trump-election-money-seized-115856785.html>.

³⁸ Elena Burnett, Tinbete Ermyas and Ailsa Chang, ‘Trump’s Legal Defense Focuses on Free Speech – Will That Strategy Hold Up in Court?’, *All Things Considered*, 3 August 2023, www.npr.org/2023/08/03/1191972821/trump-s-legal-defense-focuses-on-free-speech-will-that-strategy-hold-up-in-court; Susan Milligan, ‘Trump’s Fine Legal Line on Free Speech’, *US News & World Report*, 7 August 2023, www.usnews.com/news/politics/articles/2023-08-07/trumps-fine-legal-line-speaking-for-the-courtroom-and-the-campaign-trail.

³⁹ *United States v. Alvarez*, 567 US 709, 720–21 (2012); *Susan B. Anthony List v. Driehaus*, 573 US 149, 153 (2014); Alan K. Chen and Justin Marceau, ‘Developing a Taxonomy of Lies under the First Amendment’ (2018) 89 *University of Colorado Law Review* 655, at 663 (‘Instead of a

outside of the ambit of First Amendment protections.⁴⁰ The argument I am advancing here is that just as common law fraud (and wire fraud) is not protected by the First Amendment, raising money for Trump's Save America PAC (and other political committees) with the Big Lie is not covered by the First Amendment either.

The Supreme Court has long been hostile to individuals who have defrauded others. Dating back to 1820 the Court stated, 'the first principles of the common law [is that] fraud [is] the object of its peculiar abhorrence, and [fraud] contaminat[es] every act'.⁴¹ The Court has defined common law fraud as including 'a scheme to deprive a victim of his entitlement to money'.⁴² In 1976, the Supreme Court concluded in *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* about commercial advertisements that '[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake'.⁴³ And in another case the Supreme Court added to this definition, 'common-law fraud has long encompassed certain misrepresentations by omission, "false or fraudulent claims" include more than just claims containing express falsehoods. The parties and the Government agree that misrepresentations by omission can give rise to liability'.⁴⁴ Thus, according to the Supreme Court, fraud can be both express lies as well as failures to tell key truths. In Trump's case the express lie was the Big Lie that he won the 2020 election, and the failure to tell the truth was omitting where the money raised by his PACs would really be used.

In a case decided in 2023, *United States v. Hansen*,⁴⁵ the Supreme Court considered a First Amendment defense raised by an individual who induced immigrants to break US immigration and naturalization laws through fraudulent promises of an easy path to US citizenship. As the Supreme Court explained 'federal law prohibits "encourag[ing] or induc[ing]" illegal immigration. 8 U.S.C. § 1324(a) (1)(A)(iv) . . . Properly interpreted, this provision forbids only the intentional solicitation or facilitation of certain unlawful acts. It does not "prohibi[t] a substantial amount of protected speech".'⁴⁶ Defendant Helaman Hansen sold immigrants the false hope of becoming US citizens through 'adult adoption'. This path to

general rule against speech protection for lies, *Alvarez* suggests a presumption that lies are covered by the First Amendment').

⁴⁰ *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, at 612.

⁴¹ *Polk's Lessee v. Wendell*, 18 US 293, 296–97 (1820).

⁴² *Pasquantino v. United States*, 544 US 349, 356 (2005).

⁴³ *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 US 748, 771 (1976).

⁴⁴ *Universal Health Services v. United States*, 579 US 176, 187 (2016); *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, at 606 ('While bare failure to disclose that information directly to potential donors does not suffice to establish fraud, when nondisclosure is accompanied by intentionally misleading statements designed to deceive the listener, the First Amendment leaves room for a fraud claim').

⁴⁵ *United States v. Hansen*, 143 S.Ct. 1932.

⁴⁶ *Ibid.* at 1937.

citizenship is nonexistent. This grifter charged desperate immigrants who wanted to stay in the USA thousands of dollars, making \$2 million in the illegal scheme.⁴⁷

When the federal government prosecuted Hansen for this fraud, he defended himself by claiming that the immigration law that was being used against him was constitutionally overbroad and violated his free speech rights.⁴⁸ The Ninth Circuit had agreed with him.⁴⁹ The Supreme Court disagreed in a seven-to-two decision, quoting *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, a case about charitable fraud, for the proposition that ‘the First Amendment does not shield fraud’.⁵⁰ In *Hansen*, the Court explained what counted as criminal solicitation:

Criminal solicitation is the intentional encouragement of an unlawful act. Facilitation – also called aiding and abetting – is the provision of assistance to a wrongdoer with the intent to further an offense’s commission. While the crime of solicitation is complete as soon as the encouragement occurs, liability for aiding and abetting requires that a wrongful act be carried out. Neither solicitation nor facilitation requires lending physical aid; for both, words may be enough.⁵¹

Hansen’s lawyers argued that criminalizing speech that only induced an immigrant to break a civil law violated the First Amendment (as many violations of immigration law are handled as civil not criminal matters).⁵² But the Supreme Court rejected this distinction, and upheld the challenged law as being constitutional under the First Amendment.⁵³ While *Hansen* is of course focused on immigration law, nonetheless its principles would apply in prosecutions of fraud in other contexts like raising

⁴⁷ Adam Shaw, ‘Supreme Court Upholds Law Barring Encouraging Illegal Immigration’, Fox News, 23 June 2023, www.foxnews.com/politics/supreme-court-upholds-law-barring-encouraging-illegal-immigration.

⁴⁸ Court Cases: *United States v. Helaman Hansen*, ACLU, 17 February 2023, www.aclu.org/cases/united-states-v-helaman-hansen (‘This case is about whether the First Amendment permits criminal punishment of speech that merely encourages a noncitizen to remain in the United States, without any requirement of intent to further illegal conduct, and when remaining in the United States unlawfully is itself not a crime’).

⁴⁹ *United States v. Hansen*, 25 F.4th 1103, 1106 (9th Cir. 2022) (‘we hold that subsection (iv) is facially overbroad’).

⁵⁰ *United States v. Hansen*, 143 S.Ct. 1932 at 1939 (quoting *Madigan Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, at 612; *ibid.* at 1952 (Justices Jackson and Sotomayor dissented); *Madigan Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, at 623–24, citing *Riley v. National Federation of the Blind of North Carolina*, 487 US 781, 800 (1988) (‘Just as government may seek to inform the public and prevent fraud through such disclosure requirements, so it may vigorously enforce its antifraud laws to prohibit professional fundraisers from obtaining money on false pretenses of by making false statements’).

⁵¹ *United States v. Hansen*, 143 S.Ct. 1932 (internal citations omitted).

⁵² *Ibid.* at 1947–48 (Hansen ‘resists the idea that the First Amendment permits Congress to criminalize speech that solicits or facilitates a civil violation – and some immigration violations are only civil ... [And] generally does not carry a criminal sentence. See *Arizona v. United States*, 567 US 387, 407, 132 S.Ct. 2492, 183 L.Ed.2d 351 (2012)’).

⁵³ *United States v. Hansen*, 143 S.Ct. 1932 at 1948 (‘As we have discussed, the provision has a wide legitimate reach insofar as it applies to non-expressive conduct and speech soliciting or facilitating criminal violations of immigration law’).

money for an election defense fund which, like ‘adult adoption citizenship’, did not exist.

In 2010 in *United States v. Stevens* the Supreme Court infamously said that ‘crush videos’ are protected by the First Amendment; nonetheless, in that same case the Court noted that ‘[f]rom 1791 to the present . . . the First Amendment has permitted restrictions upon the content of speech in a few limited areas . . . [The punishment of these] historic and traditional categories long familiar to the bar[,] including . . . fraud . . . and speech integral to criminal conduct . . . have never been thought to raise any Constitutional problem.’⁵⁴ The Supreme Court came to a similar conclusion in *United States v. Alvarez* (better known as the stolen valor case) in 2012, that ‘[w]here false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment.’⁵⁵

In *United States v. Smith*, Malcom Smith, a New York Democratic State Senator, and Vincent Tabone, the Queens County Republican Party Vice Chairman, entered into a complicated scheme to allow Democrat Smith to run for the Mayor of New York City as a Republican. They were both convicted of bribery and honest services wire fraud, and Tabone raised First Amendment defenses during his prosecution. The Southern District of New York Judge Kenneth Karas rejected this argument:

[If] Tabone is attempting to raise an as-applied or facial First Amendment challenge to the statute, he fundamentally misconstrues the statute’s thrust. The statute does not criminalize mere association with a political party, or advocacy for certain political candidates. In fact, in this case, the statute is being applied to alleged bribes offered and received in return for certain conduct. Just because this alleged quid pro quo arrangement involved political-party officials, they are not entitled to immunity for their actions under the guise of protected speech.⁵⁶

These appeals failed and both men went to prison.⁵⁷

A 2023 federal district court case reached a similar result in a case involving a scheme to defraud voters. In *United States v. Mackey*, a man was charged with tricking voters who supported Hillary Clinton to vote online (a voting method which

⁵⁴ *United States v. Stevens*, 559 US 460, 468–69 (2010) (citations and internal quotation marks omitted).

⁵⁵ *United States v. Alvarez* at 723 (citing *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, at 771 (noting that fraudulent speech generally falls outside the protections of the First Amendment)); see also *United States v. Alvarez* at 718 (quoting *Brown v. Hartlage*, 456 US 45, 60–61 (1982): ‘False statements “are not protected by the First Amendment in the same manner as truthful statements”’).

⁵⁶ *United States v. Smith*, 985 F.Supp.2d 547, 605–6 (S.D.N.Y. 2014).

⁵⁷ Luca Marzorati, ‘Former State Senator Malcolm Smith Sentenced to 7 Years’, Politico, 1 July 2015, www.politico.com/states/new-york/albany/story/2015/07/former-state-senator-malcolm-smith-sentenced-to-7-years-090717.

does not exist in the USA).⁵⁸ This is sometimes referred to as the ‘vote by Tweet’ case.⁵⁹ Defendant Douglass Mackey, as known as ‘Ricky Vaughn’, argued that he had the free speech right to say what he said on social media to Clinton supporters. The federal district court in his case rejected this argument, stating: ‘[t]his case is about conspiracy and injury, not speech . . . [T]he language [Defendant Mackey] used is akin to verbal acts, which fall outside the scope of the First Amendment, rather than protected’ speech.⁶⁰ Mackey was sentenced to seven months incarceration for his crime.⁶¹ As the Southern Poverty Law Center, which tracks right-wing hate groups, said of the Mackey verdict that it ‘set more clearly visible boundaries around what is legal when sowing disinformation online, prosecutors may have also created inroads to bring about charges similar to those filed against other radical-right activists who engaged in coordinated efforts to shape the outcome of elections’.⁶² Defendant Mackey has appealed his conviction using the argument that his actions in the 2016 election are protected by the First Amendment.⁶³ These cases, *Hansen*, *Stevens* and *Alvarez*, at the Supreme Court level and *Mackey* and *Smith* at the district court level, all indicate that defrauding individuals is not going to enjoy First Amendment protections.

8.4 DEPARTMENT OF JUSTICE FREQUENTLY USES WIRE FRAUD CHARGES IN CAMPAIGN FINANCE CASES

The Department of Justice has frequently used wire fraud to charge crimes that involve campaign funds. In 2023 alone, the DOJ alleged wire fraud violations in a case ‘charging the [Republican] Sheriff of Culpepper County, Virginia, and three . . . men with a conspiracy to exchange bribes for law enforcement badges

⁵⁸ *United States v. Mackey*, Memorandum and Order, United States District Court Eastern District of New York, Document 54 (23 January 2023), 1, at 5, <https://storage.courtlistener.com/recap/gov.uscourts.nyed.459733/gov.uscourts.nyed.459733.54.o.pdf> (‘The scheme, as alleged, aimed to cause [Hillary] Clinton supporters to believe they could cast their ballots by sending a text message or posting on social media and, as a result, fail to cast their vote for [Hillary Clinton] in the Election in a legally valid manner’).

⁵⁹ Eugene Volokh, ‘Douglass Mackey Convicted for Vote-by-Tweet Meme’, *Reason*, 31 March 2023, <https://reason.com/volokh/2023/03/31/douglass-mackey-convicted-for-vote-by-tweet-meme-prosecution>.

⁶⁰ *United States v. Mackey*, Memorandum and Order at 39 (internal quotation marks removed).

⁶¹ ‘Social Media Influencer Douglass Mackey Sentenced after Conviction for Election Interference in 2016 Presidential Race,’ DOJ, 18 October 2023, www.justice.gov/usao-edny/pr/social-media-influencer-douglass-mackey-sentenced-after-conviction-election.

⁶² Michael Edison Hayden, ‘Douglass Mackey Verdict Sinks “Shitposting” Defense’, Southern Poverty Law Center, 4 April 2023, www.splcenter.org/hatewatch/2023/04/04/douglass-mackey-verdict-sinks-shitposting-defense.

⁶³ Nika Schoonover, ‘“On Trial for Memes”: Man Asks Second Circuit to Overturn Conviction over Election Day Shenanigans’, *Court House News*, 5 April 2024, www.courthousenews.com/on-trial-for-memes-man-asks-second-circuit-to-overturn-conviction-over-election-day-shenanigans.

and credentials. According to court documents, from at least April 2019 . . . Sheriff Scott Howard Jenkins, . . . accepted cash bribes in the form of campaign contributions totaling . . . \$72,500.’⁶⁴ Additionally, on 9 May 2023, sitting Republican Congressman George Santos was indicted by the DOJ. He was charged with seven counts of wire fraud, three counts of money laundering, one count of theft of public funds, and two counts of making materially false statements to the House of Representatives.⁶⁵ Santos was expelled from the House of Representatives after the House Ethic Committee ‘unanimously concluded that there was substantial evidence that Representative George Santos: knowingly caused his campaign committee to file false or incomplete reports with the Federal Election Commission; used campaign funds for personal purposes; [and] engaged in fraudulent conduct’.⁶⁶

In 2022, a Democratic ex-Congressman was hit with wire fraud charges. As a press release from DOJ stated, a ‘28-count indictment was unsealed . . . charging a former member of Congress with multiple fraud schemes and campaign contribution fraud. Terrance John “TJ” Cox . . . is charged with 15 counts of wire fraud, . . . and one count of campaign contribution fraud.’⁶⁷ The DOJ leveled similar charges against a former Republican Governor of Puerto Rico, Wanda Vázquez Garced.⁶⁸

There have been guilty pleas in cases where defendants have been charged with wire fraud in campaign finance cases. A former Republican congressional candidate, Nicholas Jones, pleaded guilty to wire fraud ‘for falsifying records to conceal thousands of dollars of in-kind contributions by employees in a report to the Federal Elections Commission (FEC)’.⁶⁹ In 2023, the Chair of the Louisiana Democratic

⁶⁴ ‘Sheriff and Three Men Charged with Bribery Scheme Involving Purchase of Law-Enforcement Badges and Credentials’, DOJ, 29 June 2023, www.justice.gov/opa/pr/sheriff-and-three-men-charged-bribery-scheme-involving-purchase-law-enforcement-badges-and.

⁶⁵ ‘Congressman George Santos Charged with Fraud, Money Laundering, Theft of Public Funds, and False Statements’, DOJ, 10 May 2023, www.justice.gov/usao-edny/pr/congress-man-george-santos-charged-fraud-money-laundering-theft-public-funds-and-false.

⁶⁶ ‘Statement of the Chairman and Ranking Member of the Committee on Ethics Regarding Representative George Santos’, House Committee on Ethics, 16 November 2023, <https://ethics.house.gov/press-releases/statement-chairman-and-ranking-member-committee-ethics-regarding-representative-76>; Kevin Freking, ‘The House Expels Rep. George Santos. An Ethics Report Had Accused Him of Breaking Federal Law’, Associated Press, 1 December 2023, <https://apnews.com/article/george-santos-expulsion-vote-ethics-investigation-fd0f1524065883c6b2fe3e6f9afd84db>.

⁶⁷ ‘Former Member of Congress Charged with Multiple Fraud Schemes’, DOJ, 16 August 2022, www.justice.gov/opa/pr/former-member-congress-charged-multiple-fraud-schemes.

⁶⁸ ‘Former Governor of Puerto Rico Arrested in Bribery Scheme’, DOJ, 4 August 2022, www.justice.gov/opa/pr/former-governor-puerto-rico-arrested-bribery-scheme (‘A former governor of Puerto Rico was arrested today on bribery charges related to the financing of her 2020 campaign’).

⁶⁹ ‘Congressional Candidate Pleads Guilty to Wire Fraud and Falsification of Records’, DOJ, 1 June 2022, www.justice.gov/opa/pr/former-congressional-candidate-pleads-guilty-wire-fraud-and-falsification-records.

Party, Karen Carter Peterson, pled guilty to wire fraud in a case that accused her of defrauding the party and political donors.⁷⁰ Republican ex-Arkansas State Senator Jeremy Hutchinson pled guilty to taking bribes as an elected official to move legislation for a business.⁷¹ In 2020, Republican then-Member of Congress Duncan Hunter and his wife were accused of wire fraud for the personal use of campaign funds.⁷² Congressman Hunter pled guilty,⁷³ and was sentenced to eleven months in prison.⁷⁴ But the Congressman never served jail time because President Trump pardoned him.⁷⁵

Individuals running so-called Scam PACs have also been convicted of wire fraud violations. An example of this from 2020 is a 'Maryland political consultant [who] was sentenced to three years in prison . . . for fraudulently soliciting hundreds of thousands of dollars in political contributions through several scam political actions committees (PACs) that he founded and advertised as supporting candidate for office and other political causes'.⁷⁶ In another example, in 2022, a 'California man pleaded guilty . . . to conspiracy to solicit millions of dollars in contributions to two political action committees based on false and misleading representation that the funds would be used to support presidential candidates during and after the 2016 election cycle'.⁷⁷ A former Republican candidate for the US House of Representatives, Robert Cannon Hayes, pled guilty and was sentenced for 'wire fraud and willfully violating the Federal Election Campaign Act (FECA) by

⁷⁰ 'Former Louisiana State Senator and Chair of State Political Party, Sentenced to 22 Months Imprisonment for Role in Nearly Seven-Year Scheme to Defraud Campaign Entity, Donors, and Political Party Organization', DOJ, 11 January 2023, www.justice.gov/usao-edla/pr/former-louisiana-state-senator-and-chair-state-political-party-sentenced-22-months.

⁷¹ 'Former Arkansas State Senator Jeremy Hutchinson Pleads Guilty to Bribery and Tax Fraud Charges in Multi-District Investigation', DOJ, 25 June 2019, www.justice.gov/opa/pr/former-arkansas-state-senator-jeremy-hutchinson-pleads-guilty-bribery-and-tax-fraud-charges.

⁷² 'Rep. Duncan D. Hunter and Wife Indicted for Converting Hundreds of Thousands of Dollars in Campaign Funds and Falsifying Campaign Finance Records', DOJ, 21 August 2018, www.justice.gov/usao-sdca/pr/rep-duncan-d-hunter-and-wife-indicted-converting-hundreds-thousands-dollars-campaign.

⁷³ 'Congressman Duncan D. Hunter Pleads Guilty to Stealing Campaign Funds', DOJ, 3 December 2019, www.justice.gov/usao-sdca/pr/congressman-duncan-d-hunter-pleads-guilty-stealing-campaign-funds.

⁷⁴ 'Former Congressman Duncan D. Hunter Sentenced to 11 Months in Prison for Stealing Campaign Funds', DOJ, 17 March 2020, www.justice.gov/usao-sdca/pr/former-congressman-duncan-d-hunter-sentenced-11-months-prison-stealing-campaign-funds.

⁷⁵ 'Pardons Granted by President Donald J. Trump (2017–2021)', DOJ, 2021, www.justice.gov/pardon/pardons-granted-president-donald-j-trump-2017-2021.

⁷⁶ 'Maryland Man Sentenced to Prison for Fraudulent Scheme to Solicit Hundreds of Thousands of Dollars in Contributions to Scam-PACs', DOJ, 17 January 2020, www.justice.gov/opa/pr/maryland-man-sentenced-prison-fraudulent-scheme-solicit-hundreds-thousands-dollars.

⁷⁷ 'California Man Pleads Guilty to \$3.5 Million Scam-PAC Fraud', DOJ, 9 August 2022, www.justice.gov/opa/pr/california-man-pleads-guilty-35-million-scam-pac-fraud.

operating fraudulent and unregistered political action committees'.⁷⁸ And in 2023, Jack Daly and Nathanael Pendley 'pled guilty to conspiring to (i) commit mail fraud and (ii) lie to the Federal Election Commission' because of their actions related to a scam PAC called the Draft PAC.⁷⁹

The Department of Justice has also chalked up wins in front of juries in cases about campaign funds that charged wire fraud. For instance, in 2020, Greg Lindberg and John Gray were convicted in a case of bribing the North Carolina Insurance Commissioner. As Acting Assistant Attorney General Brian Rabbitt said, '[w]hen Greg Lindberg and John Gray offered millions of dollars in bribes to the North Carolina Insurance Commissioner, they referred to their elaborately corrupt scheme as a "win-win" – unaware that the FBI was watching and listening'.⁸⁰ In another case, a jury convicted 'former [Republican] US Representative Stephen E. Stockman for orchestrating a scheme to steal hundreds of thousands of dollars from charitable foundations and the individuals who ran those foundations to illegally finance Stockman's campaigns for public office and to pay for his and others' personal expenses'.⁸¹

All of this is evidence that if the DOJ wants to charge Trump, his PACs or his campaign with wire fraud for defrauding donors of money using the Big Lie, this prosecutorial tool is available.⁸² Another thing to note is that these listed prosecutions have been against both Republicans and Democrats. Moreover, the Trump Administration prosecuted Republicans and the Joe Biden Administration has prosecuted Democrats. So this does not fall into the lazy and inaccurate trope of criminalizing politics, or of an administration going after its political enemies.

⁷⁸ 'Former Candidate for the U.S. House of Representatives Sentenced After Conviction for Fraud and Campaign Finance Violations', DOJ, 24 July 2019, www.justice.gov/opa/pr/former-candidate-us-house-representatives-sentenced-after-conviction-fraud-and-campaign.

⁷⁹ 'Two North Carolina Lawyers Plead Guilty to Conspiracy Involving Scam Political Action Committee', DOJ, 12 June 2023, www.justice.gov/usao-edwi/pr/two-north-carolina-lawyers-plead-guilty-conspiracy-involving-scam-political-action-o.

⁸⁰ 'Founder and Chairman of a Multinational Investment Company and a Company Consultant Convicted of Bribery and Public Corruption Are Sentenced to Prison', DOJ, 19 August 2020, www.justice.gov/opa/pr/founder-and-chairman-multinational-investment-company-and-company-consultant-convicted ('The founder and chairman of a multinational investment company and a company consultant were sentenced to prison today for orchestrating a bribery scheme involving independent expenditure accounts and improper campaign contributions').

⁸¹ 'Former US Congressman Convicted of Mail and Wire Fraud, Campaign Finance Violations, Money Laundering and Filing a False Tax Return', DOJ, 12 April 2018, www.justice.gov/opa/pr/former-us-congressman-convicted-mail-and-wire-fraud-campaign-finance-violations-money.

⁸² Sami Azhari and Sergio Lopez, 'Guilty until Proven Guilty: The Prosecution of Public Corruption and White Collar Crime' (2021) *The Champion* 32, at 35, www.federalcriminallawyer.us/wp-content/uploads/2021/06/Bridgegate.Final-copy.pdf ('Notwithstanding the highest court's limitation in the prosecution of public officials for "honest services", prosecutors have recently been able to successfully utilize the honest services fraud statute for the prosecution of self-benefiting individuals').

8.5 LEGAL PERIL FOR TRUMP, TRUMP FUNDRAISERS AND THE REPUBLICAN NATIONAL COMMITTEE

Two investigations have focused on the post-2020 fundraising by team Trump: one by Congress and one by the Special Counsel Smith.⁸³ The Save America PAC was created on 9 November 2020, just days after Trump lost the 2020 election.⁸⁴ Trump's Save America PAC was the primary vehicle for his post-election fundraising.⁸⁵ Super PACs that are nominally independent of Trump have also fundraised on the basis of the Big Lie.⁸⁶ The Select Committee found that Save America PAC along with the Trump campaign raised a quarter of a billion dollars.⁸⁷ Many of its fundraising emails and texts featured the Big Lie prominently.⁸⁸ As the Select Committee detailed:

Evidence gathered by the Committee indicates that President Trump raised roughly one quarter of a billion dollars in fundraising efforts between the [2020] election and January 6th [footnote omitted]. Those solicitations persistently claimed and referred to election fraud that did not exist. For example, the Trump Campaign, along with the Republican National Committee, sent millions of emails

⁸³ Kenichi Serino, 'Jan. 6 Committee Alleges Funds Raised by Trump to Overtum 2020 Election Used to Sway Witness Testimonies', Associated Press, 19 December 2022, www.pbs.org/news/hour/politics/jan-6-committee-alleges-funds-raised-by-trump-to-overtum-2020-election-used-to-sway-witness-testimonies; Feuer, Haberman and Swan, 'Prosecutors in Jan. 6 Case'; Rubin, 'Why Jack Smith's Reported Wire Fraud Probe'.

⁸⁴ 'Save America', Ballotpedia, https://ballotpedia.org/Save_America.

⁸⁵ Feuer et al., 'Trump's Post-Election Fund-Raising' ('Save America was officially registered with the Federal Election Commission on Nov. 9, 2020 – two days after news organizations declared Mr. Biden's victory over Mr. Trump').

⁸⁶ Super PACs are committees that make 'independent expenditures' in federal elections, which means they do not coordinate with candidates or political parties. Super PACs are allowed to accept unlimited amounts of money from US individuals and corporations because the DC Circuit has found after Citizens United that 'the government has no anti-corruption interest in limiting contributions to an independent expenditure group'; *SpeechNow.org v. Federal Election Commission*, 599 F.3d 686, 695 (D.C. Cir. 2010), cert. denied sub nom. *Keating v. Federal Election Commission*, ___ S.Ct. ___, 2010 WL 4272775 (1 November 2010).

⁸⁷ Final Report at 770 ('the Big Lie helped President Trump and the Republican National Committee (RNC) raise more than \$250 million after the election, much of it from small-dollar donors who were promised their money would "Stop the Steal"'); Feuer et al., 'Trump's Post-Election Fund-Raising Comes under Scrutiny by Justice Dept.' ('At a committee hearing in June, Representative Zoe Lofgren, Democrat of California, laid out the panel's account of how Save America PAC and Mr. Trump's campaign raised \$250 million after the election by claiming they were fighting widespread fraud when they knew there was none').

⁸⁸ Jill Colvin, Brian Slodysko and Eric Tucker, 'Trump's PAC Faces Scrutiny amid Intensifying Legal Probes', Associated Press News, 13 September 2022, <https://apnews.com/article/2022-midterm-elections-russia-ukraine-donald-trump-presidential-campaigns-4ce3a13c3fe27255210adcc0c83a80dai> ('Much of the money Trump has amassed was raised in the days and weeks after the 2020 election, which he lost to Democrat Joe Biden. That's when Trump supporters were bombarded with a nonstop stream of emails and texts, many containing all-caps lettering and blatant lies about a stolen 2020 election, soliciting cash for an "election defense fund"').

to their supporters, with messaging claiming that the election was ‘rigged’, that their donations could stop Democrats from ‘trying to steal the election’, and that Vice President Biden would be an ‘illegitimate president’ if he took office.⁸⁹

As the Select Committee also documented, none of this was true, and multiple people told Trump in real time that there was ‘no there, there’ when it came to massive election fraud in the 2020 election.⁹⁰ The fact that multiple individuals told Trump he was completely wrong about the existence of election fraud featured prominently in his third indictment by Special Counsel Smith for his actions surrounding January 6.⁹¹ Moreover, some of the post-2020-election Trump fundraising emails indicated that the money would be used for an election defense fund related to the 2020 election litigation for the sixty-plus litigations that he would eventually lose.⁹² The Select Committee investigated the fundraising by Save America PAC and other Trump fundraising entities and discovered that the election defense fund did not exist.⁹³ Rather, as the Select Committee explained: ‘Despite what they told their supporters, however, most of their money was not used to stop any purported steal – it was diverted to accomplish the Big Rip-off. Millions of dollars that were raised ostensibly for “election defense” and “fighting voter fraud” were not spent that way at all.’⁹⁴

Finally, in an indication of how bizarre the post-2020 election period has become, there is also potential for wire fraud charges against the Republican National Committee (RNC) itself. Key events happened at RNC headquarters. For example, the following incidents are detailed in Fulton County, Georgia’s indictment of Trump and eighteen co-conspirators to overturn Georgia’s election:

⁸⁹ Final Report at 27–28.

⁹⁰ Barack Obama, Keynote Address at the Challenges to Democracy in the Digital Information Realm Symposium: Disinformation Is a Threat to our Democracy, Stanford University, 21 April 2022 (‘I already mentioned the 2020 presidential election. President Trump’s own attorney general has said that the Justice Department uncovered no evidence of widespread voter fraud . . . A review of the ballots in Arizona’s largest county, the results of which were endorsed by some pretty courageous local Republicans, because many of them were harassed and received death threats, actually more votes for President Biden and fewer votes for President Trump’).

⁹¹ *United States of America v. Trump and Others*, Indictment.

⁹² Final Report at 784 (‘The false claims of election fraud and the “Official Election Defense Fund” were so successful President Trump and his allies raised more than \$250 million after the election.[footnote omitted] . . . The Trump Campaign continued to publicly state the election had been stolen by “the Left”, while behind closed doors they prepared a new plan to spend their supporters’ money’).

⁹³ Dawsey, Devlin and Helderman, ‘Trump Campaign Officials Got Subpoena Asking New Questions about Jan. 6’ (‘Recipients [a federal subpoena] were . . . asked for documents related to the genesis of an “Election Defense Fund”, an entity that Trump officials created to raise money from grass-roots donors. . . . Officials later testified to the House committee investigating the events of Jan. 6, 2021, that such a fund never technically existed’).

⁹⁴ Final Report at 770.

On or about the 19th day of November 2020, Rudolph William Louis Giuliani, Jenna Lynn Ellis, Sidney Katherine Powell, and unindicted co-conspirator Individual 3, whose identity is known to the Grand Jury, appeared at a press conference at the Republican National Committee Headquarters on behalf of Donald John Trump and Donald J. Trump for President, Inc. (the ‘Trump Campaign’) and made false statements concerning fraud in the November 3, 2020 presidential election in Georgia and elsewhere. These were overt acts in furtherance of the conspiracy.⁹⁵

And as the Select Committee found:

Moreover, the Select Committee’s investigation shows that the RNC knew that President Trump’s claims about winning the election were baseless and that post-election donations would not help him secure an additional term in office. Yet, both the Trump Campaign and the RNC decided to continue fundraising after the election, a decision that would have come from President Trump himself.⁹⁶

Thus, if Trump is culpable for defrauding donors by fundraising on the basis of the Big Lie, then so too are the upper echelons of the RNC who did the same thing.

There should be legal consequences for defrauding donors with the Big Lie. The brutal repetition of the Big Lie for years warped Republicans’ and especially Trump supporters’ views of the 2020 election. Years later, many still think there was voter fraud.⁹⁷ And many are still forking out their hard-earned dollars because of the Big Lie.⁹⁸ Incidentally, the RNC is also implicated in a completely different crime of Trump’s fake elector scheme. As the Special Counsel detailed in his 1 August 2023 indictment of Trump:

On December 6 [2020], the Defendant [Donald Trump] and Co-Conspirator 2 [John Eastman] called the Chairwoman of the Republican National Committee to ensure that the plan was in motion. During the call, Co-

⁹⁵ *The State of Georgia v. Trump and Others*, Indictment, at 20.

⁹⁶ Final Report at 770.

⁹⁷ Obama, Keynote Address (‘And yet today, as we speak, a majority of Republicans still insist that President Biden’s victory was not legitimate. That’s a lot of people’); see also Glenn Kessler, Scott Clement and Emily Guskin, ‘Which Trump Lies Stick? Republicans Believe Some Falsehoods more than They Did Six Years Ago, Our Poll Finds,’ *The Washington Post*, 9 April 2024, www.washingtonpost.com/politics/2024/04/09/some-trump-falsehoods-stick-more-than-others-fact-checker-poll-finds/ (‘Trump has made significant inroads in convincing Republicans that his lies are the truth. That applies to election integrity especially – the basis of Trump’s “big lie.” . . . Trump has convinced 70 percent of Republicans – and 81 percent of his strong supporters – that Biden won the 2020 election because of voter fraud, though not a single allegation has been proven. Slightly more than one-third of Americans overall believe this’).

⁹⁸ Stephen Collinson, ‘New Signs Trump’s Campaign Is Designed to Bankroll His Legal Defense’, CNN, 31 July 2023, www.cnn.com/2023/07/31/politics/donald-trump-campaign-legal-defense-2024/index.html; Jeffrey M. Berry, ‘“Stop the Steal” Is about Trump. It’s Also about Lots and Lots of Money’, WBUR, 11 January 2022, www.wbur.org/cognoscenti/2022/01/11/trump-2020-election-big-lie-jeffrey-berry.

Conspirator 2 told the Chairwoman that it was important for the RNC to help the Defendant's Campaign gather electors in targeted states, and falsely represented to her that such electors' votes would be used only if ongoing litigation in one of the states changed the results in the Defendant's favor. After the RNC Chairwoman consulted the Campaign and heard that work on gathering electors was underway, she called and reported this information to the Defendant, who responded approvingly.⁹⁹

And then, a week later, the Chairwoman of the RNC sent the names of fake electors who had pretended to vote for him to Trump. As detailed in the indictment, this is what happened:

That evening [14 December 2020], at 6:26 p.m., the RNC Chairwoman forwarded to the Defendant [Trump], through his executive assistant, an email titled, 'Electors Recap Final' which represented that in 'Six Contested States', Georgia, Michigan, Nevada, Pennsylvania and Wisconsin the Defendant's electors had voted in parallel to Biden's electors. The Defendant's executive assistant responded, 'It's in front of him!'

This behavior was also noted in the Fulton County indictment, which stated:

On or about the 8th day of December 2020, Donald John Trump and John Charles Eastman placed a telephone call to Republican National Committee Chairwoman Ronna McDaniel to request her assistance gathering certain individuals to meet and cast electoral votes for Donald John Trump on December 14, 2020, in certain states despite the fact that Donald John Trump lost the November 3, 2020, presidential election in those states. This was an overt act in furtherance of the conspiracy.¹⁰⁰

At this point, neither the RNC nor its Chairwoman have been charged with any crimes in any venue.

Though the Fulton County Prosecutor did note that one of the overt acts in the overall conspiracy to overthrow the 2020 election in Georgia included:

On or about the 27th day of December 2020, Mark Randall Meadows sent a text message to Office of the Georgia Secretary of State Chief Investigator Frances Watson that stated in part, 'Is there a way to speed up Fulton county signature verification in order to have results before Jan. 6 if the trump campaign assist financially.' This was an overt act in furtherance of the conspiracy.¹⁰¹

Put another way, the sitting Chief of Staff to the president was offering Trump campaign funds to speed up the vote count in Georgia as part of the alleged criminal conspiracy to overturn the lawful 2020 election. A federal judge has already found that these actions were beyond Meadows' powers as a federal official because the Hatch Act bars executive officers from interfering or intervening in an

⁹⁹ *United States of America v. Trump and Others*, Indictment, at 23.

¹⁰⁰ *The State of Georgia v. Trump and Others*, Indictment, at 30.

¹⁰¹ *Ibid.* at 45.

election.¹⁰² Nonetheless, there are thirty unindicted co-conspirators in the Fulton County indictment that could face future prosecution, including for fraudulent fundraising, so this story is still unfurling.

8.6 WHERE DID THE MONEY RAISED USING THE BIG LIE GO?

Some of the fundraising after the 2020 election using the Big Lie was done through Donald J. Trump for President, Inc. – that is, the Trump 2020 campaign. Even before the physical insurrection at the Capitol, the Select Committee found that Trump and certain of his lawyers and his supporters waged a campaign to get state election officials to overturn the results of the 2020 election. The Select Committee further found that President Trump had approved funding of ads that badgered state lawmakers to overturn the election, including in Arizona:

President Trump personally approved a series of advertisements that the Campaign ran on cable television and social media in several important States. One advertisement in Arizona called for pressure on Governor Ducey . . . alleging, ‘The evidence is overwhelming. Call Governor Ducey and your legislators. Demand they inspect the machines and hear the evidence.’ . . . Stand up for President Trump. Call today. Paid for by Donald J. Trump for President, Inc.¹⁰³

Top Trump advisors, including his son-in-law Jared Kushner, were involved in approving the ad campaign to pressure state lawmakers to overturn the results of the 2020 election. As the Select Committee noted:

Trump Campaign Senior Advisor Jason Miller . . . wrote that ‘the President and Mayor Giuliani want to get back up on TV ASAP, and Jared [Kushner] has approved in budgetary concept, so here’s the gameplan’ in order to ‘motivate the GOP base to put pressure on the Republican Governors of Georgia and Arizona and the Republican-controlled State legislatures in Wisconsin and Michigan to hear evidence of voter fraud before January 6th.’ Miller anticipated a budget of \$5 million . . . On December 22nd, Jason Miller texted Jared Kushner that ‘POTUS has approved the buy’.¹⁰⁴

This places President Trump, Donald J. Trump for President, Inc., and his key advisors at the center of the effort to illegitimately overturn a democratic election at the state level.

The Select Committee found that the Save America PAC, in turn, gave funds to former White House Chief of Staff Mark Meadows’ charity the Conservative

¹⁰² *State of Georgia v. Meadows*, Case 1:23-cv-03621-SCJ (8 September 2023), www.documentcloud.org/documents/23945268-meadowsordog0823, Order at 33.

¹⁰³ Final Report at 300 (internal citation omitted).

¹⁰⁴ *Ibid.* at 300–1 (internal citation omitted).

Partnership Institute (CPI).¹⁰⁵ The CPI then gave \$1 million to another group called American Voting Rights Foundation,¹⁰⁶ which was created two days after the CPI got money from Save America PAC.¹⁰⁷ Through this daisy-chain of donations, which occurred in 2021, Save America PAC helped fund the bogus effort to audit the 2020 vote in Arizona – which the press derisively called the Cyber Ninjas’ ‘fraudit’, a portmanteau of ‘fraudulent’ and ‘audit’.¹⁰⁸ As criminal investigations around Trump heated up in 2022 and 2023, Save America PAC spent tens of millions on criminal defense lawyers for Trump and witnesses around him.¹⁰⁹

Money was diverted from the 2020 Trump Campaign to the Save America PAC. And much of this money went to Trump-affiliated companies. As the Select Committee noted when following the money:

The Trump Campaign spent the money on President Trump, giving donations to his associates, and keeping it for himself in Save America. Hundreds of millions of dollars that were raised to go towards ‘election defense’ and ‘fighting voter fraud’ were not spent that way at all. To the contrary, most of the funds remain unspent, and millions have been paid to companies that are known affiliates of President Trump, or payments to entities associated with former Trump administration officials. Since the election, former Trump officials who are still working for President Trump’s PACs and are publicly receiving salaries as FEC-reported ‘payroll’, are also associated with these companies.¹¹⁰

Another entity to consider is American Made Media Consultants, an LLC to which the Trump campaign paid millions throughout the 2020 re-election campaign. This LLC spent hundreds of thousands of dollars on messaging about January 6.¹¹¹ According to the Campaign Legal Center, ‘reporting shows that Jared Kushner

¹⁰⁵ Brendan Fischer and Ed Pilkington, ‘Revealed: Trump Secretly Donated \$1M to Discredited Arizona Election “Audit”’, *The Guardian*, 27 January 2023, www.theguardian.com/us-news/2023/jan/27/trump-secretly-donated-1m-arizona-election-audit (‘In its final report released in December, the bipartisan January 6 committee investigating the insurrection at the US Capitol highlighted how Save America Pac gave \$1m to the Conservative Partnership Institute (CPI). Top CPI officials include Mark Meadows, Trump’s former chief of staff, along with other senior Trump insiders after they left the White House’).

¹⁰⁶ *Ibid.* (‘Tax filings obtained recently show that CPI in turn gave \$1m to AVRf in 2021 – the only known donation that the group has ever received’).

¹⁰⁷ *Ibid.* (‘Ten days later, on 26 July 2021, Trump’s Save America Pac made its \$1m transfer to CPI, according to Federal Election Commission records. Two days after that, on 28 July, a new group called the American Voting Rights Foundation (AVRF) was registered as a corporation in Delaware’).

¹⁰⁸ *Ibid.* (‘An analysis by the watchdog group Documented has traced [\$1 million in] funding for the Arizona audit back to Trump’s Save America Pac’).

¹⁰⁹ Maggie Haberman and Shane Goldmacher, ‘\$60 Million Refund Request Shows Financial Pressure on Trump from Legal Fees’, *The New York Times*, 29 July 2023 (‘That \$40 million was in addition to \$16 million that Save America spent in the previous two years on legal fees’).

¹¹⁰ Final Report at 784–85.

¹¹¹ Anna Massoglia, ‘Details of the Money behind Jan. 6 Protests Continue to Emerge’, Open Secrets, 25 October 2021, www.opensecrets.org/news/2021/10/details-of-the-money-behind-jan-6-protests-continue-to-emerge.

approved AMMC's [American Made Media Consultants'] formation and that its board initially included members of the former president's and former vice president's families who also held senior roles with the Trump campaign.¹¹² The Select Committee summed up: 'After raising \$250 million dollars on false voter fraud claims, mostly from small-dollar donors, President Trump did not spend it on fighting an election he knew he lost. Instead, . . . President Trump got a war chest with millions of dollars, and the American people were left with the U.S. Capitol under attack.'¹¹³ If any of money raised by the Big Lie ended up in Trump's hands, that could be a key element in proving wire fraud in a federal criminal case or common law fraud in a state criminal case. In other words, Trump was not lying about the outcome of the 2020 election only to puff up his own ego – he was lying for monetary gain, which is a factor that triggers criminal liability.

8.7 CONCLUSION

Within weeks of the Select Committee making criminal referrals to the DOJ, Attorney General Merrick Garland appointed Jack Smith Special Counsel to investigate (1) Trump's alleged retention of classified documents at Mar-a-Lago after he was president and (2) crimes that may have been committed during the events leading up to and on 6 January 2021.¹¹⁴ As Jack Smith's office became a subpoena factory, the Save America PAC funded lawyers for witnesses close to Trump.¹¹⁵ And press reports indicate that the Special Counsel's office is investigating the Save America PAC.¹¹⁶

The Special Counsel's investigations go directly into the inner circle running Trump's 2024 election campaign. Presently, instead of having a traditional 'campaign manager', the Trump 2024 campaign has four senior advisors: Brian Jack, Chris LaCivita, Jason Miller and Susie Wiles, who is also the CEO of the Save America PAC.¹¹⁷ Wiles is a key witness in Trump's federal criminal case about

¹¹² 'Supplemental FEC Complaint: Trump Payments to American Made Media Consultants', Campaign Legal Center, 28 January 2021, <https://campaignlegal.org/document/supplemental-fec-complaint-trump-payments-american-made-media-consultants>.

¹¹³ Final Report at 789.

¹¹⁴ 'Appointment of a Special Counsel', DOJ, 18 November 2022, www.justice.gov/opa/pr/appointment-special-counsel-o.

¹¹⁵ Devlin Barrett, Josh Dawsey and Isaac Stanley-Becker, 'Trump's Committee Paying for Lawyers of Key Mar-a-Lago Witnesses', *The Washington Post*, 5 December 2022, www.washingtonpost.com/national-security/2022/12/05/trump-witnesses-legal-bills-pac ('Former president Donald Trump's political action committee is paying legal bills for some key witnesses involved in the Justice Department investigation into whether Trump mishandled classified documents').

¹¹⁶ *Ibid.* ('The [Save America] PAC is the subject of a federal investigation for its fundraising tactics around false claims that the election was stolen').

¹¹⁷ 'Donald Trump Presidential Campaign Staff, 2024', Ballotpedia, 19 June 2023, https://ballotpedia.org/Donald_Trump_presidential_campaign_staff_2024; Matt Flegenheimer, Maggie Haberman and Michael C. Bender, 'DeSantis Tried to Bury Her: Now She's Helping Trump Try to Bury Him', *The New York Times*, 18 April 2023, www.nytimes.com/2023/04/18/us/politics/susie-wiles-trump-desantis.html ('Ms. Wiles brought in an ally, Brian

classified documents.¹¹⁸ She is apparently referred to as ‘PAC Representative’ in Trump’s Mar-a-Lago indictment, and Trump allegedly showed her a classified map even though she did not have the security clearance to see it.¹¹⁹ She worked on Trump’s 2016 election as its Florida chair, and she also worked on his 2020 election until being fired in September 2020.¹²⁰ But she is back for round three with Trump’s 2024 campaign.¹²¹ For the past few years, Wiles worked out of both of Trump’s resorts, Bedminster and Mar-a-Lago.¹²² At present, Wiles has been accused of wrongdoing by prosecutors, though it is possible that prosecutors are considering charges related to how the Save America PAC acted while she ran it.¹²³ She has been interviewed by the Special Counsel’s office several times.¹²⁴

When this chapter was written, Special Counsel Smith had not charged any actions related to fundraising using the Big Lie or its closely related problem of the

Jack, to oversee the campaign with her alongside Chris LaCivita, a longtime Republican strategist’).

¹¹⁸ Areeba Shah, ‘“She Is a Potential Government Witness”: Top Trump Campaign Official Cited in Indictment Revealed’, *Salon*, 29 June 2023, www.salon.com/2023/06/29/she-is-a-potential-government-witness-top-campaign-official-cited-in-indictment-revealed.

¹¹⁹ *United States v. Trump and Others*, Case 9:23-cr-80101-AMC (8 June 2023), <https://d3j6fh83elv35t.cloudfront.net/static/2023/06/trump-indictment.pdf>.

¹²⁰ Maggie Haberman, ‘Donald Trump’s Florida Effort Relied on Veteran of Gov. Rick Scott’s Campaign’, *The New York Times*, 15 March 2016, <https://archive.nytimes.com/www.nytimes.com/politics/first-draft/2016/03/15/donald-trumps-florida-effort-relied-on-veteran-of-gov-rick-scotts-campaign> (‘Donald J. Trump . . . will have to thank . . . Susie Wiles [for electoral success in Florida]’); Alex Isenstadt and Matt Dixon, ‘Trump Campaign Cuts Ties with Top Adviser in Florida’, *Politico*, 17 September 2019, www.politico.com/states/florida/story/2019/09/17/trump-campaign-cuts-ties-with-top-adviser-in-florida-1189767 (‘President Donald Trump’s campaign has severed ties with Florida adviser Susie Wiles’).

¹²¹ Gabby Orr and Steve Contorno, ‘She Helped Trump Win Florida Twice. Now She Could Lead His Expected 2024 Campaign’, *CNN*, 8 August 2022, www.cnn.com/2022/08/08/politics/susie-wiles-donald-trump-2024-campaign/index.html (‘Susie Wiles was searching for her next act when Donald Trump came knocking last spring [in 2021]’).

¹²² *Ibid.* (‘Wiles spends most of her time with Trump huddling in offices at his Bedminster, New Jersey, golf club or Mar-a-Lago resort [in the summer of 2022], . . . Wiles was seated to the right of Trump during a meeting at Bedminster with Hungarian Prime Minister Viktor Orban, according to a photo posted by Orban’s spokesman’).

¹²³ Feuer et al., ‘Trump’s Post-Election Fund-Raising Comes under Scrutiny by Justice Dept.’ (‘A federal grand jury . . . is examining the formation of – and spending by – a fund-raising operation created by Donald J. Trump after his loss in the 2020 election as he was soliciting millions of dollars by baselessly asserting that the results had been marred by widespread voting fraud’).

¹²⁴ Kaitlan Collins et al., ‘Top Trump Campaign Aide Susie Wiles Met Numerous Times with Special Counsel Investigators in Documents Probe’, *CNN*, 29 June 2023, www.cnn.com/2023/06/29/politics/susie-wiles-special-counsel-investigation-documents-trump/index.html (‘A senior campaign official for Donald Trump was allegedly shown a classified map by the former president during a meeting at his New Jersey golf club . . . The campaign adviser, Susie Wiles, has spoken to federal investigators numerous times’); Isaac Arnsdorf and Josh Dawsey, ‘Awkwardness in Trump’s Circle: Top Aides Could Be Trial Witnesses’, *The Washington Post*, 5 August 2023, www.washingtonpost.com/national-security/2023/08/05/trump-trial-witnesses-2020-election-charges.

Big Rip Off.¹²⁵ Nor had the Fulton County District Attorney. Smith's indictment has been analogized to a rifle shot, while the Fulton County indictment was compared to a shotgun blast.¹²⁶ But the lack of fundraising-related charges is not because these avenues are legally foreclosed. Indeed, as this chapter has demonstrated, the DOJ frequently charges similar campaign finance cases with wire fraud. With four charges already pending against ex-President Trump for his actions surrounding January 6, it is possible that viable charges about wire fraud were left out just to streamline the Special Counsel's case against Trump.¹²⁷ Additionally, the Fulton County Prosecutor did not focus on the fundraising in her sprawling Racketeer Influenced and Corrupt Organizations Act indictment of ex-President Trump and his eighteen co-conspirators.¹²⁸ It is still possible that the Fulton County District Attorney could charge common law fraud offenses related to Save America PAC's fundraising that defrauded residents of Fulton County, Georgia, of their hard-earned money.¹²⁹ Prosecuting these crimes would be better for future elections as it would disincentivize other politicians from copying Trump's fundraising using disinformation.

¹²⁵ *United States of America v. Trump and Others*, Indictment (listing six co-conspirators none of whom appear to be fundraisers with the possible exception of the yet unnamed co-conspirator 6); *United States of America v. Trump and Others*, Superseding Indictment (against Trump and co-conspirators Waltine Nauta and Carlos De Oliveira).

¹²⁶ Glenn Thrush and Danny Hakim, 'Court Skirmishes Show Divergent Strategies by Prosecutors in Trump Cases', *The New York Times*, 29 August 2023, www.nytimes.com/2023/08/29/us/politics/trump-prosecutors-strategy.html.

¹²⁷ *United States of America v. Trump and Others*, Indictment, at 1 (charging Count 1 18 U.S.C. 371 (Conspiracy to Defraud the United States); Count 2 18 U.S.C. 1512(k) (Conspiracy to Obstruct an Official Proceeding); Count 3: 18 U.S.C. §§ 1512(c)(2) (Obstruction of and Attempt to Obstruct an Official Proceeding); Count 4 18 U.S.C. 241 (Conspiracy against Rights)).

¹²⁸ *The State of Georgia v. Trump and Others*, Indictment.

¹²⁹ Charles Bethea, 'Georgia's Broad Racketeering Law May Now Ensnare Donald Trump', *The New Yorker*, 31 July 2023, www.newyorker.com/news/letter-from-the-south/georgias-broad-racketeering-law-may-now-ensnare-donald-trump.