THE TRUMP EXCEPTION TO THE CONSTITUTION: ASSESSING THE ROLE OF JUDICIAL ATTITUDES IN A NEW ERA OF AMERICAN ELECTION VIOLENCE

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ABSTRACT

Can American courts meaningfully act to prevent election violence? This question has never been seriously asked but is becoming urgent in a new era of election-related violence, much of which has been encouraged by former President Trump. This Article begins the process of exploring answers to that question. The author examines failed attempts at lawsuits against Trump for provoking violence at campaign rallies from 2015 until January 6th, 2021, including the case of Nwanguma v. Trump, and offers explanations as to why the courts were reluctant to hold the former President accountable. This Article will demonstrate that inaction by the courts is best understood using models of assessing judicial attitudes rather than First Amendment jurisprudence or any other legalistic explanation. Furthermore, political science research into the role the courts play in preventing election violence in Africa provides a framework for understanding the ability of our own judiciary to stop election violence before it becomes insurrection—or worse.

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INTRODUCTION[1]

No serious observer could deny that Donald Trump has been asking for election-related violence for years, first on the campaign trail and then at his political rallies as president. Trump's calls for violence culminated in the January 6th insurrection, an event that marks a turning point in American history. Never before has a major presidential candidate—let alone a sitting president—openly sought to use election-related violence as a political tool. As of this writing Trump now, and it seems unlikely that the genie of election violence will return to its bottle anytime in the foreseeable future.

Equally undeniable (as I will make clear below) is the fact that our courts knew about Trump's attempts to incite election violence well in advance of January 6th, but failed to stop him. This Article begins to explore some of the questions that no scholar, institution, reporter, lawyer, or other source has answered—or even seriously asked—about

1. Some of the subject matter in this Article involves the ever-changing circumstances of cases that are still in active litigation. While the principles at the core of this Article's thesis will likely remain unchanged, the factual information presented here represents a snapshot of the political and legal landscape as of early 2024.

the role of the judiciary. Chief among these questions is: *why?* Why didn't the courts stop, or even slow, Trump's calls for violence? Could they have done more? If so, why didn't they? If not, why not? Can the courts be useful in preventing more political violence from occurring in the future? If so, how?

In this Article, I explore possible answers by examining my own attempt to sue Donald Trump and his campaign for election-related violence. Part I recounts the details of *Nwanguma v. Trump*, a case in which federal courts refused to hold Trump accountable for inciting violence during the 2016 presidential campaign. In Part II, I discuss other failed attempts to use the courts to hold Trump responsible for similar instances of violence, and how those cases served to enable the January 6th attacks. Part III argues that the courts' reluctance to restrain Trump's incitement of violence has little to do with First Amendment precedent, but instead can be seen as strategic decision-making by the presiding judges. Part IV delves further into non-free-speech-related explanations for the inaction of the courts by relying on current political science research into African courts and their effectiveness in preventing election violence in the twenty-first century. As we shall see, principles observed from the examples of Nigeria and Kenya reveal much about the role of public confidence in the courts, judicial punishment as a deterrent factor, the threat of bodily harm as a judicial influencer, and how courts might prevent future instances of election-related violence. Part V applies those principles to the rise of Trump and the corresponding rise of election violence in America. Part VI offers some concluding thoughts.

I. *NWANGUMA V. TRUMP*

On March 1, 2016, then-candidate Donald Trump held a campaign rally in downtown Louisville, Kentucky.[2] Kashiya Nwanguma, a twenty-one-year-old Black college student, attended that rally.[3] As Trump began speaking, Nwanguma quietly made her way to the front of the crowd and held up a poster depicting Trump's head on the body of a pig.[4] When

2. Phil Helsel, *Lawsuit Filed Against Trump Over Violence at Kentucky Rally*, NBC NEWS, https://www.nbcnews.com/politics/2016-election/lawsuit-filed-against-trump-over-violence-kentucky-rally-n548896 (Apr. 1, 2016, 2:11 AM).

3. Avi Selk, *The Violent Rally Trump Can't Move Past*, WASH. POST (Apr. 3, 2017, 1:29 PM), https://wapo.st/4eaefvE.

4. *See* Eliott C. McLaughlin, *It's Plausible Trump Incited Violence, Federal Judge Rules in OK'ing Lawsuit*, CNN, https://www.cnn.com/2017/04/02/ politics/donald-trump-lawsuit-incite-violence-kentucky-rally (Apr. 3, 2017, 11:50 AM).

Trump spotted Nwanguma, he ordered the crowd to eject her.[5] That was just one of five times Trump stopped his half-hour speech to point out protesters and to command his crowd of supporters to "get 'em out of here."[6] Upon Trump's orders, the crowd descended on three people who would later become my clients: Nwanguma; Henry Brousseau, a seventeen-year-old white high school student; and Molly Shah, a thirty-six-year-old white mother and special education teacher.[7] The crowd did, in fact, get them out of there.

The crowd punched and shoved Brousseau and Shah, but Nwanguma received the worst of the crowd's wrath. Matthew Heimbach, an outspoken white nationalist and leader of the now-defunct Traditionalist Worker Party,[8] took it upon himself to personally eject her.[9] In a video that went viral, Heimbach, who is white and nearly twice Nwanguma's size, repeatedly shoved her toward the exit while shouting "[l]eftist scum!"[10] Then Nwanguma was passed off to Alvin Bamberger, a seventy-five-year-old white military veteran, who also shoved her as she was exiting.[11] Others groped her and shouted racial epithets.[12] As my clients were being manhandled, Trump stated: "Don't hurt 'em . . . . [I]f I say 'go get 'em,' I get in trouble with the press, the most dishonest human beings in the world."[13] By then, they were already hurt. Trump went on to say: "In the old days, which isn't so long ago, when we were less politically correct, that kinda stuff wouldn't have happened. Today we have to be so nice, so nice."[14] Then Trump went into a discussion about how waterboarding is "absolutely fine."[15]

5. *Id.*

6. WLKY News Louisville, *Complete Speech: Donald Trump in Louisville*, YOUTUBE (Mar. 1, 2016), https://www.youtube.com/watch?v=dp-M9siqfvY.

7. *See* Helsel, *supra* note 2.

8. Brett Barrouquere, *Two Prominent Neo-Nazis Recant, but Their Actions Sow Doubts*, S. POVERTY L. CTR. (May 14, 2020), https://www.splcenter.org/hatewatch/2020/05/14/two-prominent-neo-nazis-recant-their-actions-sow-doubts.

9. Joe Heim, *This White Nationalist Who Shoved a Trump Protester May Be the Next David Duke*, WASH. POST (Apr. 12, 2016, 11:49 AM), https://wapo.st/3XJ8JdZ.

10. *Id.*

11. WLKY News Louisville, *Video Goes Viral of Trump Supporters Pushing Woman Out of Rally*, YOUTUBE, at 00:44 (Mar. 2, 2016), https://www.youtube.com/watch?v=lb-KFVv4XEs; Ray Sanchez, *Man Accused of Attacking Rally Protester Says Trump Inspired Him*, CNN, https://www.cnn.com/2017/04/15/politics/donald-trump-rally-lawsuit/index.html (Apr. 16, 2017, 7:03 AM).

12. Selk, *supra* note 3.

13. WLKY News Louisville, *supra* note 6, at 27:18.

14. *Id.* at 29:58.

15. *Id.* at 30:42.

A. The Trial Court

The violence at the 2016 Louisville rally was the sort of howling nightmare commonly seen at subsequent Trump events, but at the time it was novel enough to garner national attention. Although political violence has always existed in one form or another in the United States, there had been no recorded incidents of violence at major party presidential campaign rallies before Trump, and certainly no record of a presidential candidate asking supporters to attack protesters.[16] Wide-eyed legal analysts asked: "Is Donald Trump Inciting Violence?"[17]

My colleagues and I tried to answer that question with a lawsuit against Trump, the Trump Campaign, Heimbach, and Bamberger. In our complaint, we told the court that while this type of violence was unprecedented in a general sense, it was the same type of havoc Trump was deliberately trying to wreak in the months before the Louisville rally.[18] On November 21, 2015, a protester was attacked at an Alabama rally.[19] Trump responded that "maybe he should have been roughed up."[20] On February 1, 2016, at a rally in Cedar Rapids, Iowa, Trump instructed those in the crowd to "knock the crap out of" anyone who was "getting ready to throw a tomato."[21] Trump followed this instruction by saying, "[s]eriously. Just knock the hell . . . ." Trump assured the crowd: "I will pay for the legal fees. I promise. I promise."[22] Just a week before the Louisville rally, Trump responded to a protester in Las Vegas by alluding to the fact that protesters had it too easy in present times.[23] "I love the old days. You know what they used to do to guys like that when

16. *See generally The History of Violence on Presidential Campaign Trails*, ABC NEWS (Mar. 14, 2016, 6:38 PM), https://abcnews.go.com/Politics/history-violence-presidential-campaign-trails/story?id=37634969.

17. Dahlia Lithwick, *Is Donald Trump Inciting Violence?*, SLATE (Mar. 15, 2016, 6:05 PM), https://slate.com/news-and-politics/2016/03/is-donald-trump-inciting-violence-he-might-be.html.

18. Complaint at 12, Nwanguma v. Trump, 273 F.Supp.3d 719 (W.D. Ky. 2017) (No. 3:16–cv–247–DJH).

19. *See* Jenna Johnson & Mary Jordan, *Trump on Rally Protestor: 'Maybe He Should Have Been Roughed Up'*, WASH. POST (Nov. 22, 2015, 3:29 PM), https://www.washingtonpost.com/news/post-politics/wp/2015/11/22/black-activist-punched-at-donald-trump-rally-in-birmingham/.

20. *Id.*

21. Nolan D. McCaskill, *Trump Urges Crowd to 'Knock the Crap out of' Anyone with Tomatoes,* POLITICO, https://www.politico.com/blogs/iowa-caucus-2016-live-updates/2016/02/donald-trump-iowa-rally-tomatoes-218546 (Feb. 1, 2016, 4:43 PM).

22. *Id.*

23. *See* Michael E. Miller, *Donald Trump on a Protester: 'I'd Like to Punch Him in the Face'*, WASH. POST (Feb. 23, 2016, 6:08 AM), https://www.washingtonpost.com/news/morning-mix/wp/2016/02/23/donald-trump-on-protester-id-like-to-punch-him-in-the-face/.

they were in a place like this? They'd be carried out on a stretcher, folks."[24] Trump told his supporters that he would like "to punch [the protester] in the face."[25] All of these prior incidents, which were highly publicized at the time, were collected and described in detail in our complaint.[26]

We also warned the court that the violence in Louisville was indicative of a dangerous trend; one that would get much worse if the courts did not end it.[27] As evidence, we laid out six more incidents of campaign rally violence that happened between the Louisville rally (March 1, 2016) and when we filed our complaint (March 31, 2016).[28] Specifically: on March 4, 2016, at a rally in Michigan, Trump instructed the crowd to remove a protester, promising "[i]f you [hurt him], I'll defend you in court. Don't worry about it."[29] Then on March 8, 2016, a reporter was nearly thrown to the ground at a press conference in Florida by Trump's campaign manager, who was later arrested for assault.[30] The next day at a rally in North Carolina, Trump again spoke of the "good old days" when protesters were treated "very, very rough."[31] Trump asserted that such treatment deterred the protesters from doing it "again so easily."[32] Two days later, at a rally in St. Louis, Trump claimed that "[p]art of the problem and part of the reason it takes so long" to remove protesters was that people are too averse to hurting each other.[33] On March 19, 2016, at a rally in Arizona, a protester was punched and repeatedly kicked after Trump pointed him out and described him as

24. *Id.*

25. *Id.*

26. Complaint, *supra* note 18, at 12–14.

27. *See id.* at 14.

28. *Id.* at 13–14.

29. Libby Cathey & Meghan Keneally, *A Look Back at Trump Comments Perceived by Some as Inciting Violence*, ABC NEWS (May 30, 2020, 5:00 AM), https://abcnews.go.com/Politics/back-trump-comments-perceived-encouragingviolence/story?id=48415766.

30. *See* Hadas Gold, *Trump Campaign Manager Gets Rough with Breitbart Reporter*, POLITICO, https://www.politico.com/blogs/on-media/2016/03/trump-campaign-manager-breitbart-reporter-220472 (Mar. 9, 2016, 5:14 PM); Steve Peoples & Terry Spencer, *Police Charge Trump Campaign Manager with Assault*, PBS NEWS (Mar. 29, 2016, 11:57 AM), https://www.pbs.org/newshour/politics/police-charge-trump-campaign-manager-with-assault.

31. Robert Mackey, *Trump Concerned His Rallies Are Not Violent Enough*, INTERCEPT (Mar. 11, 2016, 5:46 PM), https://theintercept.com/2016/03/11/trumps-good-old-days-when-battering-protesters-was-celebrated-in-the-white-house.

32. *Id.*

33. Nick Gass, *Trump: 'There Used to Be Consequences' for Protesting*, POLITICO, https://www.politico.com/blogs/2016-gop-primary-live-updates-and-results/2016/03/trump-defends-protest-violence-220638 (Mar. 11, 2016, 2:50 PM).

"disgusting."[34] Finally, on March 29, 2016, at a rally in Janesville, Wisconsin, a fifteen-year-old female protester was pepper-sprayed in the face and sexually assaulted by two unidentified Trump supporters.[35] As the protester left the rally, Trump's supporters erupted with "[h]ell yeah," name-calling, e.g., "goddamn communist, n***** lover," cries of victory, and an echo of Trump's usual response to protesters: "Get 'em out of here!"[36] Again, these incidents took place in the thirty days between the Louisville rally and the filing of our complaint.

The Trump defendants immediately filed motions to dismiss the lawsuit, claiming that we had failed to state a claim upon which relief could be granted.[37] They argued what one might expect: Trump was talking to "professional security personnel," not the crowd; that the negligence count was insufficient because plaintiffs did not allege "what sort of security should have been provided or what the cost of such security would have been"; that Trump could not be held liable for the actions of his audience.[38] But the centerpiece of their argument was that Trump was merely exercising his right to free speech, and "[p]olitical speech at a political rally lies at the core of the First Amendment."[39]

We argued that Trump knew exactly what he was doing. By barking commands at a crowd that was already primed for violence, Trump certainly knew by March 1, 2016, that the crowd would treat protesters, in his words, "very, very rough." Not only did Trump know what he meant, by "get 'em out of here," but his intended audience knew it too and acted accordingly. This assertion need not be left to speculation; Heimbach and Bamberger explicitly said so. In cross-claims against Trump and the Trump campaign, both assaulters claimed they were acting on Trump's orders, and sought indemnification from Trump for any liability.[40] Surely, we said, the First Amendment cannot shield someone who is deliberately stirring up violence at rallies all over the

34. Jacqueline Alemany, *Violence Erupts at Donald Trump Rally in Tucson*, CBS NEWS, https://www.cbsnews.com/news/violence-erupts-at-donald-trump-rally-in-tucson-arizona-election-2016/ (Mar. 20, 2016, 7:54 AM).

35. *Wisconsin Police: Teen Girl Sexually Assaulted, Pepper-Sprayed Outside Trump Rally,* CBS NEWS NEW YORK (Mar. 29, 2016, 9:21 PM), https://www.cbsnews.com/newyork/news/ donald-trump-wisconsin-rally/.

36. *Id.* (citing video posted by Molly Beck (@MollyBeck), X (Mar. 29, 2016, 6:01 PM), https://x.com/MollyBeck/status/714935469667168256.

37. Motion to Dismiss at 1, Nwanguma v. Trump, 273 F. Supp. 3d 719 (W.D. Ky. 2017) (No. 3:16-cv-00247-DJH).

38. *Id.* at 4–6, 15.

39. *Id.* at 1.

40. *See* Kenneth P. Vogel, *White Nationalist Claims Trump Directed Rally Violence*, POLITICO (Apr. 17, 2017, 6:18 PM), https://www.politico.com/story/2017/04/donald-trump-rally-violence-237302.

country, especially when the violence-doers themselves say they were following orders.

For a while, it seemed we were right. A year to the day after we filed our complaint, in 2017, U.S. District Judge David Hale issued an opinion allowing most of the suit to go forward.[41] According to Judge Hale, "[p]laintiffs allege throughout the complaint that Trump knew or should have known that his statements would result in violence, and they describe a prior Trump rally at which a protestor was attacked. The Court finds these allegations to be sufficient [to overcome a First Amendment defense]."[42]

But the case did not proceed to the discovery phase. Four months and two rounds of briefing later, Judge Hale reversed himself and dismissed the negligence claim against the Trump defendants as "incompatible with the First Amendment."[43] Nonetheless, Hale permitted the claim of incitement against Trump to survive.[44] He rejected the argument that "Trump's statement [should] be considered in a vacuum," and held that "the cases cited by the Trump Defendants demonstrate that whether speech constitutes incitement is a fact-specific inquiry."[45] Upon analyzing a long line of cases including *Hess v. Indiana*,[46] *Cohen v. California*,[47] *NAACP v. Claiborne Hardware Co.*,[48] and *Connick v. Myers*,[49] the court concluded that "context matters; 'the character of every act depends upon the circumstances in which it is done.'"[50] Hale underscored the issue of discovery, explaining that nearly all of the aforementioned speech cases "were fully litigated prior to appeal, and the Supreme Court's decisions in those cases were based on the evidence of record."[51]

> For example, the exclamation "shoot!" might constitute incitement if directed to a crowd of angry armed individuals, but shouted by a basketball fan or muttered in disappointment, it has no violent connotations. In short, the mere absence of overtly

41. Nwanguma v. Trump, 273 F. Supp. 3d 719, 723 (W.D. Ky. 2017).
42. *Id.* at 727 (citations omitted).
43. Nwanguma v. Trump, No. 3:16-cv-247-DJH-HBB, 2017 WL 3430514, at *4 (W.D. Ky. Aug. 9, 2017).
44. *Id.*
45. *Id.* at *2–3.
46. 414 U.S. 105 (1973).
47. 403 U.S. 15 (1971).
48. 458 U.S. 886 (1982).
49. 461 U.S. 138 (1983).
50. *Nwanguma*, 2017 WL 3430514, at *2–3 (quoting Schenck v. United States, 249 U.S. 47, 52 (1919)).
51. Nwanguma v. Trump, No. 3:16-CV-247-DJH-HBB, 2017 WL 3430514, at *2 (W.D. Ky. Aug. 9, 2017).

> violent language in Trump's statement does not appear fatal to Plaintiffs' incitement claim.[52]

Indeed, the dismissal of the negligence claim was partially premised on the survival of the incitement claim. Hale wrote, "the purported negligence was ordering audience members to remove protestors—an intentional act, and one subsumed by Plaintiffs' incitement claim, the appropriate vehicle for challenging Trump's statement."[53] Thus, the entirety of Nwanguma's case hinged on whether Trump could be held liable for incitement.

At Trump's urging, Hale certified for immediate appeal the issue of whether the First Amendment protected him from the incitement claim.[54] And so, before a single document could be exchanged or any testimony taken, Judge Hale's ruling was heard by the Sixth Circuit Court of Appeals.

B. The Sixth Circuit

After more briefing and oral argument,[55] the appellate court issued its ruling on September 11, 2018.[56] By then, it had been more than two years since the Louisville rally. There had been many incidences of violence at Trump events, and anyone who was paying attention knew that Trump had become the first major party candidate—and the first president—in the history of America to openly encourage political violence. We were hopeful that the Sixth Circuit would act to stop it. They did not.

In a published opinion styled *Nwanguma v. Trump*, authored by Judge David McKeague, the court of appeals sharply diverged from Hale's opinion by focusing exclusively on the literal content of Trump's words: "In the ears of some supporters, Trump's words may have had a tendency to elicit a physical response, in the event a disruptive protester refused to leave, but they did not specifically advocate such a response."[57] McKeague explained:

52. *Id.* at *3.
53. *Id.* at *4.
54. *Id.*
55. Oral Argument, Nwanguma v. Trump, 903 F.3d 604 (6th Cir. 2018) (No. 17-6290), https://www.opn.ca6.uscourts.gov/internet/court_audio/audio/06-06-2018%20-%20Wednesday/17-6290%20Kashiya%20Nwanguma%20v%20Donald%20Trump%20et%20al.mp3.
56. Nwanguma v. Trump, 903 F.3d 604 (6th Cir. 2018).
57. *Id.* at 612.

> It is the words used by the speaker that must be at the focus of the incitement inquiry, not how they may be heard by a listener. This, of course, is sensible and plaintiffs have not rebutted this understanding by reference to any contrary authority. The bottom line is that the analysis employed in [prior cases] evidences an unmistakable and consistent focus on the actual words used by the speaker in determining whether speech was protected. Following these authorities, we hold that Trump's speech, too, is protected and therefore not actionable as an incitement to riot.[58]

Additionally, the court seemed to treat Trump saying "don't hurt 'em" as something to be taken seriously enough to be legally significant, even after months of Trump saying, in essence, "hurt 'em." McKeague wrote: "That this undercuts the alleged violence-inciting sense of Trump's words can hardly be denied."[59]

McKeague's opinion acknowledged the need to evaluate the context of a statement, and even quoted *Snyder v. Phelps* for the proposition that "it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said."[60] But the way in which these "circumstances" were gathered, or even what those circumstances were, was unimportant to the Sixth Circuit, which held: "[I]n addition to the content and form of the words, we are obliged to consider the context, based on the whole record. Here, of course, the 'whole record' consists of the complaint."[61] In its reliance on *Snyder*, *Hess*, and its own en banc opinion in *Bible Believers v. Wayne County, Michigan*,[62] the appellate court disregarded Hale's emphasis on record development, collapsing the case into a facile analysis of the literal meaning of a speaker's words, and even reframing the high court's emphasis in *Snyder* to be primarily about "what was *said*, where it was *said*, and how it was *said*."[63]

58. *Id.* at 613.

59. *Id.* at 612. Based on McKeague's questions at oral argument, courts could only read the intention of violence into context if Trump had said "'get 'em out of here and do what they did to them in Akron,' or wherever a prior rally was, if that had involved excessive violence, but that didn't happen here." Oral Argument, *supra* note 55, at 17:30. For McKeague, "even if he had said 'rough 'em up on the way out,' I'm having trouble seeing how that rises to the level of a riot." *Id.* at 20:55.

60. *Nwanguma*, 903 F.3d at 611 (quoting Snyder v. Phelps, 562 U.S. 443, 454 (2011)).

61. *Id.* at 611.

62. 805 F.3d 228 (6th Cir. 2015) (en banc).

63. *Nwanguma*, 903 F.3d at 610–11 (quoting *Snyder,* 562 U.S. at 454).

Our request for en banc review to the full Sixth Circuit Court of Appeals was denied in November of 2018.[64] By that time, two Trump-appointed Justices were already on the Supreme Court. We decided a petition for certiorari would likely do more harm than good, and so the case of *Nwanguma v. Trump* came to an end.

C. Aftermath

What has happened in the years since the Sixth Circuit's opinion? Matthew Heimbach pleaded guilty to disorderly conduct for his behavior at the rally and received a ninety-day suspended sentence.[65] He later violated the terms of his plea agreement by getting into a trailer-park brawl for which he was sentenced to thirty-eight days in jail.[66] The Traditionalist Worker Party dissolved soon thereafter.[67] All the rest, at least so far as it concerns us in this Article, is bad news.

Violence at Trump rallies did not abate, and Trump himself has become more brazen about encouraging it every chance he gets.[68] Worse, his embrace of brutality-*cum*-politics has demonstrably spread. One source notes that episodes of political violence "skyrocketed" from 2016 to 2021, and identifies political speech as a factor driving the increase in such violence.[69] As a society, it seems the very idea no longer bothers us quite so much; according to a 2021 Washington Post/University of Maryland poll, only sixty-two percent of Americans now believe violence is never justified, down from about ninety percent in the 1990s,[70] and

64. *Id.* at 604.

65. Brett Barrouquere, *How Matthew Heimbach Will Spend Part of His Summer*, S. POVERTY L. CTR. (May 15, 2018), https://www.splcenter.org/hatewatch/2018/05/15/how-matthew-heimbach-will-spend-part-his-summer.

66. *Id.*; Thomas Novelly, *White Nationalist Matthew Heimbach Arrested After Trailer Park Fight Over Alleged Affair*, COURIER JOURNAL, https://www.courier-journal.com/story/news/2018/03/14/white-nationalists-matthew-heimbach-david-parrott-trailer-park-fight-affair/423366002/ (Mar. 14, 2018, 4:18 PM). Regrettably, there is not space to elaborate on this story here.

67. Barrouquere, *supra* note 8.

68. *See* Fabiola Cineas, *Donald Trump Is the Accelerant*, VOX, https://www.vox.com/21506029/trump-violence-tweets-racist-hate-speech (Jan. 9, 2021, 11:04 AM); *see also* Hilary McQuilkin & Meghna Chakrabarti, *Is Donald Trump Normalizing Political Violence in America?*, WBUR (Oct. 5, 2023), https://www.wbur.org/onpoint/2023/10/05/donald-trump-normalizes-political-violence-in-america (noting that "month after month, Trump has escalated," culminating most recently in calls for the execution of General Mark Milley).

69. *See* Rachel Kleinfeld, *The Rise of Political Violence in the United States*, 32 J. DEMOCRACY 160, 160, 173 (2021).

70. Ivana Saric, *Poll: Americans Increasingly Justifying Political Violence,* AXIOS, https://www.axios.com/2022/01/02/poll-america-violence-against-government (Jan. 2, 2022).

other recent polling shows that a majority of Republicans agree that they "may have to use force to save" the "traditional American way of life."[71] A May 2023 survey reveals that around sixteen million adults agree that violence would be justified to prevent Trump's prosecution.[72] As of this writing, violent clashes at Trump rallies rarely even merit a mention on twenty-four-hour news networks, nor do random incidences of violence by Trump supporters.[73] Trump acolytes, vying for lesser offices than the presidency, now regularly promise violence in stump speeches.[74] According to Mary McCord, the executive director of the Institute for Constitutional Advocacy and Protection and former acting assistant attorney general for national security at the Department of Justice: "There's no question that Donald Trump and actually many of his close allies have been really on a trend over the last number of years, really going back even to the 2016 campaign to normalize violence."[75] Their tactics seem to have worked.

This more expansive buy-in to political violence has caused a corrosion of American democracy, leading scholars to believe we are in "constitutional retrogression," or something like it.[76] It is hard to imagine better evidence of such "retrogression" than the events of January 6th, 2021, in which a losing presidential candidate asked throngs of conspiracy theorists to overthrow the government. Seven years after the Louisville rally, the Select Committee to Investigate the January 6th Attack on the United States Capitol issued a voluminous report aimed at establishing the same basic issue we posited in *Nwanguma*, i.e., that Trump was not-so-slyly asking his supporters to engage in violence, and that some of those supporters complied.[77] The National Guard sent more than 20,000 troops to protect Joe Biden's inauguration ceremony.[78] Death threats against poll workers are still commonplace nearly three years

71. Kleinfeld, *supra* note 69, at 162.

72. McQuilkin & Chakrabarti, *supra* note 68.

73. *See generally id.*

74. *See* Astead W. Herndon, *In Iowa, Gaetz and Greene Pick Up Where Trump Left Off*, N.Y. TIMES (Aug. 21, 2021), https://www.nytimes.com/2021/08/21/us/politics/marjorie-taylor-greene-matt-gaetz-iowa.html.

75. McQuilkin & Chakrabarti, *supra* note 68.

76. Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 96, 163–65 (2018).

77. H.R. REP. NO. 117-663, at 111 (2022).

78. Howard Altman & Associated Press, *Up to 21,000 National Guard Troops Now Authorized in DC for Biden Inauguration*, MILITARY TIMES (Jan. 14, 2021), https://www.militarytimes.com/news/your-military/2021/01/14/national-guard-dc-presence-will-swell-to-26000-for-biden-inauguration/.

after the 2020 election.[79] More bloodshed is almost certain to occur during the 2024 presidential election.[80] As Timothy Snyder writes in his book *On Tyranny*, Trump's brand of "mob violence was meant to transform the political atmosphere, and it did."[81] The courts had the opportunity to at least try to stop this transformation in its tracks years before the January 6th insurrection, but declined to do so.

II. THE COURTS' REPEATED FAILURES TO ACT

My purpose in this Article is not just to say "we told you so"—though that is certainly part of it. The larger point, rather, is for this mid-career litigator to engage in some prolonged navel-gazing. To wit: *What are we doing here?* What is the point of seeking relief through courts that are unable —or worse yet, unwilling—to stop the worst people from engaging in the worst conduct? Is it too late for lawyers, acting through the courts, to do anything to save American democracy?

Long before attending law school, I understood that courts are supposed to stop bad things from happening. This idea reverberates throughout any theoretical framework we apply. Classical deterrence theory "posits that if the probability of being caught and suffering negative consequences is high enough, people will choose not to engage in conduct that results in sanctions."[82] Theoretical models that are more focused on individual recompense rather than general welfare still take basic social cohesion into account: If the state will not allow aggrieved parties to take the law into their own hands, the courts must therefore offer meaningful relief or the stability of society is at risk.[83] Even under cold, calculating economic theories of justice, the courts are charged with ensuring the safety of the public—so long as it does not cost too much.[84]

79. *See e.g.*, *Chelsey* Cox, *'We're Going to Hang You': DOJ Cracks Down on Threats to Election Workers Ahead of High-Stakes Midterms*, CNBC, https://www.cnbc.com/2022/10/27/were-going-to-hang-you-doj-cracks-down-on-threats-to-election-workers-ahead-of-high-stakes-midterms.html (Nov. 2, 2022, 12:24 PM).

80. *See* Barton Gellman, *Trump's Next Coup Has Already Begun*, ATLANTIC, https://www.theatlantic.com/magazine/archive/2022/01/january-6-insurr ection-trump-coup-2024-election/620843/ (Dec. 9, 2021, 3:21 PM).

81. TIMOTHY SNYDER, ON TYRANNY: TWENTY LESSONS FROM THE TWENTIETH CENTURY 45 (2017).

82. Deana A. Pollard, *Sex Torts*, 91 MINN. L. REV. 769, 813 (2007) (citing Daniel S. Nagin & Greg Pogarsky, *Integrating Celerity, Impulsivity, and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence*, 39 CRIMINOLOGY 865, 866 (2001)).

83. *See* JOHN C. P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS 31 (2020).

84. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 358 (Little, Brown and Company 1972).

Most of us believe in one or more of these models for understanding the role of the courts, or at least the ideals they are supposedly based upon. Under any of these theories, the Sixth Circuit should have taken meaningful, decisive action to protect American democracy from those who have shown themselves to be its chief assailants, but it did not.

Similarly, one might reasonably expect that courts might use the First Amendment as a tool for stopping, rather than allowing, political violence at presidential campaign rallies—that is, if one puts any stock in what scholars and the framers have said about the Free Speech Clause for the last 200-some-odd years.[85] One can find a lot of waxing patriotic re: free speech used to further the best interests of democracy.[86] Still, few commentators would likely argue that an imperative given to a seething mob of white supremacists after months of explicit calls for violence should be entitled to sacrosanct-speech status, especially when violence actually results. And yet, that is apparently what the Sixth Circuit did in the *Nwanguma* opinion.

The tendency to absolve Trump for deeply troubling conduct is not confined to one conservative circuit court. Nearly every other court to weigh in on Trump's brand of political violence has ended up advancing a similar interpretation of the law. In another lawsuit brought by victims of rally violence, the U.S. District Court for the Northern District of Alabama held that despite Trump's calls for violence and a prior incidence of rally violence, there was no way that Trump could have foreseen "violence against these particular Plaintiffs."[87] That case, like *Nwanguma*, was dismissed and no discovery was ever conducted.[88] Another protester claimed he was roughed up by police at the behest of the Trump campaign at an event one month after the Louisville rally, but that was not enough to survive a motion to dismiss in the U.S. District Court for the District of Maryland.[89] The U.S. Court of Appeals for the

85. *See, e.g.*, *From Thomas Jefferson to James Madison, 17 November [1798]*, NATIONAL ARCHIVE: FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/01-30-02-0392 (last visited Oct. 22, 2024); Robert M. Chesney, *Democratic-Republican Societies, Subversion, and the Limits of Legitimate Political Dissent in the Early Republic*, 82 N.C. L. REV. 1525, 1525 (2004).

86. *See, e.g.*, Ashutosh Bhagwat, *The Democratic First Amendment*, 110 NW. U. L. REV. 1097, 1102 (2016); James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 497–98, 501 (2011).

87. Southall v. Birmingham Jefferson Convention Ctr. Auth., No. 2:16-CV-01687-LSC, 2017 WL 4155100, at *1, *3–4 (N.D. Ala. Sept. 19, 2017).

88. *See id.* at *2, *4.

89. Thaler v. Donald J. Trump for President, Inc., 304 F. Supp. 3d 473, 480 (D. Md.), *aff'd per curiam*, 730 F. App'x 177 (4th Cir. 2018).

Fourth Circuit did not want to hear oral argument on appeal, and its unpublished opinion was only a paragraph long.[90]

There are only a few cases regarding Trump's involvement in election-related violence in which plaintiffs have been able to get past the motion to dismiss stage. The earliest of these cases involved an assault by hired security against protesters outside of Trump Tower in September 2015 but, apparently, did not involve any contemporaneous orders given by Trump himself.[91] After six years of litigation, pursuant to an order by a New York Supreme Court judge, Trump finally gave his first and only deposition in any protester-violence case in October of 2021.[92] The case quietly settled on the eve of trial, more than seven years after the rally in question, and nearly two years after the events of January 6th.[93] Only one other campaign-violence case has produced anything remotely resembling tangible consequences to Trump. In that case, the U.S. District Court for the District of New Hampshire stripped out all the claims against Trump himself, leaving only claims against the individual police officers and a Trump security guard who tossed pro se plaintiff Roderick Webber into a table in October 2015.[94] This case also did not involve any contemporaneous commands by Trump himself. The Trump campaign finally settled the case for $20,000.00 on December 23, 2020—a little more than one month after Trump lost the 2020 election.[95]

Despite years of plaintiffs and their attorneys sounding the alarm, the courts took no real action to stop Trump's increasingly bold calls for campaign violence before the events of January 6, 2021. And even *after* the fact, the federal judiciary has been reluctant to impose the sort of

90. Thaler v. Donald J. Trump for President, Inc., 730 F. App'x 177 (4th Cir. 2018) (per curium).

91. *See* Complaint at 1, 8, Galicia v. Trump, No. 24973/2015E (N.Y. Sup. Ct. Nov. 11, 2015), https://www.politico.com/f/?id=00000159-05ef-d6f8-af7f-1fffc8750000.

92. Laura Italiano, *Meet the Only Lawyer Who's Managed to Sit Donald Trump Down for a Deposition Since the 2016 Election*, BUS. INSIDER (Mar. 4, 2022, 3:21 PM), https://www.businessinsider.com/deposing-trump-persistence-works-says-only-lawyer-to-win-2022-3; Transcript of Deposition of Donald J. Trump, Galicia v. Trump, 109 N.Y.S.3d 857 (N.Y. Sup. Ct. 2019) (No. 24973/2015E), https://s3.documentcloud.org/documents/21748396/trumpdepositionexcerptsefraingalicia42622.pdf.

93. Chloe Atkins & Tom Winter, *Protestors' NYC Civil Assault Suit Against Trump Reaches Settlement*, NBC NEW YORK, https://www.nbcnewyork.com/news/local/crime-and-courts/protestors-nyc-civil assault-suit-against-trump-reaches-settlement/3935285/ (Nov. 2, 2022, 2:57 PM).

94. Webber v. Deck, 433 F. Supp. 3d 237, 243, 252, 254 (D.N.H. 2020).

95. Settlement Agreement and Release of All Claims, Webber v. Deck, 433 F. Supp. 3d 237 (D.N.H. 2020) (No. 1:18-cv-00931-LM), https://www.documentcloud.org/documents/20437951-the-trump-campaign-agrees-to-pay-20000-to-settle-2015-assault-claim.

consequences one might expect following a failed *coup d'état*. High-profile members of Congress including Bennie G. Thompson, Maxine Waters, and Eric Swalwell filed suit against Trump and other high-level insurrectionists in a case called *Thompson v. Trump*.[96] U.S. District Court Judge Amit P. Mehta allowed most of the claims against Trump to proceed past the motion to dismiss stage but not without a certain amount of hand-wringing.[97] Judge Mehta called the question of whether Trump should enjoy absolute immunity "not an easy issue."[98] The First Amendment issues seem to be a close call, too. The court went further than many district courts by looking at the broader context of Trump's January 6 rally to hold that his speech "plausibly" constituted "words of incitement."[99] But Judge Mehta, like Judge McKeague, reasoned that Trump's winks and nods to heavily armed protesters tended to absolve him. Taking Trump's exhortation to march "peacefully and patriotically" at face value, Judge Mehta cited the Sixth Circuit's opinion in *Nwanguma* to conclude: "Those words are a factor favoring the President."[100] This is in a context in which the president had been actively fomenting inauguration related violence for days and violence in general for years.

To Mehta's credit, he does not apply the First Amendment quite as pedantically as McKeague. Had *Thompson* followed the Sixth Circuit's ruling in *Nwanguma*, Trump would almost certainly bear no liability for January 6th. Sure, he said "fight like hell,"[101] but the word "fight" can mean many things. One can "fight" for one's children in a custody battle and no physical violence need occur. The "Fight for 15" campaign presumably does not mean you get into fisticuffs with your boss to raise

96. Thompson v. Trump, 590 F. Supp. 3d 46 (D.D.C. 2022).

97. *Id.* at 63.

98. *Id.* at 73–74.

99. *Id.* at 115.

100. *Id.* at 117. One might reasonably assume that few federal judges have ever seen a gangster movie in which a well-dressed mafioso tells a frightened shopkeeper, "[y]ou've got a nice [place] here. It'd be a shame if anything were to . . . *happen* to it." *See Shame If Something Happened*, TROPEDIA, https://tropedia.fandom.com/wiki/Shame_If_Something_Happened (last visited Oct. 22, 2024). Trump is a true aficionado of this sort of barely concealed threat. *See, e.g.*, Josephine Harvey, '*Like A Mobster': Joe Scarborough Rips Trump's Menacing Remark About Potential Jail Time*', HUFFPOST (July 21, 2023, 11:57 AM), https://www.huffpost.com/entry/joe-scarborough-trump-dangerous-jail_n_64ba9243e4b08cd259dc13ac (quoting Trump as saying the possibility of jail time for him is "very dangerous thing to even talk about, because we do have a tremendously passionate group of voters — much more passion than they had in 2020 and much more passion than they had in 2016."). Then again, perhaps I am too cynical in thinking that the mafioso may not really be extending well-wishes to the shopkeeper, or that there may be more than just "passion" implied in Trump's speech.

101. H.R. REP. NO. 117-663, at 104 (2022).

your wage.[102] Trump did not specifically say "march down to the Capitol building, break the doors down, beat a police officer to death, and ransack congressional offices," so he could not have incited violence under the Sixth Circuit's expansive interpretation of free speech. And what does "like hell" mean? According to the Cambridge English Dictionary, it could be used to mean "certainly not," in which case he was telling people not to fight at all.[103] Besides, after all the violence at the Capitol, Trump said "[w]e don't want anybody hurt" which is a lot like saying "don't hurt 'em," and therefore potentially exculpatory.[104] So perhaps *Thompson* is a signal that the judiciary is finally moving in the right direction.

However, given the overall context (i.e., "[t]he first ever presidential transfer of power marred by violence"),[105] Judge Mehta still extends Trump the benefit of the doubt to an unsettling degree at the pleading stage. Dismissing Swalwell's aiding-and-abetting-assault claim, the court writes: "Swalwell must plead facts establishing that the President had an increased awareness of a risk of a violent assault at the Capitol. Not surprisingly, he does not meet this demanding standard."[106] Of course, Swalwell could not demonstrate Trump's "increased awareness" without the benefit of discovery. Swalwell's intentional and negligent infliction of emotional distress claims were also dismissed as "largely conclusory," with no opportunity to develop a record to support those claims.[107] The former president's closest allies were also let off the hook; the court acknowledged that Rudy Giuliani and Donald Trump Jr. were engaged in overt conspiratorial acts, but their calls for "trial by combat," assertions that the "stolen" election "has to be vindicated to save our country," and warning that "we're coming for you" were nonetheless "protected expression," so the claims against them were dismissed, again without any discovery.[108] In all, the *Thompson* opinion cannot be read as a full-throated denunciation of an attempt to provoke a violent overthrow of an election. The opinion is essentially eighty pages of analyzing Trump's characteristically insincere arguments to determine that only a

102. *See generally* Yannet Lathrop et al., *Ten-Year Legacy of the Fight for $15 and a Union Movement*, NAT'L EMP. L. PROJECT (Nov. 29, 2022), https://www.nelp.org/insights-research/10-year-legacy-fight-for-15-union-movement/.

103. *Like Hell*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/like-hell (last visited Oct. 22, 2024).

104. Brian Naylor, *Trump Downplays Insurrection but Tells Supporters to "Go Home,"* NPR (Jan. 6, 2021, 5:13 PM), https://www.npr.org/sections/congress-electoral college-tally-live-updates/2021/01/06/954098712/in-video-trump-sympathizes-with-protesters-but-tells-them-to-go-home.

105. Thompson v. Trump, 590 F. Supp. 3d 46, 62 (D.D.C. 2022).

106. *Id.* at 125.

107. *Id.* at 122.

108. *Id.* at 66, 106, 118.

few claims may proceed past the initial filing stage. Critically, the court summarily denied the plaintiffs' request that the judge order Trump not to engage in similar misconduct pending the outcome of the litigation, holding that the plaintiffs "have not plausibly pleaded at this stage any likelihood of future injury."[109] As of this writing, two and a half years after the January 6th insurrection, discovery in *Thompson* is just now beginning, and Donald Trump is back on the campaign trail.[110]

Pretending for a moment that the courts are a monolith, what can be said about their treatment of Trump's incitement of political violence? It is beyond cavil that no court in any jurisdiction has been willing to impose meaningful civil consequences on Trump for what amounts to an unprecedented, brutal subversion of American democracy. Most will not even allow incitement-type claims to proceed beyond a motion to dismiss. Of the courts that have allowed claims to proceed, none have acted with urgency; no injunctions or meaningful sanctions have been issued, and Trump has been ordered to give only a single deposition in nearly a decade of incitement litigation that spans the entire country. Stacked up against other courts, the opinion of the D.C. district court looks positively brave. In the aggregate, it seems the only way the courts can assign liability to someone trying to foment election-related violence is if they come very close to actually overthrowing the government—and this extreme scenario might only get a plaintiff to the discovery phase.

When the courts fail to prevent, or even hinder, obviously bad actors from their attempts to openly and violently disrupt democratic processes, we should ask why.

III. WHY DO COURTS DO WHAT THEY DO?

A. First Amendment Jurisprudence and the Legal Decision-Making Model

There is nothing I can say about incitement jurisprudence that has not been said (and said better) by other scholars elsewhere.[111] What I propose here is that the courts' recent incitement decisions have little to do with the *Brandenburg* standard,[112] the First Amendment, or anything we would call "law" at all.

109. *Id.* at 73 n.7.

110. Scheduling Order, Thompson v. Trump, No. 1:21-cv-02265-APM (D.D.C. filed Apr. 6, 2023).

111. *See, e.g.*, JoAnne Sweeny, *Incitement in the Era of Trump and Charlottesville*, 47 CAP. U. L. REV. 585 (2019).

112. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that inciting speech cannot be restricted unless it advocates for "imminent lawless action").

First, free speech jurisprudence does not demand the degree of absolutism given to Trump in *Nwanguma* or any other incitement case cited above. Professor James Weinstein has described a "large range of speech regulated on account of its content, all without a hint of interference from the First Amendment," concluding that "a more accurate snapshot of First Amendment protection is almost the photonegative of the all-inclusive approach: highly protected speech is the exception, with most other speech being regulable because of its content with no discernable First Amendment constraint."[113] This assertion will likely ring true to attorneys who sat through two semesters of constitutional law classes in law school, and it is true when it comes to incitement-type cases specifically.[114]

Take the courts' near-universal approach to solicitation crimes. To put it mildly, courts are not shy about prosecuting folks for suggesting that other people engage in bad actions, even when the suggestion is vague. The U.S. Court of Appeals for the Seventh Circuit in *United States v. White* found that a member of the "American National Socialist Workers Party" could be tried for posting on a website that "everyone associated" with the trial of another notorious white supremacist leader "ha[ve] deserved assassination for a long time," and then subsequently posting the personal information of a juror in that case.[115] A panel including Judge Richard Posner held, "that a request for criminal action is coded or implicit" does not entitle it to First Amendment protection.[116] Indeed, the defendant did not give any command to anyone—he simply posted some cryptic language, followed by a posting of a juror's personal information three years later.[117] In *United States v. Hale*, an appellate court held that there was sufficient evidence to uphold a solicitation conviction where the defendant never explicitly asked his chief enforcer to do anything but locate a judge's home address, and made statements such as, "that information's been pro-, provided. If you wish to, ah, do anything yourself, you can, you know?"[118] The defendant in that case even went so far as to say, "I can't take any steps to further anything illegal," but this was not enough to overturn his solicitation conviction.[119]

The courts' willingness to overlook the supposed requirement that speech explicitly advocate violence extends to civil cases, too. In *Doe v. Mckesson*, an unidentified police officer sued for injuries he sustained at

113. Weinstein, *supra* note 86, at 492.
114. *See* Sweeny, *supra* note 111, at 595.
115. 610 F.3d 956, 957 (7th Cir. 2010).
116. *Id.* at 960.
117. *Id.* at 957.
118. 448 F.3d 971, 979 (7th Cir. 2006).
119. *Id.*

a Black Lives Matter rally in 2016.[120] According to the complaint, demonstrators stole water bottles from a convenience store and threw them at police.[121] When those ran out, an unidentified person threw a "rock-like object" that hit the plaintiff.[122] The complaint alleged that "the protest was peaceful until activist[s] began pumping up the crowd."[123] DeRay Mckesson, an organizer and media personality, was one of those activists. In that case, the plaintiff did not allege that Mckesson himself threw anything, nor that he told anyone to throw anything, nor even that he suggested any violent action of any kind. The complaint just says that Mckesson was "present during the protest and . . . did nothing to calm the crowd."[124] The closest the plaintiff gets to alleging incitement is his statement that Mckesson "directed" demonstrators to protest on the public road in front of police headquarters and "knew or should have known . . . that violence would result" from the demonstration he "staged."[125] And yet the U.S. Court of Appeals for the Fifth Circuit saw the First Amendment as "not a bar" to foreseeability-based liability for the unlawful acts of others,[126] a ruling contrary to the district court's relatively lenient holding in *Nwanguma*. The U.S. Supreme Court vacated the ruling due to a provision of state law but declined to hear the First Amendment issue.[127] The Louisiana Supreme Court later held that "Officer Doe has plausibly alleged that Mckesson breached his duty of reasonable care in the course of organizing and leading the Baton Rouge demonstration," giving the final green light for the case to proceed to discovery.[128]

None of the courts above—indeed, no court in history—would say that speech could only be actionable in the unlikely event that a speaker explicitly said, "[d]o a violent thing right this very second." To do so would subvert the entire idea that words may *implicitly* encourage violence, which has long been the accepted standard.[129] In fact, neither the Sixth

120. 945 F.3d 818, 822–23 (5th Cir. 2019), *vacated* 592 U.S. 1 (2020).
121. *Id.* at 823.
122. *Id.*
123. Doe v. Mckesson, 339 So. 3d 524, 527 (La. 2022) (alteration in original).
124. *Id.* (internal quotation marks omitted).
125. *Mckesson*, 945 F.3d at 841 (alteration in original).
126. *Id.* at 832.
127. Doe v. Mckesson, 592 U.S. 1 (2020) (per curiam).
128. *Mckesson*, 339 So. 3d at 531–32. On remand, Doe v. Mckesson, 71 F.4th 278, 289 (5th Cir. 2023), the Fifth Circuit again rejected the argument that the First Amendment prevented Doe's claims. For another recent case that examines speech that would be protected were it not for context, see Sines v. Kessler, 324 F. Supp. 3d 765, 802 (W.D. Va. 2018).
129. *See* Hess v. Indiana, 414 U.S. 105 (1973)*; see also* Nwanguma v. Trump, 903 F.3d. 604, 609 (6th Cir. 2018) ("Under the *Brandenburg* test, only speech that explicitly or

Circuit nor Judge McKeague himself has ever been so hawkish on the First Amendment prior to Trump's campaign shenanigans. Judge McKeague has joined opinions holding, for example, that the Free Speech Clause does not keep a court from telling a third party nonlitigant that it cannot contact class members if it thinks those communications were "misleading,"[130] and that it is constitutionally permissible to impose a permanent visitation restriction on an incarcerated person's loved one in retaliation for complaints of abuse by guards.[131] Even judges thought of as liberals do not seem fazed by, say, an eight-level sentence enhancement to a Black defendant for making suggestive Facebook comments.[132] Such issues are decided under different legal standards, to be sure, but tend to controvert any notion of free-speech absolutism as a guiding judicial philosophy.

Furthermore, courts generally delve further into an extensive set of circumstances—beyond the face of a complaint or indictment—to determine the context in which certain comments were made. This is true not just in the context of speech-based crimes like those discussed above, but in the Supreme Court's most famous speech cases, including *Brandenburg*, *Hess*, and *Snyder*, all of which were decided on appeal after a verdict was reached.[133] Even the Sixth Circuit's en banc opinion in *Bible*

implicitly encourages the imminent use of violence or lawless action is outside the protection of the First Amendment.").

130. Fox v. Saginaw County, 35 F.4th 1042, 1047–48 (6th Cir. 2022).

131. *See* Haertel v. Mich. Dep't of Corr., No. 20-1904, 2021 WL 4271908, at *3 (6th Cir. May 11, 2021).

132. *See* United States v. Adams, 598 F. App'x 425, 426–28 (6th Cir. 2015). The opinion was written by Judge Martha Craig Daughtrey, a Clinton appointee and former Vanderbilt professor noted for being the first woman to serve on the Tennessee Supreme Court, among other accomplishments. *A Trailblazer in Women's History, Judge Martha Craig "Cissy" Daughtrey*, CHATTANOOGAN (Mar. 22, 2023), https://www.chattanoogan.com/2023/3/22/466120/A-Trailblazer-in-Women-s-History-Judge.aspx. The defendant in that case posted a picture of an informant along with a suggestion that the informant should be harmed or killed. *Adams*, 598 F. App'x at 426–27. Daughtrey held that the defendant's guilty plea constituted a waiver of any First Amendment argument. *Id.* at 429.

133. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (jury verdict); Hess v. Indiana, 297 N.E.2d 413 (Ind. 1973) (tried by court with stipulated facts); Snyder v. Phelps, 562 U.S. 443, 450 (2011) (jury verdict). It should be noted that in his dissent Justice Rehnquist criticized the lack of factual development in *Hess*:

> The majority makes much of this "uncontroverted evidence," but I am unable to find anywhere in the opinion an explanation of why it must be believed. Surely the sentence "We'll take the fucking street later (or again)" is *susceptible of characterization as an exhortation*, particularly when uttered in a loud voice while facing a crowd. The opinions of two defense witnesses cannot be considered *proof* to the contrary, since the trial court was perfectly free to reject this testimony if it

Believers, relied heavily upon by McKeague in the *Nwanguma* opinion, was issued upon appeal from a ruling on cross motions for summary judgment, in which both parties asserted that no material facts were in dispute.[134] The *Nwanguma* court's out-of-hand dismissal of the need for any discovery at all must therefore be seen as an outlier, or at the very least as a deliberate decision to buck ordinary procedural conventions by the Sixth Circuit. *Nwanguma*'s myopic focus on the specific words of a speaker, to the point that the opportunity to determine the context in which those words were used is precluded, is not consistent with Supreme Court precedent,[135] the *Thompson* opinion,[136] or its prior rulings.

The bottom line is: To analyze Trump-era incitement cases as "normal" First Amendment cases, or as jurisprudentially informed at all, is to invite madness. It is natural for litigators to want to make sense of the inconsistencies and absurdities resulting from these decisions under a standard legal decision-making model,[137] in which rules from one opinion are followed or distinguished in the next, but to do so bends the imagination to the point of breaking. How, then, are we to understand the courts' laissez-faire response to election violence?

B. The Attitudinal Model

One way is to assume the courts are fundamentally anti-democratic and agree with Trump's agenda, and/or that they generally believe right-wing politicians should be able to use violence to influence elections.

> so desired. Perhaps, as these witnesses and the majority opinion seem to suggest, appellant was simply expressing his views to the world at large, *but that is surely not the only rational explanation*.

Hess v. Indiana, 414 U.S. 105, 111 (1973) (Rehnquist, J., dissenting) (emphasis added). This suggests that Rehnquist, at least in theory, would have allowed the incitement cases against Trump to proceed to discovery. However, as discussed in subsequent sections, the analysis is not that simple.

134. Bible Believers v. Wayne County, 805 F.3d 228, 241–42 (6th Cir. 2015).

135. *See* Counterman v. Colorado, 600 U.S. 66, 69 (2023) (holding that "true threat" analysis requires proof of the "subjective understanding of the threatening nature of his statements," and if that proof is lacking, even the plain meaning of the speech may be negated); *see also* United States v. Hansen, 599 U.S. 762, 775 (2023) (explaining that in the context of statutory construction, "[w]hen words have several plausible definitions, context differentiates among them").

136. Thompson v. Trump, 590 F. Supp. 3d 46, 115 (D.D.C. 2022) ("The 'import' of the President's words must be viewed within the broader context in which the Speech was made and against the Speech as a whole . . . . It is reasonable to infer that the President would have known that some supporters viewed his invitation as a call to action.").

137. *See* Kate Webber, *It Is Political: Using the Models of Judicial Decision Making to Explain the Ideological History of Title VII*, 89 ST. JOHN'S L. REV. 841, 843 (2015).

Scholars might call this the "attitudinal model" of decision-making.[138] Under that theory, judges "decide cases based on their individual political preferences and are not constrained in that ideological pursuit by congressional or presidential intent, nor even by the dictates of the law."[139] In other words, judges do whatever they want and dress up their personal biases in fancy constitutional clothes.

If the legal decision-making model is too naïve, there are good reasons to think the attitudinal model is too cynical. Thus far, the First Amendment has not presented a barrier to prosecuting the hundreds of Trump acolytes who engaged in "legitimate political discourse" at the Capitol on January 6th.[140] In the civil realm, the courts have allowed suits to go forward against other officials—even police officers—who contributed in various ways to campaign rally acts of violence,[141] and in 2021 a federal jury in Virginia issued a twenty-six million dollar judgment against right-wing provocateurs.[142] It is true that the judges who issued the decisions that were most deferential to Trump were white, male, and appointed by Republican presidents. But the judges who did not fall into that demographic gave him a pass, too, and even when they did not, their response was anything but resolute.[143]

C. The Strategic Decision-Making Model

Perhaps the best way to analyze the behavior of the courts vis-á-vis Trump's incitement is by reference to the strategic decision-making model sometimes referred to as "rational choice" or "positive political"

138. *Id.* at 859.

139. *Id.*

140. *See generally* Martin Pengelly, *Republican Party Calls January 6 Attack 'Legitimate Political Discourse,'* GUARDIAN (Feb. 4, 2022, 4:39 PM), https://www.theguardian.com/us-news/2022/feb/04/republicans-capitol-attack-legitimate-political-discourse-cheney-kinzinger-pence.

141. Puente v. City of Phoenix, No. CV-18-02778-PHX-JJT, 2022 WL 357351, at *2–3, *19 (D. Ariz. Feb. 7, 2022).

142. Ellie Silverman et al., Spencer, Kessler, Cantwell and Other White Supremacists Found Liable in Deadly Unite the Right Rally, WASH. POST., https://www.washingtonpost.com/dc-md-va/2021/11/23/charlottesville-verdict-live-updates/ (Nov. 23, 2021, 8:32 PM) ($26 million verdict). *See generally* Sines v. Kessler, 324 F. Supp. 3d 765, 784 (W.D. Va. 2018) (noting that nearly all claims were allowed to proceed against all defendants based on the pleadings, except for a few dismissed on *Iqbal* plausibility grounds—not on First Amendment principles). The district court later reduced the punitive damages award from $24 million to $350,000. Michelle Watson, *Virginia Judge Decreases Punitive Damages Owed by Unite the Right Organizers from $24 Million to $350,000*, CNN (Jan. 4, 2023, 8:29 PM), https://www.cnn.com/2023/01/04/us/virginia-unite-the-right-punitive-damages/index.html.

143. *See* Nwanguma v. Trump, 903 F.3d 604, 614 (6th Cir. 2018) (White, J., concurring).

theory. Professors Daniel Rodriguez and Matthew McCubbins explain: "Because judges act in the middle of a political process and are *not* the endpoint, they must act strategically to get what they want. That is, judges must anticipate how other political actors will react and must take these reactions into account."[144] Under some interpretations of this model, commentators suggest that judges trick themselves into believing their own hackneyed rationales. Professor Dan Kahan explains that even where judges were "sincerely basing their decisions on their views of the law [,] . . . what they understood the law to require was nevertheless shaped by . . . subconscious, extralegal influences."[145] Judge Posner once asserted, "[j]udges have a terrible anxiety about being thought to base their opinions on guesses or their personal views. To allay that anxiety, they rely on the apparatus of precedent and history, much of it extremely phony."[146]

Through this lens, the evidence suggests that First Amendment jurisprudence has had less bearing on the outcome of Trump's incitement cases than we might like to think. Instead, the Free Speech Clause becomes a tool that can be used to handily dispose of difficult cases. A court faced with the uncomfortable task of involving itself in a heated political battle where the stakes are high may instead hide behind the rampart of unrestrained "free speech." Taking down bad actors is one thing, but if that bad actor happens to be the President of the United States, the power dynamics change, and, consciously or otherwise, the court makes "strategic" choices to account for that change. For reasons explained in more detail below, this theoretical framework best explains why jurists might cautiously parse language and conduct clearly designed to result in violence.

IV. COULD THE COURTS HAVE DONE ANYTHING?

A threshold question is whether the courts *could* have done anything to stop the insurrection on January 6, 2021, or any other act of election violence inspired by former President Trump. The specific inquiry into whether courts can effectively prevent election violence is a surprisingly difficult one. No significant studies have been published to answer this question when it comes to American courts. We are, after all, early in the

144. Mathew D. McCubbins & Daniel B. Rodriguez, *The Judiciary and the Role of Law*, *in* THE OXFORD HANDBOOK OF POLITICAL ECONOMY 273, 274 (Donald A. Wittman & Barry R. Weingast eds., 2008).

145. Dan M. Kahan, *"Ideology in" or "Cultural Cognition of" Judging: What Difference Does It Make?*, 92 MARQ. L. REV. 413, 417 (2009).

146. Nancy Scherer, *Viewing the Supreme Court's Marriage Cases Through the Lens of Political Science*, 64 CASE W. RSRV. L. REV. 1131, 1132 (2014).

era of presidential candidates using violence to influence an election. But even when the whole of world legal history is examined, the question is practically unanswered.[147] Since election violence could become increasingly common in the United States over the next decade,[148] we should dedicate some time and energy to answering it. If courts cannot successfully deter election violence, it is hardly worth examining the "strategic" choices made by judges in incitement cases because the only rational strategy for an impotent actor is quite clear: Do not try to act. At the very least, an answer to this question will help practitioners know if we are wasting our time filing incitement lawsuits.

In general, electoral violence is less likely where there are strong institutions with adequate enforcement mechanisms.[149] This includes institutions charged with "implementation of the legal framework" in a way that demonstrates that "violence makers" will be punished.[150] Conversely, weak institutions may be inadequate when it comes to deterring violence. A report by the Global Commission on Elections, Democracy, and Security reveals that "[e]lectoral violence is more likely in a context in which institutions like the courts, the criminal justice system, the security forces, and the media are corrupt or too weak to carry out their roles in the face of violence and intimidation."[151] The notion that accountability-creating institutions can halt political violence is uncontroversial. But most of the credible work on violence prevention principles speak of the courts only under the generic umbrella of

147. *See* Stephanie M. Burchard & Meshack Simati, *The Role of the Courts in Mitigating Election Violence in Nigeria*, 38 CADERNOS DE ESTUDOS AFRICANOS 123, 130 (2019) ("[N]o research at this point exists to help us understand the effect of courts on electoral violence.").

148. *See* Philip Elliott, *Startling New Poll Finds Political Violence Gaining a Mainstream Foothold*, TIME (Oct. 25, 2023, 7:00 AM), https://time.com/6328179/political-violence-jan-6-extremism/.

149. *See* SEAD ALIHODŽIĆ & ERIK ASPLUND, INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, THE PREVENTION AND MITIGATION OF ELECTION-RELATED VIOLENCE: AN ACTION GUIDE 16 (2d ed. 2018), https://www.researchgate.net/publication/328762059_The_Prevention_and_Mitigation_of_Election-related_Violence_An_Action_Guide.

150. Kristine Höglund & Anna K. Jarstad, *Strategies to Prevent and Manage Electoral Violence: Considerations for Policy*, AFR. CTR. FOR CONSTRUCTIVE RESOL. DISP.: POL'Y & PRAC. BRIEF, June 2010, at 3–4, https://www.files.ethz.ch/isn/121072/Brief1.pdf.

151. GLOB. COMM'N ON ELECTIONS, DEMOCRACY & SEC., DEEPENING DEMOCRACY: A STRATEGY FOR IMPROVING THE INTEGRITY OF ELECTIONS WORLDWIDE 25 (2012), https://www.cs.yale.edu/homes/peralta/deepening_democracy.pdf; *see also* Sherna Tamboly, *The Role of the Judiciary in Preventing Post-Electoral Violence*, UNIV. TORONTO FAC. LAW, https://ihrp.law.utoronto.ca/role-judiciary-preventing-post-electoral-violence (last visited Oct. 22, 2024).

"institutions," and lack any empirical link between the actions of a judiciary and a reduction in violence.[152]

The best contemporary evidence of the courts' potential effectiveness in stopping election violence comes from Africa. Since the continent-wide push for democratization in the 1990s, around fifty percent of African elections have included some election-related violence.[153] Two political scientists, Stephanie Burchard and Meshack Simati, have extensively examined the role of African courts in preventing such incidents. After in-depth studies of Nigeria and Kenya, they concluded that the courts can be "instrumental" in alleviating both pre- and post-election violence.[154] According to their hypothesis,

> In situations where electoral actors believe that there are no viable venues to resolve problematic elections, political actors may be more likely to turn to intimidation, harassment, and physical attacks to win elections. Furthermore, if political actors believe that an independent court system will hold them accountable for electoral infractions, they may be less likely to engage in fraud and violence. If no such judicial avenue exists, the inverse may be true.[155]

Burchard and Simati's research supports these conclusions. As Kenya has moved toward greater judicial independence, election violence has dropped significantly.[156] Similarly, in Nigeria, court intervention has reduced the likelihood of pre-election violence by as much as sixty percent.[157]

These numbers do not tell the whole story. Electoral violence in Nigeria, though down from its peak in 2011, has remained steady over the last two election cycles, despite continued involvement by election

152. *See* Burchard & Simati, *supra* note 147, at 130–31. There is a robust body of research on Latin America that suggests "strong judiciaries play a critical role in consolidating democracy." *Id.* at 131. However, this research does not say much about the ability of courts to combat election violence specifically. *Id.*

153. Stephanie Burchard, *Presidents Who Threaten Election Violence Lose Votes*, WASH. POST (Nov. 3, 2020, 5:00 AM), https://www.washingtonpost.com/politics/2020/11/03/presidents-who-threaten-election-violence-lose-votes/.

154. *See* Burchard & Simati, *supra* note 147, at 140.

155. *Id.* at 126.

156. Meshack Simati & Stephanie Burchard, *Election Violence in Kenya: When and How Courts Matter*, *in* GIANT STEPS IN THE DEVELOPMENT OF AFRICA 40 (Maurice N. Amutabi & Magdalene Ndeto Bore eds., 2021).

157. Burchard & Simati, *supra* note 147, at 140.

petition tribunals.[158] In Kenya, a long trend away from violent elections was upended in 2022, when instances of reported pre-election rioting "far exceeded" similar reports in 2017.[159] And in any event, comparing the United States to democratizing countries like Nigeria and Kenya might be cramming a square peg into a round hole. Still, Burchard and Simati's research is the best (indeed, the only) starting point available. It, along with the general principles of institutional importance and centuries of conventional wisdom on the role of the courts, makes it reasonable to conclude that courts can be effective tools to prevent election violence.[160] The next natural question is: how can they be *most* effective?

A. Confidence in the Courts

First, where confidence in courts is high, violence is less likely, and vice versa. Surveys conducted in 2014–15 demonstrated that a large minority of respondents in thirty-six African countries had no confidence in the courts at all, and a third believed that most judges were corrupt.[161] In those years, and in those countries, it was not uncommon to see pre-

158. Andrea Carboni & Ladd Serwat, *Political Violence and the 2023 Nigerian Election*, ACLED (Feb. 22, 2023), https://acleddata.com/2023/02/22/political-violence-and-the-2023-nigerian-election/.

159. Clionadh Raleigh, *Kenya's Political Violence Landscape in the Lead-Up to the 2022 Elections*, ACLED (Aug. 9, 2022), https://acleddata.com/2022/08/09/kenyas-political-violence-landscape-in-the-lead-up-to-the-2022-elections/.

160. The specific question of whether American courts could stop Trump's particular brand of election violence is necessarily a matter of pure speculation. There is some anecdotal evidence to suggest that courts might have stopped—and might still stop—Trump's harmful speech. *See* Ben Meiselas, *Trump Gets Scared After Federal Judge Warns His Lawyers*, MEIDASTOUCH NETWORK (Aug. 11, 2023), https://www.meidastouch.com/news/trump-gets-scared-after-federal-judge-warns-his-lawyers (noting a brief social media break following the gag order issued against Trump by the D.C. district court). Trump still participates in court proceedings, and even took the stand in his civil fraud trial in 2023; this is hardly the behavior of a strongman who doesn't accept the authority of the courts. *See Trump Completes Testimony in N.Y. Civil Fraud Trial*, WASH. POST, https://www.washingtonpost.com/national-security/2023/11/06/trump-testimony-ny-fraud-trial/ (Nov. 6, 2023, 5:11 PM). *Cf.* Paula K. Speck, *The Trial of the Argentine Junta: Responsibilities and Realities*, 18 U. MIA. INTER-AM. L. REV. 491, 500–03 (1987) (discussing the refusal of dictator Jorge Videla and other military officers accused of human rights violations to accept the authority of Argentinian civil courts). Though Trump's strategy is to undermine confidence in the courts, it seems he is not willing to go all the way—yet.

161. Burchard & Simati, *supra* note 147, at 131 (citing CAROLYN LOGAN, AFROBAROMETER, AMBITIOUS SDG GOAL CONFRONTS CHALLENGING REALITIES: ACCESS TO JUSTICE IS STILL ELUSIVE FOR MANY AFRICANS 2 (2017), https://afrobarometer.org/wp-content/uploads/migrated/files/publications/Policy%20papers/ab_r6_policypaperno39_access_to_justice_in_africa_eng.pdf).

electoral violence resulting in multiple fatalities.[162] In contrast, where most citizens have "some trust or a lot of trust in courts," incidences of pre-election violence decline by as much as forty-six percent.[163]

According to Burchard and Simati's theory, where political actors are not confident in the electoral process itself, and they are not confident that the courts will properly mediate an election dispute where the results are in doubt, they will turn to violence because they feel like there is no other choice. As Burchard puts it, "[I]f folks don't trust the electoral process AND don't trust the [c]ourts to remedy injustices, there is no longer a mechanism to prevent violent recourse as a viable alternative to electoral loss."[164] This conclusion parallels the time-honored idea that American courts "depend on the goodwill of the citizenry to remain viable,"[165] and Justice Frankfurter's oft-repeated maxim that "[t]he Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction."[166] Dr. Burchard believes public confidence is such a critical component that courts should focus their efforts on building the appearance of integrity.[167] And the courts should not be solely—or even primarily—responsible for their own image maintenance. Burchard states:

> I think that publicizing the fairness, quickness, and impartiality of the [c]ourts can be done by a number of other tangential actors. But to the extent that the [c]ourts are concerned about public opinion and outreach, they can engage in outreach campaigns and publicity campaigns to ensure that the [c]ourts (in general) remain a trusted institution.[168]

B. Punishment as a Deterrent

Second, Burchard and Simati theorize that "a robust court system may act as a deterrent for violence if political actors believe they will be punished for the use of violence during an election campaign."[169] It seems a matter of common sense that when politicians who are inclined to use violence as a political tool do not "believe that an independent court

162. *See id.* at 133.
163. *Id.* at 140.
164. Interview with Stephanie M. Burchard, Adjunct Professor, George Wash. Univ. (Sep. 6, 2022) (on file with author).
165. James. P. Wenzel et al., *The Sources of Public Confidence in State Courts: Experience and Institutions*, 31 AM. POL. RSCH. 191, 192 (2003).
166. Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).
167. *See* Interview with Stephanie M. Burchard, *supra* note 164.
168. *Id.*
169. Burchard & Simati, *supra* note 147, at 130.

system will hold them accountable for electoral infractions," then they become more inclined to violence.[170] However, there is no hard data to measure how much this inclination is affected by the courts.[171] Dr. Burchard notes: "As far as I know, very few perpetrators of election violence have been tried and convicted in Kenya, although I think this is beginning to change."[172] She suggests that the degree to which "increased prosecution and punishment of offenders have a deterrent effect on election violence in Kenya in the future" could be tested with "longitudinal data over time or in[-]depth interviews with alleged perpetrators of election violence."[173]

C. Violence as a Judicial Influencer

Another important takeaway from Simati's research is that bad actors can effectively use election violence to manipulate judicial decision-making.[174] Judges are "influenced by the political environment," an observation that rings true both in the United States and abroad.[175] In democratizing countries, "non-state actors will strategically engage in post-election violence to create political uncertainty in order to force the hand" of the judiciary.[176] This theory relies on the strategic model of judicial decision-making explained above. Simati says:

> The underlying assumption in the rational choice model is an actor will make the decision that maximizes the utility of their choice. So, the judges in my universe of cases will make the best decision that suits them (not other actors) while considering the constraining and incentivizing factors.[177]

The "constraining and incentivizing factors" involved can obviously vary quite a bit depending on the system of government and other attendant circumstances, but the point is that where a system allows political violence to go unchecked, that violence becomes a factor in the

170. *Id.* at 126.
171. *Id.* at 130.
172. Interview with Stephanie M. Burchard, *supra* note 164.
173. *Id.*
174. *See* MESHACK B. SIMATI, POST-ELECTION VIOLENCE IN AFRICA: THE IMPACT OF JUDICIAL INDEPENDENCE 3, 17–18 (2020).
175. *Id.* at 3; *see also* Bryan Calvin et al., *On the Relationship Between Public Opinion and Decision Making in the U.S. Courts of Appeals*, 64 POL. RSCH. Q. 736, 743 (2011).
176. SIMATI, *supra* note 174, at 3.
177. Interview with Meshack Simati, Associate Professor, Cal. State Univ., San Marcos (Aug. 12, 2022) (on file with author).

judicial decision-making process—one that can readily be created by political actors.

Even absent the precedent of a presidential candidate calling for violence on the campaign trail, we have ample evidence of American courts responding to threats of violence, even if that violence was not deliberately targeted at the judiciary. Chief Justice Earl Warren infamously allowed violence to shape the Supreme Court's opinion in *Brown v. Board of Education*,[178] as he "began the conference following the oral argument by stating that segregation could only be sustained on the basis of racial inferiority, but the Court should move cautiously to avoid 'inflam[ing] the South more than necessary.'"[179] Fear of white supremacist violence may have stifled further action by the courts on civil rights during that era; the year after *Brown*, the Court refused to hear an anti-miscegenation case.[180] An anonymous Justice later explained that "[o]ne bombshell at a time is enough."[181]

V. WHAT HAPPENED: USING BURCHARD & SIMATI'S THEORIES AND THE STRATEGIC DECISION-MAKING MODEL TO EXPLAIN JUDICIAL INACTION

With these principles in mind, and operating under the assumption that courts are theoretically capable of preventing political violence, we can do some basic calculations regarding why judges have thus far failed to take meaningful action to stop former President Trump's violence-inducing statements. First: the role of confidence. Our judiciary, unlike those in countries most prone to electoral violence, is considered fully independent. And yet the public's confidence in the courts is at an all-time low. A 2018 poll revealed that only thirty-seven percent of Americans are "very" confident in the judiciary.[182] That number appears to have gone down in the last six years. A study by the National Center for State Courts found that "public trust and confidence in the courts continues to slide," dropping three percentage points from 2021 to

178. 347 U.S. 483 (1954).

179. *See* BARRY FRIEDMAN ET AL., JUDICIAL DECISION-MAKING: A COURSEBOOK 30 (2020) (citing RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 682 (2004)) (describing how the threat of political violence sways American judges).

180. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 81 (2d ed. 2008).

181. *Id.* (citing STEPHEN L. WASBY ET AL., DESEGREGATION FROM BROWN TO ALEXANDER: AN EXPLORATION OF SUPREME COURT STRATEGIES 141 (1977)).

182. *Do Americans Have Confidence in the Courts?*, WILLOW RESEARCH (Mar. 27, 2019), https://willowresearch.com/american-confidence-courts/.

2022.[183] Moreover, a 2022 Gallup poll shows that only forty-one percent of Americans have a favorable view of the Supreme Court—only slightly above the lowest level of public trust since polling began in 1972.[184] Despite its relative isolation from the executive and legislative branches, two-thirds of the public perceive the judiciary as "too political."[185] This is consistent with an overall decline in public confidence in virtually all American institutions over the last forty years.[186] The corresponding rise in political violence fits the Burchard-Simati hypothesis: less confidence equals more bloodshed.

In the United States, however, not having a "viable alternative to electoral loss" is probably not a factor driving election violence. The courts did not overturn the results of the 2016 election, but it was not aggrieved supporters of Hillary Clinton who perpetrated violence at political rallies from 2016 to 2020 out of a supposed lack of confidence in governing institutions, it was still Trump supporters. And to say that the January 6, 2021 insurrection was the product of a "lack of confidence in the courts" is to succumb to delusion; even Trump himself does not believe there was a basis to overturn the 2020 election results[187] (though he tried to get dozens of courts to say there was).[188] Under the Burchard-Simati model, it is a tribunal's willingness to *undo* election results that stokes public confidence and therefore lessens the risk of violence.[189] But that does not quite translate here; if the type of "confidence" necessary to prevent violence means confidence that the courts will cast aside reason and do whatever a political bully might like, rather than being a neutral

183. *The State of State Courts: A 2022 NCSC Public Opinion Survey*, NAT'L CTR. FOR STATE CTS., https://www.ncsc.org/consulting-and-research/areas-of-expertise/court-leadership/state-of-the-state-courts/the-state-of-state-courts-a-2022-ncsc-public-opinion-survey (last visited Oct. 22, 2024).

184. Robert Katzberg, *Trump's Gag Order Was Upheld. That Gives the Supreme Court a Huge Opportunity*, SLATE (Dec. 8, 2023, 2:49 PM), https://slate.com/news-and-politics/2023/12/trump-gag-order-upheld-supreme-court-ruling.html (citing *Supreme Court*, GALLUP, https://news.gallup.com/poll/4732/supreme-court.aspx).

185. *Do Americans Have Confidence in the Courts*, *supra* note 182.

186. *Id.*

187. Eastman v. Thompson, 636 F. Supp. 3d 1078, 1092 (C.D. Cal. 2022) ("The emails show that President Trump knew that the specific numbers of voter fraud were wrong but continued to tout those numbers, both in court and to the public. The Court finds that these emails are sufficiently related to and in furtherance of a conspiracy to defraud the United States.").

188. Russell Wheeler, *Trump's Judicial Campaign to Upend the 2020 Election: A Failure, But Not a Wipe-Out*, BROOKINGS (Nov. 30, 2021), https://www.brookings.edu/articles/trumps-judicial-campaign-to-upend-the-2020-election-a-failure-but-not-a-wipe-out/.

189. *But see* Carboni & Serwat, *supra* note 158 (opining that overturned election results in Nigeria would "increas[e] the risk of fresh violence in the state").

arbiter of election disputes, then it is not a very useful component of this analysis. Who wants that kind of "confidence?" The Burchard-Simati model appears to conceptualize violence as an endpoint, rather than contemplating that a chaotic actor would seek to use it as a political tool at the outset.

Still, the correlation between public confidence and violence can be helpful to our analysis. If we set aside Burchard and Simati's explanation for that correlation in Africa, it is possible to come up with a new, distinctly American explanation that makes sense. For one thing, the outsized influence of public confidence helps explain why someone seeking to use violence would also seek to deliberately harm the integrity of the courts. Three days before the Louisville rally in 2016, Trump publicly bashed Gonzalo Curiel, a federal judge presiding over a class action case relating to Trump University, saying, "I believe he happens to be Spanish, which is fine. He is Hispanic, which is fine . . . . But we have a judge who is very hostile. Should've been thrown out. Wasn't thrown out."[190] Months later, he said that Justice Ginsburg's "mind [was] shot" and that she made "very dumb political statements."[191] These attacks continued after the election, as Trump used his Twitter account to attack judges who ruled against him in high-profile cases. He called James L. Robart, who ruled against an obviously discriminatory travel ban,[192] a "so-called judge," and said that he "put our country in such peril."[193] He characterized similar Ninth Circuit rulings as "ridiculous."[194] Every judge in America knew about these attacks by the time the decision came down in *Nwanguma* in 2018.

All this rhetoric was designed to undermine public confidence in the courts. It appears to have worked.[195] Trump seems to have recognized the

190. Maureen Groppe, *What Trump Has Said About Judge Curiel*, INDYSTAR, https://www.indystar.com/story/news/2016/06/11/what-trump-has-said-judge curiel/85641242/ (June 11, 2016, 1:16 PM).

191. Donald Trump (@realDonaldTrump), X (July 13, 2016, 12:54 AM), https://x.com/realDonaldTrump/status/753090242203283457.

192. Washington v. Trump, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017).

193. Donald Trump (@realDonaldTrump), X, (Feb. 4, 2017, 8:12 AM), https://x.com/realDonaldTrump/status/827867311054974976 ("The opinion of this so-called judge, which essentially takes law-enforcement away from our country, is ridiculous and will be overturned!"); Donald Trump (@realDonaldTrump), X, (Feb. 5, 2017, 3:39 PM) https://x.com/realDonaldTrump/status/828342202174668800. The travel ban was ultimately upheld. Trump v. Hawaii, 585 U.S. 667, 710 (2018).

194. Donald Trump (@realDonaldTrump), X, (April 26, 2017, 6:20 AM), https://x.com/realDonaldTrump/status/857177434210304001.

195. Politicians on the other side of the aisle arguably engaged in some of this behavior by openly criticizing Supreme Court justices in their public comments. *See* Andrew Desiderio, *Schumer Walks Back SCOTUS Comments After Roberts Rebuke*,

effectiveness of this tactic, even if he might not have been fully aware of it in 2016, and he has continued to refine it in the aftermath of January 6th.[196]

Perhaps, as the Burchard-Simati model suggests, a portion of the population lost faith in the process and thus became more susceptible to Trump's barely concealed calls for violence. But here it is not the public who is chiefly to fear as a result of the lack of public confidence, it is the judges themselves. This is so because in their desire to appear impartial, or at least not be subject to personal attacks, judges become more vulnerable to multi-volume defense motions. All fears of public ridicule and scorn may be sidestepped by giving the appearance of a strictly applied First Amendment as if to say, "[w]e don't condone this total breakdown of American democracy, but [points at the Free Speech Clause] what can we do?" The law, in other words, becomes "a figment used to provide a veneer of legitimacy."[197]

Public confidence also helps explain decisions like *Thompson*, in which Trump faced no immediate consequences for encouraging violence at the U.S. Capitol. Judge Mehta is almost certainly not a MAGA Republican, but may have wanted to look fair by stripping out all but the worst claims against Trump to avoid being called another biased "Obama judge."[198] Even judges who are unconcerned with Trump's public jabbering about their rulings might still be influenced to rule in his favor to preserve the courts' appearance of legitimacy. This is not just because Trump is going to tell millions of people that the courts are illegitimate, but also because there is a very good chance that he might not follow a court's orders. Imagine the damage done to the public reputation of the

POLITICO, https://www.politico.com/news/2020/03/05/chuck-schumer-supreme-court-comments-121960 (Mar. 5, 2020, 1:03 PM). And of course, we should not ignore the role of the justices themselves in the corrosion of confidence in the courts. *See* Zach Schonfeld, *Thomas, Alito Go on the Attack Over Supreme Court Ethics*, HILL (Aug. 31, 2023, 4:27 PM), https://thehill.com/regulation/court-battles/4181847-thomas-alito-go-on-the-attack-over-supreme-court-ethics/.

196. *See* Robert Reich, *Trump Is Undermining the Entire US Judicial System with Another Big Lie*, GUARDIAN (Aug. 16, 2023, 3:10 PM), https://www.theguardian.com/commentisfree/2023/aug/16/donald-trump-big-lie-fulton-county-georgia-indictment.

197. FRIEDMAN ET AL., *supra* note 179, at 100.

198. Katie Reilly, *President Trump Escalates Attacks on 'Obama Judges' After Rare Rebuke from Chief Justice*, TIME, https://time.com/5461827/donald-trump-judiciary-chief-justice-john-roberts/ (Nov. 21, 2018, 6:32 PM). It is worth pointing out that the stakes were somewhat lower for Mehta, not only because Trump was no longer in office, but because Trump had been effectively deplatformed (i.e. removed from both Facebook and Twitter) at the time of the *Thompson* opinion. Melina Delkic, *Trump's Banishment from Facebook and Twitter: A Timeline*, N.Y. TIMES, https://www.nytimes.com/2022/05/10/technology/trump-social-media-ban-timeline.html (May 13, 2022).

courts overall if a judge were to issue an injunction like the one requested by plaintiffs in *Thompson*,[199] saying "stop inciting violence right now," and Trump simply said, "make me." In 2016, candidate Trump did not have the heft to successfully do that, but by 2018, President Trump could have provoked a full-blown constitutional crisis. The irony, then, is that courts can ultimately undermine public confidence by trying to preserve it.

Dr. Simati's findings on the use of violence to influence judicial decisions resonate strongly on this point. Simati explains that the use of violence creates "political and professional uncertainty in order to force judges to strategically defect to be *impartial*."[200] In countries with courts that are not fully independent from the other branches of government, this "impartiality" means that judges wish to appear less biased toward the status quo.[201] But even here, where there is a supposedly independent judiciary, we can plainly see this nudge toward a false impartiality. In their desire to appear unbiased, our judges may overcompensate. How else can we explain opinions like the Colorado trial court's 2023 finding that, to the astonishment of constitutional law scholars everywhere, Trump had incited violence on January 6th, but still could not be held responsible for it?[202]

As for Burchard and Simati's idea of punishment through the courts as a deterrent, here, as in Kenya, the jury is still out. Unless and until a court—or some other American institution—is willing to hold high-level political actors who ask for election violence accountable, we have no measuring stick. The best we might be able to deduce in the near future is whether prosecuting those who carry out the dirty work (e.g., those

199. Thompson v. Trump, 590 F. Supp. 3d 46, 73 n.7 (D.D.C. 2022).

200. Simati & Burchard, *supra* note 156, at 35, 38 (emphasis added).

201. *Id.*

202. Anderson v. Griswold, No. 2023CV32577, 2023 WL 8006216, at *43, *45–46 (Colo. Dist. Ct. Nov. 7, 2023) (holding that the President of the United States is not an "officer of the United States" within the meaning of the Constitution). The court's opinion halfheartedly apologizes for its "reluctance to embrace an interpretation which would disqualify a presidential candidate without a clear, unmistakable indication that such is the intent of Section Three." *Id.* at *46. The opinion was sharply criticized. See Hayes Brown, *Trump May Get to Stay on the Ballot Thanks to a Ridiculous Technicality*, MSNBC (Nov. 20, 2023, 12:20 PM), https://www.msnbc.com/opinion/msnbc-opinion/trump-colorado-ruling-2024-presidential-ballot-rcna125964, in which MSNBC Legal Analyst Hayes Brown said he was "gobsmacked" by the ruling, and that the Colorado judge "refused to stick her neck out ahead of the other courts that have either punted on the decision until later or claiming that it's Congress that needs to make the final call." The Colorado Supreme Court reversed, Anderson v. Griswold, 2023 CO 63, ¶ 152, but the U.S. Supreme Court ultimately vindicated the trial court while deftly avoiding the issue of whether Trump engaged in insurrection. Trump v. Anderson, 601 U.S. 100, 108 (2024).

charged in the January 6th Capitol breach) will deter those giving the orders. After repeated tests, the courts have done little aside from reassure Trump that they will *not* be a meaningful obstacle to his use of violence as a political tool. Worse, in *Nwanguma* the court ultimately legitimized calls for violence at campaign rallies by treating such speech as on the same plane as calls for civil disobedience.[203] The court would have done better by remaining silent.[204]

Beyond the Burchard-Simati framework, there are other "constraining and incentivizing factors" that likely influence judges into thinking that ruling in Trump's favor is a rational choice. The choice to continue living, for example, seems eminently rational. Judge Robart received over one hundred death threats after ruling against Trump's travel ban.[205] The magistrate judge who issued the search warrant for Trump's Mar-a-Lago property in August of 2022 received antisemitic death threats at both his home and his temple.[206] Judge Juan Merchan was the target of "dozens of threats" for being assigned to Trump's criminal prosecution in New York.[207] A court security officer in New York transcribed 275 pages worth of death threats and abusive phone calls to the judge presiding over Trump's civil fraud trial and his law clerk.[208] And a Texas woman is about to go on trial for allegedly telling Washington D.C. Judge Tanya Chutkan: "If Trump doesn't get elected in 2024, we are coming to kill you, so tread lightly, b****," and "[y]ou will

203. *See* Nwanguma v. Trump, 903 F.3d 604, 613 (6th Cir. 2018).

204. *See id* at 614 (White, J., concurring). Judge White, concurring, notes that while "the majority opinion elides salient details of Trump's speech that make this a closer case for me than for the majority and overemphasizes the legal significance of the 'don't hurt 'em' statement," she nevertheless would have dismissed the case without reaching the constitutional issues at all. *Id.*

205. *Judges Raise Alarm as Personal Threats Intensify, Amplified by Social Media*, ABA (Aug. 10, 2019), https://www.americanbar.org/news/abanews/aba-news-archives/2019/08/judges-raise-alarm-as-personal-threats-intensify--amplified-by-s/.

206. *See* Gary Fields & Nicholas Riccardi, *Donald Trump Supporters Send Death Threats to Judge Who Approved Mar-a-Lago Search*, PBS NEWS (Aug. 17, 2022, 4:52 PM), https://www.pbs.org/newshour/politics/donald-trump-supporters-send-death-threats-to-judge-who-approved-mar-a-lago-search; Joel Lopez, *Anti-Semitic Threats Made Toward Judge Responsible for Signing Off on Search of Mar-a-Lago*, WPTV , https://www.wptv.com/news/region-n-palm-beach-county/palm-beach-gardens/judge-bruce-reinhart-threats (Aug. 18, 2022, 5:44 AM).

207. *See* David Jackson, *Donald Trump Case: Courts Step Up Security After Death Threats to Judge and Family*, USA TODAY (Apr. 6, 2023, 6:31 PM), https://www.usatoday.com/story/news/politics/2023/04/06/donald-trump-case-court-security-death-threats-judge-juan-merchan/11617034002/.

208. Sean O'Driscoll, *Donald Trump Says Court Clerk 'Allowed Herself' to Be Exposed to Abuse*, NEWSWEEK, https://www.newsweek.com/donald-trump-trial-update-allison-greenfield-threatening-messages-fraud-engoron-1847456 (Nov. 28, 2023, 7:57 AM).

be targeted personally, publicly, your family, all of it."[209] In a time when Trump supporters are willing to launch ill-fated attacks on the FBI[210] or the homes of members of Congress,[211] it is not unreasonable to assume that those supporters might make good on their threats against judges, too.[212] If Supreme Court Justices were influenced by acts of violence in the Deep South during the civil rights era,[213] lower court judges are almost certainly influenced by the threat of violence in their own homes.

There is one sense in which prior jurisprudence plays a role in the decisions under consideration here. The uncertainty of what constitutes incitement created by the vast jurisprudential gulf between *Brandenburg* and Trump is a factor that enables judges to act more freely according to their own personal doubts, fears, or prejudices.[214] As demonstrated above, precedent certainly existed before and after the *Nwanguma* opinion in 2018 that would allow judges to hold Trump responsible for incitement if they wanted to. But if they did *not* want to, the ambiguity created by the Supreme Court's sixty-year silence on incitement gave them an easy escape route. Even Judge Hale's opinion, the most decisive on the issue of campaign rally incitement, uses the uncertainty of *Brandenburg* to undermine an entire case.[215] In *Nwanguma*, the negligent security claim was premised on the idea that Trump had left the business of ejecting protesters to the crowd, not to hired security or law enforcement,[216] a tactic that is readily observable in Trump rallies both before and after

209. Sean O'Driscoll, *Abigail Shry's Trial Begins Over Judge Chutkan Death Threats*, NEWSWEEK (Oct. 30, 2023, 11:45 AM), https://www.newsweek.com/abigail-shry-donald-trump-judge-tanya-chutkan-threat-1839133.

210. *See* Tom Dreisbach, *An Attempted Attack on an FBI Office Raises Concerns About Violent Far-Right Rhetoric*, NPR (Aug. 12, 2022, 4:54 PM), https://www.npr.org/2022/08/12/1117275044/an-attempted-attack-on-an-fbi-office-raises-concerns-about-violent-far-right-rhe.

211. Jeremy B. White, *Pelosi Attacker Was Immersed in 2020 Election Conspiracies*, POLITICO (Oct. 28, 2022, 8:52 PM), https://www.politico.com/news/2022/10/28/pelosi-attacker-online-hints-conspiracy-immersion-00064093.

212. Trump's own appointees are evidently not exempt from this treatment, even if they have never issued a ruling adverse to Trump himself. *See* David Thomas, *Texas Woman Pleads Guilty to Threats Against Judge in Trump Case*, REUTERS (Nov. 10, 2023, 3:19 PM), https://www.reuters.com/legal/government/texas-woman-pleads-guilty-threats-against-judge-trump-case-2023-11-10/ (reporting that a Houston woman was prosecuted for telling Judge Aileen Cannon she was "a federal agent" with "a license to kill," and promising to kill the judge in front of her children).

213. *See supra* notes 179–81 and accompanying text.

214. FRIEDMAN ET AL., *supra* note 178, at 67.

215. *See* Nwanguma v. Trump, No. 3:16-cv-247-DJH-HBB, 2017 WL 3430514, at *3–4 (W.D. Ky. Aug. 9, 2017).

216. *Id.* at *4 ("Plaintiffs do not contend that there were insufficient or incompetent professional security personnel present . . . . Rather, the purported negligence was ordering audience members to remove protestors.").

Nwanguma's assault.[217] This claim had little, if anything, to do with Trump's speech, but the district court chose to treat it as "subsumed by Plaintiffs' incitement claim."[218] The court then allowed an interlocutory appeal because "whether speech constitutes incitement is frequently a close question."[219] The ostensibly procedural maneuver of letting the Sixth Circuit hear an interlocutory appeal, which was based on uncertainty regarding incitement jurisprudence, relieved the district court of the uncomfortable business of holding Trump responsible. Uncertainty prevailed even though there is no clearer example of "imminent" violence in the history of incitement jurisprudence: Trump told his supporters to act, and they immediately acted—one was even convicted of a crime for his response to Trump's command.[220] Still, because of the ambiguity of *Brandenburg* and its progeny, Hale was able to hand the case off to McKeague (who, curiously, believes incitement caselaw to be "unmistakable and consistent").[221]

Indeed, it is even easier for judges to dodge the issue now that cases like *Nwanguma* have created a sort of self-fulfilling prophecy. Courts treat the First Amendment as Trump's impenetrable armor, and it has become so. The civil opinions discussed in this Article undoubtedly factored into Special Counsel Jack Smith's decision not to include incitement crimes in his indictment of Trump.[222] If Smith thinks it too risky to charge him for January 6th, it is unlikely that any other prosecutor will charge him for lesser incitements in the future, and few plaintiff's lawyers will seek redress on behalf of protesters injured at future rallies. Similarly, the D.C. Circuit carefully parsed Judge Chutkan's gag order, striking part of it down—and Judge Chutkan herself stayed the order out of an abundance of caution—despite Trump's openly defiant disrespect to the court in a series of social media posts that resulted in the explicit death threats to the judge described above.[223] "Free speech," as applied to Trump, has become too robust a defense. And of course, Trump's lawyers are raising the Free Speech Clause as a

217. *See supra* notes 29–37 and accompanying text.

218. *Nwanguma*, 2017 WL 3430514, at *4.

219. *Id.*

220. Barrouquere, *supra* note 65.

221. *See* Nwanguma v. Trump, 903 F.3d 604, 613 (6th Cir. 2018).

222. *See generally* J.D. Capelouto, *Why Jack Smith Didn't Charge Trump with Inciting an Insurrection*, SEMAFOR (Aug. 2, 2023, 12:33 PM), https://www.semafor.com/article/08/02/2023/donald-trump-indictment-jack-smith-insurrection-charge.

223. United States v. Trump, 87 F.4th 524, 530, 532, 534 (D.C. Cir. 2023). Compare this case to the enforcement of a gag order against former Trump campaign chair Paul Manafort in his own criminal trial. United States v. Manafort, 897 F.3d 340, 342 (D.C. Cir. 2018).

defense to everything he is presently accused of, whether it makes sense or not.[224] One cannot blame them for sticking with a strategy that has worked so well; we might reasonably say that there is a Trump exception to the Constitution.

Finally, it is never wise to leave demographics unexamined, and there is a certain resonance to the idea that white, upper-class conservative judges think that Trump is basically right. Perhaps some judges thought he would do what he promised to do: that is, protect white, upper-class people from "invasions" of scary others.[225] If it is true that most Republicans think a little violence is necessary to preserve the "traditional American way of life," then some judges probably believe it, too.[226] It might be too cynical to think of identity politics as a sole decision driver, but it would be ill-advised to ignore it as a factor.[227]

VI. CONCLUSIONS

Upon close examination, the conclusion that judges in *Nwanguma* and other political violence cases deliberately chose not to stop Trump's repeated incitements seems inescapable. These decisions were not the result of impotence nor of bare cowardice. Most courts are not wicked enough to want the subversion of democracy, nor are they so ignorant that they do not know it when they see it. Instead, judges weighed constraining and incentivizing factors and made what they thought was the best decision for the integrity of the courts, their careers, and/or their personal safety. In doing so, they almost universally decided that letting Trump get away with it would lead to better outcomes. This explanation, grounded in the strategic decision-making model, makes more sense than

224. *See* Andrew Zhang, *Trump Lawyer Blasts Indictment as Attack on Free Speech*, POLITICO (Aug. 2, 2023, 9:52 AM), https://www.politico.com/news/2023/08/02/trump-indictment-lawyer-00109360 (reporting Trump's lawyer called charges that Trump conspired to steal a presidential election an "unprecedented" "attack on free speech and political advocacy").

225. *See generally* Ben Zimmer, *Where Does Trump's 'Invasion' Rhetoric Come From?*, ATLANTIC (Aug. 6, 2019), https://www.theatlantic.com/entertainment/archive/2019/08/trump-immigrant-invasion-language-origins/595579/.

226. Kleinfeld, *supra* note 69, at 162.

227. *See* Sonia Sotomayor, *A Latina Judge's Voice*, 13 BERKELEY LA RAZA L.J. 87, 92 (2002) ("Whether born from experience or inherent physiological or cultural differences . . . our gender and national origins may and will make a difference in our judging."); *see also* Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking,* 58 DUKE L.J. 1895, 1946 (2009) (arguing that where "positive law is imprecise," judges "are obliged to refer to the conception of our community's political morality that strikes them as the most compelling").

the idea that "get 'em out of here" should be venerated as speech worthy of First Amendment protection.

While the courts could have done more to stop our downward spiral into election violence, we still know very little about how effective they could have been, or how to make them better at it. Perhaps we should steel ourselves to the possibility that courts are just not that good at stopping wealthy narcissists from doing bad things. Election violence aside, Trump has been sued thousands of times in his life, for everything from rape to trademark infringement to defrauding college students.[228] His organizations have been fined, enjoined, and bankrupted.[229] Yet, as of this writing, his reign of terror continues unabated. He has never been jailed for anything, he has only recently been charged for his years of brazenly criminal behavior,[230] and whatever legal consequences he has personally incurred—including felony convictions—have not been enough to deter his bad behavior, nor to prevent him from becoming one of the most powerful people on the planet. Worse, he now undoubtedly realizes his own power relative to the courts; he can influence judicial opinions with threats of violence, and even if the judges aren't scared, he can undermine public confidence in the courts by calling them biased, thus weakening the efficacy of the courts no matter what. Any judge that might have been willing to rule against him on incitement issues before is now more likely to hesitate in doing so, and with good reason.[231]

There is a silver lining here. Dr. Burchard notes that "threatening violence as a campaign tool has a tendency to backfire," especially where elections are close.[232] That is because voters show up in greater numbers

228. *See generally Donald Trump: Three Decades 4,095 Lawsuits*, USA TODAY, https://www.usatoday.com/pages/interactives/trump-lawsuits/ (last visited Oct. 22, 2024); David A. Graham, *The Cases Against Trump: A Guide*, ATLANTIC (Sept. 13, 2024), https://www.theatlantic.com/ideas/archive/2024/09/donald-trump-legal-cases-charges/675531/.

229. *See generally* Jeanne Sahadi, *Judge Engoron's Ruling: What Will It Mean for Trump's Businesses?*, CNN (Feb. 17, 2024, 4:00 AM), https://www.cnn.com/2024/02/17/economy/donald-trump-trial-ruling-business/index.html; Philip Mattera, *Trump Organization*, CORP. RSCH. PROJECT, https://www.corp-research.org/trump-organization (Feb. 5, 2017).

230. *See generally*, *Tracking the Trump Criminal Cases*, POLITICO, https://www.politico.com/interactives/2023/trump-criminal-investigations-cases-tracker-list/ (Aug. 2, 2024, 10:35 AM).

231. *See* Trump's Trials, *Why Gag Orders Against Trump Haven't Stopped His Attacks*, NPR, at 04:43 (Nov. 25, 2023), https://open.spotify.com/episode/6dwJOuibq9cxYqxk9UamR0?si=0HtLNa2NQ AGYsEoMi4kvcg. At the time of the final edit of this Article, Trump's criminal sentencing has been placed on hold indefinitely. Kayla Epstein & Nadine Yousif, *Trump's Criminal Sentencing Delayed Until After Election*, BBC (Sept. 6, 2024), https://www.bbc.com/news/articles/c5ypr3vd7x9o.

232. Burchard, *supra* note 153.

when a candidate they oppose uses violence, and independents tend to vote against bullies.[233] The implication is that the courts' inability to stop Trump's incitement may actually have helped his defeat in 2020. Still, it is hard for me to imagine that things would not be different had the courts taken decisive action against Trump before his ascendance to the White House. My belief may merely be an echo of my own dormant, romantic notions of courts as vindicators, as great equalizers, as compasses for justice, and so on. But overall, the research discussed above reinforces my original inclination: The courts possessed the power to prevent January 6th from ever happening, even if they did not exercise that power.

In any event, the critical questions to be answered may have changed since *Nwanguma*. With a federal bench now staffed by Trump appointees, many of whom were put in place precisely because they would remain loyal to Trump,[234] it may be too late for any useful speculation as to what motivates these judges. The challenge, however, remains substantially the same: to figure out how courts may best be used to quell the election violence that may lie ahead. For all that we do not know about the extent of the judiciary's effectiveness, we know that independent, courageous courts are critical to the success of any democracy. If we want to keep ours, we need courts that will act decisively to preserve it.

233. *See id.*

234. *See* Peter M. Shane, *The Curious Case of Trump's "Well Qualified" Judges*, WASH. MONTHLY (Apr. 21, 2022), https://washingtonmonthly.com/2022/04/21/the-curious-case-of-trumps-well-qualified-judges/.