October 4, 2021

George S. Cardona
Office of Chief Trial Counsel
The State Bar of California
845 South Figueroa Street
Los Angeles, CA 90017

Re: Request for Investigation of John C. Eastman, California State Bar No. 193726

Dear Chief Trial Counsel Cardona:

We write to request that the State Bar investigate serious evidence of professional misconduct by Professor John C. Eastman in connection with his representation of former President Donald J. Trump in efforts to discredit and overturn the results of the 2020 presidential election. We concur in the view of the enclosed memorandum that there is substantial reason to investigate whether Mr. Eastman violated California Rules of Professional Conduct 3.1, 3.3, 4.1, 8.4(c), and/or 1.2.1 through his actions on behalf of his client Mr. Trump beginning in late 2020 and culminating in their efforts to hijack or postpone the final counting of the electoral votes at the January 6, 2021 Joint Session of Congress.

We draw your attention to Mr. Eastman's conduct as described in public documents and reports because we believe in the importance of protecting the rule of law by holding those who are sworn to defend it accountable under professional standards. Lawyers, particularly those who represent elected and appointed officials, have a solemn duty to the public to advise their clients within the four corners of the law, and to ensure that they do not allow themselves to become the tools by which those officials seek to undermine democratic governance. Our state bars set standards of professional responsibility for their members to ensure that in their zealous defense of their clients, lawyers also serve as the guardians of the rule of law. We accordingly urge an immediate and expeditious investigation.

We are available for consultation on the ethics rules addressed in the attached complaint should you wish to contact us. Otherwise, we urge careful attention to the enclosed memorandum in which our concerns regarding Mr. Eastman's conduct are set forth. Please be advised that California counsel for this matter is Christine P. Sun; she can be reached for any additional information at christine@statesuniteddemocracy.org.

Thank you in advance for your attention to this important matter.

Sincerely,

Ambassador Norman Eisen (ret.)
Founder and Executive Chair, States United Democracy Center
Former White House Special Counsel for Ethics and Government Reform

Joanna Lydgate
Founder and Chief Executive Officer, States United Democracy Center
Former Chief Deputy Attorney General of Massachusetts

Governor Christine Todd Whitman
Founder and Co-Chair, States United Democracy Center
Former Governor of New Jersey

Dennis Aftergut
Co-Chair, Coalition to Preserve, Protect & Defend
Former Assistant U.S. Attorney, Northern District of California
Former San Francisco Chief Assistant City Attorney

Frederick Baron
Former Associate Deputy Attorney General and Director, Executive Office for National Security
Former Assistant U.S. Attorney, District of Columbia
Former Special Assistant to the U.S. Attorney General

Ambassador Jeffrey Bleich (ret.)
Former President, State Bar of California

James J. Brosnahan
Senior Of Counsel, Morrison & Foerster LLP
Member, State Bar of California Trial Lawyers Hall of Fame

Governor Steve Bullock
Former Governor of Montana
Former Attorney General of Montana

Dean Erwin Chemerinsky
Dean and Jesse H. Choper Distinguished Professor Law, University of California, Berkeley, School of Law

Honorable Jack Conway
Former Attorney General of Kentucky

Honorable John J. Farmer, Jr.
Former Attorney General of New Jersey
Former Assistant U.S. Attorney, District of New Jersey

Professor Claire Finkelstein
Algernon Biddle Professor of Law and Professor of Philosophy
Center for Ethics and the Rule of Law, Faculty Director
University of Pennsylvania

Honorable Joseph Grodin
Retired California Supreme Court Justice
Distinguished Professor *Emeritus*, University of California, Hastings College of the Law

Honorable Thelton Henderson
Retired U.S. District Court Judge, Northern District of California

Honorable Jim Hood
Former Attorney General of Mississippi

Honorable D. Lowell Jensen
Retired U.S. District Court Judge, Northern District of California
Former Deputy U.S. Attorney General

Honorable Patricia A. Madrid
Former Attorney General of New Mexico

Professor Richard W. Painter
S. Walter Richey Professor of Corporate Law, University of Minnesota Law School
Former Associate Counsel to the President

Louise H. Renne
Co-Chair, Coalition to Preserve, Protect & Defend
Former San Francisco City Attorney

Honorable Sarah Saldaña
Former Director, Immigration & Customs Enforcement
Former U.S. Attorney, Northern District of Texas

Honorable Fern M. Smith
Retired U.S. District Court Judge, Northern District of California
Former Director of the Federal Judicial Center

Professor Laurence H. Tribe *(California State Bar No. 39441)*
Carl M. Loeb University Professor *Emeritus*, Harvard University
Professor of Constitutional Law *Emeritus,* Harvard Law School

Honorable Joyce Vance
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Former U.S. Attorney, Northern District of Alabama

Honorable Kathryn Werdegar
Retired California Supreme Court Justice

Honorable Grant Woods
Former Attorney General of Arizona

All titles and affiliations are listed for identification purposes only.

States United DEMOCRACY CENTER

October 4, 2021

George S. Cardona
Office of Chief Trial Counsel
The State Bar of California
845 South Figueroa Street
Los Angeles, CA 90017

Re: Request for Investigation of John C. Eastman, California Bar Number 193726

Dear Chief Trial Counsel Cardona:

The States United Democracy Center is a nonpartisan organization advancing free, fair, and secure elections. We focus on connecting state and local officials, public safety leaders, and pro-democracy partners across America with the tools and expertise they need to safeguard our democracy. Our work centers on making sure every election is safe, every vote is counted, and every voice is heard. Critical to our mission is helping to ensure that democracy violators are held accountable, including those in the legal profession who betray their ethical duties to uphold the rule of law.

SUMMARY AND INTRODUCTION

We respectfully request that the State Bar of California open an investigation into whether John C. Eastman, a member of the California bar, violated the California Rules of Professional Conduct 3.1, 3.3, 4.1, 8.4(c), and/or 1.2.1 through his actions in late 2020 and in early January 2021 to assist his client Donald J. Trump in attempts to discredit and overturn the results of the 2020 presidential election. This memorandum is based upon public documents and publicly available reports of Mr. Trump's and Mr. Eastman's conduct, beginning around Election Day and concluding with their efforts to prevent Mr. Biden's victory by hijacking or postponing the final counting of the electoral votes at the January 6, 2021, Joint Session of Congress.

The available evidence supports a strong case that the State Bar should investigate whether, in the course of representing Mr. Trump, Mr. Eastman violated his ethical obligations as an attorney by filing frivolous claims, making false statements, and engaging in deceptive conduct. There is also a strong basis to investigate whether Mr. Eastman assisted in unlawful actions by his client, Mr. Trump. That evidence shows that, both before and after Election Day, Mr. Trump asserted, without evidence, that any victory for Mr. Biden must have been stolen. During November and December, however, the American legal system undertook an extraordinary effort to investigate those allegations and adjudicate those claims. The responsible federal and state election officials who investigated those allegations uniformly found them to be baseless. In

addition, Mr. Trump and his allies lost over 60 lawsuits[1] claiming election fraud or illegality, in both state and federal courts, often in circumstances that compellingly demonstrated the recklessness of those claims.

In the face of this overwhelming evidence, Mr. Trump refused to concede and continued to make false claims that the election had been stolen. In part with Mr. Eastman's assistance as counsel, he also launched outlandish legal strategies based on those falsehoods to prevent the outcome of what was by then an indisputably lawful election from being recognized by the Electoral College and Congress.

One of Mr. Trump's attempts included persuading the state of Texas, represented by an attorney with close ties to the Trump campaign, to file a suit in the original jurisdiction of the United States Supreme Court against four states whose electors had voted for Mr. Biden. The substantive allegations of that lawsuit simply repeated the baseless allegations of fraudulent and unlawful conduct that Mr. Trump and his allies had already brought and lost, without acknowledging those losses. The suit frivolously asserted that Texas had standing to insist that the Supreme Court retry those claims (as if they had never been heard or lost before), decide them on a summary basis in Mr. Trump's favor, and bar the certification or counting of the electoral votes from those states. Mr. Eastman, representing Mr. Trump, immediately filed a Bill of Complaint in Intervention that expressly adopted Texas's frivolous and false claims, and explicitly sought the rulings and relief that Mr. Trump had repeatedly been denied in the lower courts. The Supreme Court swiftly dismissed the Texas action for lack of standing. In light of these filings, there is a strong basis to investigate whether Mr. Eastman violated Rule 3.1 (Meritorious Claims and Contentions) and Rule 3.3 (Candor Toward the Tribunal) of the California Rules of Professional Conduct ("CRPC").

Mr. Eastman also assisted in Mr. Trump's dangerous efforts to prevent or disrupt the counting of electoral votes at the January 6, 2021, Joint Session of Congress. The core of that strategy was to pressure Vice President Mike Pence to violate his legal obligations under the Electoral Count Act of 1887 and the Constitution by refusing to count the lawful electoral votes from numerous states—thereby throwing the election to Mr. Trump—or by delaying the count until some undefined time after an indeterminate "investigation"—thereby provoking a constitutional and national security crisis in which no president has been lawfully elected. Mr. Trump sought to execute this strategy by threatening to destroy Mr. Pence's political career if he did not comply.

Mr. Eastman undertook to provide the legal rationale for this extraordinary attempt to overturn the election in two memoranda, which were intended to influence Mr. Pence. The core claim of those memoranda was that it was a "fact" that the Constitution gave Mr. Pence complete and unfettered authority to prevent the counting of lawful ballots from seven select states or to postpone the count altogether. That claim was based on nothing more than the notion that the legitimacy of the election continued to be "disputed" in some unexplained fashion. That conclusion was thoroughly wrong—and Mr. Eastman knew it or was willfully blind. An honest account of the law and facts would have disclosed its lack of merit. So to disguise its enormity,

[1] Amy Sherman & Miriam Valverde, *Joe Biden is right that more than 60 of Trump's election lawsuits lacked merit,* Politifact (Jan. 8, 2021), https://www.politifact.com/factchecks/2021/jan/08/joe-biden/joe-biden-right-more-60-trumps-election-lawsuits-l/.

Mr. Eastman dressed it up with a series of deliberate falsehoods, omissions, and half-truths and allowed the resulting legal advice to be presented to Mr. Pence as reflecting his standards as a scholar and lawyer.

On January 6, 2021, Mr. Eastman continued this pattern of misconduct by giving the crowd at the "Stop the Steal" rally on the National Mall another version of his misleading advice and stating that, by rejecting it, Mr. Pence had proved himself undeserving of his office. Mr. Eastman also made a number of false factual statements at the rally, including that there was a "secret folder" of ballots on voting machines that was used to turn the election against Mr. Trump. This conduct ultimately contributed to Mr. Trump's successful efforts to provoke members of that crowd to assault and breach the Capitol in an effort to intimidate Mr. Pence and prevent the count from proceeding.

There is a strong basis to investigate whether in assisting Mr. Trump's efforts to prevent or delay the counting of the lawful electoral votes from numerous states, Mr. Eastman violated CRPC Rule 4.1 (Truthfulness in Statements to Others), CRPC 8.4(c) (Misconduct), CRPC 1.2.1 (Advising or Assisting the Violation of Law), and related provisions of the State Bar Act.

Mr. Eastman is a highly credentialed lawyer, who clerked at the U.S. Supreme Court, was a teacher and scholar of constitutional law, former Dean of Chapman Law School, and has extensive experience in public law appellate practice. He knew better.

Though much of Mr. Eastman's conduct involved speech on political subjects, it is not protected by the First Amendment. As the discipline and sanctions already meted out to other Trump attorneys demonstrate, a lawyer representing a politician and dealing directly with courts and third persons is not free to ignore reality. Instead, a lawyer must avoid speech that is intentionally false or deceptive, *Matter of Giuliani*, 146 N.Y.S.3d 266, 271 (1st Dep't 2021), that asserts or advances frivolous claims, *King v. Whitmer*, No. 20-13134, 2021 WL 3771875, at *20 (E.D. Mich. Aug. 25, 2021), or that knowingly assists the client in unlawful conduct. If the State Bar finds that Mr. Eastman's conduct crossed those boundaries, it is not entitled to constitutional protection.

FACTUAL BACKGROUND

The below factual background, presented in chronological order, is based on publicly available reporting of the relevant events.

I. Donald Trump's False Claims of Fraud in the 2020 Election

Donald Trump's dishonest and lawless efforts to subvert and discredit the outcome of the 2020 election began long before his loss on Election Day. On June 22, 2020, he tweeted: "MILLIONS OF MAIL-IN BALLOTS WILL BE PRINTED BY FOREIGN COUNTRIES, AND OTHERS. IT WILL BE THE SCANDAL OF OUR TIMES!"[2] At a campaign rally on August 17, 2020, Mr.

[2] Bob Woodward & Robert Costa, *Peril* 131 (2021).

Trump said, "[t]he only way we're going to lose this election is if the election is rigged."[3] On August 27, he told the Republican National Convention that "the only way they can take this election away from us is if this is a rigged election."[4] During a nationally televised presidential debate on September 29, 2020, Mr. Trump repeated the false claim that "[i]t's a rigged election."[5] As the vote count on Election Night began to turn against him in several key swing states, he gave a brief speech in the East Room of the White House. "This is a fraud on the American public," he claimed. "This is an embarrassment to our country. We were getting ready to win this election. Frankly, we did win this election . . . So we'll be going to the U.S. Supreme Court."[6] Early in the morning the day after the election, Mr. Trump also falsely tweeted, "[w]e are up BIG, but they are trying to STEAL the election."[7] Later that morning, he falsely claimed on Twitter, "[l]ast night I was leading, often solidly, in many key States, in almost all instances Democrat run & controlled. Then, one by one, they started to magically disappear as surprise ballots dumps were counted."[8]

Consistent with that pre-determined narrative, in the days following the election, Mr. Trump, his campaign and his allies, with Rudolph Giuliani often as lead counsel, launched dozens of lawsuits in both state and federal courts challenging the outcome of the election in multiple states on a wide range of grounds, including manipulation of voting machines, ballot box stuffing, barring of Republican observers from polling places, voting on behalf of dead persons, and violations of Article II, Section 1, cl. 2 of the Constitution, often referred to as the Electors Clause, which provides that a state's presidential electors shall be appointed "in such manner as the legislature thereof may direct." They also requested recounts as permitted (or not) by the laws of those states. Very early on, Mr. Trump proposed going directly to the Supreme Court. But both his campaign lawyers and White House Counsel told him that, like any individual litigant, he would have to bring his claims in the lower courts, subject to the ultimate possibility of Supreme Court review of his federal claims.[9]

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[3] Terrance Smith, *Trump has longstanding history of calling elections 'rigged' if he doesn't like the results*, ABC News (Nov. 11, 2020), https://abcnews.go.com/Politics/trump-longstanding-history-calling-elections-rigged-doesnt-results/story?id=74126926.

[4] Woodward & Costa, *supra*, at 131.

[5] *September 29, 2020 Presidential Debate Transcript,* The Commission on Presidential Debates, https://www.debates.org/voter-education/debate-transcripts/september-29-2020-debate-transcript/.

[6] Woodward & Costa, *supra*, at 133.

[7] Donald Trump (@realDonaldTrump), Twitter (Nov. 4, 2020, 12:44 am), https://www.thetrumparchive.com; Donald Trump (@realDonaldTrump), Twitter (Nov. 4, 2020, 12:49 am), https://www.thetrumparchive.com.

[8] Donald Trump (@realDonaldTrump), Twitter (Nov. 4, 2020, 10:04 am), https://www.thetrumparchive.com.

[9] Woodward & Costa, *supra*, at 136.

Mr. Trump's claims of a fraudulent, stolen, or rigged election were themselves fraudulent, as subsequent events made abundantly clear.

- After Election Day, states with close election results completed the counting of ballots and conducted audits and recounts as required by law, including an audit and recounts in Georgia and a recount in Wisconsin. All recounts confirmed Mr. Biden's victory.[10] None identified any fraud sufficient to affect the outcome. Subsequently, the key election officials and the governors in those states and in Arizona, Pennsylvania, and Michigan, some of whom were strong Trump supporters, affirmed the integrity of their states' election returns.

- On November 12, a Joint Statement by the Elections Infrastructure Government Coordinating Council and the Election Infrastructure Sector Coordinating Council[11] reported: "There is no evidence that any voting system deleted or lost votes, changed votes, or was in any way compromised. . . . While we know there are many unfounded claims and opportunities for misinformation about the process of our elections, we can assure you we have the utmost confidence in the security and integrity of our elections, and you should too."[12] Shortly after that statement, Mr. Trump fired the head of one of the signing agencies, Christopher Krebs, the Director of the Cybersecurity and Infrastructure Security Agency in the United States Department of Homeland Security.[13] Mr. Krebs, a Trump appointee, later wrote that the election was "the most secure in U.S.

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[10] Richard Fausset & Nick Corasaniti, *Georgia Recertifies Election Results Affirming Biden's Victory*, N.Y. Times (Dec. 7, 2020), https://www.nytimes.com/2020/12/07/us/politics/georgia-recertify-election-results.html; Hailey Fuchs, *Recount in two Wisconsin counties reinforces Biden's Victory*, N.Y. Times (Nov. 29, 2020), https://www.nytimes.com/2020/11/29/us/politics/recount-in-two-wisconsin-counties-reinforces-bidens-victory.html.

[11] The Election Infrastructure Government Coordinating Council enables local, state, and federal governments to share information and collaborate on best practices to mitigate and counter threats to election infrastructure. Its members include officials from the Cybersecurity and Infrastructure Security Agency, the Election Assistance Commission, and the National Association of Secretaries of State, among others. *See, e.g.*, Election Infrastructure Subsector Government Coordinating Council Charter (Feb. 2021), https://www.cisa.gov/sites/default/files/publications/gov-facilities-EIS-gcc-charter-2021-508.pdf. The Election Infrastructure Coordinating Council similarly enables critical infrastructure owners and operators, their trade associations, and industry representatives to interact on a wide range of sector-specific policies and activities.

[12] Cybersecurity & Infrastructure Security Agency, *Joint Statement From Elections Infrastructure Government Coordinating Council & The Election Infrastructure Sector Coordinating Executive Committees* (Nov. 12, 2020), https://www.cisa.gov/news/2020/11/12/joint-statement-elections-infrastructure-government-coordinating-council-election.

[13] Woodward & Costa, *supra*, at 159.

history."[14]

- Throughout November, Mr. Trump and his campaign received information confirming that their claims of voting machine manipulation were false. In mid-November, Mr. Trump's campaign staff prepared an internal memo debunking many of those claims.[15] On November 23, Attorney General William Barr told Mr. Trump that, based on the Department of Justice's investigation, his voting machine claims were "bullshit."[16] In a further meeting with Mr. Trump on December 1, he advised Mr. Trump that the theory of voting machine fraud on which he was relying was "demonstrably crazy."[17]

- On December 1, Attorney General Barr, whose Department of Justice had monitored the relevant state elections for fraud and illegality, publicly stated that "to date, we have not seen fraud on a scale that could have effected a different outcome in the election."[18]

- By early December, Mr. Trump and his allies had lost more than 50 post-election lawsuits.[19] In some, claims of fraud were withdrawn.[20] In others, reputable lawyers refused to make them and withdrew.[21] In still others, Mr. Trump's lawyers continued to make claims of fraud despite the absence of any probative evidence, engaging in conduct which has since led to the imposition of judicial sanctions in multiple actions and, in Mr. Giuliani's case, to temporary suspension of his license in New York and potential

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[14] Christopher Krebs, Opinion, *Trump fired me for saying this, but I'll say it again: The election wasn't rigged*, Wash. Post (Dec. 1, 2020), https://www.washingtonpost.com/opinions/christopher-krebs-trump-election-wasnt-hacked/2020/12/01/88da94a0-340f-11eb-8d38-6aea1adb3839_story.html.

[15] Alan Feuer, *Trump Campaign Knew Lawyers' Voting Machine Claims Were Baseless, Memo Shows*, N.Y. Times (Sept. 21, 2021), https://www.nytimes.com/2021/09/21/us/politics/trump-dominion-voting.html.

[16] Woodward & Costa, *supra*, at 166.

[17] Woodward & Costa, *supra*, at 170.

[18] Michael Balsamo, *Disputing Trump, Barr says no widespread election fraud*, Assoc. Press (Dec. 1, 2020), https://apnews.com/article/barr-no-widespread-election-fraud-b1f1488796c9a98c4b1a9061a6c7f49d.

[19] Woodward & Costa, *supra*, at 178.

[20] Pete Williams & Nicole Via y Rada, *Trump's election fight includes over 50 lawsuits. It's not going well*, NBC News (Nov. 23, 2020), https://www.nbcnews.com/politics/2020-election/trump-s-election-fight-includes-over-30-lawsuits-it-s-n1248289.

[21] Aaron Blake, *Timeline: Trump's Revolving Door of Lawyers*, Wash. Post (Nov. 23, 2020), https://www.washingtonpost.com/politics/2020/11/17/trump-keeps-losing-court-he-keeps-losing-his-lawyers-too/.

permanent disbarment based on his repeated knowing false statements concerning election misconduct.[22]

By early December, with every relevant state and federal official or agency having conducted audits, recounts, or investigations and finding no evidence of significant fraud in any state, with every litigated claim of fraud or illegality failing in the courts, and with the Electoral College due to meet on December 14, it was apparent that absent drastic action, the Biden electors from the seven most closely fought over states would soon be certified and that the Electoral College vote would confirm Biden's election.[23]

II. Mr. Eastman Participated in Mr. Trump's Effort to Derail the Judicial Process: *Texas v. Pennsylvania*

At this point, Mr. Trump elected to bypass the normal avenues for challenging state electoral outcomes by going directly to the United States Supreme Court.[24] Mr. Trump's lawyers knew that he could not go there himself directly.[25] Their solution was to concoct an inter-state claim that could be filed within the Court's original jurisdiction.[26] Ken Paxton, the Attorney General of Texas, petitioned the Supreme Court for leave to file a Bill of Complaint against four states: Pennsylvania, Georgia, Michigan, and Wisconsin.[27] Mr. Paxton signed the request and the Bill of Complaint itself.[28] Both the proposed Bill of Complaint and the briefing in support were also signed by a lawyer with close ties to the Trump campaign, a signal that though the suit was being prosecuted in the state's name, it was actually being quarterbacked by Mr. Trump's team and brought to vindicate his interests.[29] Consistent with that view, the Solicitor General of Texas, who regularly represents Texas in the United States Supreme Court, did not appear as counsel of record or sign any papers in the action.[30]

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[22] Nicole Hong, et. al., *Court Suspends Giuliani's License, Citing Trump Election Lies,* N.Y Times *(June 24, 2021),* https://www.nytimes.com/2021/06/24/nyregion/giuliani-law-license-suspended-trump.html.

[23] Peter Baker, *Trump's Final Days of Rage and Denial,* N.Y. Times (Dec. 5, 2020), https://www.nytimes.com/2020/12/05/us/politics/trump-presidency-election-loss.html.

[24] Jim Rutenberg, et al., *77 Days: Trump's Campaign to Subvert the Election*, N.Y. Times (Jan. 31, 2021), https://www.nytimes.com/2021/01/31/us/trump-election-lie.html?action=click&module=Spotlight&pgtype=Homepage.

[25] *Id.*

[26] *Id.*

[27] Motion for Leave to File Bill of Complaint, *Texas v. Pennsylvania*, 141 S. Ct. 1230 (2020) (No. 22O155).

[28] *Id*; Bill of Complaint, *Texas v. Pennsylvania*, 141 S. Ct. 1230 (2020) (No. 22O155).

[29] *See id*.; *see also* Jim Rutenberg, et al., *77 Days: Trump's Campaign to Subvert the Election*, N.Y. Times (Jan. 31, 2021), https://www.nytimes.com/2021/01/31/us/trump-election-lie.html?action=click&module=Spotlight&pgtype=Homepage.

[30] *Id*.

Texas's claim largely recycled factual and legal claims that Mr. Trump and his allies had already repeatedly brought, and lost, in the state and lower federal courts, including claims of fraud, illegality, and violations of the Electors Clause.[31] The core claim was that Texas (or, for that matter, any other state) *also* had the right to pursue those claims under the Court's original jurisdiction notwithstanding lower court determinations that substantially similar claims lacked merit.[32] Texas asked the Court to decide those claims, on a summary basis, declare that presidential elections in certain states were illegally conducted, nullify the Electoral College votes in those states, enjoin the use of the 2020 election results, require those states that had already appointed presidential electors to appoint a new slate of electors, and necessarily disenfranchise over 20 million voters in four states.[33]

It is not known whether Mr. Eastman played a role in drafting the Texas Bill of Complaint, but two days after its filing, on December 9, 2020, Mr. Eastman appeared as counsel of record for Mr. Trump in *Texas v. Pennsylvania*, signing Mr. Trump's Motion to Intervene and Bill of Complaint in Intervention.[34] The proposed Bill of Complaint in Intervention expressly adopted and joined in the central allegations of the Texas Bill of Complaint,[35] and sought an injunction prohibiting the defendant states from using the 2020 election results to appoint electors and nullifying any prior appointment of electors by those states.[36]

Scholars and Supreme Court advocates, of all political persuasions, swiftly agreed that both Texas's proposed Bill of Complaint and Mr. Trump's Complaint in Intervention based upon it

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[31] *See, e.g.*, Bill of Complaint at 2, *Texas v. Pennsylvania*, 141 S. Ct. 1230 (2020) (No. 22O155) ("Presently, evidence of material illegality in the 2020 general elections held in Defendant States grows daily.").

[32] *See id.* at 8-9 ("Individual state courts do not—and under the circumstance of contested elections in multiple states, cannot—offer an adequate remedy to resolve election disputes within the timeframe set by the Constitution to resolve such disputes and to appoint a President via the electoral college. No court—other than this Court—can redress constitutional injuries spanning multiple States with the sufficient number of states joined as defendants or respondents to make a difference in the Electoral College.").

[33] *See id*. at 39-40.

[34] Motion of Donald J. Trump, President of the United States, To Intervene in His Personal Capacity as Candidate for Re-Election, Proposed Bill of Complaint in Intervention, and Brief in Support of Motion to Intervene, *Texas v. Pennsylvania*, 141 S. Ct. 1230 (2020) (No. 22O155).

[35] *Id*. at 13 (noting that Mr. Trump "adopts by reference and joins in the Bill of Complaint submitted by Plaintiff State of Texas" and adding only a handful of additional factual allegations).

[36] *Id.* at 17-18.

were at best frivolous on their face and had no possibility of succeeding.[37] Many of them observed that the frivolous nature of the claim was likely linked to the apparent refusal of the Texas Solicitor General to be associated with it.[38] As shown below in Section II of the Analysis of this memorandum, the conclusion that those claims were frivolous is surely correct.[39]

On December 11, the Supreme Court denied Texas's Motion for Leave to File a Bill of Complaint for lack of standing under Article III of the Constitution, on the ground that Texas had not demonstrated a judicially cognizable interest in the manner in which another state conducts its elections.[40] All other pending motions were dismissed as moot.[41]

III. Mr. Eastman Participated in Mr. Trump's Effort to Subvert the Lawful Counting of Electoral Votes

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[37] Conservative legal experts included Andrew C. McCarthy, *Texas's Frivolous Lawsuit Seeks to Overturn Election in Four Other States*, National Review (Dec. 9, 2020), https://www.nationalreview.com/2020/12/texass-frivolous-lawsuit-seeks-to-overturn-election-in-four-other-states/ ("frivolous and blatantly political"); and George T. Conway III, *Trump's Last-Ditch Effort to Steal The Election is the Biggest Farce of All*, Wash. Post (Dec. 10, 2020), https://www.washingtonpost.com/opinions/george-conway-trump-texas-steal-election/2020/12/10/be38b1dc-3b0c-11eb-98c4-25dc9f4987e8_story.html ("legally preposterous" and an "embarrassment to the legal profession"). Academic experts included Professor Lisa Marshall Manheim, *Texas Can't Block Votes Cast in Other States. Absurdly, It's Trying*, Wash. Post (Dec. 9, 2020), https://www.washingtonpost.com/outlook/2020/12/09/texas-supreme-court-election-lawsuit/ ("It is hard to understand why a person in a position of public service, who has taken an oath to defend the Constitution, would challenge an election through an incendiary lawsuit that even he, surely, knows is frivolous—a lawsuit that will do nothing more than inflame, frustrate and confuse."). Professor Richard Hasen, one of the nation's leading election law scholars, was more succinct, describing the suit as: "utter garbage. Dangerous garbage, but garbage." Rick Hasen, *Texas Asks Supreme Court for Permission to Sue Georgia, Pennsylvania, Michigan, and Wisconsin Over How They Conducted the Election, To Disenfranchise Voters in These States and Let State Legislators Choose Electors. It Won't Work*, Election Law Blog (Dec. 18, 2020), https://electionlawblog.org/?p=119395.

[38] *See, e.g.*, Andrew C. McCarthy, *Texas's Frivolous Lawsuit Seeks to Overturn Election in Four Other States*, National Review (Dec. 9, 2020), https://www.nationalreview.com/2020/12/texass-frivolous-lawsuit-seeks-to-overturn-election-in-four-other-states/.

[39] It is worth noting that on July 21, 2021, 16 complainants, including four former Texas Bar Association Presidents, filed a disciplinary complaint in Texas against Paxton over his frivolous Supreme Court petition. On August 30, 2021, Texas's chief disciplinary counsel informed the complainants that their complaint was proceeding to the stage of requiring a response from Paxton. As discussed, Mr. Eastman's Bill of Complaint in Intervention on behalf of Mr. Trump adopted Paxton's allegations.

[40] *Texas v. Pennsylvania*, 141 S. Ct. 1230 (2020).

[41] *Id.*

Following the failure of Mr. Trump's effort to persuade the Supreme Court to throw out the electoral results from four states, the Electoral College process moved to completion. By December 8, each state had certified its electors.[42] On December 14, the Electoral College met and voted 306-232 for Mr. Biden.[43] And on December 15, Senator Mitch McConnell, the Senate Majority Leader, announced that, in his view, Mr. Biden had won the election and was now the president-elect.[44]

In the weeks that followed, Mr. Trump considered a variety of desperate strategies to stave off defeat, including efforts to persuade the Justice Department to appoint one of his personal attorneys as a special counsel, with authority to seize voting machines across the country.[45] Eventually, however, he evidently concluded that the best remaining avenue to reverse the outcome of the election was to prevent the counting of multiple states' electoral votes at the Joint Session of Congress on January 6, 2021.[46] Mr. Trump, advised by Mr. Eastman, decided that he would try to achieve that result through pressure on Vice President Mike Pence.[47]

In his capacity as presiding officer of the Senate, Mr. Pence was scheduled to participate in the certification of Mr. Biden's victory at the January 6 Joint Session. Under Article II of the Constitution, the Electoral Count Act of 1887, and a Concurrent Resolution of the Senate and House of Representatives incorporating its provisions—and long-standing past practice—Mr. Pence's role in that process was limited to opening the Certificates of Votes sent by the respective states' presidential electors and announcing the outcome. Resolution of disputes about whether a state's reported electoral votes should be counted or, in the case of rival state-backed slates of electors, which slate should be counted, were the province of Congress. The Electoral Count Act further provided that once convened, the session to count the ballots could not be dissolved until the count was completed.[48] Based upon past practice, the failure of every lawsuit challenging state election returns, and the declared views of members of Congress, including Senate Majority Leader Mitch McConnell, Mr. Trump and his advisors surely knew by mid-

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[42] *See* Miles Parks, *Biden's Victory Cemented As States Reach Key Electoral College Deadline*, NPR (Dec. 8, 2020), https://www.npr.org/2020/12/08/942288226/bidens-victory-cemented-as-states-reach-deadline-for-certifying-vote-tallies.

[43] *Track Electoral College votes, state by state*, CNN (Dec. 14, 2020), https://www.cnn.com/2020/12/14/politics/2020-electoral-college-vote-tracker/index.html.

[44] Nicholas Fandos & Luke Broadwater, *McConnell congratulates Biden and lobbies colleagues to oppose a final-stage G.O.P. effort to overturn his victory*, N.Y. Times (Dec. 15, 2020), https://www.nytimes.com/2020/12/15/us/politics/mitch-mcconnell-congratulates-biden.html.

[45] Maggie Haberman & Zolan Kanno-Youngs, *Trump Weighed Naming Election Conspiracy Theorist as Special Counsel*, N.Y. Times (Dec. 19, 2020), https://www.nytimes.com/2020/12/19/us/politics/trump-sidney-powell-voter-fraud.html.

[46] *See* Woodward & Costa, *supra*, at 228-230.

[47] Woodward & Costa, *supra*, at 225-226.

[48] 3 U.S.C. § 16.

December that Congress would in fact count the votes of all of the Biden electors, including those from multiple states where Mr. Trump had unsuccessfully litigated the outcome. Absent some type of intervention, the proceedings on January 6 would confirm Mr. Biden's election.

Unwilling to accept defeat, Mr. Trump decided that he would attempt to pressure Mr. Pence to violate this settled law by disallowing multiple state Electoral College votes and then either declare Mr. Trump the outright victor or throw the election to the House of Representatives, where each state delegation would have one vote, and the fact that Republicans controlled 26 state delegations would likely ensure a Trump-Pence majority.[49]

Mr. Trump had enormous leverage over Mr. Pence. As Mr. Trump repeatedly said and implied, if Vice President Pence did not accede to Mr. Trump's demand that he violate the law, Mr. Trump would effectively denounce him, potentially eliminating any chance that he could be a viable presidential candidate.[50] Mr. Pence's own staff reportedly believed that Mr. Trump had Mr. Pence "in a corner" since he could not sever his relationship with Mr. Trump without forgoing his presidential ambitions."[51] As conservative legal scholar John Yoo put it, for Mr. Pence, Mr. Trump's pressure put Mr. Pence to "a choice between his constitutional duty and his political future."[52]

Starting in late December and continuing up to and during the January 6 Joint Session, Mr. Trump maintained a relentless campaign of public and private pressure on Mr. Pence to violate his constitutional obligations.[53] Mr. Eastman played a critical role in that pressure campaign by authoring an incorrect and wildly misleading legal justification for Mr. Pence to set aside the swing state electoral votes or postpone the count indefinitely.[54] That justification was set out in two undated memoranda, both labeled "PRIVILEGED AND CONFIDENTIAL," that Mr. Eastman prepared in late December and early January.[55]

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[49] Woodward & Costa, *supra*, at 209-212; 225-226.

[50] Woodward & Costa, *supra*, at 228-230; 238-240.

[51] Woodward & Costa, *supra*, at 205.

[52] Peter Baker et al., *Pence Reached His Limit With Trump. It Wasn't Pretty*, N.Y. Times (Jan. 12, 2021), https://www.nytimes.com/2021/01/12/us/politics/mike-pence-trump.html.

[53] *See* Woodward & Costa, *supra*, at 238-240; *see also* Michael S. Schmidt, *Trump Says Pence Can Ovterturn His Loss in Congress. That's Not How it Works*, N.Y Times (Apr. 30, 2021), https://www.nytimes.com/2021/01/05/us/politics/pence-trump-election.html.

[54] *See* Woodward & Costa, *supra*, at 209-212.

[55] Woodward & Costa, *supra*, at 209-212. The full two-page and six-page memoranda are available here: *READ: Trump lawyer's memo on six-step plan for Pence to overturn the election*, CNN (Sep. 21, 2021), https://www.cnn.com/2021/09/21/politics/read-eastman-memo/index.html (two-page memo); *READ: Trump lawyer's full memo on plan for Pence to overturn the election*, CNN (Sep. 21, 2021), https://www.cnn.com/2021/09/21/politics/read-eastman-full-memo-pence-overturn-election/index.html (six-page memo).

In the first, two-page memorandum (the "Short Memorandum"), Mr. Eastman outlined a scenario in which Vice President Pence would refuse to count ballots from each of seven unnamed Biden states on the basis of a claim that there were "multiple slates of electors" in those states (though Mr. Eastman knew that only one slate of electors had been certified in each state) while continuing to count the votes from other states.[56] At the close of the count of the other states, Mr. Pence would then announce that, because of unspecified "ongoing disputes" in those seven states, none of the electors from those states had been validly appointed. Without the votes from those states, the total number of validly appointed electors then would be 454, and since Mr. Trump would have a majority of their votes, Mr. Pence would declare him the winner outright and, as Mr. Eastman writes, "Pence then gavels President Trump as re-elected."[57] In the alternative, if congressional Democrats were to claim that 270 votes were required, then Mr. Pence would declare that no candidate had achieved the necessary majority, throwing the vote into the House, where Trump would prevail. The Short Memorandum stressed that "Pence should do this without asking for permission—either from a vote of the joint session or from the Court," and concluded that "[t]he fact is that the Constitution assigns this power to the Vice President as the ultimate arbiter."[58]

A later six-page memorandum (the "Longer Memorandum") prepared by Mr. Eastman elaborated on this scheme without altering the essential claim that "the Constitution assigns this power to the Vice President as the ultimate arbiter."[59] The Longer Memorandum's discussion of alternative scenarios is headed "War Gaming the Alternatives."[60] The main variation from the Short Memorandum is to include a scenario in which Mr. Pence follows the law by taking a passive role. In those scenarios, Mr. Biden always wins. Against that circumstance, Mr. Eastman proposes a series of scenarios in which Mr. Pence, as ultimate arbiter, either: (a) counts the Trump electors from seven listed "swing states," if they have been certified by the legislature; (b) counts no electors for each of the "swing states"; (c) throws the election to the House of Representatives; or (d) unilaterally decides to adjourn the Joint Session without counting in the hope that Republican legislatures in the "swing states" will decide to appoint a slate of Trump electors.[61] Mr. Eastman concludes that these alternative scenarios, though "BOLD," are justified by the fact that "this Election was Stolen by a strategic Democrat [sic] plan to systematically

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[56] *READ: Trump lawyer's memo on six-step plan for Pence to overturn the election, supra*. The seven states were not listed in the Short Memorandum. The Longer Memorandum lists Georgia, Pennsylvania, Wisconsin, Michigan, Arizona, Nevada, and New Mexico.

[57] *Id.*

[58] *Id.*

[59] *READ: Trump lawyer's full memo on plan for Pence to overturn the election, supra.*

[60] *Id.*

[61] *Id*.

flout existing election laws for partisan advantage," and that "we're no longer playing by Queensbury Rules, therefore."[62]

The Longer Memorandum sought to soften the audacious and implausible nature of its legal conclusions by including a number of false or misleading factual claims suggesting that Mr. Pence had potential bases for taking action. He did not. Without citing any evidence, the Longer Memorandum falsely claimed as a matter of fact that the election was tainted by "outright fraud (both traditional ballot stuffing and electronic manipulation of voting tabulation machines),"[63] willfully ignoring the repeated and uniform governmental and judicial findings to the contrary at both the state and federal level. The Longer Memorandum also claims "important state elections laws were altered or dispensed with all together" in the "swing states,"[64] citing as proof the continued pendency of several untimely or dilatory claims, while omitting to mention that, in every one of the dozens of cases where such claims had been adjudicated, they had failed. The Longer Memorandum repeats the Short Memorandum's claim that "there are dual sets of electors from seven states," while omitting the fact that the so-called Trump electors had no official or legal status and and that their purported election had neither been certified by any state agency nor validated by a Certificate of Ascertainment as required by federal law. Finally, the Longer Memorandum ends with the assertion that, "[i]f the illegality and fraud that demonstrably occurred here is allowed to stand—and the Supreme Court has signaled unmistakably that it will not do anything about it—then the sovereign people no longer control the direction of their government, and we will have ceased to be a self-governing people. The stakes could not be higher."[65]

Stripped of these falsehoods, Mr. Eastman's memoranda advance as constitutional "fact" a claim that the Constitution gave Vice President Pence unfettered power to, and under a very credible threat that the wrong decision would end his political career:

- Determine unilaterally, without consulting with Congress or any court, that the Electoral Count Act and the Concurrent Resolution incorporating it are unconstitutional and not binding on him;
- Exercise unreviewable discretion to set aside the Electoral College vote counts of the seven "swing states," or postpone the count indefinitely on the basis of his determination that those results are "disputed" in some unspecified manner; and
- Take those steps even if, as was the case in 2021, (a) the legitimate "swing state" ballots legally comply with all of the requirements of the Constitution and the Electoral Count Act, (b) all timely legal challenges to those ballots have failed, (c) there is no competing slate of certified electors, (d) both chambers of Congress disagree, and (e) the Vice President knows that the process specified in the Electoral Count Act, adopted in the

[62] *Id*.

[63] *Id*.

[64] *Id*.

[65] *Id.*

Concurrent Resolution, and followed uniformly for over 130 years would yield a different result.

In short, Mr. Eastman's memoranda sought to justify a brazen power play by Mr. Trump that aimed to set aside the results of an election that had been repeatedly and authoritatively determined to be free and lawful, and to potentially install the loser of that election as a winner, based on nothing more than a false narrative that Mr. Trump had originally authored. Not only is there no support in the text of the Constitution for that extraordinary result, but it is also contrary to an unbroken chain of past practice and legislation since the enactment of the 12th Amendment and wholly unsupported by the scholarship Mr. Eastman tried to invoke to bolster his analysis, that of Professor Laurence H. Tribe. [66] It is flatly contradicted by Mr. Eastman's own public testimony on the subject, in connection with the 2000 presidential election, which stated that under the Electoral Count Act it is Congress that "counts" the votes and is "the ultimate judge" of disputes about the count" and that in doing so "it is answerable to no one, not the Supreme Court of the United States, not the Supreme Court of Florida, in that judging, because that power is delegated to it by the Constitution."[67] And it is an obvious prescription for constitutional chaos. Indeed, scholars had explained even prior to January 6 why Mr. Eastman's assertions about the vice president's role on January 6 were without merit.[68] Yet, in his memoranda, Mr. Eastman presented it, without qualification, as a constitutional "fact" supported by "strong authority." These were not statements that any lawyer, let alone a lawyer of Mr. Eastman's expertise and scholarly standing, could honestly have made.

Mr. Trump and Mr. Eastman presented this advice to Mr. Pence at a meeting in the Oval Office on January 4, 2021.[69] Mr. Trump strongly emphasized Mr. Eastman's outstanding credentials as

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[66] Mr. Eastman claimed in his Short Memo that there was some support for his analysis in the writings of Professor Laurence Tribe, but Professor Tribe has recently explained why nothing he had said or written in any way supported Mr. Eastman's legal analysis or the strategy it advanced, which Tribe called "jaw-droppingly ludicrous." Laurence H. Tribe, Neil H. Buchanan, and Michael C. Dorf, Opinion, *How to Prevent the Legal Strategy that Nearly Undid the Last Election from Ending Democracy*, Boston Globe (Sept. 27, 2021), https://www.bostonglobe.com/2021/09/27/opinion/how-prevent-legal-strategy-that-nearly-undid-last-election-ending-democracy/. As Tribe and his co-authors explain, "[o]ur analysis showed that in the event some states' electors had been legitimately excluded, the candidate receiving the majority of electoral votes actually cast would win. Eastman apparently took this as a challenge to see how many states he could exclude illegitimately." *Id.*

[67] *Florida Select Joint Committee on the Manner of Appointment of Presidential Electors*, 2000, (Fl. 2000) (testimony of Professor John C. Eastman), https://www.c-span.org/video/?160847-1/manner-appointment-presidential-electors.

[68] *See, e.g.*, Joshua Matz et al., *Guide to Counting Electoral College Votes and the January 6, 2021 Meeting of Congress,* States United Democracy Center (Oct. 1, 2021), https://statesuniteddemocracy.org/wp-content/uploads/2021/01/VPP-Guide-to-Counting-Electoral-Votes.pdf.

[69] Woodward & Costa, *supra*, at 225-226.

a constitutional scholar as a reason for accepting and relying upon his conclusions.[70] Mr. Pence stated he had obtained guidance that he could not interfere in the process, but Mr. Trump told him Mr. Eastman was one of the nation's best scholars.[71] Mr. Eastman then advised that the theory asserted in the memorandum was sound, and that Mr. Pence could act.[72] Later that day, in a speech to supporters in Georgia, Mr. Trump told the crowd that "[w]e're going to fight like hell, I'll tell you right now," and that "I hope Mike Pence comes through for us, I have to tell you."[73]

Mr. Trump followed up with Mr. Pence on January 5, 2021. In his meeting with Mr. Pence, Mr. Trump continued to insist that Mr. Pence had the power to set aside the swing state ballots or postpone the count and told Mr. Pence that if he failed to do so, "Your career is over."[74] Later that evening, he tweeted: "If Vice President @Mike_Pence comes through for us, we will win the Presidency. Many States want to decertify the mistake they made in certifying incorrect & even fraudulent numbers in a process NOT approved by their State Legislatures (which it must be). Mike can send it back!"[75]

On the morning of January 6, Mr. Trump tweeted that: "All Mike Pence has to do is send them back to the States, AND WE WIN. Do it Mike, this is a time for extreme courage!"[76] Later, he called Mr. Pence and again pushed him to prevent certification. "You can either go down in history as a patriot," Mr. Trump told him, "or you can go down in history as a pussy."[77] Mr. Pence, having been advised by his staff, by former Vice President Dan Quayle,[78] and by multiple leading conservative lawyers that he had no discretion to stop or delay the count and that doing so would be illegal, issued a letter in which he disclaimed "unilateral authority to determine

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[70] *Id.; See* Carol Leonnig & Philip Rucker, *I Alone Can Fix It: Donald J. Trump's Catastrophic Final Year*, 448 (2021).

[71] Woodward & Costa, *supra*, at 225.

[72] Woodward & Costa, *supra*, at 226.

[73] Woodward & Costa, *supra*, at 226-227.

[74] Woodward & Costa, *supra*, at 228-230.

[75] Donald Trump (@realDonaldTrump), Twitter (Jan. 6, 2020, 1:00 am), https://www.thetrumparchive.com.

[76] Donald Trump (@realDonaldTrump), Twitter (Jan. 6, 2020, 8:17 am), https://www.thetrumparchive.com.

[77] Peter Baker, Maggie Haberman and Annie Karniet al., *Pence Reached His Limit With Trump. It Wasn't Pretty.*, N.Y. Times (Jan. 12, 2021), https://www.nytimes.com/2021/01/12/us/politics/mike-pence-trump.html.

[78] Woodward & Costa, *supra*, at 198-200.

which electoral votes should be counted and which should not" and indicating his intention to abide by the Electoral Count Act.[79]

Later that morning, the President's efforts—and Mr. Eastman's—continued at the "Stop the Steal" rally on the National Mall. Before a crowd of thousands of Trump supporters, a parade of speakers, including Mr. Giuliani, repeated false claims of election fraud and urged the crowd to fight and to resist the certification process.[80] Mr. Eastman spoke toward the end of the rally, just before Mr. Trump.[81] Mr. Giuliani introduced Mr. Eastman as one of "the preeminent constitutional scholars in the United States" and said "[i]t is perfectly appropriate given the questionable constitutionality of the Election Counting Act of 1887 [sic] that the Vice President can cast it aside."[82] Referring to the results of the previous day's U.S. Senate runoffs in Georgia, Mr. Giuliani repeated the many-times debunked theory that voting machines had been manipulated to generate fraudulent votes, both in the previous day's Georgia runoff elections and in the presidential election. He claimed that an "expert" had examined the voting machines and "has absolutely what he believes is conclusive proof that in the last 10%, 15% of the vote counted, the votes were deliberately changed."[83] Giuliani said, "Let's have trial by combat. I'm willing to stake my reputation, the President is willing to stake his reputation, on the fact that we're going to find criminality there."[84] He then asked Mr. Eastman to explain how "they" cheated during the January 5th Georgia Senate runoff the night before and how "it was exactly the same as what they did on November 3rd."[85]

Mr. Eastman then spoke. He began by asserting "we've got petitions pending before the Supreme Court," likely referring to a petition for a writ of certiorari that Mr. Eastman had filed in late

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79 Woodward & Costa, *supra*, at 240; *Read Pence's Full Letter Saying he Can't Claim 'Unilateral Authority' to Reject Electoral Votes*, Associated Press (Jan. 6, 2021), https://www.pbs.org/newshour/politics/read-pences-full-letter-saying-he-cant-claim-unilateral-authority-to-reject-electoral-votes.

80 Matthew Choi, *Trump is on Trial for Inciting an Insurrection. What About the 12 People Who Spoke Before Him?,* Politico (Feb. 10, 2021), https://www.politico.com/news/2021/02/10/trump-impeachement-stop-the-steal-speakers-467554.

81 *Id.*

82 *Rudy Giuliani Speech Transcript at Trump's Washington, D.C. Rally: Wants 'Trial by Combat,'* Rev Transcripts (Jan. 6, 2021), https://www.rev.com/blog/transcripts/rudy-giuliani-speech-transcript-at-trumps-washington-d-c-rally-wants-trial-by-combat; *see also User Clip: Rudy Giuliani & Professor John Eastman*, CSPAN (Jan. 6, 2021),https://www.c-span.org/video/?c4933578/user-clip-rudy-giuliani-professor-john-eastman (full video of the Giuliani and Eastman speeches).

83 *Rudy Giuliani Speech Transcript at Trump's Washington, D.C. Rally: Wants 'Trial by Combat,' supra.*

84 *Id.*

85 *Id.*

December on Mr. Trump's behalf in a case titled, *Trump v. Boockvar*, a petition that the Court would ultimately deny summarily.[86] Mr. Eastman again repeated false claims of outcome-altering fraud, stating that "we know there was fraud, traditional fraud that occurred. We know that dead people voted."[87] Elaborating, he focused on the claims of voting machine fraud that had been rejected many times in the courts and that Attorney General Barr had described as "demonstrably crazy."[88] He claimed, falsely, that fraudulent votes generated by voting machines had changed the outcome of both the previous night's Senate elections in Georgia and the November presidential elections.[89] Mr. Eastman explained his theory as follows, "[t]hey put those ballots in a secret folder in the machines. Sitting there waiting until they know how many they need. And then the machine, after the close of polls, we now know who's voted, and we know who hasn't. And I can now, in that machine, match those unvoted ballots with an unvoted voter and put them together in the machine."[90] Mr. Eastman went on to claim that "they were unloading the ballots from that secret folder, matching them to the unvoted voter, and voila, we have enough votes to barely get over the finish line. We saw it happen in real time last night, and it happened on November 3rd as well."[91]

Mr. Eastman then asserted that "[w]e no longer live in a self governing republic if we can't get the answer to this question." He went on to say "[a]nd all we are demanding of Vice President Pence is this afternoon at 1:00, he let the legislatures of the state look into this so we get to the bottom of it, and the American people know whether we have control of the direction of

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[86] *Donald J. Trump for President, Inc. v. Veronioca Degraffenreid, Acting Secretary of Pennsylvania, et al.,* 141 S. Ct. 1044 (2020) (denying application for expedited review); *Donald J. Trump for President, Inc. v. Veronioca Degraffenreid, Acting Secretary of Pennsylvania, et al.*, 141 S. Ct. 1451 (2021) (denying petition for certiorari).

[87] *Rudy Giuliani Speech Transcript at Trump's Washington, D.C. Rally: Wants 'Trial by Combat,' supra.*

[88] Woodward & Costa, *supra*, at 170.

[89] *Rudy Giuliani Speech Transcript at Trump's Washington, D.C. Rally: Wants 'Trial by Combat,' supra.*

[90] *Id.*

[91] *Rudy Giuliani Speech Transcript at Trump's Washington, D.C. Rally: Wants 'Trial by Combat,' supra.* Podcast host and conspiracy theorist Joe Oltmann claims that he met with Mr. Eastman and "fed Eastman the theory of election fraud that he presented at the rally on Jan. 6 near the Ellipse." *See* Susan Dominus, *He was the 'Perfect Villain' for Voting Conspiracists*, N.Y. Times Magazine (Aug. 24, 2021), https://www.nytimes.com/2021/08/24/magazine/eric-coomer-dominion-election.html.

our government, or not."[92] Referring directly to Mr. Pence,[93] and echoing Mr. Trump's coercive rhetoric, he closed by asserting that "anybody that is not willing to stand up to do it, does not deserve to be in the office. It is that simple."[94]

Following Mr. Eastman's speech, Mr. Trump addressed the rally at length, repeating claims that "we won this election, and we won it by a landslide" and telling the crowd that "if you don't fight like hell, you're not going to have a country anymore."[95] Mr. Trump also praised Mr. Eastman, saying, "John is one of the most brilliant lawyers in the country, and he looked at this and he said, 'What an absolute disgrace that this can be happening to our Constitution.' And he looked at Mike Pence, and I hope Mike is going to do the right thing."[96] An hour later, in an effort to interfere with or stop the certification process, members of the crowd breached and vandalized the Capitol.[97] As the mob was entering the Capitol, and Mr. Pence was driven into hiding, Mr. Trump tweeted that Mr. Pence lacked "the courage to do what should have been done to protect our Country and our Constitution."[98]

Two days after January 6, more than 150 Chapman faculty members and members of the university's board of trustees signed a letter that argued that Mr. Eastman's actions "should disqualify him from the privilege of teaching law to our students and strip him of the honor of an endowed chair."[99] Shortly thereafter, Mr. Eastman resigned his position at Chapman under pressure. Shortly thereafter, the University of Colorado, Boulder, where Mr. Eastman had been a

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[92] *Rudy Giuliani Speech Transcript at Trump's Washington, D.C. Rally: Wants 'Trial by Combat,' supra.*

[93] *Trump lawyer John Eastman: Rally, insurrection not connected*, CNN (Jan. 23, 2021) https://www.cnn.com/videos/tv/2021/01/23/trump-lawyer-john-eastman-rally-insurrection-separate.cnn (Mr. Eastman admitting that he was referring to Mike Pence in this part of his speech).

[94] *Rudy Giuliani Speech Transcript at Trump's Washington, D.C. Rally: Wants 'Trial by Combat,' supra.*

[95] Brian Naylor, *Read Trump's Jan. 6 Speech, A Key Part Of Impeachment Trial*, NPR (Feb. 10, 2021), https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial.

[96] *Id.*

[97] *Inside the Capitol Riot: An Exclusive Video Investigation*, N.Y. Times (Sept. 23, 2021), https://www.nytimes.com/2021/06/30/us/jan-6-capitol-attack-takeaways.html.

[98] Donald Trump (@realDonaldTrump), Twitter (Jan. 6, 2020, 2:24 p.m.), https://www.thetrumparchive.com.

[99] Michael T. Nietzel, *John Eastman Retires from Chapman University*, Forbes (Jan. 23, 2021), https://www.forbes.com/sites/michaeltnietzel/2021/01/13/john-eastman-retires-from-chapman-university/?sh=321729eb65e7.

visiting scholar, "relieved John Eastman of duties related to outreach and speaking as a representative of" a center at the University.[100]

ANALYSIS

I. There is a Strong Case that the State Bar Should Investigate Whether Mr. Eastman Violated His Ethical Obligations in His Efforts to Assist Mr. Trump in Preventing or Delaying the Electoral College Count

A. Applicable Ethical Principles

Mr. Eastman's conduct is potentially subject to discipline under provisions of the California Rules of Professional Conduct and the State Bar Act.[101]

1. *Advising or Assisting the Violation of Law*

Rule 1.2.1 provides that:

> (a) A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal.
>
> (b) Notwithstanding paragraph (a), a lawyer may: (1) discuss the legal consequences of any proposed course of conduct with a client; and (2) counsel or assist a client to make a

[100] Michael T. Nietzel, *University of Colorado Takes Action Against John Eastman*, Forbes (Jan. 23, 2021), https://www.forbes.com/sites/michaeltnietzel/2021/01/23/university-of-colorado-takes-action-against-john-eastman/?sh=fff965f26968.

[101] There is no question that Mr. Eastman is subject to California's disciplinary process. Under Rule 8.5 (a) "a lawyer admitted in California is subject to the disciplinary authority of California, regardless of where the lawyer's conduct occurs." It is a closer question whether Mr. Eastman's conduct should be evaluated under the California Rules of Professional Conduct and the State Bar Act. Under Rule 8.5 (b) (1), the rules governing Mr. Eastman's conduct before the Supreme Court should be "the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise." But it is not clear how to define the jurisdiction in which the Supreme Court sits (arguably it is the United States as a whole) and that Court has apparently not adopted binding ethical rules. For Mr. Eastman's non-litigation conduct, the applicable rules will be those of the jurisdiction in which the conduct occurred unless the predominant effect of the conduct was in a different jurisdiction, in which case the law of the latter jurisdiction will apply. This language suggests that the District of Columbia's Rules of Professional Conduct should apply, again unless the "predominant effect" test points to the United States as the relevant jurisdiction. Our examination of the District of Columbia Rules of Professional Conduct indicates that they do not differ materially from the California Rules in their treatment of the issues described here, with the exception of a potential difference between California Rule 1.2.1 (a) and D.C. Rule 1.2 (d). Because of these considerations, and for simplicity of analysis, this memorandum has assumed for purposes of analysis that California law governs.

good faith effort to determine the validity, scope, meaning, or application of a law, rule, or ruling of a tribunal.

Under the Rules of Professional Conduct, knowledge is defined as "actual knowledge of the fact in question," which "may be inferred from the circumstances." Rule 1.0.1 (f). Such knowledge also includes "willful blindness." *In re Girardi*, 611 F.3d 1027, 1036 (9th Cir. 2010). Willful blindness is shown when "the facts before the lawyer create a high probability" of illegality and the lawyer consciously and deliberately chooses not to inquire further. *See* ABA Formal Op. 491 (2020) (interpreting the same "actual knowledge" standard that is applied in California).

2. *Advisor*

Rule 2.1 provides that: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice."

3. *Misrepresentation or Deceit*

A lawyer may not make knowing or reckless misstatements of fact or law. The prohibition is reflected in multiple rules. Rule 3.3 (a) states that a lawyer "shall not (1) knowingly make a false statement of fact or law to a tribunal." Rule 4.1 (a) provides that "in the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person." A lawyer can violate these rules by incorporating or affirming the truth of a statement of another person that the lawyer knows is false. *Id.* at Comment 1. "A nondisclosure can be the equivalent of a false statement of material fact or law…where a lawyer makes a partially true but misleading material statement or material omission." *Id.* Under these Rules, too, knowledge is "actual knowledge," which "may be inferred from the circumstances,[102] and includes "willful blindness."

Other provisions of the Rules and the State Bar Act encompass both knowing and reckless deception, whether or not it occurs in court or in the context of an attorney-client relationship. Rule 8.4(c) states that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation." Similarly, Business and Professions Code Section 6068(d) states that a lawyer is bound "to 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."[103]

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[102] *See* Rule 1.0.1(f).

[103] Under both Rule 8.4(c) and Section 6068(d) it does not matter whether the lawyer is representing a client or acting in a professional capacity. *See* Rule 8.4, Comment 1 (a "violation…can occur when a lawyer is acting in propria persona or when a lawyer is not practicing law or acting in a professional capacity."); *In re Chesnut*, 4 Cal. State Bar Ct. Rptr. 166, 174 (Review Dept. 2000) (noting that Section 6068 requires attorneys "to refrain from deceptive acts, *without qualification*.") (cleaned up and citing *Rodgers v. State Bar*, 48 Cal.3d 300, 315 (1989)) (emphasis in original).

Finally, Business and Professions Code Section 6106 provides that "the commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension." Under Section 6106 "actual intent to deceive is not necessary [for a finding of dishonesty]; a finding of gross negligence in creating a false impression is sufficient." *In the Matter of Maloney and Virsik*, 4 Cal. State Bar Ct. Rptr. 774, 786 (Review Dept. 2005); *see In the Matter of Moriarty*, 4 Cal. State Bar Ct. Rptr. 9, 15 (Review Dept. 1999); *In the Matter of Wyrick*, 2 Cal. State Bar Ct. Rptr. 83, 90–91 (Review Dept. 1992).

A determination that a lawyer has engaged in unethical deception does not depend on whether the lawyer's dishonesty achieved its goal or resulted in harm. The test of culpability is not whether the deception succeeded. Rather "'it is the endeavor to secure an advantage by means of falsity which is denounced.'" *In re Chesnut*, 4 Cal. State Bar Ct. Rptr. at 175 (citing *Pickering v. State Bar*, 24 Cal.2d 141, 144–145 (1944). Once intent to deceive has been shown, "it is immaterial whether any harm was done, since a member of the State Bar should not under any circumstances attempt to deceive another person." *McKinney v. State Bar*, 62 Cal.2d 194, 196 (1964).

4. *Meritorious Claims and Contentions*

Rule 3.1(a) states that:

> (a) A lawyer shall not: (1) bring or continue an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or (2) present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of the existing law.

Under Business and Professions Code Section 6068(c) an attorney has a duty to "counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense." This section has been interpreted as ensuring that attorneys only bring complaints and maintain arguments that "are supported by law or facts." *Canatella v. Stovitz*, 365 F. Supp. 2d 1064, 1077 (N.D. Cal. 2005).

5. *Duty to Support the Constitution*

Business and Professions Code Section 6068 (a) states that an attorney has a duty "to support the Constitution and laws of the United States and of this state."

B. <u>There is a Strong Basis to Investigate Whether Mr. Eastman Committed Multiple Ethical Violations</u>

The foregoing facts concerning Mr. Eastman's conduct as a lawyer for Mr. Trump and during January 2021 make out a strong case that the State Bar should investigate whether Mr. Eastman has violated each of the ethical rules cited above.

1. *Mr. Eastman's Conduct in Connection with Mr. Trump's Effort to Pressure Mr. Pence to Violate His Legal Obligations*

There is a strong case for the State Bar to investigate whether Mr. Eastman's memoranda and other conduct in connection with Mr. Trump's effort to prevent or delay indefinitely the counting of lawful swing state electoral votes violated Rule 4.1, Rule 8.4(c) and related provisions of the State Bar Act forbidding deceptive conduct, and Rule 1.2.1 forbidding knowing assistance in unlawful conduct, as well has his obligation under Section 6068(a) to "support the Constitution and laws of the United States."

There is no doubt that Mr. Eastman's memoranda were wrong in their core claim that the Constitution gave Mr. Pence unquestioned and unreviewable authority to declare the Electoral Count Act and Concurrent Resolution unconstitutional and to refuse to count or delay the counting of the "swing state" Electoral College vote certificates, even though those certificates were proper in form, had withstood all timely legal challenges, and were not opposed by any valid competing slate of electors. Other lawyers who looked at the question—many of them stalwart conservatives and Trump supporters—believed that that advice was absolutely wrong.

Mr. Eastman's advice, however, was not simply wrong—it was false or deceptive, in multiple respects. First, it rested on factual statements that were false or misleading, including the falsehoods that there were competing slates of electors and that there existed outcome-determinative fraud. Mr. Eastman also misleadingly omitted the fact that virtually every timely filed claim challenging the "swing state" election results had failed.

In addition, the memoranda did not give an accurate or candid account of the legal principles involved, affirmatively stating that the absolute power claimed for Vice President Pence was a constitutional fact, falsely claiming that there was strong authority supporting that position, while failing to mention any of the authority or arguments countering that position or to provide any realistic discussion of the consequences of following it in the case at hand.

The misleading character of the memoranda was heightened by Mr. Eastman's decision to frame them as privileged advice to a client, and Mr. Trump's decision, in Mr. Eastman's presence, to stress Mr. Eastman's scholarly standing as a reason to accept that advice. These representations were clearly meant to imply that the memoranda met the standards of independent professional judgment and candor required of a lawyer acting as an advisor, *see* Rule 2.1, and the intellectual rigor expected of a scholar. But as noted above, those implied representations were false. Contrary to both professional and scholarly standards of analysis and candor, the memoranda omitted or misstated facts inconsistent with their claims, misstated and omitted relevant authority, and failed to analyze the consequences of following the recommended course.

The available facts indicate that this conduct may well have been deliberate. Mr. Eastman was a highly skilled and experienced lawyer and scholar who knew what he was doing. On their face, the memoranda show that his goal was not to provide accurate advice or analysis. Instead, it was to provide a veneer of legality for Mr. Trump's efforts to coerce Mr. Pence into setting aside the results of the election or postpone the count to some indefinite time. He surely knew that a candid presentation of the relevant facts and legal arguments would not provide that veneer, because it led to only one conclusion—that Mr. Pence could not lawfully interfere with or postpone the counting of the swing state ballots. Accordingly, Mr. Eastman elected to misstate the law and facts, to willfully ignore any facts and arguments that would have refuted the required conclusion, and to pretend that the resulting product met professional and scholarly standards that it in fact violated.

In a lengthy September 27, 2021, podcast interview with Harvard Law Professor Lawrence Lessig and Matthew Seligman, Mr. Eastman attempted to downplay the core of his memoranda.[104] In the podcast, Mr. Eastman said that, contrary to the text of his memoranda, he orally advised Mr. Pence that it was an open question whether the vice president had unilateral constitutional authority to not count Electoral College votes (it is not), that the view that he had such authority was weak, and that it would be foolish to pursue that option when no state legislature had certified a rival set of electors. Moreover, Mr. Eastman said he continued to support the (equally unfounded) claim that the vice president had unilateral constitutional authority to postpone the count. He acknowledged that doing so would have violated the Electoral Count Act's proscription on adjournment once the Joint Session had begun and that he nevertheless urged Mr. Pence to exercise that authority.

Mr. Eastman's after the fact explanation does not square with the text of the memoranda themselves or with the reported accounts described herein of the January 4 meeting or Mr. Trump's January 5 meeting with Mr. Pence, where Mr. Trump repeated the claim that Mr. Pence could throw out the ballots of Biden electors. It is also inconsistent with Mr. Pence's January 6 letter, which is explicitly aimed at rejecting suggestions that the Vice President has the unilateral power to accept or reject electoral ballots, but does not refer to postponement. That evidence indicates that Mr. Trump and Mr. Eastman initially sought to use the memoranda to force Mr. Pence to set aside ballots. If Mr. Eastman ever abandoned that argument, it was only because it had become clear that Mr. Pence would not yield on that issue. Mr. Eastman's own account implicitly confirms that view, stating that the President's demand was narrowed to delaying the count only "after all was said and done."[105]

Mr. Eastman's deceptive conduct in support of Mr. Trump's unlawful goals continued on January 6 at the "Stop the Steal" rally. In his speech at that gathering, Mr. Eastman essentially repeated the substance of his false advice to Mr. Pence. As in his memoranda, Mr. Eastman repeated long-debunked and false claims that there had been outcome-determinative fraud in the presidential elections. In particular, he repeated claims of voting machine fraud that had been repeatedly disproved in court, and that Attorney General Barr and others had told Mr. Trump were unfounded. Mr. Eastman knew, or was willfully blind to, the falsity of those claims. Those false claims then provided Mr. Eastman with a basis for justifying Mr. Trump's unlawful request that Mr. Pence suspend the count to permit further investigation. That justification, too, was knowingly false. Based upon those false claims, Mr. Eastman, echoing his client, suggested that if Mr. Pence refused the unlawful request to postpone the count, he would be unworthy of his office. This disingenuous account of his legal advice, which seems to have been precisely calculated to feed the crowd's animus against Mr. Pence, can reasonably be thought to have contributed to the decision by many members of the audience to storm the Capitol to prevent the count from going forward.

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[104] *See Discussing The John Eastman Memo with John Eastman*, Another Way by Lawrence Lessig (Sept. 27, 2021) (streamed using Simplecast), https://equalcitizens.us/discussing-the-john-eastman-memo-with-john-eastman/.

[105] *See* John C. Eastman, *Setting the Record Straight on the POTUS "Ask"*, American Mind (January 18, 2021) https://americanmind.org/memo/setting-the-record-straight-on-the-potus-ask/.

Finally, Mr. Eastman's deceptive advice and his equally deceptive explanation of that advice to the Trump supporters who gathered on the National Mall may also have violated Rule 1.2.1 if it was intended to, and did, assist his client, Mr. Trump, in unlawful conduct seeking to overturn the results of the election, and Mr. Eastman knew that conduct was criminal, fraudulent, or unlawful. Indeed, experts have pointed to a variety of statutes under which Mr. Trump may be criminally liable for his conduct on and before January 6.[106]

II. There is a Strong Case That the State Bar Should Investigate Whether Mr. Eastman's Conduct as Counsel of Record in *Texas v. Pennsylvania* Violated His Ethical Obligations

There is a strong case to investigate whether Mr. Eastman's conduct in *Texas v. Pennsylvania* violated Rule 3.1 and Rule 3.3, as well as associated provisions of the State Bar Act.

Rule 3.1(a) calls for discipline when a lawyer (1) files an action without probable cause and for the purpose of harassing or injuring any person or (2) presents a claim that is not warranted under existing law, unless it can be supported by good faith argument for an extension, modification, or reversal of existing law.

There is a strong case that Mr. Trump's claims in the proposed Bill of Complaint in Intervention in *Texas v. Pennsylvania*, like Texas's Bill of Complaint whose central allegations it adopted, violated Rule 3.1 (a) (2). Clearly, those claims were not supported by existing law.

It seems equally clear that those claims were not supported by a good faith argument for an extension, modification, or reversal of existing law. Instead, the theories underlying Texas's Bill of Complaint and Mr. Trump's Bill of Complaint in Intervention were, on their face, flatly inconsistent with settled principles of existing law, in ways that neither Texas nor Mr. Trump made any effort to address in their filings. In particular, under the theories of the two complaints:

- Any state could sue another state in the Court's original jurisdiction to challenge the responding state's conduct of its presidential elections—even in the absence of any injury.
- The Court should hear such claims even if they could readily have been (and had in fact been) brought in state and lower federal courts, in violation of the settled principle that original jurisdiction is intended to address only inter-state claims that cannot be addressed in other fora.
- The Court should grant equitable relief that would disenfranchise 20 million voters on a claim whose filing had been delayed until literally hours before the statutory safe-harbor deadline for certifying electoral college members, even though those claims could have been brought before the election and voters had since relied on the state's own interpretation of its laws, in violation of settled equitable principles of laches and Due Process.

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[106] *See, e.g.*, Laurence H. Tribe, Barbara McQuade and Joyce White Vance, *Opinion: Here's a Roadmap for the Justice Department to Follow in Investigating Trump*, Wash. Post (Aug. 5, 2021), https://www.washingtonpost.com/opinions/2021/08/05/heres-roadmap-justice-department-follow-investigating-trump/.

- The Court should grant the requested relief even though granting it would effectively reverse dozens of decisions already rendered in the lower courts and directly restrict the autonomy of the responding state to conduct its own elections under its own laws, defeating the evident purpose of the Electors Clause to preserve state autonomy.
- Under Mr. Trump's further theory, once a state had filed in the Supreme Court's original jurisdiction, a candidate who had lost every similar claim it filed in the lower courts would be able to intervene, relitigate those claims, and obtain from the Court the precise relief it had repeatedly been denied by lower courts, in violation of settled principles governing the division of jurisdiction between state and federal courts, federal appellate review, finality, and issue and claim preclusion.

To succeed, Mr. Trump's claims would have required reversal of settled principles of law. But neither Texas's nor Mr. Trump's Supreme Court submissions even acknowledged many of these difficulties, let alone suggested any reason for how or why they should be overcome. A lawyer who presents a claim flatly inconsistent with existing law in multiple respects, and who intentionally ignores that law and that inconsistency, cannot legitimately claim to have proceeded on the basis of a good faith claim that such law should be reversed.

There is also a strong case that the State Bar should investigate whether Mr. Trump's Bill of Complaint in Intervention violated Rule 3.1(a)(1). Clearly the Complaint was not supported by probable cause. Probable cause is a question of law. The standard is objective. It is violated when a court, "[taking] into account the evolutionary potential of legal principles," determines that no "reasonable attorney would have thought the claim tenable." *Sheldon Appel Co. v. Albert & Oliker*, 47 Cal.3d 863, 886 (1989); *see Franklin Mint. Co. v. Manatt, Phelps & Phillips LLP,* 184 Cal.App.4th 313, 333 (2010) (noting that existence of probable cause is a question of law). No reasonable lawyer could have regarded the theory of Mr. Trump's complaint as tenable. Moreover, the available facts strongly suggest that although Mr. Biden was not the named defendant, Mr. Trump's suit was intended to harm him, by delaying the count of electoral votes and by continuing to propagate Mr. Trump's false claims of a fraudulent or stolen election, undermining Mr. Biden's legitimacy and ultimate effectiveness.

Finally, there is a strong case that the State Bar should investigate whether Mr. Eastman's submission in the *Texas v. Pennsylvania* matter violated Rule 3.3(a)(1) forbidding knowing misstatements of fact or law to a tribunal. Of many possible examples, one will have to suffice. Mr. Eastman's papers adopted by reference all the factual averments made in at least the first 134 paragraphs of Texas's Bill of Complaint, which contained, among other things a factual averment that: "[t]he probability of former Vice President Biden's winning the popular vote in [each of] the four defendant states—Georgia, Michigan, Pennsylvania and Wisconsin … given President Trump's early lead in those States as of 3 a.m. on November 4, 2020, is less than one in a quadrillion, or 1 in 1,000,000,000,000,000."[107] That statement, though, rested on the transparently false assumption that the composition of the same-day voting populations that gave Trump his early lead during the night of November 3-4 was identical to the composition of the voting populations that submitted the later-counted mail-in votes that eventually put Biden over

[107] Bill of Complaint at 6, *Texas v. Pennsylvania*, 141 S. Ct. 1230 (2020) (No. 22O155).

the top, a proposition that Mr. Eastman, like anyone who reads the news or watches television, knew to be false. Presenting it as fact to the Supreme Court plainly violated Rule 3.3(a)(1).

III. Mr. Eastman's Conduct Caused and Threatened to Cause Substantial Harm

While a finding that unethical conduct caused harm is not required to support professional discipline, it is surely relevant here that Mr. Eastman's conduct caused substantial harm and threatened to cause even more. Mr. Eastman's conduct caused harm because it was intended to, and did, further Mr. Trump's false narrative that in 2020 American political and judicial institutions at both the state and federal levels failed to ensure a free and fair election—when in fact those institutions did just that (even while conducting an election during a global pandemic). The damage of that corrosive lie to our collective life is incalculable. But the harm that Mr. Eastman's conduct sought, but failed, to achieve—the jettisoning of those lawful results—was far greater. Mr. Eastman's conduct in seeking that outcome deserves the most searching of investigations, and, if the case outlined above is sustained, substantial professional discipline.

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For the reasons set forth above, we respectfully request that the State Bar of California open an ethics investigation into Mr. Eastman's conduct.

Very Truly Yours,

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