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STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of: JOHN CHARLES EASTMAN, State Bar No. 193726, An Attorney of the State Bar.	CASE NO.: SBC-23-O-30029 **DR. EASTMAN'S POST-HEARING BRIEF**

TO THE COURT, THE OFFICE OF CHIEF TRIAL COUNSEL OF THE STATE BAR OF CALIFORNIA ("OCTC") AND TO ITS DEPUTY TRIAL COUNSEL OF RECORD:

Respondent JOHN CHARLES EASTMAN ("Dr. Eastman") submits this post-hearing brief.

Dated: December 1, 2023

MILLER LAW ASSOCIATES, APC

By: _____

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I. INTRODUCTION

The State Bar has charged Dr. Eastman, a renowned constitutional scholar, professor, and former Dean with, first and most prominently, violating his oath as an attorney to uphold the Constitution of the United States. The only violations of clearly-established constitutional law that occurred in the 2020 election were the numerous and acknowledged violations by state election officials of Article II of the Constitution, which assigns plenary authority *to the state legislatures* for directing the manner of choosing presidential electors. As numerous courts were declining to hear the merits of challenges to that unconstitutional conduct, the issue confronted by Dr. Eastman in fulfilling his ethical duty to zealously represent the interests of his client – the former President of the United States – was whether there were other potential remedies not foreclosed by clearly-established precedent. After thorough research and investigation, he determined that there were. First, because Article II assigns plenary power to the state legislatures, when that authority was usurped by non-legislative actors altering or ignoring state election codes, Dr. Eastman determined that the plenary power reverted back to the legislatures, consistent with that Article II grant of power and recognized by federal statutory law at the time, 3 U.S.C. §2. There was no precedent foreclosing that conclusion, or even addressing it at the time Dr. Eastman first articulated that conclusion, though the U.S. Court of Appeals subsequently held that reversion to the legislature was a remedy for the illegal conduct of an election. *Trump v. Wisconsin Elections Commission* (7th Cir. 2020) 983 F.3d 919, 925. Second, based on thorough research and his extensive knowledge (gained during decades of scholarly study) of core separation of powers principles codified in the Constitution, Dr. Eastman determined that another viable remedy was for the President of the Senate (the Vice President of the United States) to accede to requests from state legislators for a brief delay in the electoral college proceedings, in order to allow for additional time for state legislatures to exercise their constitutional power of determining whether illegality in the election had affected the outcome.

Whether the Vice President has more than a ministerial role in the counting of electoral votes was and remains an open question, one that has been the subject of dispute in the halls of Congress for our entire history but never addressed, much less resolved, by any court. Crafting such legal arguments, grounded in a good-faith interpretation of the historical record and not foreclosed by precedent, is

precisely what is demanded of attorneys in our adversarial system. After all, every lawyer is ethically and by oath ***obligated*** to pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, *and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor*. And with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. That principle, the law for 225 years, teeters under the weight of this Bar proceeding.

Dr. Eastman also spoke out publicly about the illegality and outright fraud that he uncovered during the course of his investigations, or that he had ample reason to believe existed. These public statements are fully protected by the First Amendment of the United States Constitution as Freedom of Speech and the Right to Petition the Government for Redress of Grievances. More importantly, exposing what may well have been outcome-determinative illegality and fraud in the election *protects* rather than undermines one of the most basic principles of our republican system of government, that government is and must be based on the consent of the governed.

Others disagreed, of course. That is the nature of political disputes, particularly in the hyper-partisan times in which we live, and also the cornerstone of our legal system which exists to hear "cases and controversies."

Former Attorney General William Barr famously asserted that his investigations had revealed no fraud in significant enough amount to have affected the outcome of the election – though the investigations that had been conducted at that point had been anemic, at best, and General Barr did not address *at all* the question of illegality, on which Dr. Eastman had primarily focused. The former head of CISA announced that 2020 was the most secure election in U.S. history – a contention that was laughable on its face given the already documented evidence of vote flips in Antrim County, Michigan and Ware County, Georgia, deletion of logs, and expert opinions about the security vulnerabilities of voting equipment. Numerous state election officials assured American citizens that the elections conducted on their watch were perfect, fair, and legal – exactly what one would expect to hear from anyone whose efforts at their job are questioned – despite clear evidence and even court holdings *at the time* to the contrary. And Vice President Pence, in his January 6 remarks, confirmed "significant allegations of voting irregularities and numerous instances of officials setting aside state election law,"

assuring that citizens have every right under the law to demand free and fair elections and a full investigation of electoral misconduct.

The premise of the State Bar's charge against Dr. Eastman, which rests on these and other similar statements, has an Orwellian cast to it: the government has spoken, and if you disagree, then *you* must be lying. Two plus two equals five, after all, and if the government says so, you must not only repeat the lie, but you must come to believe it as well.

This is authoritarianism, not republicanism. And Dr. Eastman, in fulfilling his duties to a client, happens to have been thrust to the forefront of the push-back against such authoritarianism, at great expense both in time and treasure to himself. If Dr. Eastman and his client were correct that the 2020 election was stolen – a view they firmly held at the time and continue to hold – then the threat to our system of government is extraordinarily high.

Allegations of illegal conduct and fraud in elections have become a staple of our political contests for decades, including 2000 and 2016, but only in the wake of the 2020 election has any attempt been made to criminalize or to subject to bar disciplinary process the lawyers who made such allegations. What we are witnessing is an unprecedented use – and abuse – of the legal system to silence the views of political opponents. When seen in that light, the Notice of Disciplinary Charges ("NDC") at issue here should never have been brought, and it should be dismissed now, categorically, lest a precedent be set that will have a chilling effect on legal advocacy for decades to come.

II. BURDEN AND STANDARD OF PROOF

"The State Bar must prove culpability by clear and convincing evidence." State Bar Rules of Procedure, Rule 5.103. "Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind." *Matter of Clevenger* (Cal. Bar. Ct. Mar. 3, 2021) No. 16-J-17320, 2021 WL 837487, at *6 n.18. Where a disciplinable offense hinges on underlying criminal conduct, the applicable evidentiary standard is the "constitutionally required standard of proof for criminal violations…, [which] is guilty beyond a reasonable doubt." *In re Wells* (Cal. Bar Ct. Dec. 5, 2005) No. 01-O-00379, 2005 WL 3293313, at *5 n.11, (subsequent history omitted) (citation omitted).

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All reasonable doubts about culpability must be resolved in favor of Dr. Eastman, and the Court must choose the inference leading to innocence if equally reasonable inferences may be drawn from the facts. *In the Matter of Respondent H* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 234, 240, and cases cited therein. And where the current state of the law the attorney has allegedly violated is uncertain, any reasonable doubts regarding the law's violation must be resolved in the attorney's favor. *Matter of Loftus* (Rev. Dept. 2007) 5 Cal. State Bar Ct. Rptr. 80, 86-87.

III. LEGAL STANDARDS

a. Claims Under Business & Professions Code Section 6068(a)

i. To Prove a Violation of Cal. Bus. & Prof. Code §6068(a), The State Bar Must Prove the Attorney Violated a Specific Law of the State of California or The United States.

Section 6068(a) provides that an attorney has a duty "to support the Constitution and laws of the United States and of this state." An attorney's good faith may be considered in determining whether negligent or mistaken acts constitute a violation of §6068(a). *Matter of Respondent P* (Rev. Dept. 1993) 2 Cal. State Bar Ct. Rptr. 622, 631-632. There is very limited authority that explains the legal standard applied to a charge under §6068(a). However, two opinions by the Review Department show that in order for an attorney to be held liable for violating §6068(a), the State Bar must allege and prove that the attorney actually violated another specific law. *See Matter of Lilley* (Cal. Bar Ct. May 1, 1991) No. 87-0-16728, 1991 WL 70703, at *1; *Matter of Bhardwaj* (Cal. Bar Ct. May 1, 2019) No. 14-O-00848, 2019 WL 2051006, at *6.

As explained in *In re Lilley*, "the Supreme Court interprets section 6068(a) as a conduit by which attorneys may be charged and disciplined *for violations of other specific laws* which are not otherwise made disciplinable under the State Bar Act." *Lilley*, 1991 WL 70703, at *7 (emphasis added). Further, "the Supreme Court has decisively rejected the past prosecutorial practice of routinely charging an attorney with a violation of the duty under section 6068(a) to support the 'Constitution and laws of the United States and of this state' without specifically identifying the underlying provision of law allegedly violated." *Id.* Finally, the only circumstances identified by the court in *Lilley* that would support a finding that an attorney violated Cal. Bus. & Prof. Code §6068(a) are: (1) where there is a violation of a

statute not specifically relating to the duties of attorneys, (2) where there is a violation of a section of the State Bar Act which is not, by its terms, a disciplinable offense, and (3) where there is a violation of an established common law doctrine which governs the conduct of attorneys, which is not governed by any other statute. *Id.* at *7–8, and cases cited therein. *Id.* at *7–8.

Therefore, if the State Bar does not allege and prove the attorney violated a specific law, there can be *no* culpability under §6068(a). *See Bhardwaj*, 2019 WL 2051006, at *6 (attorney, although a vexatious litigant who asserted frivolous arguments, could not be held liable for violating §6068(a) because this section does not apply to violations of the Rules of Professional Conduct); *see also*, *e.g.*, *In re Rohan* (1978) 21 Cal.3d 195, 201 ("Because petitioner was convicted of a federal crime he failed to support a law of the United States, he thereby failed to discharge his duties as an attorney to the best of his knowledge and ability, and such breach of his oath as an attorney is urged to constitute grounds for disciplinary action").

It is unclear what specific law the State Bar is asserting Dr. Eastman violated. In fact, in Count One, the only law that appears to be alleged was violated was 18 U.S.C. §371. Therefore, in the absence of a conviction under 18 U.S.C. §371, this charge should be dismissed. Merely advising a client does not violate any law, except perhaps California Rules of Professional Conduct[1], Rule 1.2.1. But that Rule, which forbids a lawyer from counseling a client to engage in conduct "that the lawyer *knows* is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal," (emphasis added), is not raised in the notice of charges. Even if it were, the Bar has offered no evidence of any such violation, much less that Dr. Eastman *knew* of any such violation.[2]

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[1] All further references to "Rules" are to the California Rules of Professional Conduct.

[2] The Bar has alleged that Dr. Eastman counseled a violation of the timing provisions of the Electoral Count Act by asking Vice President Pence to delay the electoral count proceedings. XXVIII-88:1-23; 89:17-25. But Pence was not Dr. Eastman's client, so this request was not advice *to a client* for a violation of law; it was, instead, a constitutionally-protected petition of a government officer for redress of grievances. Moreover, the ECA is not a criminal statute, or even a civil liability statute. Congress, itself, does not even view it as binding. That, plus Dr. Eastman's well-grounded conclusion that the ECA is an unconstitutional usurpation of authority the Constitution assigns to the Vice President, preclude even this allegation from qualifying as a violation of §6068(a).

ii. If the court departs from precedent set forth above and considers whether an attorney setting forth what the Bar believes was a frivolous legal theory or misrepresentation of facts may constitute a violation of Cal. Bus. & Prof. Code §6068(a), the Court must apply the tenability standard.

As discussed, attorneys are only subject to discipline under §6068(a) where they violate laws and are not otherwise disciplinable under the State Bar Act. There appear to be *no* cases (reported or unreported) or State Bar opinions that articulate the legal standard to be applied to situations in which an attorney has not violated a law, but merely advised a client or prosecuted an assertedly questionable case. If the Court is inclined to consider whether Dr. Eastman committed a §6068(a) violation under the novel circumstances presented in this case, the standard it should apply is the objective tenability test.

The cases most analogous to the one at hand are malicious prosecution actions, in which courts invoke the tenability test to determine whether a proceeding was brought without probable cause and was thus frivolous, not based in fact or law, or lacked sufficient "merit" such that liability could be imposed on the litigant and/or litigant's attorney. *See*, *e.g.*, *Marijanovic v. Gray, York & Duffy* (2006) 137 Cal.App.4th 1262, 1270–71 ("In every case, in order to establish a cause of action for malicious prosecution a plaintiff must plead and prove that the prior proceeding commenced by or at the direction of the malicious prosecution defendant, was: (1) pursued to a legal termination favorable to the plaintiff; (2) brought without probable cause; and (3) initiated with malice"); *see also*, e.g., *Bradley v. United States* (9th Cir. 1987) 817 F.2d 1400, 1404 (holding in another context, "[t]he test for frivolousness is purely an objective one").

The probable cause determination "requires an *objective* determination of the reasonableness of the pursuit of the underlying lawsuit. That is, whether, on the basis of the facts known to [litigant], the institution and prosecution of the [action at issue] was legally tenable." *Id.*; *see also Zamos v. Stroud* (2004) 32 Cal.4th 958, 971. This tenability standard is a "rather lenient standard for bringing a civil action [and] reflects 'the important public policy of avoiding the chilling of novel or debatable legal claims.'" *Marijanovic,* 137 Cal. App. 4th at 1271 (citation)." Applying this standard, courts have explained:

> A litigant or attorney who possesses competent evidence to substantiate a legally cognizable claim for relief does not act tortiously by bringing the claim, even if also

> aware of evidence that will weigh against the claim. Plaintiffs and their attorneys are not required, on penalty of tort liability, to attempt to predict how a trier of fact will weigh the competing evidence, or to abandon their claim if they think it likely the evidence will ultimately weigh against them. They have the right to bring a claim they think unlikely to succeed, so long as it is arguably meritorious.

Id. (quoting *Wilson*, 28 Cal.4th at 817); *see also See Sheldon Appel*, *supra*, 47 Cal.3d at 885, citing *Marriage of Flaherty* (1982) 31 Cal.3d 637, 650 (appeal could properly be found frivolous only if "any reasonable attorney would agree that the appeal is totally and completely without merit"; "any definition [of frivolousness] must be read so as to avoid a serious chilling effect on the assertion of litigants' rights...Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win...").

Applying a standard other than tenability to §6068(a) would chill attorneys' willingness to advance arguments in controversial or uncertain cases or to handle such matters altogether. Exposing attorneys to potential disbarment for advising clients or asserting positions on unsettled legal issues in a manner that might ultimately be deemed frivolous or grossly negligent would be particularly chilling for practitioners of constitutional law, *whose purpose is* to establish and safeguard the principles and framework for our nation's governance. The unfortunate result would be to inhibit claims of fundamental constitutional importance.

b. Claims Under Business & Professions Code Section 6068(d)

Section 6068(d) provides that an attorney has a duty "[t]o employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." To be liable for a charge under section 6068(d), the attorney must conceal material facts or make explicit false statements. *Di Sabatino v. State Bar* (1980) 27 Cal.3d 159, 162. This includes making *knowingly* false allegations in a complaint. *Paonessa v. State Bar of Cal.* (1954) 43 Cal.2d 222, 223. Finally, in order to be held liable under section 6068(d), the State Bar must prove, by clear and convincing evidence, that the attorney had the intent to mislead; this cannot be proven by circumstantial evidence. *See In Matter of Chandler* (Cal. Bar Ct. July 16, 2013) No. 08-O-13631, 2013 WL 3783738, at *5 ("where the attorney's version of events is plausible and there is only circumstantial evidence to the contrary, misconduct has not been shown by clear and convincing evidence."). Moreover, "if equally reasonable

inferences may be drawn from proven facts, the inference leading to a conclusion of innocence, rather than guilt, must be accepted." *Id.* (citing *Himmel v. State Bar* (1971) 4 Cal.3d 786, 793–794).

c. Claims Under Business & Professions Code Section 6106

Section 6106 provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment. Since the charges under 6106 are duplicative of charges under 6068(d), the same standard applies to both statutes for certain underlying violations (e.g., intentionally misleading a court). *See In re Maloney* (Cal. Bar Ct. Jan. 14, 2005) No. 00-O-14000, 2005 WL 103063, at *10.

Gross negligence by an attorney may constitute moral turpitude where, for example, the conduct affects the general public. *See Vaughn v. State Bar* (1972) 6 Cal.3d 847, 859. In determining whether the attorney's gross negligence rises to the level of moral turpitude, a different standard - the totality of the circumstances test - is applied to the facts. *In Matter of Palmer* (Cal. Bar Ct. Jan. 6, 2016) No. 12-O-16924, 2016 WL 364192, at *4 (explaining the court employed a totality-of-the-circumstances analysis to find moral turpitude).

IV. CULPABILITY

a. Dr. Eastman's Assessment that Potentially Outcome-Determinative Illegalities or Irregularities Impacted the 2020 Election are Well-Grounded in Fact and Anything But Frivolous (Counts 1, 2, and 4-11)

i. Overview of Applicable NDC Counts and Relevant Law

Counts 1, 2, and 4-11, which allege a panoply of wrongful acts by Dr. Eastman, are all undergirded by the same core premise: that there was insufficient factual support for Dr. Eastman's conduct. This shared theme is evident from the NDC's repeated allegation that there was "no evidence upon which a reasonable attorney would rely" to support Dr. Eastman's alleged beliefs and actions. See, e.g., Count 1, ¶19 ["Dr. Eastman engag[ed] in a course of conduct … to plan, promote, execute, and assist Trump in executing a strategy for Trump to overturn the legitimate results of the election by obstructing the count of electoral votes of certain states, which strategy Dr. Eastman knew, or was grossly negligent in not knowing, was not supported by either the facts or law."]; ¶22 ["Dr. Eastman knew at the time, there was no evidence upon which a reasonable attorney would rely of fraud in any

state election, involving deceased voters or otherwise, which could have affected the outcome of the election"]; Count 2,¶ 38(a) [same]; Count 1, ¶23 ["There was no evidence upon which a reasonable attorney would rely of fraud through electronic manipulation of Dominion voting tabulation machines"]; Count 4, ¶46(a) ["[n]o evidence upon which a reasonable attorney would rely that the alleged irregularities in Georgia, even collectively, occurred in sufficient number as to affect the outcome of the election in Georgia …. [n]o evidence upon which a reasonable attorney would rely that the allegedly fraudulent or unlawful actions in the administration of Georgia's election approached that margin]; Count 9, ¶69 ["no evidence upon which a reasonable attorney would rely that illegal votes by absentee ballots in Michigan had affected the outcome of the election …. [n]o evidence upon which a reasonable attorney would rely that votes were "electronically flipped from Trump to Biden" in Antrim County, Michigan"].

These allegations are far-reaching, novel, and appear to present issues of first impression in a State Bar disciplinary proceeding. Insofar as the State Bar's claims test the sufficiency of the evidence on which Dr. Eastman relied for his conduct, the line of cases addressing violations of Federal Rule of Civil Procedure 11 is instructive. And, while Rule 11 strictly applies to pleadings and not attorney misconduct *per se*, judicial consideration of concepts like an attorney's duty to conduct a "reasonable inquiry" and the meaning of "frivolous" in the Rule 11 context is insightful.

Rule 11(b)(2) is violated where it is "patently clear that a claim has absolutely no chance of success under existing precedent and ... no reasonable argument can be advanced to extend, modify or reverse the law as it stands..." *Greenberg v. Chrust* (S.D.N.Y. 2004) 297 F.Supp.2d 699, 203. This standard is violated if no "plausible, good faith argument can be made by a competent attorney to the contrary." *Zaldivar v. City of Los Angeles* (9th Cir. 1986) 780 F.2d 823, 833, abrogated on other grounds by *Cooter & Gell v. Hartmarx Corp.* (1990) 496 U.S. 384. "The extent to which a litigant has researched the issue and found some support for its theories even in minority opinions, in law review articles, or through consultation with other attorneys should certainly be taken into account when determining whether [Rule 11(b)(2)] has been violated." Fed. R. Civ. P. Rule 11 advisory committee's note to 1993 amendments.

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Courts have observed that "frivolous" is "shorthand for filings that are '*both* (1) baseless and (2) made without reasonable and competent inquiry.'" See *Jefferson v. Carey* (N.D. Cal. July 20, 1991) No. C98-3754 VRW, 1999 WL 551196 at *5. Courts apply an objective test in assessing whether the Rule has been violated. *See Townsend v. Holman Consulting* (9th Cir. 1990) 929 F.2d 1358. A reasonable inquiry requires only that the party presenting the factual contentions has conducted a prefiling examination of the facts that is reasonable under the circumstances. *Zaldivar, supra*, 780, F.2d 823, 831. The duty of inquiry requires attorneys to seek credible information beyond mere suspicion or supposition, consisting of either witness interviews, direct documentary evidence, or reasonable inferences from other evidence. *California Architectural Building Products, Inc. v. Franciscan Ceramics, Inc.* (9th Cir. 1987) 818 F.2d 1466, 1472; *King v. Idaho Funeral Services Ass'n* (9th Cir. 1988) 862 F.2d 744, 747-748.

Aided by these precepts, the Court should find that the evidence, when viewed objectively, more than adequately supports all of Dr. Eastman's assessments, views, and conduct at issue.

ii. Widespread Election Integrity Concerns Across Multiple States Predominated in the 2020 Election

In evaluating Dr. Eastman's conduct, it bears emphasis that concerns about the integrity of the 2020 election were widely prevalent up through, and continuing after, the electoral count. Pence himself addressed this matter in the January 6 letter he prepared with assistance from his counsel, Greg Jacob, and sent to Congress acknowledging "[s]ignificant allegations of voting irregularities and numerous instances of officials setting aside state election law." Ex. 64; II-83:18-84:19. These concerns were expressed in the reports of illegality and fraud that more than 100 state legislators sent to Washington, D.C., before the count took place. See, e.g. Exs. 1050, 1153-1155, and 1159.

Kurt Olsen, one of the attorneys who worked on the 2020 election challenges in collaboration with Dr. Eastman and others, explained how the activities of non-legislative actors (i.e., Secretaries of State, courts, administrative officials) in abrogating, disregarding, or modifying state election laws in several swing states potentially violated the Constitution and profoundly impacted the 2020 election. XX-35:21-38:5. During the course of his investigation and work, Olsen determined that such non-

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legislative actions in four swing states (Wisconsin, Pennsylvania, Georgia, Michigan) were sufficient to affect the outcome of the 2020 presidential election. XX-47:16-48:24, 52:23-54:2.

Amidst this backdrop, Dr. Eastman proposed a delay of the electoral count, as requested by the legislators, to give them time to assess the impact of the illegalities and/or possible fraud on the election results. As Dr. Eastman acknowledged in his testimony, the extent to which actual fraud may have impacted the election remains an open question and was not the primary focus of his analysis. XXXI-87:17-88:2. Rather, his focus was on violations of state election laws by non-legislative actors and, on that issue, the evidence adduced at trial demonstrates that Dr. Eastman's assertion that outcome-determinative illegality occurred in the swing states was factually well-founded and nullifies the State Bar's claim that he did not conduct himself as a "reasonable attorney."

iii. Dr. Eastman Conducted a Thorough and Reasonable Inquiry of Election Integrity Issues

Dr. Eastman went to great lengths to inform himself of ongoing developments relating to election integrity concerns as they were unfolding in late 2020, early 2021, and continuing to this day. As part of these efforts, he maintained a spreadsheet depicting developments in post-election lawsuits across the nation, which involved reviewing the counts alleged in the various cases, tracking outcomes, and keeping notes. XVII-169:3-20. He reviewed court documents available on Westlaw, PACER, and other databases, including affidavits, exhibits, and expert reports. XVII-170:17-171:13, 173:12-17. He followed news accounts, read reports generated by election integrity groups, and monitored legislative hearings. XVII-173:5-11. When he received new information relating to an illegality (such as the elimination or weakening of state signature-verification requirements), he would research and catalogue the relevant state statutes. XVII-171:14-25. He also endeavored to estimate the number of votes impacted by the illegalities and to document items for further review and analysis. XVII-172:1-4.

As part of this process, Dr. Eastman vetted incoming information with a critical eye. He would personally assess the credibility of his sources, consult with experts, and reject information whose accuracy he could not verify – as for example, the evidence he received of purported ballot manipulation originating from IP addresses in China. XXXI-98:11-99:9, XXVII-221:18-222:7. Dr. Eastman also

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gave due consideration to criticisms of election-related claims and flagged them for further research. XVII-172:1-8.

iv. Evidence of Illegalities or Irregularities in Wisconsin

In Wisconsin (where Biden's margin over Trump was approximately 20,800 votes) (XI-187:16-19), numerous illegalities affected the 2020 election, as attested to by Michael Gableman, the former Wisconsin Supreme Court Justice selected by the Wisconsin state legislature to investigate election integrity issues. At trial, Gableman discussed the following illegalities that he also identified in his report to the legislature (Ex. 1056):

(1) *Use of unauthorized absentee drop boxes*. This practice, conducted pursuant to non-legislative guidance from the Wisconsin Elections Commission ("WEC"), violated Wisconsin's law requiring that ballots be mailed or delivered in person, by the voter, to the municipal clerk. XI-185:12-187:3; XII-12:3-23:2; Ex. 1056-78-80. On July 8, 2022, the Wisconsin Supreme Court held that the use of the challenged drop boxes was unauthorized by law. *Teigen v. Wisconsin Elections Commission* (2022) 403 Wis.2d 607; XI-186:2-12; XII-23:3-13; Ex. 1307. Olsen, who analyzed election illegalities in Wisconsin while working on *Texas v. Pennsylvania*, recalled that there were hundreds of thousands, if not millions, of ballots cast using drop boxes - a "material amount that violated the statute." [3] XIII-86:20-87:6.

Significantly, Greg Jacob, one of the State Bar's key witnesses, acknowledged that this category of illegality alone may well have been outcome determinative in Wisconsin. II-182:15-21 ["So it's possible that, between the absentee ballot boxes and that unlawful guidance, that that might have affected the outcome of the election in Wisconsin, which, again, just had that 20,000-vote margin…"].

(2) *Avoidance of voter ID requirements through abuse of statutory "indefinite confinement" requirements.* Under Wisconsin law, individuals who are "indefinitely confined" (i.e., physically ill, infirm, elderly, or disabled – Ex. 1056-99, citing Wis. Stat. §6.86(2)(b)) are exempt from voter identification requirements. Ex. 1056-97, citing Wis. Stat. §6.87. Gableman explained how Wisconsin election officials in two heavily Democrat counties, encouraged by WEC, violated state law by advising

[3] According to Gableman, there is no way to assign an exact number to the ballots received by drop box because many of the boxes were unmonitored. XII-13:5-19.

voters that they could claim to be indefinitely confined merely because of fear of COVID, notwithstanding that the Wisconsin Supreme Court had previously ruled that only the persons who are indefinitely confined may declare themselves as such. XII-143:1-146:19; Ex. 1056-96-99. Both Gableman and Olsen testified that the number of individuals claiming indefinite confinement status in 2020 exceeded 200,000. [4] XII-145:8-12; XX-65:9-12.

(3) *Illegal ballot curing*. Acting pursuant to WEC guidance, county election officials altered ballot envelopes by physically adding information (such as addresses) that Wisconsin law required the voter to provide. XII-146:20150:15. Gableman could not precisely quantify the number of votes affected by this unlawful practice, but estimated the number to be in the "thousands." XI-187:8-15.

(4) *Violations of Wisconsin's election law involving residential care facilities*. Gableman testified that WEC directed election officials to disregard Wisconsin law requiring that bipartisan special voting deputies visit care facilities to assist residents in casting absentee ballots. (XII-65:6-69:1; Ex. 1056:81-95.) The Racine County Sheriff's Office recommended that certain WEC members be criminally prosecuted for the instructions they gave to election officials. XII-65:20-66:8; Ex. 1056-90-91.

Dr. Eastman testified that he considered the impact of Wisconsin's illegalities – unauthorized use of drop boxes and elimination of voter identification for false indefinite confinement claims, – on the 2020 election. XI-27:9-28:4. Among the documents he relied on in forming his assessments were court decisions, including the vigorous dissents in *Trump v. Biden* (Dec. 14, 2020) 394 Wis.2d 629, where the Wisconsin Supreme Court, by a narrow majority, dismissed an election challenge on laches grounds. See, e.g., Ziegler, J. dissent, Ex. 1189-57-58, ¶114 ["The petitioners raised four allegations regarding election administration: Absentee ballots lacking a separate application; absentee envelopes that are missing or have a defective witness address; indefinitely confined voters/faulty advice from election officials; and ballots cast at Madison's Democracy in the Park/ballot drop boxes. The respondents cannot demonstrate that laches bars a single one of these claims"]; Roggenstack, C.J., dissent, 1189-34, ¶ 62 ["In the case now before us, a significant portion of the public does not believe

[4] Kurt Olsen identified the use of unmanned drop boxes and indefinite confinement claims as the two primary violations in Wisconsin. XXIII-83:15-84:2.

that the November 3, 2020, presidential election was fairly conducted. Once again, four justices on this court cannot be bothered with addressing what the statutes require to assure that absentee ballots are lawfully cast"], 1189-43, ¶81 ["My conclusion that errors in the certification of absentee ballots require discarding those ballots is consistent with our precedent"]; Bradley, J., dissent, 1189-69, ¶140 ["Once again, the majority of the Wisconsin Supreme Court wields the discretionary doctrine of laches as a mechanism to avoid answering questions of law the people of Wisconsin elected us to decide…When the state's highest court refuses to uphold the law, and stands by while an unelected body of six commissioners rewrites it, our system of representative government is subverted"].)

v. Evidence of Illegalities or Irregularities in Pennsylvania

Olsen testified regarding the myriad violations of state election laws that he investigated and analyzed in Pennsylvania, where Biden's margin over Trump was 81,660 votes (Ex. 260-25, ¶56), including:

(1) *Elimination of signature verification requirements*. Olsen testified that Pennsylvania's Secretary of State, Kathy Boockvar, without legislative approval, unilaterally abrogated several Pennsylvania statutes requiring signature verification for absentee or mail-in ballots. [5] XX-45:17-46:18; Ex. 260-21-24. This non-legislative conduct was in response to a lawsuit filed by the League of Women Voters in August 2020 seeking to impose a notice and cure requirement on the State's signature verification process, *League of Women Voters of Pennsylvania v. Boockvar* (E.D. Pa. Aug. 7, 2020) No. 2:20-cv-03850-PBT. XX-46:8-18; Ex. 260-21-22, ¶¶44-45. But instead of defending against that lawsuit, Secretary Boockvar simply announced she would eliminate signature verification altogether.

(2) *Extension of the deadline for mail-in ballots*. Olsen testified that Boockvar extended the statutory deadline for mail-in ballots from Election Day until three days after Election Day and that the Pennsylvania Supreme Court affirmed that extension in *Republican Party v. Boockvar* and *Scarnati v. Boockvar*. XX-47:16-48:9; Ex. 260-99-100. These cases were appealed to the U.S. Supreme Court by way of a motion for expedited review. XX-50:1-16. In a split decision, four justices voted for review

[5] As Olsen explained, the signature verification requirement is a security measure for mail-in ballots meant to ensure that the signature on record with the state matches the signature associated with that ballot and thus establish that the person casting the mail-in ballot is a legal, registered voter. XX-46:8-18.

under a standard reflecting that those justices believed the actions were likely to succeed on the merits. *Id*. This legal result reinforced Olsen's view that his client's allegations had merit. *Id*.

(3) *The Ryan Report findings of irregularities/improprieties*. Olsen testified that his team received the Ryan Report, analyzed it, and incorporated it into the *Texas v. Pennsylvania* complaint after concluding it was a reliable resource. XX-51:14-52:15. As described in the complaint, the Ryan Report was issued on December 4, 2020, by 15 members of the Pennsylvania House of Representatives led by Representative Francis Ryan. Ex. 260-25, ¶56. The report concluded that "[t]he general election of 2020 in Pennsylvania was fraught with inconsistencies, documented irregularities and improprieties associated with mail-in balloting, pre-canvassing, and canvassing that the reliability of the mail-in votes in the Commonwealth of Pennsylvania is impossible to rely upon." *Id*. For example, the report identified 58,221 absentee or mail-in ballots that were received on or before the day state records indicated they were mailed out; another 51,200 ballots returned "the day after the Mailed Date"; and another 9,005 ballots had "no mailed date." Ex. 260-25, ¶ 57. The total number of these ballots (118,426) well exceed Biden's margin over Trump in Pennsylvania. Ex. 260-25, ¶58.

The State Bar's expert, Dr. Grimmer, addressed the 58,221 absentee ballots by laboring to explain that, under Act 77, voters were able to apply for, receive, and vote their absentee ballots on the same day. V-187:7-188:19. There is, however, no way for the court to consider how many individuals might actually fall into this category because no such data is in evidence. Furthermore, Dr. Grimmer's explanation fails to account for the fact that the "Mailed date" field in the SURE [Statewide Uniform Registry of Electors] system – the date Rep. Ryan relied on for his analysis – is the date that a mailing label was generated for "outgoing absentee and mail-in ballots." See Ex. 132, n. 1. The generation of a "mailing label" for an "outgoing" ballot is not compatible with Dr. Grimmer's claim that the discrepancy was a result of in-person early voting.

Representative Ryan also found that there were 202,377 more ballots than voters. Jonathan Marks testified that the discrepancy was simply a function of the fact that Philadelphia and Pittsburgh had not finished uploading their data into the SURE system. XXXII-59:12-60:2. But Dr. Grimmer, was pressed during cross-examination with evidence – a report produced by VerityVote – that the discrepancy was still 121,000 more ballots than voters *after* all data had been uploaded to the SURE

system. *Id.* at 166:16-24. Grimmer discounted this evidence by claiming that the SURE system excluded voters who had been dropped from the voter rolls in the interim. *Id.* at 167:13-20. However, he did not offer any evidence as to how many voters had been dropped from the rolls.[6] And his claim that the SURE system should not be used for this kind of analysis is belied by the fact that the Department of State's own reports likewise use the SURE system as the data source. See Ex. 134-8.

vi. Evidence of Illegalities or Irregularities in Georgia

Testimony from Dr. Eastman, Olsen and Garland Favorito shows there was ample evidence of illegalities and irregularities in Georgia, where Biden's margin over Trump was a mere 11,779 votes. XIV-144:13-16. Favorito is a cofounder of the non-profit, non-partisan election integrity group VoterGA and a former Information Technology professional with more than 40 years of industry experience, including in the areas of data administration and security. XIV-27:15-23; 29:21-30:15, 50:10-53:24. He testified before the Georgia 2020 Senate Judiciary Subcommittee and the House Government Affairs Committee in their investigations of fraud, errors, and irregularities in the 2020 election. XIV-63:2-65:20. Favorito was also the primary author of a rebuttal report to Secretary of State Brad Raffensperger's letter to the Georgia General Assembly, Pence, and certain Congress members relating to the 2020 election. XIV-68:2-69:18, 70:5-15; Ex. 1144. His trial testimony addressed a multitude of illegalities/irregularities in the 2020 election in Georgia, including the following:

(1) *Chain-of-custody issues involving absentee ballots*. More than 100,000 absentee ballots collected from drop boxes had chain-of-custody issues that violated State Election Board rules (e.g., forms lacking the requisite signatures and/or or reflecting pick-up dates that, impossibly, predated installation of the associated drop box or that post-dated the election. XIV-86:24-88:9. Favorito also testified that chain-of-custody forms were missing for as many as 355,000 ballots, according to some estimates. Favorito explained that the precise number of affected ballots cannot be ascertained because the Secretary of State did not require the number of absentee ballots collected from drop boxes to be recorded. XIV-88:10-17.

[6] The number, as would have been testified to by Heather Honey in rebuttal had she been permitted to testify, is actually about 16,000, leaving a discrepancy of more than 100,000 – well in excess of the 80,000 vote margin in the State.

(2) *Weakening of signature verification requirements*. According to Favorito, the 2020 election was marked by a dramatic statewide reduction in signature rejection rates.[7] He attributed the reduction to a settlement agreement between Georgia's Secretary of State and Attorney General that allowed signature matches to be approved not only where the ballot signature matches the voter registration on file, but also where that signature matches the signature on the ballot application form. XIV-133:12-133:4; Ex. 1144-9. Favorito explained how this relaxation of signature verification requirements creates an opportunity for fraud. XIV-134:23-135:4. Dr. Eastman also explained the risk attendant to this practice: "[t]he danger of that, in my view, was that somebody could fraudulently apply for an absentee ballot and sign it, have the ballot mailed to them, and then sign the ballot, and the signatures would match, even though it was a fraudulent vote." XXV-215:13-216:4.

(3) *Counterfeit ballots*. Favorito testified that four senior poll managers and two audit managers declared in sworn affidavits that they handled counterfeit ballots in the 2020 Fulton County post-election audit. XIV-145:9-146:3. According to Favorito, the reason the affiants believed the ballots to be counterfeit was because they were not folded after being mailed despite being mail-in ballots; were not on the correct paper stock; were marked with toner as opposed to a writing instrument; appeared to be copied; and there were instances where dozens of ballots in a row voted for the same candidate. XIV-146:4-11.[8]

(4) *Unavailable ballot images*. Favorito's investigation revealed that ballot images (i.e., digital electronic images that are supposed to be recorded when a vote is scanned) are unavailable for a large number of ballots across the state, including 17,724 ballots in Fulton County alone. Ex. 1144-5; XIV-157:7-158:11, 159:2-4. Favorito's team requested ballot images from the 2020 election for all 159 counties in Georgia, but 1.7 million images were not provided, with most of the responding counties

[7] The Bar's expert witness, Justin Grimmer, attributed this decline to a recent change in Georgia law (HB 316) that, among other things, allowed voters to "cure" problems with their ballots. XXXI-207:16-208:5, 209:1-9. But that change in the law merely conformed the statute to a prior court decision mandating a cure process, a court order that was in effect for the 2016 election and of which Grimmer was unaware. XXXI-116:17-118:9. Moreover, even Grimmer himself acknowledged that the signature verification rate decline 46% from 2016 and 2020. XXXI-214:10-11, XXXI-212:9-11 [acknowledgment by Grimmer that Georgia's signature rejection rate was .28% in 2016 and 15% in 2020 - a 46% decline].

[8] Favorito was serving as an audit monitor when the counterfeit ballots were discovered during the audit on November 14, 2020. XIV-146:21-147:1.

admitting they did not have them, and others refusing to comply with open records requests. XIV-164:3-9. According to Favorito, the unavailability of ballot images means they were either destroyed in violation of federal and state laws requiring retention of the data or that "someone has inserted votes into the count which don't belong, because they have no supporting image or supporting ballot." XIV-158:12-160:6.

(5) *Evidence of Vote Flipping*. Favorito testified that a Dominion voting machine in at least one county in Georgia was found to have flipped votes between candidates. Based on the published results of the hand-count audit conducted of the November 3 election results in Ware County, a small county in which only 14,192 voters cast votes for President in 2020, the Dominion voting system recorded 37 more votes for Biden and 37 fewer votes for Trump than the actual, verifiable audit totals. XIV-167:8-168:17, 173:5-173:11, Ex. 1144-6. [9] Favorito's team requested a forensic audit to determine the cause of the vote flip, but the Secretary of State took no action. XIV-172:3-17.

(6) *Double-counted ballots*. Favorito testified that VoterGA's investigation found approximately 200 "duplicate scanned ballots" – i.e., individual ballots that were scanned and counted twice. XV-14:7-15:10; Ex. 1144-3 and 1144-6.

(7) *Duplicate reported ballots in Fulton County post-election recount*. VoterGA analyzed the Fulton County hand recount of the November 3 election. Their investigation revealed that more than 6,000 duplicate ballots were reported in the recount, which resulted in a net increase of 4,081 votes for Biden. XV-17:8-21, 64:3-11, 136:4-138:8. According to Favorito, these duplicate ballots were recorded for Biden in the underlying presidential race (XV-64:7-11); therefore, they represent yet another irregularity calling into question the integrity of the 2020 election in Georgia.

(8) *Ineligible Voters.* VoterGA determined that 2,047 individuals who voted in the November 2020 election were under the legal age of 17 when they registered to vote. [10] XV-74:3-75:1.

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[9] That is an error rate of about ½ of 1%, which would be about 26,000 votes statewide – more than double the margin between Biden and Trump.

[10] Bryan Geels stated in the expert report he prepared on behalf of the petitioners in *Trump v. Raffensperger* that "at least 2,047 individuals" who voted in the 2020 election, "according to the State's records, were registered to vote prior to their 17th birthday, below the minimum age permitted under the Election Code." Ex. 1149-3; I-93:3-92:2. As Dr. Eastman testified, Geels' report corrected his earlier statement from a prior affidavit that the number of underage registrants who voted in 2020 was 66,247, transposing that number with another category of problematic votes. Ex. 1048-554, ¶24. Dr. Eastman

77:11-78:24; Ex. 1144-14. Consistent with his report, Favorito also testified about evidence of ballots cast in the 2020 election by unregistered voters. Specifically, he testified regarding VoterGA's discovery that there were 4,502 registration numbers in the voter history file, which lists voters who were credited with voting in the November 2020 election, who did not appear in the voter registration file, which lists voters who are eligible to vote in the election. XV-80:4-84:5; Ex. 1144-14.

Dr. Eastman and Favorito communicated about election integrity issues in Georgia during the relevant time frame. Favorito recalled being on a phone call in the November 2020 to January 2021 time frame during which the participants, including Dr. Eastman, discussed issues of fraud, errors and irregularities in the 2020 election. XIV-152:12-154:5. Dr. Eastman concluded that the issues that VoterGA identified and analyzed, when viewed in the aggregate, were outcome-determinative for the 2020 election. XXXI-89:3-22.

vii. Evidence of Illegalities or Irregularities in Michigan

Olsen testified about two actions taken by Michigan Secretary of State Jocelyn Benson that, according to allegations in the *Texas v. Pennsylvania* complaint, materially affected the 2020 election and violated the Constitution. The first action was the unsolicited mailing of ballot applications to more than seven million Michigan residents without statutory authorization. XXIII-72:16-73:4, 74:25-78:3; Ex. 260-31-32; ¶¶79-84. [11] The second allegedly unlawful action Benson took was to abrogate signature-verification requirements for absentee ballots. XXIII-73:5-8; Ex. 260-33-34. Olsen explained his understanding that, under Michigan law, voters must request ballot applications and sign the ballot application. XXIII-76:6-13; Ex. 260-31-35, ¶¶84-89, 92-97. Olsen also testified that he believes these unlawful actions affected a sufficient number of ballots to be outcome-determinative. XXIII-78:4-20, 79:18-80-1; Ex. 260-31, ¶78. Last, Olsen testified about evidence that poll watchers and inspectors were

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pointed out that Raffensperger falsely stated that Geels was reporting the number of underage people who voted, when he was in fact identifying the number of individuals who were underage at the time of their registration. I-92:7-18; Ex. 94-9.

[11] A Michigan trial court upheld the action, despite it not being authorized by statute, as within the "inherent authority" of the Secretary of State. *Davis v. Benson* (Mich. Ct. Claims, Aug. 25, 2020) No. 20-000099-MM. The decision was affirmed by the intermediate court of appeals over a strong dissent from Judge Meter, who found that "under the plain language of" the statute, the Secretary "lacked the authority to distribute absent-voter ballot applications." *Davis v. Benson* (Mich. Ct. App. Sept. 16, 2020) No. 354622. The Michigan Supreme Court declined to review the case, over an equally strong dissent from Justice Vivano. *Davis v. Benson* (Mich. S.Ct. Dec. 28, 2020) No. 162007.

impeded from carrying out their function on Election Day. XXIII-80:2-13. This evidence consists of sworn affidavits and video depicting cardboard paper being put up in the windows of the TCF tabulation center to block poll watchers from observing voting activity. XXIII-80:22-81:4.

The issues Olsen testified about are among the allegations that prompted Michigan Senate President Pro Tem Aric Nesbitt and Michigan Senators Lana Theis and Tom Barrett to demand the election results be audited prior to certification. Exs. 1062 and 1063. Their letters, which Dr. Eastman reviewed in November or December of 2020, support his assessment that illegalities existed in the conduct of the 2020 election in Michigan. XXXI-130:21-131:6, 132:3-133:19. Overall, Dr. Eastman's involvement in Michigan was minimal, though he did speak with one of the lead attorneys, Thor Hearne, as part of his inquiry into the illegalities in that state. XXIII-210:15-21.

viii. Evidence of Security Vulnerabilities Involving Voting Equipment

The State Bar alleges that, during his January 6, 2021, speech at the Ellipse, "Dr. Eastman also stated that Dominion electronic voting machines had fraudulently manipulated the election results." NDC, ¶59. Dr. Eastman testified regarding his awareness, including during the time of his asserted misconduct, that investigations had identified a number of serious security flaws in the Dominion system that could allow malevolent actors to be able to hack into the system and commit fraud. XXXI-54:11-55:4. For example, Dr. Eastman knew that in Antrim County, Michigan, election officials conceded that votes were switched between candidates during the 2020 election. Ex. 100-1. The State of Michigan's own expert, Alex Halderman, confirmed that votes had flipped from Biden to Trump in a report issued in March 2021. (Ex. 1062.) Though this report was not available at the time of Dr. Eastman's asserted misconduct, Dr. Eastman had reviewed declarations from Halderman, including in the Antrim litigation in Michigan. XXIII-28:20-29:14; XXIII-35:15-23; Ex. 1141-28-29.

Dr. Eastman had also reviewed a declaration from Harry Hursti, a voting system cybersecurity analyst, detailing Hursti's observations of ballot scanning and tabulation issues involving Dominion machines in Fulton County, Georgia. XXIII-35:15-23; Ex. 1140. Dr. Eastman's judgment regarding Dominion voting equipment was also informed by the court's October 11, 2020, decision in *Curling v. Raffensperger*. XXIII-47:18-48:6; see ex. 1141, including at 145, fn. 99, and 146. Favorito also testified at trial that the QR-coded voting system used by the Dominion machines does not offer appropriate

election integrity. The reason for this, he explained, is that the machine-readable QR codes are not verifiable by the voters because they do not present the voter's choices in a human-readable text. XIV-46:25-50:9.

As part of his inquiry into voting equipment, Dr. Eastman met with two individuals on January 5, 2021 (the day before he spoke at the Ellipse) – Joe Oltmann and Russell Ramsland – to discuss their findings relating to voting machine vulnerabilities. XVIII-17:22-18:13. Before he spoke to Oltmann and Ramsland, Dr. Eastman had known that Ramsland was involved with the forensic audit of electronic voting machines in *Bailey v. Antrim County* and that the State of Texas had relied on his expertise in declining to authorize the use of Dominion election equipment in Texas. XVIII-18:19-19:4, 22:20-23:3. Oltmann, whom Dr. Eastman did not know, presented himself as the founder of a data analytics firm who was fairly heavily involved in the assessment of election information. XVIII-19:5-12.

Oltmann and Ramsland informed Dr. Eastman of security vulnerabilities involving the voting machines – specifically, that it was possible for ballots to be preloaded into the voting machines (either scanned in advance or electronically copied and stored in a suspense folder or an adjudication folder) that a malevolent actor could then exploit. XVIII-25:16-23.; See Ex. 1092-11, ¶14. Oltmann showed Dr. Eastman a chart he prepared demonstrating the various points of vulnerability in the process of receiving, opening, and counting ballots through sending them to adjudication. XVIII-25:23-26:2; Ex. 1213.

Dr. Eastman's views regarding Dominion voting equipment were also shaped by two predictions that Oltmann and Ramsland shared with him about the Georgia Senate runoff election on January 5, 2021 if bad actors were interfering with the election through the vulnerabilities of the machines. XVIII-30:21-25. The first prediction was that as the vote totals approached 100 percent in the ballots or precincts being reported, the percentage of ballots that had been reported would remain constant while additional ballots continued to be reported. XVIII-30:21-31:7. This occurrence would indicate that additional preloaded ballots were being pulled from suspense folders and injected into the count after the close of the polls, with the percentage of outstanding ballots remaining unchanged because the numerator and denominator would increase at the same time. XVIII-33:11-34:5.

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The second prediction was that the reporting of the counting would shut down. XVIII-31:8-16. This prediction was based on Oltmann and Ramsland's research and assessment that if bad actors were drawing ballots from the suspense folders, they would need to then tag voters in the voter rolls who had not voted, so that if there were an audit after the fact, the number of ballots would match the number of voters recorded as having voted. *Id*. Dr. Eastman testified that both phenomena were observed during the United State Senate runoff election in Georgia on January 5, 2021. XVIII-31:17-33:9.

The inquiries Dr. Eastman made regarding Dominion voting machines, and the information he evaluated in forming his assessments of those machines, belie the State Bar's assertion that he acted unreasonably or unethically with respect to his speech at the Ellipse, which would be protected speech under the First Amendment in any event. See section IV.b.iv, *infra*.

ix. Evidence Relating to Deceased Voters

The NDC alleges that Dr. Eastman made false and misleading statements that "dead people had voted," yet the NDC goes on to belie this same accusation by acknowledging evidence confirming that votes were, in fact, cast on behalf of deceased individuals, including "only" 1,616 such votes in Michigan. NDC, ¶¶22, 80-81. [12] Further, Favorito testified that VoterGA, based on data obtained by Geels, determined that 873 people received credit for voting in the 2020 election though they had died prior to election day. This was determined by comparing the voter history file from November 28, 2020, with each decedent's file from Georgia's Public Health Department.[13] Ex. 1144-14; XV-95:2-96:24. Favorito allowed for the possibility that some of these voters may have expired after casting their ballots, but this possibility does not render Dr. Eastman's representations false or misleading, nor does it delegitimize the need to investigate the potential impacts caused by VoterGA's findings.

[12] The Bar's contention appears to be based on the erroneous view that Eastman's statement can be read as asserting an *outcome-determinative* number of votes were cast on behalf of deceased voters. But Eastman testified that he never made such a claim, (I-59:15-23) and the Bar has offered no evidence to the contrary.

[13] Favorito testified that the criteria Geels used for matching purposes were the individual's first and last name and birth year, because that was the only data available at the time, as was expressly acknowledged by Geels with a notation that corrected numbers would be provided once additional data was obtained through discovery. XVI-134:19-135:6; Ex. 1036-555-56. VoterGA also added an additional characteristic – the individual's address information – which removed many likely false positives and reduced the number of potential deceased voters identified by Geels from "as many as 10,315" to 873. XVI-135:6-9, 137:8-12, 171:4-13. Favorito testified that he believes this is a conservative figure that understates the number of individuals in this category. XVI-135:6-10.

x. The Findings of Statistical Voting Anomalies by John Droz's Team Reinforced the Need for Further Investigation into Election Illegalities

John Droz, who holds a master's degree in physics and worked as a quality control engineer in charge of General Electric's microelectronics facility, assembled a team of statistical Ph.D.s to volunteer for a project investigating election integrity issues surrounding the 2020 election. XIX-17:10-16, 18:5-14, 20:7-21:23, 22:18-23. Dr. Eastman received and relied on the voting analysis reports the Droz team prepared for Pennsylvania and Michigan. Exs. 1041 and 1042. Droz oversaw preparation of the reports and worked with his fellow team members to ensure their individual contributions were understandable to laypeople. XIX-35:18-36:17. Working independently, each team member found there were "major statistical aberrations" in Pennsylvania and Michigan's voting records and concluded that "the reported results are highly unlikely to be an accurate reflection of how Pennsylvania and [Michigan] citizens voted." Exs. 1041-40, 1042-24. The November 2020 iterations of the report found the respective number of "suspicious votes" in Pennsylvania and Michigan to be 300,000± and 190,000±, respectively - totals that far exceed Biden's margin over Trump in each state. *Id*. Most of the statistical anomalies occurred in 11 of Pennsylvania's 67 counties and nine of Michigan's 83 counties. *Id*.

Dr. Young, a member of the Droz team and Dr. Eastman's designated expert in this matter, has a deep background in statistics. He holds a Ph.D. in joint statistics and genetics, performed statistical analyses involving product safety testing while employed by Ely Lilly and later worked as a statistical consultant in the computer science division of GlaxoSmithKline. XXII-90:14-24, XXII-95:9-97:11, 98:16-99:12. Dr. Young prepared a contrast analysis report comparing the results of the 2016 and 2020 presidential elections for every county in the United States. XIX-121:19-122:10. He found positive contrasts in states like Massachusetts, Colorado and New York, which recorded significantly more votes for Biden against Trump than they did for Clinton versus Trump in 2016. XXVI-15:2-11; Ex. 1046-6. Positive contrasts in Biden's favor were also found in numerous counties in Georgia, Michigan, and Pennsylvania. XXVI-71:8-16. [14]

[14] The Bar's expert criticized Dr. Young's analysis as based on raw numbers rather than vote percentages. But Dr. Young also conducted a contrast analysis based on percent of party registrations. That analysis is reflected in his portion of the Pennsylvania report on which Dr. Eastman relied. Ex. 1041:15-16.

The purpose of Dr. Young's contrast report was to point to numbers that are unusual relative to the body of data and aid other experts in their efforts to ascertain possible reasons for the anomalies observed. XXVI-32:18-21, 33:21-34:1. The statistical anomalies identified in the Michigan and Pennsylvania Reports and Dr. Young's contrast analyses reinforced Dr. Eastman's concerns that the illegalities in the 2020 election warranted further investigation XXVII-204:6-212:16, 213:24-215:3. Dr. Eastman was struck in particular by the aspect of Dr. Young's contrast analysis that showed the differential between the 2016 and 2020 results was much greater in a few counties than it was on average across similar counties. XVII-211:6-212:2; Ex. 1041-15.

xi. The Cicchetti Declaration

The motion for leave to file a bill of complaint filed in *Texas v. Pennsylvania* included a declaration from Dr. Charles J. Cicchetti, Ph.D. (the "Cicchetti Declaration"), which contained his statistical analysis of the 2020 election results in Georgia, Michigan, Pennsylvania, and Wisconsin. Ex. 1033. Dr. Eastman reviewed the filings, including the Cicchetti Declaration, before he filed his motion to intervene on Trump's behalf on December 9, 2020, and he concluded they appeared credible and accurate based on his own research and investigation up to that point. IV-37:18-24. XXV-234:21-235:15. His primary focus was determining whether the attorneys in Texas addressed the federal constitutional issue arising from the illegality by non-legislative officials changing the manner of choosing presidential electors. XXV-216:9-217:15.

Though the Cicchetti Declaration became a subject of dispute after its filing, differences of opinion among experts are an indispensable feature of the adversarial process – so long as attorneys presenting expert opinion do not knowingly commit fraud. See, e.g., *People v. Riel* (2000) 22 Cal.4th 1153, 1217, citing *People v. Gordon* (1973) 10 Cal.3d 460, 472-474; see also *Marijanovic*, *supra*, at 1273; *Coffey v. Healthtrust, Inc.* (10th Cir. 1993) 1 F.3d 1101, 1104 ("[T]he court must allow parties and their attorneys to rely on their experts without fear of punishment for any errors in judgment made by the expert").

At the time of his review, Dr. Eastman was mindful that the *Texas v. Pennsylvania* filings were provisional documents that would likely be tested at a later stage in the "crucible of litigation" as part of the adversarial process. XXV-234:21-235:15, 237:3-21. He also knew that the attorneys who worked

on the filings were competent and scrupulous about the evidence they were gathering in support of their claims. I-111:20-112:3. Nothing in the Cicchetti declaration ran afoul of prior court findings or rulings or subsequently served as a basis for a subsequent Rule 11 sanctions request. [15] Last, the time for Dr. Eastman to conduct further investigation was exceedingly short: Eastman's Motion to Intervene on behalf of President Trump was filed less than 48 hours after the State of Texas filed its motion for leave to file a bill of complaint. [16] IV-48:11-15, 50:7-14. As discussed, in the instructive context of adjudicating an asserted Rule 11 violation, the amount of time available for investigation is a factor courts consider in evaluating the reasonableness of an attorney's prefiling inquiry. See *Jones v. International Riding Helmets, Ltd*. (11th Cir. 1995) 49 F.3d 692, 695.

The Bar has alleged that the characterization of Cicchetti's sophisticated statistical analysis contained in Texas's Bill of Complaint was inaccurate, and that Dr. Eastman therefore made a false statement by incorporating the Texas Bill of Complaint by reference. There are three problems with the Bar's position. First, whether or not Texas misunderstood and then mischaracterized Cicchetti's analysis, Dr. Eastman incorporated by reference the entirety of the Texas complaint, including the Cicchetti Declaration itself, so the actual Cicchetti analysis was part of Dr. Eastman's incorporation and serves as a corrective to whatever mischaracterization Texas might have made, if any. Second, Cicchetti's analysis was a quite sophisticated analysis by a statistical expert of impeccable credentials; the Bar has offered no evidence that Dr Eastman knew that Texas's description of that analysis was in error, even if it was. And third, as Dr. Eastman noted during his trial testimony, the description in the Texas brief of the Cicchetti analysis was introductory discussion, not material to the legal arguments advanced in the brief.

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[15] Cf. Ex. 375, sanctions order issued in a wholly different context in *Hobbs v. Lake*, Arizona Supreme Court Case No. CV-23-0046-PR (admitted over relevancy objection by Dr. Eastman's counsel). In that order, the Court imposed sanctions under Ariz. R. Civ. App. P. 25 and A.R.S. §12-349 against Kari Lake's attorneys for making a false statement – specifically, by repeatedly referring to a certain alleged fact as "undisputed" even though it was strongly disputed by other parties and despite the court having previously concluded and stated that the fact was "unsupported by the record." Ex. 375-4.

[16] The case ended four days after the filing of the motion for leave to file the bill of complaint when the Supreme Court denied the motion for lack of standing. Two justices - Alito and Thomas - dissented based on their belief that the Court has no discretion to deny the motion in light of its original jurisdiction. Ex. 1376, XXV-206:13-24.

xii. Dr. Grimmer's Opinions Do Not Invalidate the Tenability of Dr. Eastman's Conduct

Dr. Eastman has demonstrated, by competent and credible evidence, that illegalities and irregularities in the 2020 election may well have been outcome determinative in several states whose election results favored Biden by modest margins – namely, Georgia (11,779 votes), Wisconsin (20,800 votes), Pennsylvania (81,660 votes), and Michigan (146,007 votes). As shown, the illegalities took a number of different forms, and affected so many ballots in the aggregate, that even if only some of those claimed illegalities were accepted by the courts, there would have been a sufficient basis for recognizing a different election outcome. On the evidence presented, the claims of potentially outcome-determinative illegality were objectively tenable.

Though Dr. Grimmer has interpreted the evidence differently from Dr. Eastman, his opinions are not dispositive of the tenability issue. His "top-line conclusion" that Dr. Eastman did not present evidence demonstrating "outcome-determinative voter fraud or illegal votes being cast" (V-132:7-12) is merely the opposing view of an adversarial expert regarding intensely factual issues. His opinions on the merits of the alleged illegalities of state election laws and the statistical findings of Droz's team do not negate the reasonable grounds Dr. Eastman had for his asserted conduct.

b. Dr. Eastman's Conduct is Protected Under the First Amendment (Counts 1, 5, 7, and 9)

The First Amendment provides, in relevant part, that "Congress shall make no law…abridging the freedom of speech." U.S. Const. amend. I. Similarly, the right to petition the government for redress of grievances is also guaranteed – the freedom of speech and the freedom of petition are cognate rights. *Thomas v. Collins* (1945) 323 U.S. 516, 530. And it is well-established that the "First Amendment protects the freedom of expression of all citizens, including lawyers." *Jacoby v. State Bar* (1977) 19 Cal.3d 359, 368; see also *In the Matter of Dixon* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 23, 30 ("Disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment."); *Matter of Anderson* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 775, 781 ("Like all other citizens, attorneys are entitled to the protection of the First Amendment, even as participants in the administration of justice."); Rule 8.4, comment 6 ("This rule does not prohibit those activities of a

particular lawyer that are protected by the First Amendment to the United States Constitution or by Article 1, section 2 of the California Constitution").

Notably, the broad protection of the First Amendment covers many forms of speech, even speech that "invites dispute, creates dissatisfaction with conditions the way they are, or even stirs people to anger." *Young v. American Mini Theatres, Inc.* (1976) 427 U.S. 50, 63- 64 (plurality opinion). Most importantly, the First Amendment protects even allegedly false statements. *United States v. Alvarez* (2012) 567 U.S. 709, 718-22; see also *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 292. In *Alvarez*, the Supreme Court found that false statements, by themselves, is not a category of unprotected speech because "some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee." *Alvarez*, *supra*, at p. 718; see also *Sullivan*, *supra*, at p. 271 ("Th[e] erroneous statement is inevitable in free debate").

Here, the Bar seeks to discipline Dr. Eastman for making what it alleges to be false statements (NDC ¶¶11, 22, 23, 49-52, 59-62, 68-71, and 80-82), which is precisely the thing that the Supreme Court in *Alvarez* and *Sullivan* held is barred by the First Amendment. Even if the statements were false, (and Dr. Eastman vigorously disputes that they were), such conduct is entirely protected by the First Amendment and thus outside of the purview of the State Bar.

Further, the State Bar cannot skirt around the protections afforded by the First Amendment to Dr. Eastman's speech by invocation that they are permitted to discipline his speech because he is an attorney. It is well-established that "[d]isciplinary rules governing the legal profession cannot punish activity protected by the First Amendment." *Dixon*, *supra*, at p. 30. Further, as the Supreme Court held in a case in which Dr. Eastman served as counsel, "[s]peech is not unprotected merely because it is uttered by 'professionals.'" *National Institute of Family and Life Advocates v. Becerra* (2018) 138 S.Ct. 2361, 2371–2372. It is equally protected as other types of speech. *Id.*

There are only a few instances where attorney speech can be limited; 1) in a courtroom – an attorney may not, by speech or other conduct, resist a ruling of the trial court beyond the point necessary to preserve a claim for appeal, (*Sacher v. United States* (1952) 343 U.S. 1, 8 (criminal trial); *Fisher v. Pace* (1949) 336 U.S. 155 (civil trial); 2) when advertising – an attorney's commercial speech can be

regulated, (*Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio* (1985) 471 U.S. 626, 652); and 3) if an attorney's out-of-court statements pose a "substantial likelihood" of materially prejudicing the fairness of the proceeding, (*Gentile v. State Bar of Nevada* (1991) 501 U.S. 1030, 1074–75; *see also Standing Committee on Discipline of U.S. Dist. Court for Cent. Dist. of California v. Yagman* (9th Cir. 1995) 55 F.3d 1430, 1443 ("[L]awyers' statements unrelated to a matter pending before the court may be sanctioned only if they pose a clear and present danger to the administration of justice.").

Here, since all of Dr. Eastman's public statements for which the State Bar seeks to discipline him are out-of-court statements (his public statements at the Ellipse on January 6, 2021 (Counts 1 and 7), his article in the American Mind (Count 9), and his interview on Steve Bannon's War Room (Count 5) (collectively, "statements")), they firmly fall within the realm of speech protected by the First Amendment to the United States Constitution and can only be the basis for discipline if there was a substantial likelihood of prejudicing the administration of justice. The State Bar has not shown by clear and convincing evidence substantial likelihood that Dr. Eastman's statements would materially prejudice any court proceeding. Indeed, it has offered no evidence on that point at all.

Moreover, for Dr. Eastman to lose First Amendment protection for his statements, whether true or false, the State Bar has the burden of proving by clear and convincing evidence that (1) Dr. Eastman intended to incite lawless action; and (2) Dr. Eastman's statements were actually likely to produce imminent lawless action. This standard, first articulated in *Brandenburg v. Ohio* (1969) 395 U.S. 444, is not only notoriously difficult to satisfy, but deliberately so, as it is the product of decades of First Amendment jurisprudence aimed at shielding political rhetoric from government censorship and punishment. Indeed, the Supreme Court of the United States has never once used *Brandenburg's* incitement standard to deprive speech of its First Amendment protection. (*See American Freedom Defense Initiative v. Metropolitan Transp. Authority* (S.D.N.Y. 2015) 70 F.Supp.3d 572 (explaining that "[a]s with the fighting words doctrine, the Supreme Court has rarely applied the *Brandenburg* incitement standard, and never explicitly found speech to be on the proscribable side of the standard.").

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i. Dr. Eastman's Statements Are Wholly Protected Because He Was Exercising His Right to Petition for Redress of Grievances

The right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives. *Borough of Duryea, Pa. v. Guarnieri* (2011) 564 U.S. 379, 388. "A petition conveys the special concerns of its author to the government and, in its usual form, requests action by the government to address those concerns." *Id*. at pp. 388-89. The "Petition Clause embraces a much broader range of communications addressed to the executive, the legislature, courts, and administrative agencies." *McDonald v. Smith* (1985) 472 U.S. 479, 488 fn. 2.

Here, Dr. Eastman's statements to Vice President Pence, and by extension to Greg Jacob and Mark Short acting in their capacity as representatives of Vice President Pence, were petitioning Vice President Pence for a redress of grievances. On January 4 and 5, 2021 Dr. Eastman was requesting (either directly or through Mr. Jacob and Mr. Short) that Vice President Pence delay the counting of electoral votes – "more precisely that he accede to requests from more than 100 state legislators to delay, to give them time to assess the impact of illegality in the conduct of the election." XI-121:14-16; XXV-45:2-6; 48:5-7. Making such a request of the Vice President, in his role as a government official in the executive branch and President of the Senate presiding over the joint session of Congress, is undoubtedly a request to the government to address Dr. Eastman's concerns about the 2020 election. See *Guarneri*, *supra*.

ii. Even if Dr. Eastman's Statements Were False (They Were Not), They Would Still Be Protected Speech

As discussed in section IV.a, Dr. Eastman's statements were not false or misleading. However, even if they were, they would still be protected under the First Amendment. *Alvarez*, *supra*, at 722. In fact, courts have only limited their discussions regarding the reduced protection of allegedly false statements to cases involving "defamation, fraud, or some other legally cognizable harm associated with a false statement, such as an invasion of privacy or the costs of vexatious litigation." *Alvarez*, *supra*, at p. 719. Notably: "Even when considering some instances of defamation and fraud, moreover, the Court has been careful to instruct that falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood." *Id*. And while statutes

criminalizing false statements made to a public official, perjury, or impersonating a government official have been upheld, those rulings were made on the basis that such was necessary to protect the integrity of government processes. *Id.* at pp. 719-22. Our law and tradition dictate that, otherwise, even false statements are protected speech. *Id.* While the State Bar asserts that Dr. Eastman's public statements were false and/or misleading,[17] even if they were, that is immaterial – Dr. Eastman's statements are entirely protected by the First Amendment. *Id.*

iii. Dr. Eastman's Out-of-Court Statements Were Not Substantially Likely to Prejudice the Administration of Justice

Black's Law Dictionary defines the phrase "administration of justice" as "[t]he maintenance of right within a political community by means of the physical force of the state" and "the state's application of the sanction of force to the rule of right." Administration of Justice, Black's Law Dictionary (11th ed. 2019). Similarly, "due administration of justice" is defined as "[t]he proper functioning and integrity of a court or other tribunal and the proceedings before it in accordance with the rights guaranteed to the parties." *Id.* Black's Law Dictionary defines "obstructing the administration of justice" and "interfering with the administration of justice" as "[t]he skewing of the disposition of legal proceedings, as by fabricating or destroying evidence, witness-tampering, or threatening or intimidating a judge." Perverting the Course of Justice, Black's Law Dictionary (11th ed. 2019) (cross-referencing these phrases).

Whether the electoral count involves the "administration of justice" has divided the Courts presiding over cases involving the electoral count. See e.g., *United States v. Seefried* (D.D.C. 2022) 639 F.Supp.3d 8 ("[t]ext, context, and precedent show that the "administration of justice" most naturally refers to a judicial or related proceeding that determines rights or obligations. The electoral certification was not such a proceeding."); *United States v. Puma* (D.D.C. 2022) 596 F.Supp.3d 90, 100 (citing *United States v. Montgomery* (D.D.C. 2021) 578 F.Supp.3d 54, 65) (proceedings before Congress are not quasi-

[17] "Representations which may be legally characterized as amounting to 'moral turpitude, dishonesty, or corruption' must be made with an intent to mislead." *Wallis v. State Bar of California* (1942) 21 Cal.2d 322, 328. As discussed in section IV.a, Dr. Eastman's statements were all well-grounded in facts, law, historical precedent, and legal scholarship. They were all made in good faith and were an accurate reflections of Dr. Eastman's honestly held beliefs.

judicial proceedings involving the administration of justice because "[a]s a matter of separation of powers, that is not what Congress does"); *c.f.*, *United States v. Wright* (D.D.C., Mar. 4, 2023, No. CR 21-341 (CKK)) 2023 WL 2387816, at *5 ("administration of justice" in §2J1.2(b)(1)(B) includes the certification of the Electoral College votes). This alone creates uncertainty in the law that requires a ruling in Dr. Eastman's favor.

But, even if the law were settled on this point, the State Bar failed to introduce any evidence, let alone clear and convincing evidence, that his statements were substantially likely to interfere in the January 6, 2021 electoral count. The State Bar provided no exhibit or witness testimony of any person who listened to his statements on Bannon's War Room or any attendee at the Save America Rally[18] who heard his statements and interfered with the electoral count because they had heard Dr. Eastman's statements. Accordingly, the State Bar has failed to meet its burden.

iv. Dr. Eastman's Statements Were Neither Incitement to Violence nor Fighting Words

The State Bar has no legitimate argument that it can discipline Dr. Eastman for his statements if they were protected speech under the First Amendment. *See Matter of Pavone* (Cal. Bar Ct. Feb. 21, 2023) No. SBC-20-O-30496, 2023 WL 2300626, at *7 ("[a]ttorneys are entitled to the protection of the First Amendment, even as participants in the administration of justice") (citing *Matter of Anderson*, *supra*, at 781). To establish that Dr. Eastman's statements fell outside of First Amendment protection, i.e. that they constituted incitement (*Brandenburg*, *supra*, at p. 447) or fighting words (*Chaplinsky v. New Hampshire* (1942) 315 U.S. 568, 572-73)), the State Bar would have to prove that (1) Dr. Eastman intended to incite lawless action; and (2) Dr. Eastman's statements were actually likely to produce imminent lawless action (*Brandenburg*, *supra*, at p. 447) or they had "a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed" (*Chaplinsky*, *supra*, at p. 573).

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[18] Since Dr. Eastman's American Mind Article was published on January 18, 2021, well after January 6, 2021, it is temporally impossible to have been substantially likely to prejudice the January 6, 2021 electoral count.

1. The State Bar Must Meet the *Brandenburg* Standard

The Supreme Court's recent decision in *Counterman v. Colorado* (2023) 143 S.Ct. 2106 makes clear that for the State Bar to have a legal basis to discipline Dr. Eastman, it must first establish that his speech lost its status as protected speech under the *Brandenburg* standard. In *Counterman*, the Court explained that *Brandenburg*'s requirement that "the speaker's words were 'intended' (not just likely) to produce imminent disorder…helps prevent a law from deterring 'mere advocacy' of illegal acts—a kind of speech falling within the First Amendment's core." *Counterman*, at 2115 (citations omitted). The Supreme Court drew an explicit distinction between "true threat" cases that require only a recklessness standard, and incitement cases that "demand more"—namely, "specific intent, presumably equivalent to purpose or knowledge." *Id.* at 2118 (citing *Hess v. Indiana* (1973) 414 U.S. 105, 109).

Notably, in *Hess v. Indiana,* the Supreme Court held that because Hess's statements – "[w]e'll take the f---ing street later" or "[w]e'll take the f--ing street again" – were spoken at the crowd at an antiwar demonstration and not directed to any person, they could not be incitement and were protected speech. *Hess v. Indiana* (1973) 414 U.S. 105, 108–109 (*per curiam*). Specifically, the *Hess* Court held: "[s]ince the uncontroverted evidence showed that Hess' statement was not directed to any person or group of persons, it cannot be said that he was advocating, in the normal sense, any action. And since there was no evidence or rational inference from the import of the language, that his words were intended to produce, and likely to produce, imminent disorder, they [did not] ha[ve] a tendency to lead to violence." *Id.*

The State Bar's burden was therefore to prove that Dr. Eastman did something more than advocate for illegal acts, and that he had the subjective intent to spur others to actually engage in lawless conduct in a context in which such was actually likely to occur. *See McCollum v. CBS, Inc.* (1988) 202 Cal.App.3d 989, 1000 ("[T]o justify a claim that speech should be restrained or punished because it is (or was) an incitement to lawless action, the court must be satisfied that the speech (1) was directed or intended toward the goal of producing imminent lawless conduct and (2) was likely to produce such imminent conduct"). The State Bar has failed to do so.

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2. The State Bar Failed to Prove That Dr. Eastman Had the Subjective Intent to Incite Imminent Lawless Conduct or Violence

The State Bar failed to prove by clear and convincing evidence that Dr. Eastman had the intent to provoke anyone to engage in imminent lawless action. The Supreme Court could not have been clearer in *Counterman*: "A [strong intent requirement] was a way to ensure that efforts to prosecute incitement would not bleed over, either directly or through a chilling effect, to dissenting political speech at the First Amendment's core." *Counterman*, *supra*, at p. 2118. Even if Dr. Eastman was advocating for illegal action (and he strongly contends he was not[19]), the mere "advocacy of illegal action at some indefinite future time" (let alone the expression of political opinions) falls below the standard for incitement. *Hess*, *supra*, at p. 109. The State Bar offered no circumstantial evidence, let alone direct evidence, that Dr. Eastman intended that any individual would view or hear his statements and then commit acts of violence or lawlessness. In fact, the direct evidence shows the opposite – Dr. Eastman never intended that anyone, after hearing his statements, could commit violence or otherwise act lawlessly. Accordingly, the State Bar failed to meet its burden.

The plain text of Dr. Eastman's statements at the Ellipse demonstrates they were clearly not even remotely a call for violence or could even be generously interpreted as calling for violence. Ex. 30; XI-106:16-18. He was merely stating the truthful information that he had at the time. XI-49:14-25; XXVIII-76:15-22, 77:11-24, 79:17-22, 82:2-86:19, 88:1-23, 90:24-91:15, 92:1-5, 93:12-94:11, and 98:18-99:21. Dr. Eastman's unrebutted (and unrebuttable) testimony was that it was not his intent to incite the attendees at the Save America rally to take violent action. XXVIII-99:22-100:25. Dr. Eastman's only intent was to identify problems with the conduct of the election and to try to have them investigated and to get to the truth of the validity of the election, not to promote doubt in the results. XXVIII-100:14-25; XXVIII-79:17-22.

[19] That the conduct for which he advocated – that the Vice President accede to requests from more than 100 state legislators for a brief delay – was contrary to timing provisions of the Electoral Count Act was not advocacy to the audience assembled at the Ellipse, or to listeners of Steve Bannon's podcast, or to readers of The American Mind. Moreover, the Electoral Count Act is not a criminal statute, nor even a civil liability statute. It is not binding on Congress itself, and as Dr. Eastman has contended in what is at the very least a tenable argument, it is itself an unconstitutional usurpation of powers the Constitution assigns to the Vice President.

The State Bar also alleges that Dr. Eastman's January 2, 2021 interview on Bannon's War Room and his January 18, 2021 article in the American Mind ("American Mind article") were non-protected speech. However, the plaint text of Dr. Eastman's statements on Bannon's War Room and his American Mind article speaks for itself. Exs. 28 and 31. Nowhere in Dr. Eastman's statements during Bannon's War Room interview or in his American Mind article does Dr. Eastman call for violence or make any statements that could reasonably be perceived as a call to violence or other lawless action. *Id.* Dr. Eastman's statements on Bannon's War Room are mainly discussing the factual and legal support for his opinion that the Vice President had the constructional authority to choose between different slates of electors and the legal cases he was filing on behalf of President Trump. Ex. 28. Dr. Eastman's American Mind article simply set forth his view as to the Vice President's role in counting electoral votes and the factual, legal, and scholarly support for his opinion. Ex. 31. It also sought to set the record straight as to what President Trump asked Vice President Pence to do. *Id.*; see also XI-108:18-109:6, 111:8-13; 112:4-17; 121:6-122:8.

There is no evidence that Dr. Eastman had any reason to believe that someone listening to him at the Ellipse on January 6, 2021 or on Bannon's War Room, or reading his American Mind Article, would be moved to violence—let alone evidence that Dr. Eastman *intended* that any specific person listening to his statements would actually engage in any type of violence or other lawless conduct. XXVIII-99:22-100:25. Notably Dr. Eastman did not direct his statements to a specific person or group, and just generally made public statements.[20] The Court thus cannot reasonably conclude on the basis of Dr. Eastman's statements alone that there is "no substantial doubt" that Dr. Eastman intended for his statements to cause others to engage in lawless action. *See Matter of Clevenger,* No. 16-J-17320, 2021 WL 837487, at *6 n.18 (Cal. Bar Ct. Mar. 3, 2021).

As the Supreme Court has "not permitted the government to assume that every expression of a provocative idea will incite a riot," there must be a "careful consideration of the actual circumstances

[20] Even speech directed at specific individuals in inflamed situations can fall short of incitement. *See N.A.A.C.P. v. Claiborne Hardware Co.* (1982) 458 U.S. 886, 903 (holding that an in-person speech to several hundred people that called for a discharge of the police force and a total boycott of all white-owned businesses in Claiborne County, and included the statement, "[i]f we catch any of you going in any of them racist stores, we're gonna break your damn neck" was "emotionally charged rhetoric," not incitement to violence).

surrounding such expression, asking whether the expression 'is directed to inciting or producing imminent lawless action[.]'" *Texas v. Johnson* (1989) 491 U.S. 397, 409 (quoting *Brandenburg*, 395 U.S. at 447). "The incited violence, however, must be a specifically intended consequence of the speaker's plea and not a result of unreasonable reactions by hostile onlookers or overly zealous supporters." *Braxton v. Mun. Ct.* (1973) 10 Cal.3d 138, 148. In this case, the context and circumstances surrounding his statements make it even less likely that Dr. Eastman intended to incite lawless action.

Not only did the State Bar fail to produce any direct evidence of Dr. Eastman's state of mind that contradicted his testimony, the State Bar never offered any witnesses related to Dr. Eastman's specific intent.

The text of Dr. Eastman's statements and his unrebutted testimony regarding his lack of intent to provoke violence can only lead to one conclusion – Dr. Eastman was only identifying problems with the conduct of the election to try and have them investigated, and voicing his opinion that based on fact, historical precedent, and law, the Vice President had the legal authority to pause the counting of electoral votes in order to allow time for that investigation. Dr. Eastman's statements were not specific direction intended to incite people to engage in criminal acts. The State Bar has thus failed to meet its burden of proving by clear and convincing evidence that Dr. Eastman acted with the specific intent of inciting imminent lawless action.

3. Dr. Eastman's Statements Were Not Actually Likely to Incite Imminent Lawless Action

Nor were Dr. Eastman's statements likely to produce imminent violent conduct. The term "imminent" connotes immediacy rather than "advocacy of illegal action at some indefinite future time." *Hess*, *supra*, at, 108. Here, Dr. Eastman made his remarks at the Ellipse at approximately 10:45 or 10:50 a.m.[21] XXVIII-68:23-69:2. And at approximately 2:10 p.m., select individuals broke into the United States Capitol Building. II-87:9-12. It is not even established – and the Bar has offered no evidence on this – that any of the individuals who broke into the Capitol had observed Dr. Eastman's speech at the Ellipse nearly two miles away. Moreover, because Dr. Eastman's remarks were nearly three hours

[21] It is also unclear whether all of the attendees at the Save America rally were able to hear Dr. Eastman. XXVIII-94:12-95:16.

before those individuals broke into the Capitol Building, and separated by a rather more significant event, namely, President Trump's own speech, there is no such immediacy here, even if Dr. Eastman's remarks could be interpreted as a call for violence or if he intended to call for violence (he did not). XXVIII-99:22-100:25. And just like in *Hess*, because Dr. Eastman made remarks to a crowd of people, not directed at any person, his statements could not be incitement and thus was protected speech.

The State Bar likewise failed to meet its burden of proving that Dr. Eastman's statements were likely to incite imminent lawless action. There is not any exhibit or piece of testimony that even indicates that anything would have been different had Dr. Eastman not made his statements. The State Bar did not present one witness who testified that they had even seen Dr. Eastman's statements, let alone anyone who saw Dr. Eastman's statements and was incited to violence *because* of them. The State Bar's evidence only shows that Dr. Eastman (among many others, including President Trump) made statements at the Ellipse and three hours later, select individuals committed acts of violence nearly two miles away at the Capitol. Like in *McCoy v. Stewart*, where the court held that a petitioner engaged in protected speech when he advised a street gang on the operation of their gang in part because the state failed to prove the speech actually caused imminent lawless action, here, the State Bar has failed to prove that the speech at issue actually caused imminent lawless action. *McCoy v. Stewart* (9th Cir. 2002) 282 F.3d 626, 631 fn. 6. Clearly, if advocating lawless action to gang members in person is still entitled to First Amendment protection, it is inconceivable that Dr. Eastman lost First Amendment protection for his statements that were all based, at least arguably, in law and fact, without any express or even implicit incitement to lawless action, especially absent a scintilla of evidence that anyone who heard his statements was likely to engage in violence because of them.

Simply, the case that the Bar has put on is not enough. Courts have even protected the right to use violent words (which Dr. Eastman did not use) – it is only when speech is actually likely to result in violence or other lawless conduct, and the speaker has the specific intent to incite violence or lawless conduct, that speech loses its First Amendment protections. And there was no evidence at trial, let alone clear and convincing evidence, that violence or other lawless conduct was likely to be incited from Dr. Eastman's statements. Since the State Bar has failed to show by clear and convincing evidence that

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Dr. Eastman's statements fell outside of the protection of the First Amendment, this Court should not find them to be a basis for disciplining Dr. Eastman.

c. Dr. Eastman Presented the Trump Campaign with a Tenable Legal Assessment of Vice Presidential Authority to Resolve Election Disputes as Discussion Points in the Two-Page and Six-Page Memoranda (Counts 1, 3, 6, and 10)

Dr. Eastman's two-page and six-page memoranda (together, the "Memos") are the subject of Counts One, Three, Six, and Ten. The State Bar has not proven culpability by clear and convincing evidence as to any of its allegations involving the Memos, through which Dr. Eastman presented two individuals working with the Trump campaign with an objectively tenable assessment of vice presidential authority respecting the electoral count, based on his considered review of relevant scholarly materials, historical records, and precedential events from several past elections.

As explained below, the memos were neither a "script for *stealing* the election," "conspiracy for overturning the results," nor a comprehensive legal analysis of the constitutional and other issues at play, as the State Bar has alleged, ***but rather*** a means of simply capturing various election scenarios in written form ("War Gaming," to borrow the phrase from Matthew Seligman), first depicting the "***most aggressive***" option (as requested) and then depicting all of the other various scenarios that might play out at the joint session of Congress on January 6. Importantly, ***all*** the drafting was done pursuant to the express request of one of the other attorneys working on behalf of Dr. Eastman's client – and ***all*** of Dr. Eastman's work was the product of his undivided duties and ethical responsibilities to that client – including the inviolate duty of ***zealous advocacy***. Characterization of the memos otherwise finds no support in the case.

i. The Two-Page and Six-Page Memoranda

Dr. Eastman wrote the two-page memo on December 23, 2020, as the first component of the larger set of scenarios presented in the six-page memo, which he finalized on January 3, 2021. IX-18:12-15; XXX-208:15-18; Stipulated Fact ["SFN"] Nos. 3 and 5. He drafted the two-page memo for internal discussion purposes at the behest of an individual in the Trump campaign and then sent it to two campaign members – political strategist/attorney Boris Epshteyn and attorney Kenneth Chesebro. IX-18:9-15; XXX-137:13-18; SFN No. 3. The two-page memo "was the beginning of an effort to lay out

all of the scenarios that were being floated both internally in the campaign, and externally in public presses about all the scenarios that might play out on January 6th." XXIII-152:22-153:5. Indeed, there was nothing novel about the information in the 2-page memo (or the 6-page memo, for that matter), as others had provided the same assessments and options both publicly (in the press) and privately (to President Trump). II-51:24-54:11; 98:4-12; 167:5-13; 178:13-17.

The issue addressed in the two-page memo concerned vice presidential authority in the event Congress is presented with dual slates of electors. Preliminarily, the two-page memo observes that the text of the 12th Amendment does not answer this question, as it merely provides that "the President of the Senate [i.e., the Vice President] shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted." Ex.3. The memo concludes that the vice president, not the two branches of Congress, has ultimate authority regarding which votes to count in a contested election: "There is very solid legal authority, and historical precedent, for the view that the President of the Senate does the counting, including the resolution of disputed electoral votes (as [John] Adams and [Thomas] Jefferson did while Vice President, regarding their own election as President), and all the Members of Congress can do is watch." Ex.3. [22]

The six-page memo sets forth nine scenarios that were being publicly discussed at the time of its drafting. XXXI-40:1-10. This memo was intended to be reviewed internally for the purpose of developing recommendations, but does not itself contain any recommendations. *Id.*

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[22] Dr. Eastman incorporated the two-page memorandum into the six-page memo about a week after drafting it. XXIII-191:14-17.

ii. Dr. Eastman's View that the Vice President's Authority to Open the Vote Count Empowers Him or Her to Resolve Electoral Disputes is Valid and Well-Supported

1. Scholarly Writings and Historical Precedent Support Dr. Eastman's Assessment of Vice Presidential Authority to Decide Electoral Disputes

Professor John Yoo, a constitutional law expert, University of California, Berkeley law professor, and Yale Law School graduate (XIII-10:15-17; 11:8-17), testified that Dr. Eastman's view that Pence had authority not only to open the votes, but to decide their legitimacy, is supported by legal scholarship. Yoo identified a number of renowned constitutional scholars whom he believes either share the same view (Professors John Harrison, Gary Lawson and Jack Beermann) or at least acknowledge this issue to be an open question (Professors Bruce Ackerman, Ed Foley, and Vasan Kesavan). XIII-134:25-136:6. He also expressed his own opinion that Dr. Eastman's view is the "better reading" of this contested question in light of the historical evidence and the ambiguity of the constitutional text. XIII-134:25-135:9. Yoo also noted that there is no judicial precedent addressing who amongst the vice president, Congress, or the United States Supreme Court has authority to resolve disputes over electoral votes. XIII-46:3-8.

Yoo researched and wrote about this issue in his American Mind article (co-authored with Robert Delahunty), *What Happens if No One Wins?* (Oct. 19, 2020) (Ex. 1017) and, more recently, in Yoo and Delahunty's law review article, *Who Counts?: The Twelfth Amendment*, *the Vice President, and the Electoral Count*, 73 Case W. Res. L. Rev. 27 (2022) (Ex. 1358). In the process of writing *Who Counts?* Yoo considered all of the scholarly material relating to the 12th Amendment as well as the numerous historical sources he described during his testimony. XVII-66:6-17, 70:2-71:3; XVIII-122:19-123:8. Yoo concluded that, while the constitutional text is ambiguous, the "best reading" is consistent with the text, structure, and original historic understanding that the vice president should be the one to resolve disputes over electoral votes rather than Congress. XVII-81:4-17.

Addressing the question of whether the vice president has authority to resolve a disputed election, Yoo and Delahunty posit in their American Mind piece "[t]hat the Vice President's role is

not the merely ministerial one of opening the ballots and then handing them over (to whom?) to be counted. Though the 12th Amendment [shifts from the active voice ("the President of the Senate shall . . . open all the certificates") to the passive voice ("and the votes shall then be counted")], the language seems to envisage a single, continuous process in which the Vice President both opens *and* counts the votes." Ex. 1017-3; XIII-98:22-99-16. The article continues: "The check on error or fraud in the count is that the vice president's activities are to be done publicly, 'in the presence' of Congress. And if 'counting' the electors' votes is the Vice President's responsibility, then the inextricably intertwined responsibility for judging the validity of those votes must also be his." Ex. 1017-3; XIII:102:12-103:2. The "better reading," according to Yoo and Delahunty, "is that Vice President Pence would decide between competing slates of electors chosen by state legislators and governors, *or decide whether to count votes that remain in litigation*." Ex. 1017:3-4 (emphasis added).

Dr. Eastman reasonably concluded that Yoo and Delahunty's article supported his view of the issue by asserting that the vice president has authority to resolve electoral count disputes, either through his role of opening the certificates (as unambiguously provided by the 12th Amendment) or though his implicit role in counting them; the role of Congress was merely to be present, observe, and have no final role. [23] XXIII-160:9-24.

Yoo testified that his judgment is informed by how the Constitution's text and structure reflected that the framers did not want Congress to be able to select presidents or choose or block presidential candidates – a conclusion confirmed by Dr. Eastman's own research. XXV-22:8-11. Yoo explained that if the Founders wanted Congress to have the role to resolve electoral disputes, they could have just copied from Article I, Section 5 – since they did not, that could not have been their intent. XIII-129:4-131:7. This view was further supported by Yoo's review of the drafting history of the Constitution, and the discussions, and the Philadelphia Convention ratifying debates. *Id*.

The scholarly materials Dr. Eastman and Professor Yoo reviewed include numerous law review articles. Among them is *Thomas Jefferson Counts Himself Into the Presidency*, 90 Va. L. Rev. 551 (2004) by Bruce Ackerman (regarded by Yoo as "one of the most important originalist

[23] Dr. Eastman read *What Happens If No One Wins?* in mid-October 2020. XXX-127:15-21.

scholars of our generation") and David Fontana. XXIII-57:2-4. As part of their analysis, the authors examined the actions respectively taken by John Adams and Thomas Jefferson with respect to electoral votes in the 1796 and 1800 presidential elections.

Regarding the 1800 election, Yoo explained that Jefferson, in his role as then-President of the Senate, counted for himself electoral votes from Georgia which were defective because they were not properly signed, sealed, and delivered to Washington to be counted. XVII-92:5-11. According to Ackerman and Fontana, Georgia's certificate was "illegal on its face." Ex. 1212-32.

Without Georgia's four electors, neither Jefferson nor his running mate, Aaron Burr, would have achieved a majority of the electoral votes, forcing them into a five-man contingent election in the House of Representatives with Federalist candidates John Adams, Charles Pinckney, and John Jay. Ex.1212-36; XVII-92:4-93:4. Yoo explained that Jefferson's actions had the effect of excluding the Federalist candidates from the runoff, which resulted in Jefferson beating Burr. Congress did nothing during the count. XXIII-58:12-59:4; 59:15-19; XVII:91:24-93:3. Ackerman and Fontana wrote that "[t]he fact Jefferson exercised the (textually arguable) authority [to determine the validity of votes] as Senate President on the Georgia matter seems very significant as a legal matter…After all, the Constitution delegated to Jefferson, and only Jefferson, an affirmative role in the vote-counting ritual."). Ex. 1212-82, 59. The authors conclude: "In short, Jefferson's actions not only illuminate a constitutional question left unresolved by the original constitutional text, but they also resolved a potentially explosive problem in a manner that garnered public consent. What more can we ask of a legal precedent?" Ex. 1212-85. According to Yoo, Jefferson resolved an electoral dispute by counting the defective Georgia votes without asking Congress for its views or pausing to see if there were any objections. XVII-93:4-13.

Fontana and Ackerman's article also cites the 1796 presidential contest between Adams and Jefferson as further historical evidence relating to the vice president's authority. At issue in that election were Vermont's four electoral votes, which represented Adams' margin of victory over his opponent. Ex.1212-62. Though Ackerman and Fontana observe that there was nothing facially or legally deficient about those votes, they note that "the legality of the state's action had been publicly impugned and privately questioned by newspapers and politicians from both political parties." Ex. 1212-3; see Kesavan, Ex. 1014-55 [characterizing Vermont's votes as 'improper'].

Yoo testified that then-vice president Adams counted Vermont's votes for himself, paused, did not hear from Congress, sat down, stood up, and declared himself president. XIII-59:5-14. Ackerman and Fontana assigned significance to Adams' act of pausing: "He would not have paused unless he harbored some doubts about his authority as President of the Senate to resolve disputed issues unilaterally." Ex.1212-32. By doing so, the authors conclude, Adams gave Congress members a formal opportunity to challenge Vermont's votes. Ex. 1212-4. According to Yoo, the article reflects Ackerman's view that, on balance, Adams had resolved the dispute. XIII-59:5-13; see Ex. 1212-13 [noting that Adams (and Jefferson) "used their power to make rulings that favored their own election as President"].

The events of 1796 and 1800 are the "Jefferson and Adams" precedents referenced in Dr. Eastman's memoranda. Both episodes, as construed by Ackerman and Fontana and recounted by Yoo, support the tenability of Dr. Eastman's conduct by serving as historical evidence that Adams and Jefferson unilaterally resolved issues involving the validity of electoral votes. In neither instance did the vice presidents submit the determination of whether or not to count the votes to the joint assembly of the House and Senate whose role, under the terms of Article II (and its identical language subsequently adopted in the 12th Amendment) was merely to be "presen[t]." Consistent with Dr. Eastman's view, Yoo testified that the 1796 and 1800 elections serve as "precedent that the vice president has this role of both opening and counting electoral votes, and, in the process of that counting, passing on the legitimacy of the dispute over those electoral votes." XIII-132:15-23. Yoo then noted that there were additional, sporadic incidents regarding the Vice President's authority to resolve disputes after the adoption of the 12th Amendment. XIII-132:15-133:1.

Dr. Eastman testified regarding one such incident: the 1856 presidential election in Wisconsin. That year, a blizzard prevented Wisconsin's electors from casting their electoral votes on the designated date. During the joint session of Congress to count the votes, objections were raised as to their validity. The acting President of the Senate ruled the objections out of order, counted the votes, and closed the joint session. XXV-78:6-14. The two Houses later debated whether the votes were legally counted, but no conclusion was reached. XXV-78:15-20. The fact that the President of the Senate acted to count the

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votes in this instance offers further historical support for Dr. Eastman's view that the vice president, rather than Congress, has a definitive role in resolving disputes involving electoral votes. [24]

More recent support for Dr. Eastman's assessment arises out of the 1960 presidential election in Hawaii. During that election, three slates of electoral votes were transmitted to Vice President Richard Nixon – one that the governor certified for Nixon after Nixon was declared the victor on election day; one that was initially provided by the John F. Kennedy electors without certification; and a third slate of Kennedy electors whom the newly-elected governor subsequently certified after a court-ordered recount resolved in Kennedy's favor. SFN No. 18; XXV-88:21-89:4; Ex. 1011. On January 6, 1961, Nixon, in his capacity as President of the Senate, opened all three slates and determined to have the third one (the late-certified Kennedy slate) counted after no objections were registered. SFN No. 18; XXV-89:5-8. Yoo testified that, in this situation, the Vice President decided between "two competing slates of electoral votes," noting that he "made that call because no one from Congress tried to trigger the [ECA] by objecting." XIII-141:9-21.

Another leading voice among the scholars whose research and writings support Dr. Eastman's views is Professor Edward B. Foley. Acknowledging Foley to be "one of the leading election law scholars," Yoo testified that Foley recognizes that the 12th Amendment is textually ambiguous" and that "there's a range of opinions" on the question of whether the legitimacy of electors is to be decided by Congress or the vice president. XIII-79:2-13; 78:18-79:1.

Yoo expressed agreement with Foley's opinion that the 12th Amendment is ambiguous and concurred with his description of the scholarship on this issue as discussed in Foley's law review article, *Preparing for A Disputed Presidential Election: An Exercise in Election Risk Assessment and Management*, 51 Loyola Chi. L. J. 309, 322, 325 (2019). Ex. 1019-17-18.

Additionally, Yoo testified, based on another law review article Foley wrote, *The Twelfth Amendment: A Constitutional Ticking Time Bomb*, 64 U. Miami L. Rev. 475, 480 (2010) (co-authored by Nathan L. Colvin), that Foley's historical review led him to conclude that until the early 1820s most

[24] Although during the subsequent debate, Senator Mason, as President Pro Tem of the Senate, denied that he had decided the dispute while presiding over the Joint Session, others expressly noted during that subsequent debate that that is precisely what he had done. Ex. 1356; XXXI-179:6-180:23.

people believed the vice president (or perhaps the states), but not Congress, would resolve disputes over electors. XIII-80:11-16; Ex. 1020. Yoo expressed agreement with this conclusion. XIII-81:4-6.

Yoo was also influenced by the views of John Harrison, whom Yoo lauded as "one of our finest constitutional scholars today." XIII-85:9-12. Yoo testified that in Harrison's article, *Nobody for President*, 16 J.L. & Pol 699 (2000), Harrison acknowledged that the Constitution does not address issues about resolving election disputes, so it is "naturally going to be the vice president to do it." XIII-82:3-11. Yoo also cited Harrison as supportive of the notion that the vice president has authority to choose among competing electors. He explained that, in Harrison's view, by opening the certificates, "the vice president is deciding which ones are legitimate electors, and he assumes as not opening and counting the illegitimate electors." XVIII-125:4-17; Harrison, Exh, 1211-2. Further, Harrison's article recognized that the framers of the Constitution did not want Congress selecting the president and, therefore, would not have considered Congress to be the "mechanism for resolving disputes over electors." XIII-82:12-17; see Ex.1211-3.

Beermann and Lawson are two more scholars who, according to Yoo, have recognized the ambiguity in the 12th Amendment and concluded that authority to resolve electoral disputes rests with the vice president. XIII-54:13-55:5; see 1015-12, Beermann and Lawson, *The Electoral Count Mess: The Electoral Count Act of 1887 is Unconstitutional, and Other Fun Facts (Plus a Few Random Academic Speculations) about Counting Electoral Votes*, (Boston Univ. School of Law, Public Law Research Paper No. 21-07, March 1, 2021) ("but in case of a dispute that must be resolved, in our view the decision falls to the Vice President as the official assigned the task of opening the certificates and presiding over the process.").

Yoo also cited congressional action occurring prior to ratification of the 12th Amendment as evidence of historic resistance to efforts to cede power to Congress to resolve electoral disputes. That resistance took the form of opposition to the "Grand Committee" bill in 1800. The unsuccessful bill would have established a committee composed of Congressmen and the Chief Justice of the United States to decide the legality or illegality of electoral votes. Ex. 1358-75; XVIII-6:3-7:17. Yoo noted that some leading founders opposed the bill, including Congressman John Marshall and Senator Charles Pinckney. In Yoo's opinion, the failure of the Grand Committee reinforced his view that the

Constitution's text and structure were understood not to give Congress authority to resolve electoral disputes. XVIII-8:11-9:1; 1358-75-78; see Kesavan, Ex. 1014:20-21, including fn. 60, quoting Pinckney ("Knowing that it was the intention of the Constitution to make the President completely independent of the Federal Legislatures, I well remember it was the object, as it is at present not only the spirit but the letter of that instrument, to give to Congress no interference in, or control over the election of a President;" The framers "well knew that to give to the members of Congress a right to give votes in this election, *or to decide upon them when given*, was to destroy the independence of the Executive and make him the creature of the Legislature" (emphasis added)).

Yoo testified that the question of whether Congress had constitutional authority to resolve electoral disputes remained unsettled long after ratification of the 12th Amendment. He cited the debates preceding the 1876 Hayes-Tilden election as the first time Congress tried to exercise this power, which led to discussion about interpreting the 12th Amendment. XVIII-4:12-21. Those debates demonstrate an "utter diversity of opinion…as to where the power is" (Ex. 1358-114), including: Representative James Garfield's position that this power lay with the vice president, subject to final review by Congress; Chancellor Kent's view that, absent legislation on the subject, it would be duty of the President of the Senate to count the votes and declare the result; and Senator William Whyte's view that only the vice president can have that role. XVIII 15:16-18:7; Ex. 1358:89-91. The debates led Congress to create the Electoral Commission, a temporary body, to resolve the disputed election. Ex. 1358:89-90; XVIII-14:1-20. But even with that effort, Congress indicated its uncertainty over whether *it* had power to resolve the dispute, delegating to the Commission whatever power it had over the subject, "if any." XXV-84:1-7.

2. Dr. Eastman Did Not Make False or Misleading Claims Regarding the Existence of Competing Slates of Electors

As the six-page memo explains, Trump electors from seven states in which election challenges were pending met and cast their votes on the date designated by Congress and transmitted those votes to Congress. At that time, the electors were uncertified pending further judicial or legislative action regarding the ongoing election challenges. The State Bar alleges that Dr. Eastman's statements relating to competing slates of electors were false and misleading. See, e.g., NDC, ¶10. There was nothing false

or misleading in the six-page Memo's description of these existing slates as "competing" elector slates. The undisputed fact that no state governor or other authority had yet certified the electors in question does not mean they were not "competing" slates, demanding consideration by the vice president as such, for several reasons.

First, the slates were legitimate as a matter of historical precedent. The situation involving the electors in 2020 was similar to the 1960 Hawaii election in all significant respects. Like Nixon, Pence received competing slates – one set from the Biden electors who had been certified as victor (like the certified Nixon electors) and another set from electors who, though not certified by a state authority, had met and cast their electoral votes on the constitutionally-mandated day (like the uncertified Kennedy electors). XXV-114:21-116:10. Nixon received both slates, as well as the third, retroactively-certified Kennedy slate, and determined that the retroactively-certified Kennedy slate should be counted.

Second, the electors at issue qualified for recognition by Pence under the Electoral Count Act of 1887 ("ECA"), 3 U.S.C. §15, which instructs the vice president to open and acknowledge not just "all the certificates" but also all "papers purporting to be certificates of the electoral votes." XXV-115:8-17. Given the expansive language used in this provision, Dr. Eastman was reasonable in believing the electors from the seven swing states qualified as "completing" electoral slates. [25]

Last, Yoo testified that certain scholars are of the mind that competing slates need not bear the imprimatur of state authority in order for there to be a dispute that would invoke vice presidential authority.[26] For example, Foley, as Yoo noted, believes there are "lots of doubts" as to "where the line should be drawn" on the matter of the legitimacy of electors. XVIII-130:6-20; Ex. 1019-38 Given the variety of scholarly thinking on the matter, Dr. Eastman's belief that the Trump electors were valid as "competing" slates was, again, entirely reasonable.

[25] The 12th Amendment says nothing about dual or competing slates of electors. Therefore, no guidance is to be gleaned from that amendment for determining the legitimacy or validity of such slates.

[26] To be clear, although Yoo expressed the view in his American Mind article that the power exists either if there are dual slates of electors *or if there is still pending litigation* over an election dispute, he indicated in his subsequent scholarship that, upon further consideration, his view is that only competing *certified* slates would trigger the Vice President's dispute resolution power.

3. Dr. Eastman's Considered Judgment that the Electoral Count Act is Unconstitutional is Supported by Legal Scholarship and Historical Precedent

Dr. Eastman is one of many scholars who have questioned the constitutionality of the ECA, through which Congress arrogated to itself the authority to decide electoral disputes. Dr. Eastman testified that he believes the ECA is unconstitutional because, through it, Congress has usurped powers from the vice president: "If, in fact, Article 2 and the identical language in the 12th Amendment gives the definitive role to the vice president to open and then decide which certificates to open, or to make the judgment about disputed certificates, the [ECA] takes that power away and gives it to Congress." XXV-22:3-13. The resulting act also poses a separation-of-powers problem insofar as the drafters of the Constitution did not want Congress to have the "definitive role" in selecting the president." *Id*.

Consistent with his own prior writings on the subject, Yoo testified that if his view of the vice president's authority is correct (a view shared by Dr. Eastman and other scholars), then the ECA is unconstitutional. XIII-152:17-153:11; Ex. 1017-3-4. Yoo's opinion stems from his recognition of constitutional constraints on congressional power: "Congress cannot use legislation to dictate how any individual branch of government is to perform its unique duties: Congress could not prescribe how future Senates should conduct an impeachment trial, for example. Similarly, we think the better reading is that Vice President Pence would decide between competing slates of electors." Ex. 1017-3; XIII-154:12-18.

Yoo testified that other scholars agree that the ECA is unconstitutional, among them Vasan Kesavan, author of *Is the Electoral Count Act Unconstitutional*?, 80 N.C. L. Rev. 1653, 1661 (2002). XIII-154:19-155:8; 70:11-71:10; Ex. 1014-10 [contending that the "Electoral Count Act violates the text and structure of the Constitution in multiple ways"]; 1014-50 ["the [ECA] is unconstitutional because it vests the counting function in the two Houses of Congress, and under the Constitution, Congress may not strip the President of the Senate of her constitutional duty."]; 1014-55 ["The Framers clearly thought that the counting function was vested in the President of the Senate alone"]; 1014-56-57 ["early commentators on the Constitution, such as Chancellor James Kent and Professor William Duer, writing in the wake of the Twelfth Amendment, thought that the counting function still belonged to the President of the Senate"]. Dr. Eastman identified Kesavan, Harrison, Beermann, Lawson, and Foley as scholars

who either believe the ECA unconstitutional or have recognized significant concerns about its constitutionality. XXV-24:7-25.

Substantial deference should be given to the legal scholarship questioning the ECA's constitutionality given the lack of judicial guidance on this issue. As Yoo testified, the constitutionality of the ECA has not been tested in court. XIII-55:9-20; 148:4-8.

4. Dr. Eastman's Position that the Vice President Could Briefly Delay the Electoral Count Was Also Tenable

In the six-page memo, Dr. Eastman outlined a scenario in which Pence could delay the electoral count had he determined that the ongoing election challenges in various states must conclude before the vote count.[27] Ex. 4-5, Section IV.d. The purpose of delaying the count would have been to enable the state legislatures to "convene, order a comprehensive audit/investigation of the election returns in their states, and then determine whether the slate of electors initially certified is valid, or whether the alternative slate of electors should be certified by the legislature…" *Id*.

The impetus for delaying the count was the unprecedented number of reports of election-related illegality and fraud that more than 100 state legislators had transmitted to Pence and other members of Congress. See, e.g., Exs. 1050, 1153-1155, and 1159. Acceding to the state legislators' requests could only be accomplished through a brief delay of the electoral count. Dr. Eastman recognized that a delay to accommodate investigations at the state level would necessarily be short in light of the constitutionally mandated January 20 presidential inauguration date. XXIV-173:21-174:6.

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[27] Though Dr. Eastman used the term "adjourn" in the six-page memo, his position from the outset has been that Pence possessed authority to ***delay*** the electoral count by calling a brief recess of Congress if he deemed it necessary to make a judgment about the validity of electoral votes. As Dr. Eastman testified, the memo describes a scenario where the joint session would "reconvene" after investigation by the states, which confirms that, regardless of the terminology used, what was discussed in the memo was actually a recess. XXV-13:14-15:24; Ex. 4-5, Sec. IV.d.ii. The State Bar appears to acknowledge this to be Dr. Eastman's position, as it asserts in the NDC that during the January 4 Oval Office meeting, "delay[ing] the count" was one course of action Dr. Eastman presented for Pence to take on January 6." NDC, ¶19. Further, Dr. Seligman testified as to his understanding that Dr. Eastman has claimed it was his position that Pence had the unilateral authority to "delay or postpone the electoral count." VII-57:4-9.

As discussed below, there is no constitutional prohibition on delaying the count and a tenable argument existed that the proposed delay would have comported with the 12th Amendment. [28] Though a delay of proceedings would have been contrary to the ECA, the answer to that contention lies in the robust scholarly body of work suggesting that the ECA is unconstitutional (both generally and with regard to the timetables it imposes) particularly to the extent it intrudes on powers that the Constitution directly assigns to the vice president.[29]

The 12th Amendment sets forth three separate actions to be taken during the process for choosing a President in the joint session of Congress and (in the event no one obtains a majority) in the House: (1) the opening of certificates; (2) the counting of votes; and (3) the choosing by the House, voting by state, from among the top three candidates if no one obtains a majority. The first action, the authority for which is exclusively and unambiguously assigned to the "President of the Senate" (that is, the Vice President), has no time constraint. The second sets out a temporal sequence ("the votes shall *then* be counted" (emphasis added)), which could plausibly imply a time constraint, but more likely merely means that the votes are to be counted after the certificates have been opened. Only the third has an explicit time constraint ("the House of Representatives shall choose *immediately* by ballot" (emphasis added)).

According to Kesavan, during the debate in the House over the 1800 election, Senator Pinckney argued that the word "immediately" in the 12th Amendment's precursor provision in Article II meant "instantly, and on the spot, without leaving the House in which they are then assembled, and without adjournment." Ex.1014-66. But even there, as Kesavan observed, language contained elsewhere in the 12th Amendment "seems to significantly soften—if not quash—Senator Pinckney's immediacy principle." Ex. 1014-66, fn. 271. Unlike its precursor language in Article II, the 12th Amendment provides that "if the House of Representatives shall not choose a President whenever the choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President." Ex. 1014-67, fn. 271. Because, at the time, federal law specified that the counting was to

[28] Yoo testified that he did not find discussion in the scholarly materials addressing whether or not the vice president has had authority under the 12th Amendment to postpone the electoral vote count. XVII-124:25-125:6.

[29] The ECA, 3 U.S.C. §15 prescribes timetables relating to the "count of the electoral votes."

take place on the second Wednesday of February, this provision "seems to countenance up to two weeks of deliberation," according to Kesavan. *Id*.

Alexander Duer made the same point in his Commentaries:

> Although the Constitution directs that when no person is found to have a majority of Electoral votes, the choice shall be immediately made by the House of Representatives, yet it is not held obligatory upon that House to proceed to the election directly upon the separation of the two Houses; but that it may proceed either at that time and place, or omit it until afterwards. This construction was adopted before the [Twelfth Amendment], and there can now be no doubt of its correctness, as the amendment expressly declares the choice of the House to be valid, if made before the fourth of March following the day on which the Electoral votes are counted.

Ex. 1014, fn. 271, quoting, William Alexander Duer, *Course of Lectures on the Constitutional Jurisprudence of the United States*, at 89-90 (Lenox Hill Pub. & Dist. Co. 1971) (1843).

Because even the explicit timetable for "immediate" choice by the House is viewed as not "obligatory," then the ECA's imposition of a timetable on the vice president, in the performance of his role to "count" (without a timetable identified in the text) would unconstitutionally interfere with the vice president's exercise of his constitutionally-assigned role to the extent he determined he required additional time to make any judgement about whether, or which, electoral votes to count. See also Nathan L. Colvin and Edward B. Foley, *The Twelfth Amendment: A Constitutional Ticking Time Bomb*, 64 U. Miami L. Rev. 475, 480 (2010), Ex. 1020-7 ["from 1789 to 1821, the power [to count and/or determine the validity of votes] was generally thought vested in the states or the President of the Senate"]; 1020-45 ["questions remain about whether the ECA is constitutional, or whether Congress is actually bound by its provisions."].

Other scholars have likewise noted that the timetables imposed elsewhere in the Electoral Count Act (the limitation on debate, for example), are an unconstitutional infringement by one Congress on the authority of a subsequent Congress to determine its own rules of proceeding. See, e.g., Kesavan [describing the time limits as "*patently* unconstitutional" under Art. I, §5, cl. 2, which provides that "Each House may determine the Rules of its Proceedings"], Ex. 1014-68 and n. 275, emphasis in original. Moreover, even if the ECA prohibited Pence from acceding to the requests of scores of legislators, a statute cannot interfere with powers given directly by the Constitution to the vice president to "open" electoral certificates and, implicitly, to make a judgement about whether further investigation

was warranted to assess the validity of electoral certificates. See, e.g., *Marbury v. Madison* (1803) 5 U.S. 133, 177 ["an act of the legislature, repugnant to the constitution, is void."].

5. Dr. Eastman Never Urged Vice President Pence To Simply Reject Biden Electors

The NDC incorrectly alleges that at the Oval Office meeting on January 4, 2021, Dr. Eastman "presented only two courses of action for Pence to take on January 6": to reject the electors from seven states or to delay the count. NDC, ¶19. Dr. Eastman testified unreservedly that the "reject" scenario was an open question but that he never urged Pence to reject the certified electors presented to him. He recalled as follows:

> The vice president turned to me and asked me point-blank, "Do you think I have the power simply to reject electoral votes?" And I said, "Mr. Vice" -- and this is, you know, etched in my mind almost verbatim -- "Mr. Vice President, it's an open question. The issue has never been resolved. But I think that, even if you had that power, in these circumstances it would be foolish to exercise it.
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> XXIV-153:16-154:12, 155:9-22.

The NDC goes on to allege that Dr. Eastman presented the "reject" scenario the next day, January 5, during his meeting with Pence's White House counsel, Greg Jacob, and his Chief of Staff, Marc Short, by stating, "I am here asking you to reject the electors." NDC, ¶20. There is conflicting testimony on this matter, but not in a way that bears on culpability: Dr. Eastman testified that he does not recall making that statement and does not think he would have made it given his forceful rejection of that scenario at the Oval Office meeting the previous day; Jacob testified that Dr. Eastman opened the January 5 meeting "making the request that we reject the electors outright." XXV-191:8-192:2; II-169:13-18. Jacob further testified that later in the meeting on January 5, and in subsequent phone calls that same day that sometimes included Dr. Eastman, Dr. Eastman "retreated" from his purported position and the only scenario being discussed by then was a delay or recess to allow further consideration by the state legislatures. II-170:6-21, 92:11-14. In other words, even if Jacob's recollection of the opening of the meeting on January 5 were correct, there is no dispute that Dr. Eastman never requested *of Pence* that he simply "reject" Biden electoral votes, only that he "delay." Pence did not change his mind as a result of the calls. II-170:22-25. Even if the Court were to discount Dr. Eastman's credible testimony in favor of Jacob's conflicting account, a short-lived discussion of the "reject" scenario at Dr. Eastman's

initiation – which, again, Dr. Eastman maintains he vigorously *discouraged* in response to Pence's inquiry – would not support a culpability finding.

6. Dr. Eastman Set Forth a Tenable Position that the Vice President's Actions in Resolving an Electoral Count Dispute Would Not Be Subject to Judicial Review

In his six-page memo, Dr. Eastman referred to matters relating to the vice president's actions under the 12th Amendment as "nonjusticiable political questions." The NDC does not link this reference to any particular misconduct beyond an oblique observation that Dr. Eastman's "proposed plan…presupposed that Pence would take unilateral action without subsequent judicial review of its legality." NDC, ¶17.

Dr. Eastman's characterization is certainly tenable. Yoo testified that nonjusticiable questions include those that the Constitution, by its text, has assigned to another branch of government. XVIII-23:2-13. An example Yoo gave is impeachment, which the Constitution's text has removed from the federal courts and given to the Senate. Likewise, in Yoo's view, the 12th Amendment creates a special body to observe the opening of the electoral vote, with the vice president occupying a dispute-resolution role, which the text has removed from the Supreme Court and assigned to another branch of government. Hence, any action taken by the vice president to resolve disputes involving electors would constitute a non-reviewable political question. XVIII-27:8-28:23.

Dr. Eastman's assessment is supported by the relevant scholarship. If, as several commentators have contended, the counting of electoral votes in the Joint Session of Congress is a non-justiciable political question because the 12th Amendment is a "textual commitment" of that authority elsewhere than the courts, then subsequent judicial review would not be permissible. That is what it means for an issue to be a non-justiciable political question. See, e.g., *Baker v. Carr* (1962) 369 U.S. 186, 217 ["Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department"]; see also, e.g., Laurence H. Tribe, *Erog .v Hsub and Its Disguises: Freeing Bush v. Gore from Its Hall of Mirrors*, 115 Harv. L. Rev. 170, 277 (2001), Ex. 1013-108 ["There is a powerful case indeed for the Court playing no role other than to protect Congress's decision-making function--that is, for treating the matter as a

political question textually committed to Congress under the Twelfth Amendment, rather than a legal question properly resolved by a court"]; Erwin Chemerinsky, *Bush v. Gore Was Not Justiciable*, 76 Notre Dame L. Rev. 1093, 1107 (2001) [contending that the Supreme Court erred in deciding Bush v. Gore because the Twelfth Amendment is a "textual commitment" of the counting of electoral votes to a branch of government other than the courts]; Beermann & Lawson, Ex. 1015-23) ["It is even conceivable that the Supreme Court would decide, contrary to our view, that the Vice President's actions are not subject to judicial review, perhaps based on the political question doctrine…"].

iii. Dr. Seligman's Opinions Do Not Negate the Tenability of Dr. Eastman's Assessments

On the issue of tenability, it bears emphasis that the Court has been presented with opposing perspectives from two qualified experts on constitutional law issues for which there is no definitive determination. On one hand, Yoo has provided competent testimony, based on his expertise as a constitutional scholar and his in-depth research, analysis, and writings on those issues, which shows that Dr. Eastman's assessment of vice presidential authority and the ECA's constitutionality was objectively tenable. On the other hand, Seligman, relying on his own efforts and more limited experience, opined that there is no legal or historical basis for Dr. Eastman's views. In order for the Court to find that Dr. Eastman committed a disciplinable offense, it would need to discount Yoo and Dr. Eastman's well-founded opinions entirely in favor of those of Seligman on disputed constitutional issues for which there is no judicial guidance and no general consensus within the scholastic community.[30] XIII-49:19-21. A culpability finding is simply not warranted under these peculiar circumstances.

Further, Seligman's testimony is problematic on key issues. For example, at trial, he did not acknowledge the textual ambiguity in the 12th Amendment arising from the shift to the passive voice. VII-72:10-73:1. Outside of this proceeding, however, Seligman previously wrote about the 12th Amendment's lack of clarity – as Yoo and Delahunty documented in *Who Counts?* Ex. 1358-28, fn.

[30] Regarding the vast expanse of opinions on the issues addressed in *Who Counts?*, Yoo testified: "I think one thing I found surprising, actually, was what a widespread there [sic] was of different articles, different points of view, even if their authors considered and rejected some of them. There were a lot of different theories presented in the literature, and one thing, actually, is that no one had actually…tried to collect all of them in one place and sort of judge their relative arguments and merits against each other." XVIII-118:3-12.

134, citing Seligman's paper, *The Vice-President's Non-Existent Unilateral Power to Reject Electoral Votes* at 11, (Draft) ["The text isn't as clear about who counts the electoral votes…[T]hat leaves unanswered the question of who has the authority to count (and to resolve disputes about counting)."]. Thus, there appears to be no legitimate dispute that the enigmatic language of the 12th Amendment regarding who counts electoral votes defies clear interpretation – a factor that is outcome determinative on the question of culpability.

Yoo is also critical of Seligman for ignoring the structure of the Constitution – specifically, the efforts of the founders to ensure Congress would not select the president and Yoo's observation that if the founders wanted Congress to have a role in resolving electoral vote disputes they could have simply taken the language addressing disputes over congressional elections found in Article I, Section 5, and repeated it for presidential elections. XVII-83:9-17, 84:1-12.

Yoo cited Kesavan's article as being responsive in two respects to Seligman's view that resolution of electoral disputes is the purview of Congress. First, Kesavan rejected the notion that Congress could pass a law that controls the special, ad hoc body created by the 12th Amendment to sit and count the electoral votes. XVII-85:18-86:8; Exh 1014:128-130 ["The anti-binding principle of rule-making prevents one Congress from binding another with respect to the rules of proceedings…The [ECA] clearly violates the anti-binding principle of rule-making…[it] impermissibly binds the actions of future joint conventions."].

Second, Yoo testified that Kesavan does not believe the Necessary and Proper Clause of the Constitution (Art. I, Sec. 8), which is the enabling clause often relied on for the claim that Congress should control the electoral vote and disputes, applies to a body that meets specially once every four years for the purpose of choosing the president and counting the electors. XVII-86:9-18; Ex. 1014:92 ["The Necessary and Proper Clause is not a font of power for the [ECA]…congressional regulation of the electoral count, however 'necessary,' is not 'proper'—and hence not within Congress's domain or jurisdiction—within the meaning of the Necessary and Proper Clause."].

As for Seligman's rejection of the 1796 and 1800 elections as relevant precedent, Yoo disagrees. XVII-74:6-22, 89:20-90:13. He thinks there was a dispute in 1796 over the four Vermont electoral votes that gave Adams the majority, and that Adams resolved that dispute by disregarding the questions about

the Vermont vote, not asking Congress of its views, and not inquiring whether there were objections from Congress. XVII-91:3-13. Yoo also believes Jefferson followed a similar procedure as Adams by making a determination as to Georgia's defective votes without asking Congress for its views or pausing to see if anyone objected to the count. XVII-93:4-13.

Yoo offers the more persuasive view on this issue. But, even if the Court disagrees, the record does not provide a sufficient basis for finding Dr. Eastman culpable for the views expressed in the Memos, on the conclusory position espoused by Seligman that no reasonable constitutional attorney would have asserted such a position. The record is replete with numerous examples of other prominent constitutional scholars either espousing the same view with respect to the Vice President's authority or acknowledging the tenability of such a view.

iv. Greg Jacob's Testimony and December 8, 2020 Memorandum Support the Tenability of Dr. Eastman's Assessments

Greg Jacob was appointed as Pence's chief legal counsel in March 2020. II-41:18-23, 130:1-5. He had held that position for approximately seven months at the time of the 2020 election. II-130:6-8. Before October 2020, he had no experience with electoral counts, the 12th Amendment, or the ECA. II-116:1-7. Knowing that Pence would preside over the electoral count on January 6, and with no one in his office having prior firsthand experience such a count, Jacob tasked his staff with pulling together relevant materials, so that he would be able to answer "questions about, mechanically, how the day operated." II-116:8-25.

On December 8, 2020, Jacob wrote a memorandum for Pence on the subject of the "January 6 Process for Elector Vote Count" (the "Jacob Memo," Ex. 1091). The Jacob Memo, which Jacob acknowledged to be his work product at trial, reinforces many of the points that support the tenability of Dr. Eastman's constitutional analysis. Those points include:

- Pence, as vice president, has a non-ministerial role in resolving objections to electoral votes. Ex. 1091-1; II-146-147:12.
- There is divergent scholarly opinion as to whether the vice president is charged with counting electoral votes under the 12th Amendment. Ex. 1091-1; II-147:13-149:16.

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- The vice president's role in resolving disputes over electoral votes has been a matter of scholarly debate and (prior to the ECA) was an unsettled question. Ex. 1091-2; II-149:17-151:5.
- Scholarly assertions have been advanced that the vice president is solely responsible to determine whether to count disputed electoral votes. Ex. 1091-2; II-151:6-17.
- Historical evidence exists of vice presidents choosing which electoral votes to count, including the actions of Adams and Jefferson - an observation that seems perplexingly at odds with Jacob's testimony that neither historical example "provide any support for [Dr. Eastman's] theory." II-67:7-24; Ex. 1091-2.
- The ECA's constitutionality has been widely debated by constitutional scholars. Ex. 1091-2; II-125:4-126:4; 128:14-129:10.

Though Jacob professed to disagree with aspects of Dr. Eastman's constitutional analysis, his testimony actually provides a wellspring of support for the tenability of Dr. Eastman's views, especially when viewed through the lens of the memorandum he prepared just a month before the January 6 electoral count.

d. The Bar Failed to Prove by Clear and Convincing Evidence that Dr. Eastman Violated Business & Professions Code §6068(d) (Counts 2 and 4)

The NDC's counts Two and Four charge Dr. Eastman with "willfully misleading [two courts] by an artifice or false statement of law or fact," in alleged violation of §6068(d). NDC, ¶39 (count 2); ¶47. Count Two addresses Dr. Eastman's filing, on behalf of President [candidate] Trump, a Motion to Intervene in an Original Action brought in the United States Supreme Court by the State of Texas, *Texas v. Pennsylvania*, 141 S. Ct. 1230 (2020). Ex. 262; NDC, pp. 16-19. The Bar asserts that, by *adopting* Texas' allegation in its the proposed Bill of Complaint relating to state election code violations and other illegality, Dr. Eastman willfully misled the United States Supreme Court. NDC, pp. 16-19. The Motion to Intervene was filed just two days after Texas filed its Bill of Complaint.[31]

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[31] Texas' Original Action (Ex. 260) was filed Monday, December 7, 2020, the Trump Motion to Intervene Wednesday, December 9, 2020 (Ex. 262), and the Supreme Court's denial of Texas' Motion for Leave Friday, December 11, 2020 (Ex. 356).

Count Four addresses Dr. Eastman's participation, as **co-counsel** for President [candidate] Trump, in the filing of a Complaint of Emergency Injunctive Relief in US District Court for the Northern District of Georgia, styled as *Trump v. Kemp*, N. 20-CV-5310. Ex. 1359. The complaint in *Trump v. Kemp* alleged various violations of Georgia state election code, including votes cast by illegally registered voters and other unqualified individuals, and that counting of absentee ballots were processed outside the presence of the public or election monitors/observers. *Id*. The Bar asserts the election code violation allegations in the Complaint were "false and misleading" because the illegally cast votes were collectively insufficient to "affect the outcome of the election" [NDC, p. 21] and that "video evidence" showed the ballot container ("suitcase") was retrieved and votes counted per code. NDC, p. 21.

i. *Texas v. Pennsylvania* (Count 2)

1. Business and Professions Code §6068(d)

Historic use of 6068(d), unchanged since first was added in 1939, confirms its reach is restricted to circumstances where there was an affirmative statement, omission when under a duty to disclose, or active misrepresentation by the lawyer to counsel or the court. [32] As to *Texas v. Pennsylvania*, the challenged action by Dr. Eastman is a ***Motion to Intervene*** – which by definition was dependent on Texas' Motion for Leave to File its proposed Bill of Complaint being granted. If Texas' Motion for Leave to File the Bill of Complaint were granted, the proposed Bill of Complaint becomes the operative pleading. Like any complaint, it initiates the Action by making *allegations* for which there is some credible evidence, and invokes the responding parties' right to deny, answer, move to dismiss, initiate

[32] *Roche v. Hyde* (2020) 51 Cal.App.5th 757, 817 (attorney withheld crucial evidence in discovery); *Scofield v. State Bar* (1965) 62 Cal.2d 624, 628 (attorney knowingly and willfully duplicated items of special damages in the claims against the insured driver in a car accident); *Grove v. State Bar* (1965) 63 Cal.2d 312 (attorney failed to disclose to the court an earlier request for continuance from opposing counsel); *Vickers v. State Bar* (1948) 32 Cal.2d 247, 253 (attorney knew or should have known the allegation of his petitions to the probate court concerning his relationship to his wife was false and untrue as his previous marriage had not yet been dissolved); *Pickering v. State Bar of Cal*. (1944) 24 Cal.2d 141, 144 (attorney filed a complaint asserting facts he *knew* to be untrue regarding his client's marital status); *Bryan v. Bank of America* (2001) 86 Cal.App.4th 185, 187, 193 (attorney filed two motions and declarations seeking an extension, falsely declaring OC could not be reached for a possible stipulation to extended time); *Furlong v. White* (1921) 51 Cal.App. 265, 271 (attorney stated that plaintiff would not submit any amendments to the proposed findings, as such could not contest the trial judge denying a motion for a new trial based on the proposed findings); *Avina v. Superior Court of San Diego County* (2023) WL 6818649, Cal.App. 4 Dist., October 17, 2023 (attorney knowingly failed to disclose that another, unrepresented party had a claimed ownership interest in his client's business).

and take all forms of investigation and discovery, or any other action consistent with its rights and remedies. That was the case here, where the Defendant States opposed the Bill of Complaint on numerous bases.

2. *Texas v. Pennsylvania*: The Facts

The Motion for Leave and Bill of Complaint was filed in the United States Supreme Court December 7, 2020 by three counsel of record: Ken Paxton, Attorney General of Texas; Brent Webster, First Assistant Attorney General of Texas, and Lawrence Joseph, Special Counsel to the Attorney General of Texas. Kurt Olsen was involved since inception, and personally drafted and reviewed every word of the filing.[33] XX-11:3-13. The filing was 108 pages (without exhibits); 132 pages with Exhibits, which included three related documents: (1) Motion for Leave to File Bill of Complaint (2) Brief In Support of Motion for Leave, and; (3) Request for Expedited Consideration. Ex. 260 (all three).

Mr. Olsen testified that as many as ten attorneys were involved in the research, drafting, editing, and collection of supportive Declarations, starting on November 14, 2020, lasting several weeks. XX-20:25-22:1; 22:5-8; 25:9-17. Mr. Joseph, whom Mr. Olsen considered more fluent with statistics, worked in particular with retained expert Dr. Charles Cicchetti on the portions of the filing related to statistical abnormalities. XX-34:4; 35:2-11. Mr. Olsen worked closely with Dr. Cicchetti on his work and declaration, qualifying and cross-validating "everything." XX-35:2-7. The team, in addition to Mr. Olsen, comprehensively researched violations of state election statutes in the Defendant States – which, in Mr. Olsen's words, constituted "clear violation[s] in terms of non-legislative actors abrogating or disregarding or modifying state election law, which underpin the…the electors' clause." XX-35:24-36:5. The proposed Bill of Complaint contained 25 pages of detailed, fact-based allegations regarding election codes disregarded or amended by non-Legislative actors in the 4 Defendant states. Ex. 260, pp. 19-44. Mr. Olsen testified the factual contentions had evidentiary support. XX35:2-11; 16. The Bill of Complaint pled detailed violations of the Electors Clause, Equal Protection, and Due Process. Ex. 260, pp. 43-47.

[33] Mr. Olsen appeared as Counsel of Record for the State of Texas (Ex. 1137, p. 3 – Reply in Support of Motion for Leave), as well as Grant Dorfman, Deputy First Assistant, Attorney General of Texas, Aaron Reitz, Deputy Attorney General for, Legal Strategy, Lesley French Henneke, Chief of Staff, Austin Kinghorn, General Counsel/Office of the Attorney General.

Two days later, on December 9, Dr. Eastman filed the Trump Motion to Intervene and Proposed Bill of Complaint. Ex. 262. The Supreme Court denied Texas' Motion for Leave (with dissents by Justices Alito and Thomas; Ex. 262), two days later, ending the Action – and mooting the Trump Motion to Intervene.

Importantly, on December 9, 2020, six other States (Missouri, Arkansas, Louisiana, Mississippi, South Carolina, and Utah), through the States' Attorneys' General, sought intervention in Texas v. Pennsylvania, the same as Dr. Eastman's filing on behalf of President Trump. XXIII-49:23-25; Proposed Ex. 1379. [34] 12 other States filed *amicus curia* briefs in support raising many of the same allegations of illegality in the conduct of the election that were raised in the Texas Bill of Complaint and in Dr. Eastman's Motion to Intervene. XXIII-49:21-23; Proposed Ex. 1004. Last, hundreds of State Legislators and members of the US Congress filed amicus brief is support. XXV-211:16-22; 212:2-11; Proposed Exhibits 1005-1009.

The allegation that "no reasonable attorney" would have taken the same action (NDC, para. 38) deems the other States' intervention motions and amicus ***highly relevant***, though the court disagreed, denying admission of those filings (proposed Exs. 1004-1009, and 1379) as "not relevant." In fact, actions by other states adopting ***Dr. Eastman's*** proposed Bill of Complaint was explicit confirmation that "other reasonable attorneys" affirmed the bases for the Original Action. Dr. Eastman asserts the court's rulings excluding the filings were error.

And, last, no motion of sanctions under FRCP 11, or the court's inherent authority, were brought by any party or the Court *sua sponte* against any involved lawyer and no sanctions issued otherwise. Under these circumstances, it strains credulity – as well as the legal reach of §6068(d) – that the Bar exercises such timorous gymnastics to sanction Dr. Eastman.

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[34] As important, all 6 States adopted Texas' Proposed Bill of Complaint *as modified by* Dr. Eastman's Motion to Intervene on Behalf of Candidate Trump. XXV-211:10-11; 230:17. Also see Respondent's ***proposed*** Ex. 1379, Six States Motion to Intervene pp. 5 and 14. Although the Court denied admission for this exhibit, the fact that 6 state attorneys general took the same action taken by Dr. Eastman in incorporating the Texas Bill of Complaint by reference is clearly relevant to the tenability of Eastman's action; it is cited here to confirm the record for any appeal that might become necessary. XXXIII-51- 60 (argument and rulings regarding relevance and admissibility of other States' Motions to Intervene and Amicus Curiae Briefs).

3. The Bar's Charge Lacks Merit

In NDC Count 2, the Bar raises three factual allegations "in the motion filed by Texas" as "false and misleading. NDC, ¶38(a) – (c). Para. 38(a) of the NDC charged Dr. Eastman with making false and misleading allegations of "fraud." NDC, ¶38(a). Yet, no such allegations were made in the Bill of Complaint [35] or the Motion to Intervene – a point Dr. Eastman made ***crystal clear***:

> Despite the chaos of election night and the days which followed, the media has consistently proclaimed that no widespread voter fraud has been proven. But this observation misses the point. The constitutional issue is ***not whether voters committed fraud*** but **whether state officials violated the law by systematically loosening the measures for ballot integrity** so that fraud becomes undetectable…Whatever doubt there is about fraud by voters or political operatives, ***there is no doubt that the officials of the Defendant States changed the rules of the contest in an unauthorized manner***.[36]

Ex. 262, p. 38 (emphasis added).[37]

NDC, ¶38(b) alleges that "there was no evidence upon which a reasonable attorney would rely that election officials in Philadelphia and Allegany Counties had…acted with intent to favor Biden…through violations of elections codes or adoptions of different standards…or that [the conduct] affected an outcome determinative numbers [sic] of popular votes. NDC, p. 18. Again, the Bar failed to prove its case. Paragraphs 49 to 54 of the Bill of Complaint set forth ***detailed*** allegations of the actions by Secretary Boockvar that instructed local election officials to cure defective mail-in ballots, despite the clear statutory prohibition before 7:00 a.m. on Election Day. Ex. 260, pp. 16-17, para. 50. This violated four specific election statutes: 25 PA Stat. Sections 3146.8(a), 3146.8(b), 3146.8(g)1)(ii), and 3146.8(g)(1.1). In addition, Mr. Olsen testified in detail about the bases for this allegation, the documentation, and statutory violations implicated. XX-20:4-67:12; XXIII-58:15-95:19. Given that the majority of mail-in and absentee ballot could be expected to be Biden supporters, it was plausible, even extremely likely, that weakening the processes, by "curing" ballots in contravention of explicit statute,

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[35] "Fraud" is used in the Bill of Complaint 6 times (Ex. 260, pp. 12, 13, 24, 29, 30, 39). None charge or assert "fraud," but reference only that the election statutes in place in various states were intended ***to detect fraud***, and that non-legislative actions created *opportunity for fraud*.

[36] In addition, the Bill of Complaint alleged that the asserted violations of each State exceeded the margins of votes separating the candidates. See, e.g., Ex. 260, p. 14, para. 42.

[37] See also, XX:4-16 (Mr. Olsen's testimony: "We focused on illegal votes.")

assisted Biden and were so designed. As was the early notification to Democrat precinct leaders about the opportunity to cure that would purportedly be authorized by the Department of State on the evening before the election. Ex. 260, p. 24, para. 52. This was hardly a "false statement of fact or law." [38]

As to the charge against Dr. Eastman, the Bar has failed to establish that **he knew** the factual assertions were false. *Vickers v. State Bar*, supra, 32 Cal.2d at 253 (whether respondent violated 6068(d) "depends first upon whether his representation to the court was untrue, and secondly, whether he knew that his statement was false and intended thereby to deceive the court. "Known" means "actual knowledge of the fact in question (though "a person's knowledge may be inferred from circumstances.") Rule 1.0.1(f).

Dr. Eastman reviewed the Bill of Complaint, found the factual and statutory recitations at Paras. 49-55 to be well supported and compelling. In the hearing, there was an absence of any evidence or proof that Dr. Eastman **knew** those allegations were false (even if they were), or that he intended to deceive the court by adopting those allegations. [39]

Last, para. 38(c) on the NDC accused Dr. Eastman of making false and misleading statements by the Intervention Motion's adoption of allegations in the Bill of Complaint regarding the expert opinions of Dr. Cicchetti in the Cicchetti Declaration. Ex. 260, pp. 13-14, para. 9-11, and pp. 115-124. Dr. Cicchetti was a highly credentialed and qualified expert, who testified in hundreds of proceedings since 1967. Ex. 260, p. 115-116. He was formally trained statistics and econometrics, and in evaluating significance of relative odds of outcomes and relative risk. *Id.* There was, according to Mr. Olsen and Dr. Eastman, no question about Dr. Cicchetti's qualifications, experience, or background. XX-34: 19-35:20.

In the NDC, the Bar focuses on only on the description in Texas's Bill of Complaint of **one aspect** of the Cicchetti Declaration – that "the odds of Biden winning the popular vote were less than one in a quadrillion." NDC, pp. 18-19. Dr. Cicchetti's statistical analysis was not intended to establish

[38] Attorneys for Texas filed a lengthy Reply countering Defendants' assertions and arguments set forth on Oppositions. Ex. 1377. The arguments in reply to Pennsylvania's opposition appear at pp. 118-120.

[39] Noteworthy, is FRCP 11, which provides that an attorney must certify, to be best of their knowledge that (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.

vote abnormities or fraud, but that if it were assumed that ballots reported after 3:00 a.m. were drawn from the same or similar population as before 3:00 a.m., then the odds of such a differential being natural were extremely low. Ex. 260, pp. 118-121, para. 17-21. Dr. Cicchetti acknowledged that the populations might be different (Ex. 260, p. 119, para. 16), but found that that had not been proved and, in any event, was unlikely given the large percentage of the total vote that had already been reported before 3:00 a.m. As stated above, Dr. Cicchetti's analysis was a highly sophisticated statistical analysis by a highly credentialed expert. Even if Texas's Bill of Complaint confused Dr. Cicchetti's opinion on this issue, there was still no proof of a knowing ("actual knowledge") mischaracterization by Dr. Eastman.

The fact that "experts in statistics were highly critical of Cicchetti's analysis" (NDC, p. 19) [40] does not signify that Dr . Cicchetti's opinions – or Dr. Eastman's Motion to Intervene – were "false and misleading," only that reasonable minds may come to different conclusions, as what occurs in virtually every contested proceeding.

ii. *Trump v. Kemp* (Count 4)

The *Trump v. Kemp* complaint, filed December 31, 2020 in USDC for the Northern District of Georgia, was necessitated, in part, because no judge had been assigned to hear *Trump v. Raffensperger*, an action filed in Fulton County, Georgia, despite being filed December 4, 2020. V-47:14-48:3; see also, Ex. 270, p. 12-13, para 21-24. The *Trump v. Kemp* complaint incorporated the *Trump v. Raffensperger* Complaint. Ex. 270, para. 24; V-58:20-22. The Trump v. Kemp action was voluntarily dismissed January 7, 2021. Ex. 358. The action was only operative *for 4 court days.*

There were significant and pervasive issues with Georgia's administration of the 2020 presidential election. See discussion, *supra*, Section IV(a)(vi)("Evidence of Illegality in Georgia"); *see also*, Ex. 260 (*Texas v. Pennsylvania* Bill of Complaint), pp. 27-30, para. 64-76; Ex. 1048 (*Trump v. Raffensperger* Complaint; Exs. 265-270)(*Trump v. Kemp* Complaint), and testimony by Mr. Olsen (XX-58:16-60:16, 62:1-63:7, 63:25-67:10), Mr. Favorito (XV-14:7-15:10; XV-17:8-21, 64:3-11, 136:4-138:8; XV-64:7-11 XV-74:3-75:1, 77:11-78:24, XV-80:4-84:5; Ex. 1144-3, 14 and 6). The incorporated

[40] Dr. Cicchetti submitted a Supplemental Declaration in the Texas Reply. Ex. 1377, pp. 31-41

Trump v. Raffensperger complaint was supported by declarations from experts Bryan Geels, Matt Braynard, and Mark Davis. Ex. 270, p. 13, para. 24; V-24:8-11.

In Count 4, the Bar charges do **not** contest allegations regarding the incidences of illegal votes or other irregularities, but instead charge that the alleged irregularities did not cumulatively approach the 11,779 margin ("no reasonable attorney would rely that the alleged irregularities…*occurred in sufficient number as to affect the outcome of the election.*") NDC, ¶46(a).

The Bar failed to prove that Dr. Eastman had actual knowledge that the allegations in *Trump v. Kemp* concerning outcome determinative illegal votes were false, and that Dr. Eastman intended to deceive the Court.

First, in both the *Trump v. Raffensperger* and *Trump v. Kemp* complaints, it was specifically alleged that the myriad Georgia election code violations had an outcome determinative effect. Ex. 1048 (*Trump v. Raffensperger*), para. 57, 223, 225, and 228; Ex. 270 (*Trump v. Kemp*) para. 19, 42, and 58. Dr. Eastman was primarily handling the constitutional aspect of the *Trump v. Kemp* matter; Kurt Hilbert, who was counsel of record for plaintiffs in the *Trump v. Raffensperger* case, and familiar with the expert declarations in that action, was responsible for the factual bases for the Action. V-46:20-47:10; V-51:5-20. Although one of the attorneys working with President Trump expressed concerns that some of the numbers in the allegations of the original *Trump v. Raffensperger* complaint may have been inaccurate, Dr. Eastman carefully reviewed the allegations in the original complaint and determined that, because of appropriate caveats, none was inaccurate. V-53:24-64:3. Dr. Eastman therefore had no reason to question the allegations in *Trump v. Raffensperger* complaint. See, e.g., V-33:25-34:5; V38:11-23; V42:10-18; V51:5-20; V57:12-15; V59:11-15. [41]

Second, Dr. Eastman had a reasonable and good faith belief, based on the evidence, that the cumulative total of the votes affected by the assuredly illegal conduct exceeded the Georgia margin of 11,779. V-113:2-10. See also, Ex. 1048, paras. 169-175 (total votes affected by the violations of state election statutes).

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[41] Election data had been withheld from experts, and open records requests made. Trump v. Kemp was dismissed, and the requested informative never received. V62:18-63:2.

Third, and as set forth above (see Section IV.a.xi, *supra*) Dr. Eastman relied not only on Mr. Hilbert, as lead counsel, but on credentialed and qualified experts. Dr. Eastman's reliance was reasonable under the circumstances, especially because of the technical nature of the issues assessed, and that the experts maintained their opinions when presented with contrary opinions of opposing experts.

Paragraph 46(b) of the NDC only challenges the allegation in *Trump v. Kemp* that video evidence showed ballots in a container ("suitcase") were processed outside the presence of the public, in violation of state law NDC, ¶45(b). V-96:24-96:6, V-107:3-15 (where Dr. Eastman correctly characterized the issue was "whether [ballots] were illegally counted, because observers had been told they were going home, and shut down, and they had re-convened without providing notice that they were re-canvassing. *That was in direct violation of Georgia law.* So it was the illegal counting of the ballots. *Whether or not the ballots were illegal or not was not the issue*). V-107:7-13. The Bar alleges Dr. Eastman knew the allegations were false and that he willfully intended to mislead the Court in his role as co-counsel. As with the allegations on para. 46(a) of the NDC, the Bar has failed to prove that the allegation was even false, much less ***knowingly false***, and that Dr. Eastman ***intended t***o mislead the Court by its submission. [42]

The *Trump v. Raffensperger* complaint included affidavits of several witnesses about State Farm Arena ("SFA"), where the Georgia hand recount was taking place, including relevant portions of a 24-hour surveillance video that was compiled by Jacki Pick, and depicting multiple views of SFA. V-78:8-25. Ms. Pick also testified at the Georgia Senate subcommittee hearing on December 3 and 4. Dr. Eastman was present at the Senate Subcommittee hearing, and watched portions of the video. V-77:1-22. The video evidence and the affidavits showed that the ballot box was placed under a table, and that people were told to go home, and that voting would continue in the morning. V-100:17:103:3. The same evidence established that after people were instructed to leave that evening, the ballot box was retrieved and counting continued, in contravention of Georgia law that required that ballots be processed

[42] Dr. Eastman was examined at length at trial regarding whether he believed "fraudulent" ballots were processed at State Farm Arena, or that the suitcases (or boxes, as referred to in the examination) contained fraudulent ballots. V-96:18-97:12.

in public. All this evidence was, of course, included in the *Trump v. Raffensperger* case, filed nearly a month earlier, with Mr. Hilbert as counsel of record. Exs. 1048 and 270. See also, V-110:4-111:17.

Dr. Eastman reasonably credited the sworn testimony regarding the allegations of unobserved counting, which if proven in an adjudicative process, would have constituted violations of Georgia election law. There was no evidence presented at trial to the contrary, or that Dr. Eastman intended to mislead the court.

e. Dr. Eastman's Conduct Cannot Constitute Moral Turpitude, Dishonesty, or Corruption (Counts 3, 5, 6, 7, 8, 9, 10, and 11)

"Moral turpitude" has been described as an elusive concept incapable of precise definition. A commonly cited definition is "an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen; or to society in general, contrary to the accepted and customary rule of right and duty between man and man." *In re Higbie* (1972) 6 Cal.3d 562, 569-70. "The concept of moral turpitude depends upon the state of public morals, and may vary according to the community or the times." *In re Hatch* (1977) 10 Cal.2d 147, 151. In practice, courts have not found moral turpitude when the attorney did not seek personal gain from the conduct. *See In re Fahey* (1973) 8 Cal.3d 842 (failure to file tax returns); *In re Burke* (2018) 5 Cal. State Bar Ct. Rptr. 448, 455 (making a court appearance when the attorney was unaware he was not entitled to practice law, and then immediately withdrawing from the matter). Further, an honest and sincere belief in justifiability of actions precludes a moral turpitude finding. *In the Matter of Klein* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 1, 10-11.

"Representations which may be legally characterized as amounting to 'moral turpitude, dishonesty, or corruption' must be made with an intent to mislead." *Wallis v. State Bar of California* (1942) 21 Cal.2d 322, 328. Negligence in making a representation does not constitute a violation of section 6106. *In the Matter of Whitehead* (Review Dept.1991) 1 Cal. State Bar Ct. Rptr. 354, 360, 367-369. And to determine whether grossly negligent misrepresentation constitutes moral turpitude, statements must be read in light of additional surrounding facts. *Call v. State Bar* (1955) 45 Cal.2d 104, 109.

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Applying the foregoing, as well as the evidence elicited at trial, to Dr. Eastman's actions, there is no evidence, much less clear and convincing evidence, which would support a conclusion that Dr. Eastman at any time acted with "baseness, vileness or depravity" or that he intended to mislead anyone. Dr. Eastman's unrebutted (and unrebuttable) testimony showed that his conduct was made entirely in good faith, based upon his (reasonable) understanding of the facts known to him at the time.

Further, this was a case of disputed questions. Disputes about the facts of election illegality and fraud; disputes about the impact of non-legislative actors suspending or altering state election law; disputes about the role of state legislatures to define the manner of choosing electors and, more importantly, about their authority if the designated manner was not followed; and disputes about the role of the President of the Senate in resolving disputes over elector votes. Most of these disputes were at the time and remain unresolved – "muddy," as Greg Jacob characterized one of them. The very foundation of our adversarial legal system requires that a lawyer representing one side in such a dispute zealously advocate for his client's position. By definition, then, Dr. Eastman's actions in furtherance of one side of such unresolved disputes cannot support a finding of moral turpitude.

Over the course of trial, Dr. Eastman repeatedly testified that he made all of his statements based upon his knowledge at the time (see e.g., XXVIII-80:16-22, 99:5-21), law, historical precedent, and legal scholarship. See Section IV.c.ii. They were all made in good faith and were an accurate reflections of Dr. Eastman's honestly held beliefs. XXXII-272:3-275:23.

Dr. Eastman also specifically testified that his only intent for the work done on behalf of President Trump was to "try to identify problems with the conduct of the election and to try and investigate them and identify whether the problems and illegality may have affected the outcome of the election so that the actual will of the voters when all legal votes were cast was what decided the election, not illegality and illegal votes." XXVIII-100:14-25; see also XXV-184:10-15. It was simply "to get to the truth of the validity of the election." XXVIII-79:20-21. He also did not perform any legal research, analyze any issues, provide any assessments, or make any statements to Greg Jacob with the intent to assure that President Trump was retained in office even if he had not won the election. XXV-183:22-84:15. He did not seek to mislead anyone and was only trying to get to the truth at the heart of the election. XXVIII-100:14-25; see also XXV-184:10-15.

Moreover, every single action Dr. Eastman took, from his statements about illegality in the conduct of the election, how those instances of illegality opened the door for fraud, and to his assertion that based upon the historical record, the Vice President had the authority to resolve disputes in the electoral count, was done in good faith. XXXII-272:11-18. Since Dr. Eastman's conduct was based in an honest and sincere belief in justifiability of his actions, there can be no finding of moral turpitude. *Klein*, *supra*, at pp. 10-11.

Further, Dr. Eastman was representing a client and had a duty to zealously represent his interests, especially when the role of the vice president in the electoral count was an open issue not resolved in the law. XXXII--273:11-17. When Rule 1.3 requires that a lawyer "act[] with commitment and dedication to the interests of the client" it cannot be said that Dr. Eastman acted adversely to the state of public morals, and thus, in moral turpitude. *Hatch*, *supra*, at p. 151.

The State Bar has not presented **any evidence whatsoever**, let alone clear and convincing evidence, that Dr. Eastman sought to mislead people via his statements, that he acted in bad faith, or he acted adversely to public morals. Accordingly, when Dr. Eastman's statements were not intended to mislead, were not made in bad faith, and were not adverse to the state of public morals, they cannot form the basis of discipline based upon moral turpitude.

V. MITIGATION

State Bar Standard 1.6 sets out the mitigating circumstances the court can consider in imposing discipline. Here, the following exist.

a. No Prior Record of Discipline (Std. 1.6(a))

Mitigation is available where no prior record of discipline exists over many years of practice, coupled with present misconduct that is not likely to recur. (Std. 1.6(a).) Dr. Eastman was admitted to practice law in California in December 1997, and his alleged misconduct began in late 2020. Mitigation credit is available notwithstanding the seriousness of the alleged misconduct. See *In the Matter of Stamper* (Review Dept. 1990) 1 Cal.State Bar Ct. Rptr. 96, 106, fn. 13 [many years of practice without a prior record may be considered as a mitigating circumstance even if the present misconduct is serious]. Dr. Eastman's many years of discipline-free practice is a mitigating factor that should be assigned significant weight.

By way of background, Dr. Eastman has had a distinguished legal career spanning more than two decades of California State Bar membership. Dr. Eastman earned his law degree from the University of Chicago Law School in 1995 after which he clerked for the Honorable J. Michael Luttig at the United States Court of Appeals for the Fourth District. From 1996 to 1997, he served as a law clerk to Justice Clarence Thomas at the Supreme Court of the United States. In 1997, Dr. Eastman gained admittance to the California State Bar. After concluding his clerkships, Dr. Eastman practiced with the national firm Kirkland & Ellis in Los Angeles until 1999. While there, he specialized in civil and constitutional litigation.

In 1999, Dr. Eastman began teaching at Chapman University's Dale E. Fowler School of Law. He remained on the school's faculty until 2021. During his time at Chapman, Dr. Eastman served as Henry Salvatori Professor of Law and Community Service and held the position of dean from 2007 to 2010. Dr. Eastman is a founding director of the Center for Constitutional Jurisprudence, a public interest law firm affiliated with the Claremont Institute that he founded in 1999.

Dr. Eastman has served as the chairman of the Federalist Society's Federalism and Separation of Powers Practice Group and a member of the board of the Public Interest Legal Foundation. He is on the Advisory Board for the St. Thomas More Society of Orange County, St. Monica's Academy, and the Life Legal Defense Foundation. He has been recognized by Chapman University as Professor of the Year (2002) and for Faculty of Excellence in Scholarly and Creative Activity (2013). Additionally, he received the St. Thomas More Award from Franciscan University (2010) and the J. Reuben Clark Award from the J. Reuben Clark Society of Orange County (2010).

In the courtroom, Dr. Eastman has represented seventeen parties before the United States Supreme Court. He has also represented *amici curiae* in over 150 cases before the Supreme Court in cases such as *Burwell v. Hobby Lobby Stores* (2014), *Conestoga Wood Specialties Corp. v. Burwell* (2014), *Harris v. Quinn* (2014), *National Labor Relations Board v. Noel Canning* (2014), *National Federation of Independent Business v. Sebelius* (2012), and *Gonzales v. Carhart* (2007).

Dr. Eastman has frequently been called upon by Congress or various state legislatures to provide testimony about significant matters of constitutional law. Dr. Eastman has also made numerous appearances as an expert legal commentator on various television and radio programs and in print

media. He has appeared on ABC, NBC, CBS, Fox News, CNN, BBC World News, and PBS. His writings and commentary on the courts and in constitution have appeared in *The New York Times*, *Wall Street Journal, Washington Post, Los Angeles Times, National Review, Economist, Atlantic, Slate, National Catholic Register*, and *ABA Journal*, as well as in numerous law reviews, including the University of Chicago Law Review, the Georgetown Law Journal, the Harvard Journal of Law & Public Policy, and the American Journal of Legal History. He has also authored chapters in several books addressing issues of constitutional law, is co-editor of a major constitutional law textbook, and is a contributor to the Oxford Encyclopedia of Legal History, the Oxford Companion to the Supreme Court of the United States, and the Heritage Guide to the Constitution.

Dr. Eastman's twenty-plus years of discipline-free practice warrants significant weight in mitigation. *Hawes v. State Bar* (1990) 51 Cal.3d 587, 596 [more than 10 years of discipline-free practice is significant mitigation]. In the case of serious misconduct, where that misconduct is aberrational and unlikely to recur, a long discipline-fee practice is most relevant. See *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029. Conversely, where an attorney's misconduct is *not* aberrational, assignment of nominal weight to this factor is appropriate. *Hawes, supra*, 51 Cal.3d 587 at 596.

Irrespective of the merits of the State Bar's charges against Dr. Eastman, his underlying conduct is unlikely to recur because it arose from a role he no longer occupies as attorney to former president Trump. As such, Dr. Eastman's conduct emerged from special circumstances involving a then-sitting president that no longer exist. Thus, Dr. Eastman's alleged violations – described by the State Bar as "(1) engaging in, assisting, counseling, and inducing a client and others to engage in conduct that is criminal, fraudulent, or a violation of any law, including the United States Constitution, rule, ruling of a tribunal, or obligation under the State Bar Act or the Rules of Professional Conduct; (2) filing frivolous lawsuits, pleadings, and contentions; and (3) making false statements in furtherance thereof" – involve uniquely situational conduct not to be repeated. As such, Dr. Eastman deserves full weight for his unblemished disciplinary history. Cf. *In the Matter of Romano* (Review Dept. 2015) 5 Cal. State Bar Ct. Rptr. 391, 395-398-399 [minimal weight afforded for 22 years of discipline-free practice where misconduct, which included filing 82 fraudulent bankruptcy petitions, "was most serious, involved intentional dishonesty, and continued over three and a half years," and was not proven aberrational].

In sum, Dr. Eastman's lack of prior discipline is a significant mitigating factor and an indicator that, if and to the extent he is determined to have engaged in misconduct, a recurrence of misconduct is all but certain not to happen. As the Supreme Court instructs, "[p]rior exemplary conduct and a distinguished career may be relevant as factors indicative of the probability that misconduct will not likely recur" provided the misconduct, although serious, does not involve a recurring pattern over a long period of time. *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029. Dr. Eastman should receive full mitigation credit for this factor.

b. Good Faith (Std. 1.6(b))

An attorney may be entitled to mitigation credit if he or she can establish a "good faith belief that is honestly held and objectively reasonable." Std. 1.6(b); see also *In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646, 653 [good faith established as mitigating circumstance when attorney proves belief was honestly held and reasonable]. Dr. Eastman is entitled to mitigation for acting in good faith because he sincerely believed his actions did not violate the professional rules of conduct ***and*** that belief was objectively reasonable.

An attorney must not advise a client to engage in conduct known to be criminal, fraudulent, or violative of any law, rule, or ruling. Rule 1.2.1(a).) However, the attorney may make a good faith effort to determine the validity, scope, meaning, or application of a law, rule, or ruling. Rule 1.2.1(b)(2).

Both of the memoranda giving rise to the State Bar's allegations against Dr. Eastman fall within the ambit of subsection (b)(2) of Rule 1.2.1 and did not violate Dr. Eastman's ethical obligations. As discussed, the memos were intended to provide a few members of then-president Trump's legal team with a comprehensive list of options available to them in the wake of the 2020 election results. Both memos were meticulously researched, reflect sound collective judgment on the part of the individuals who contributed to their preparation, were drafted in good faith reliance on well-established legal principles and doctrines, and cannot reasonably be viewed as advocacy by Dr. Eastman for his client to knowingly commit criminal, fraudulent or otherwise unlawful acts.

Though the Trump camp has been publicly denounced for purportedly seeking to "overturn" the election results, it must be remembered that Dr. Eastman did not ask the Vice President, who was presiding over the Joint Session of Congress, to overturn the election or to unilaterally decide the validity

of electoral votes himself. Dr. Eastman requested that the Vice President assent to requests from state legislators to pause the proceedings of the Joint Session of Congress for 7 to 10 days, to give time to the state legislatures to assess whether the acknowledged illegal conduct by their state election officials had affected the results of the election. An objective examination of the facts compels the conclusion that Dr. Eastman did not assist or advise former President Trump to violate the law.

Further, Dr. Eastman's conduct does not bear any of the hallmarks associated with an attorney's *lack* of good faith. See *In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 589 ["Good faith" not found where attorney's misconduct involved dishonesty, misappropriation of funds, and concealment of funds from officers of client corporation]. Dr. Eastman certainly did not inflict the types of deliberate harm on a client or the public that bespeak a lack of good faith on his part.

In sum, Dr. Eastman held an honest and objectively reasonable belief that he was properly advising his client while at the same time discharging his duty to zealously represent that client within the bounds of the law. XXXII-272:3-275:23. Therefore, he should be accorded full mitigation credit for good faith.

c. No Client Harm (Std. 1.6(c))

Standard 1.6(c) provides for mitigation where lack of harm to clients, the public, or the administration of justice can be established. Full weight should be given under this standard because Dr. Eastman did not cause harm to his clients, the public, or the administration of justice. *See* XXXII-279:9-12. [43]

Further, Standard 1.5(j) requires that the State Bar prove any aggravating circumstances by clear and convincing evidence. The State Bar presented <u>*no evidence*</u> from any person, court, party, or election official or employee (which the Bar tried to do or infer) that Dr. Eastman's "actions" (however defined) caused them any harm. There were no sanctions against Dr. Eastman, no case or party suffered (*Texas v. Pennsylvania* lasted 5 days, and *Trump v. Kemp*, 4 court days), and no court was critical of Dr.

[43] The State Bar might argue that, overall, claims of election illegality and fraud have undermined the public's faith in elections. But those claims existed long before Dr. Eastman entered the fray with his motion to intervene on behalf of President Trump on December 9, 2020; it can hardly be said, therefore, that Dr. Eastman "caused" any such harm. Moreover, it is the illegal conduct by election officials itself, not the highlighting of it by Dr. Eastman or anyone else, that caused a loss of faith in the elections.

Eastman's work or advocacy. The connection was otherwise not made that his voice, advocacy, statements, [private]lawyer-role, or advocacy anywhere was causally connected to ***any*** harm, including January 6, or any other harm, however nebulously defined. The law is clear – in order to discipline Dr. Eastman, they prove every element of their case by clear and convincing evidence. It is clear they failed to do so.

d. Cooperation (Std. 1.6 (e))

Dr. Eastman has been assiduously compliant and responsive to the Bar's contact, initiations, response to the Investigation Letters, during pretrial procedures, and during trial. *See In the Matter of Respondent K* (Review Dept. 1993) 3 Cal. State Bar Ct. Rptr. 335, 358 (mitigation credit is available for "candid" and "exemplary" conduct during disciplinary proceedings, without referencing any need for the attorney to enter into stipulations with the Bar and, notably, even where the attorney refuses to acknowledge any wrongdoing):

> Standard 1.2(e)(v) provides that a mitigating circumstance be found if the attorney displayed spontaneous candor and cooperation to the victims of the attorney's misconduct and to the State Bar during disciplinary investigation and proceedings. The examiner argues that this standard does not apply because Respondent still believes he has done nothing wrong. We agree with the referee that Respondent's vigorous defense of the charges brought against him by the State Bar does not evidence a lack of candor or cooperation. The examiner does not cite to any evidence in the record to suggest that Respondent's defense of the charges was motivated by anything other than his honest belief in his innocence. (Cf. Van Sloten v. State Bar, supra, 48 Cal.3d at pp. 932–933.) The referee found that Respondent was candid and his conduct was exemplary during the disciplinary proceedings. As Respondent suggests, the evidence fully supports these findings. We also conclude based on our review of the record that Respondent was cooperative during the disciplinary proceedings. We thus find mitigation pursuant to standard 1.2(e)(v).

Dr. Eastman participated fully in the Bar's investigation process and throughout trial. *See* XXXII-278:12-19.

e. Extraordinary Good Character (Std. 1.6(f))

Dr. Eastman may obtain mitigation for "extraordinary good character attested to by a wide range of references in the legal and general communities, who are aware of the full extent of the misconduct." (Std. 1.6(f).) During the course of his long and illustrious career, Dr. Eastman has forged deep community ties and formed longstanding relationships with individuals inside and outside the legal profession who have developed a broad knowledge of his good character, work habits, and professional

skills. Dr. Eastman has provided declarations and live testimony from such persons attesting to his honesty, integrity, and – in the case of his attorney colleagues – his "strong interest in maintaining the honest administration of justice." *In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319.

Dr. Eastman has provided 14 declarations (Exs. 1380-1387 and 1389-1394) attesting to his good character and five witnesses – Laurie Stewart (XXVI-174-188), Hon. Philip Mautino (Ret.) (XXVI-196-205), William B. Allen (XXVII-6-25), Wendy Stone Long (XXVII-29-48), and Hon. Janice Rogers Brown (Ret.) (XXVII-58-74) testified on his behalf.

Ms. Stewart, a lawyer barred in California since 2003 and one of Dr. Eastman's former students (XXVI-177:1-3 and 21-23), testified that he was very open to discussion, even with those who had very different legal and political philosophies than he did, including herself. *Id.*-180:2-14; 193:4-5. She also testified that he was open-minded, fair, and respectful of his students. *Id.*-180:17-181:8. Ms. Stewart testified that she always thought Dr. Eastman had impeccable moral character and integrity. *Id.*-185:20-21. She also testified that Dr. Eastman was a brilliant constitutional scholar who was very detail oriented and fair – when he supervised her as a law student, he encouraged her to research all sides of the issue of her directed research project to be fair. *Id.*-185:21-186:7. Ms. Stewart testified that Dr. Eastman never distorted or misrepresented facts because he was a stickler for detail, the rule of law, and being honest and candid, nor did he ever advocate for a legal position that was not grounded in law. *Id.*-186:11-17.

Judge Mautino is a retired judge of the Los Angeles County Superior Court. *Id.*-197:6-9. He first met Dr. Eastman in connection with his congressional campaign and he was on the board of advisors of Chapman Law School when Dr. Eastman was dean, meeting frequently to discuss law school business. *Id.*-200:12-201:11. Judge Mautino also testified that Dr. Eastman did an excellent job as dean of Chapman Law School, greatly raising the prestige of Chapman Law School. *Id.*-201:15-21. Judge Mautino also testified that after knowing Dr. Eastman for over 30 years, he knew Dr. Eastman's character very well and that Dr. Eastman has always been very honest and principled. *Id.*-205:1-5. Judge Mautino testified that he has never known Dr. Eastman to exaggerate and that whenever he made factual statements, he always has tremendous support for those statements, in cases or other data. *Id.*-201:5-8.

Dr. Allen had a Ph.D. in political philosophy and government from Claremont Graduate School and has held various academic teaching positions since 1972. XXVII-6:19-8:1. He has also served as a member and chairman of the United States Commission on Civil Rights. *Id.*-9:11-14. Dr. Allen was Dr. Eastman's Ph.D. supervisor at Claremont Graduate University, where his role was to provide guidance, counsel, mentorship, and to "needle him with tough questions." *Id.*-11:6-14. Dr. Allen testified that when he asked Dr. Eastman tough questions, Dr. Eastman responded with a characteristic willingness to listen and, simultaneously, a disposition to defend his research and conclusion. *Id.*-11:17-19. He also testified that during his Ph.D. research, Dr. Eastman was a diligent and hard worker, his research was thorough and competent, and he was able to handle his Ph.D. research while working as a special assistant and then special affairs officer to the United States Commission on Civil Rights. *Id.*-12:6-13:9. Dr. Allen testified that Dr. Eastman's academic scholarship was characterized by his careful research, and his ability to find omitted factors that lend context and texture to his reasoning about complicated situations. *Id.*-16:5-9. Dr. Allen testified that he has never witnessed Dr. Eastman ever be dishonest or commit an act of moral turpitude. *Id.*-16:16-21. Dr. Allen also testified that there had been numerous occasions where Dr. Eastman's scholarship and research had convinced Dr. Allen to change his position on an issue (e.g. birthright citizenship) and, likewise, there had been numerous occasions where he witnessed Dr. Eastman change his mind after discussion. *Id.*-24:11-25:15.

Ms. Long is former press secretary to United States Senator Gordon Humphrey (N.H.) and Senator Bill Armstrong (C.O.), an attorney, and former Republican candidate for U.S. Senate for New York. *Id.*-30:11-32:7. She has known Dr. Eastman for 36 years. *Id.*-33:4-6. Ms. Long testified that while Dr. Eastman worked at Kirkland & Ellis LLP, he was well known for his appellate constitutional advocacy as well as being highly respected by the partners and associates at Kirkland & Ellis. *Id.*-37:23-25; 39:3-5. Ms. Long testified that after knowing Dr. Eastman for 36 years, he is a person of great honor and intellect, with unchallenged honor and integrity with the reputation of someone who conduct himself according to the highest ethics of professionalism and is greatly respected of someone a high moral character. *Id.*-46:3-10. He also has a lot of intellectual courage, never afraid to advance a creative argument as long as it's well researched. *Id.*-46:12-14. Ms. Long testified that Dr. Eastman is a truth seeker, a man who wants to arrive at the right answer, and has earned the trust of his colleagues in doing

so. *Id.*-46:16-18. She has also never known him to advocate a legal view that was meritless, instead, Ms. Long testified that Dr. Eastman was one of the most thorough and honest legal scholars she has ever known, conducting a great deal of legal research to come to his own conclusions and zealously advocating for a client based upon the facts and the law as he was most honestly able to ascertain them. *Id.*-46:19-47:3.

Justice Rogers Brown was a lawyer with a long history of governmental work, a justice of California's Third District Court of Appeal, a justice of California Supreme Court, and a judge of the United States Court of Appeal for the District of Columbia. *Id.*-58:23-62:6. She has known Dr. Eastman for over 20 years. *Id.*-64:4-6. Over the course of her relationship with Dr. Eastman, Justice Rogers Brown testified that her opinion of Dr. Eastman's moral character was very careful and meticulous, very willing to engage opposite views, and to reveal the weaknesses of his own analysis and his own positions. *Id.*-68:1-7. Justice Rogers Brown also testified that when they disagreed, Dr. Eastman was very good natured about disagreement, very honest about the weaknesses of his analysis, and has never been uncivil. *Id.*-69:18-70:7. Justice Rogers Brown testified that Dr. Eastman's work ethic was outstanding and that he was always thoroughly prepared, had meticulous research, and an in-depth knowledge of the subject matter. *Id.*-70:10-23; 72:5-7. Justice Rogers Brown had also never witnessed Dr. Eastman engage in any conduct involving moral turpitude, dishonesty, promote any legal theories that were unsupported. *Id.*-72:10-25. Justice Rogers Brown also testified that Dr. Eastman had dedicated his entire professional life to the preservation of the constitutional order. *Id.*-73:5-7.

VI. CONCLUSION

No culpability should be found and therefore no discipline or sanctions are appropriate.

Dated: December 1, 2023

MILLER LAW ASSOCIATES, APC

By: _____

Randall A. Miller, Esq.
Zachary Mayer, Esq.
Jeanette Chu, Esq.
Attorneys for **Respondent JOHN C. EASTMAN**

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is MILLER LAW ASSOCIATES, APC, 411 South Hewitt Street, Los Angeles, CA 90013. On December 1, 2023, I e-served the document(s) described as **DR. EASTMAN'S POST-HEARING BRIEF** on the interested parties by serving them in the manner and/or manners listed below:

Sr. Trial Counsels:
Duncan Carling, Esq.
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☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date.

☐ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.

☒ by causing such document to be transmitted by electronic mail to the office of the addressees as set forth below on this date.

☐ by causing such document(s) to be sent overnight via Federal Express; I enclosed such document(s) in an envelope/package provided by Federal Express addressed to the person(s) at the address (es) set forth below and I placed the envelope/package for collection at a drop box provided by Federal Express.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on December 1, 2023, at Los Angeles, California.

OLGA GORBUNKOVA