



November 16, 2021

William Todd
Assistant Chief Trial Counsel
Office of Chief Trial Counsel
The State Bar of California
845 South Figueroa Street
Los Angeles, CA 90017
VIA EMAIL

Re: Matter of John Eastman, Case Number 21-O-12451

In the days and hours leading up to the counting of the electoral votes in Congress, a cadre of outside lawyers to the President spun a web of lies and disinformation, to him and to the public, for the purpose of pressuring the Vice President to betray his oath to uphold our laws and the Constitution of the United States Now that the moment of immediate crisis has passed, the legal profession should dispassionately examine whether the attorneys involved should be disciplined for using their credentials to sell a stream of snake oil to the most powerful office in the world, wrapped in the guise of a lawyer's advice.

—Unpublished Op-Ed written by Greg Jacob, former Chief Counsel to former-Vice President Mike Pence¹

Dear Mr. Todd:

This letter responds to your October 25, 2021, letter requesting that we provide any additional information that we have regarding our complaint addressing John Eastman's potential legal ethics violations. Our October 4, 2021 Complaint set forth why we believed it was vitally important 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 and related provisions of the State Bar Act through his

¹ *Read: Pence aide Greg Jacob's draft opinion article denouncing Trump's outside lawyers*, Wash. Post (Oct. 29, 2021), https://www.washingtonpost.com/investigations/pence-jacob-trump-op-ed/2021/10/29/d9f324ac-392b-11ec-91dc-551d44733e2d_story.html.

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.

Since we filed our complaint six weeks ago, a great deal of new information has emerged that strongly confirms the allegations of unethical conduct in the Complaint and underscores the need to investigate them. These revelations highlight the need for the bar to undertake a thorough review. Perhaps the most striking piece of new information is that quoted above, from a draft op-ed by Greg Jacob, the former Chief Counsel to Vice President Mike Pence. Mr. Jacob has served extensively in government under Republican presidents and is now a partner in a leading national law firm.² Mr. Pence was the target of Mr. Trump's and Mr. Eastman's campaign to hijack or disrupt the electoral count, and Mr. Jacob was an eyewitness to Mr. Eastman's role in it. Mr. Jacob's words as an eyewitness—that Mr. Eastman's, and his colleague Rudy Giuliani's, conduct involved “a web of lies and disinformation” and “snake oil...wrapped in the guise of a lawyer's advice”—are substantively identical to those of our October 4 Complaint, which was based on public information.

If there were nothing more than Mr. Jacob's recently published account, the case for an investigation would be exceptionally strong. But there is a great deal more.

The bulk of the new information relates to Mr. Eastman's central role in Mr. Trump's effort to hijack or derail the Joint Session of Congress that met to conduct the electoral count on January 6, 2021. We continue to learn about the many moving parts of that operation, many of them designed and orchestrated in accord with Mr. Eastman's false legal advice. Mr. Eastman also appears to have had a larger role than previously understood in both public and private efforts to pressure Mr. Pence, and the new incidents that have emerged confirm his indifference to the truth and to upholding the Constitution. We review that information, together with Mr. Eastman's recent public defense of his actions, in Part I.

Much of the new information involves Mr. Eastman's efforts to offer a defense of his advice to Mr. Trump and Mr. Pence and the response of experts and percipient witnesses to that defense. In a series of statements and interviews, Mr. Eastman has variously claimed that the memoranda he wrote mean something other than what they say, that the advice he gave orally was different from that in his written memoranda, that his memoranda were alternatively “crazy” or “solid,” and that he acted in good faith. Many of the factual details of that defense are demonstrably false, misleading, or inconsistent. Others are directly contradicted by Mr. Eastman's own contemporaneous public statements or the observations of eyewitnesses. And, to the extent that this defense rests on points of law, it has been thoroughly rejected by the analysis of experts in the field. In Part II we show how the new information, both factual and legal, confirms that Mr. Eastman in fact advised that the Vice President had constitutional power to cast aside electoral votes and/or postpone the count in his discretion, that his advice to that effect

² *Greg Jacob*, O'Melveny & Myers (last visited Nov. 16, 2021), <https://www.omm.com/professionals/gregory-f-jacob/>.

was both false and misleading, and that Mr. Eastman acted knowingly or recklessly in pressing that advice on Mr. Pence.

In Part III, we outline additional allegations of legal ethical violations related to dishonesty that are supported by the new information. One additional allegation focuses on Mr. Eastman's statements about what advice he gave and when he gave it. The available information suggests that Mr. Eastman's account of that advice is materially false and misleading in multiple respects and warrants further investigation. The other new allegations are that Mr. Eastman's advice violated Rule 1.1 (a), because it was grossly negligent, and Rule 2.1, because it was neither candid nor professionally independent.

Finally, in Part IV, we review additional sources of information that the State Bar may wish to explore during its investigation of the complaint. We note that the investigation should be made easier by the fact that Mr. Trump has already waived the privilege for relevant confidential communications to or from Mr. Eastman.

Part I: New Reported Information About Mr. Eastman's Actions in December 2020 and January 2021

Since we filed our complaint on October 4, a wide range of new information has come to light regarding Mr. Eastman's actions at the end of 2020 and the beginning of 2021, all of which highlight his central role in President Trump's efforts to overturn the lawful results of the 2020 election. We summarize that additional information below, under three headings: (a) new information about the scope of Mr. Trump's overall efforts, supported by Mr. Eastman, to derail the electoral count; (b) new revelations about the specific campaign to pressure Mr. Pence and Mr. Eastman's key part in that effort; and (c) Mr. Eastman's defense of his conduct and responses thereto. This new information is in addition to the information we included in our October 4 Complaint. For ease of reference, we have included a chronology of Mr. Eastman's reported involvement as Appendix A.

A. New Reported Information About the Organized Campaign to Derail the Electoral Count

Mr. Eastman drafted his two-page memorandum³ setting out a legal strategy for derailing the electoral count on Christmas Eve, and his six-page memorandum⁴ on January 3.⁵ We discussed each of those memoranda in detail in our October 4 Complaint.⁶ After Mr. Eastman

³READ: *Trump Lawyer's Memo on Six-step Plan for Pence to Overturn the Election*, CNN (Sept. 21, 2021), <https://www.cnn.com/2021/09/21/politics/read-Eastman-memo/index.html>.

⁴READ: *Trump Lawyer's Full Memo on Plan for Pence to Overturn the Election*, CNN (Sept. 21, 2021), <https://www.cnn.com/2021/09/21/politics/read-Eastman-full-memo-pence-overturn-election/index.html>.

⁵ John McCormack, *John Eastman vs. the Eastman Memo*, National Review (Oct. 22, 2021), <https://www.nationalreview.com/2021/10/john-Eastman-vs-the-Eastman-memo/>.

⁶ Stephen Bundy & States United Democracy Center, *Re: Request for Investigation of John C. Eastman, California Bar Number 193726* 11-14, States United Democracy Center (Oct. 4, 2021), <https://statesuniteddemocracy.org/wp-content/uploads/2021/10/10.4.21-FINAL-Eastman-Cover-Letter-Memorandum.pdf>.

completed the first of those memoranda, a team of Trump lawyers and advisors acted on the basis of its conclusions to make Mr. Eastman’s strategy a reality.⁷

Some initial steps were taken by Mr. Eastman himself. The Christmas Eve memorandum had made charges of fraud and other unlawful conduct in the swing states. But the reality, intentionally omitted in that memorandum, was that all timely claims in those states had already been rejected on the merits. So Mr. Eastman tried to revive a state court challenge to the Georgia election that the Trump campaign had effectively abandoned, by filing a federal court challenge to the state’s alleged failure to grant that challenge. The complaint, captioned *Trump v. Kemp*, was filed December 31. As an additional step, on January 2, Mr. Trump, Mr. Trump’s attorney Rudy Giuliani, and Mr. Eastman spoke to about 300 state legislators on a conference call designed to give them purported evidence of fraud and to encourage them to take action to decertify the properly appointed slates of electors and appoint new ones.⁸ The evident goal was to create new legislatively certified slates of electors to compete with those already properly submitted. Mr. Trump told the legislators, “[y]ou are the real power . . . you’re the ones that are going to make the decision.”⁹ Mr. Eastman told them that it was “the duty of the legislatures to fix this, this egregious conduct, and make sure that we’re not putting in the White House some guy that didn’t get elected.”¹⁰

⁷ This was actually a continuation of work that Mr. Eastman had begun earlier in December 2020, when he wrote a memo that was distributed to state legislators in Georgia containing a wide range of falsehoods about purported election fraud and asserting that the legislators should “adopt[] a slate of electors themselves.” See John C. Eastman, *The Constitutional Authority of State Legislatures to Choose Electors*, *The American Mind* (Dec. 1, 2020), <https://americanmind.org/memo/the-constitutional-authority-of-state-legislatures-to-choose-electors/>. Mr. Eastman cited several instances of alleged statistical anomalies in the vote totals in support of his argument, but the sources for his claims included an anonymous author and a suspended Twitter user named DuckDiver19. *Id.* On December 3, 2020—two days after Mr. Eastman wrote the memorandum—he and Mr. Giuliani testified about purported election fraud to Georgia lawmakers and again urged state legislators to disregard Joe Biden’s victory and instead adopt its own slate of electors. See: Claremont Institute, *John Eastman Testimony During Georgia Senate Election Hearing*, YouTube (Dec. 4, 2020), https://www.youtube.com/watch?v=IHt6UEc_tQ8&ab_channel=ClaremontInstitute (reposting footage from Georgia Senate hearing).

⁸ Jacqueline Alemany et al., *Ahead of Jan. 6, Willard Hotel in Downtown D.C. was a Trump Team ‘Command Center’ for Effort to Deny Biden the Presidency*, *Wash. Post* (Oct. 23, 2021), https://www.washingtonpost.com/investigations/willard-trump-Eastman-giuliani-bannon/2021/10/23/c45bd2d4-3281-11ec-9241-aad8e48f01ff_story.html.

⁹ Paul Bedard, *Exclusive: Trump Urges State Legislators to Reject Electoral Votes, ‘You are the Real Power’*, *Washington Examiner* (Jan. 3, 2021), <https://www.washingtonexaminer.com/washington-secrets/exclusive-trump-urges-state-legislators-to-reject-electoral-votes-you-are-the-real-power>.

¹⁰ Letter from Chairman Bennie G. Thompson to John Eastman, H. Select Committee to Investigate the January 6 Attack on the United States Capitol, 117th Cong. (Nov. 8, 2021), <https://january6th.house.gov/sites/democrats.january6th.house.gov/files/20211108%20Eastman.pdf>.

To implement its strategy, the Trump campaign also established a “war room” at the Willard Hotel in Washington, D.C., in early January. According to the *Washington Post*, the war room “sought to make the case to Pence and ramp up pressure on him to take the actions on Jan. 6 that Eastman had advised were within his powers.”¹¹ The war room’s activities included “finding and publicizing alleged evidence of fraud, urging members of state legislatures to challenge Biden’s victory and calling on the Trump-supporting public to press Republican officials in key states.”¹² From January 3 to January 8, Mr. Eastman stayed at the Willard Hotel and was actively involved in the “war room.”¹³ Other participants in this “war room” were Mr. Giuliani; former chief White House strategist Steve Bannon; former New York City police commissioner Bernard Kerik; a retired Army colonel who specialized in psychological operations, Phil Waldron; and a Tea Party activist known for submitting baseless fraud claims in court, Russell Ramsland.¹⁴ In total, the Trump campaign spent more than \$50,000 on rooms and suites in the Willard Hotel in early January.¹⁵

B. New Reported Information About Mr. Eastman’s Role in the Campaign to Pressure Mr. Pence to Subvert the Election Results

As part of this effort, Mr. Eastman made several public appearances intended to increase the pressure on Mr. Pence to subvert the results of the 2020 presidential election. On January 2, Mr. Eastman appeared on Steve Bannon’s radio program where he was introduced as the “constitutional lawyer for the President.”¹⁶ Mr. Eastman told Mr. Bannon that Congress “can’t count a slate of electors that were illegally certified,” and “if they were certified after an election that violated fundamental state law, those are illegally certified.”¹⁷ He then said:

The states ignored their state election law, and those slates of electors are invalid. And I think if the Vice President as presiding over the Joint Session would at least agree that because those ongoing contests have not been resolved, we can’t count those electors, that means that nobody has a majority of the electors. And either they delay things so

¹¹ Alemany et al., *Ahead of Jan. 6*, *supra*.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* “Mr. Ramsland’s key claims about alleged fraud in Antrim County, Michigan, for example, were “immediately debunked, including by officials inside Trump’s own Department of Homeland Security.”; Jacqueline Alemany et al., *Trump Campaign Payments for ‘Command Centers’ at D.C. Hotels Could Undermine Executive Privilege Claim in Jan. 6 Investigation*, *Wash. Post* (Nov. 3, 2021), https://www.washingtonpost.com/investigations/trump-campaign-payments-for-command-centers-at-dc-hotels-could-undermine-executive-privilege-claim-in-jan-6-investigation/2021/11/02/f05297bc-3680-11ec-8be3-e14aaacfa8ac_story.html.

¹⁵ Alemany et al., *Trump Campaign Payments*, *supra*.

¹⁶ The Thinking Conservative, *Episode 625: Day One with Rudy Giuliani, Boris Epshteyn and John Eastman* (Jan. 2, 2021), <https://www.thethinkingconservative.com/war-room-pandemic-week-82/>.

¹⁷ Philip Bump, *What did John Eastman Really Want to have Happen?* *Wash. Post* (Nov. 1, 2021), <https://www.washingtonpost.com/politics/2021/11/01/what-did-john-eastman-really-want-have-happen/>.

those constitutional challenges are resolved. Or they say, okay, well, we don't have electors from those states, that nobody has a majority, [so] this is going to the House.¹⁸

And after saying that Mr. Pence had the authority to reject the Biden electors, Mr. Eastman said that whether Mr. Pence took action would depend on whether he had the necessary “courage and spine”¹⁹ and that if Mr. Eastman’s words were not heeded, “we no longer have a self-governing Republic.”²⁰

On January 4, the same day he met with Mr. Pence in the Oval Office, Mr. Eastman appeared on Larry Elder’s radio program and was introduced as Mr. Trump’s attorney. Mr. Eastman did not mention the possibility of delay. Instead, in talking about the Vice President’s power to reject electors, Mr. Eastman said, “This level of corruption just can’t be allowed to stand. And I think that makes, I think that makes the exercise of the Vice President’s power here very compelling.”²¹ He also said that the “buck stops with the Vice President.”²²

A great deal of new information has come to light about the January 4 meeting in the Oval Office with Mr. Eastman, Mr. Trump, and Mr. Pence since it was discussed in our October 4 Complaint. The other attendees at the meeting included Mr. Pence’s chief counsel Mr. Jacob, and Mr. Pence’s chief of staff, Marc Short. According to the *Washington Post*, the meeting was set up because “Trump was frustrated that Pence was not acceding to his demands, and wanted the vice president to hear arguments from Mr. Eastman, whom he viewed as having more credibility in legal circles than some of Trump’s other legal advisers.”²³

Mr. Eastman claims that he told Mr. Pence in this meeting that it was an “open question” whether the Vice President had the ability to decide on his own which electoral votes to count.²⁴ According to the *Post*, however, Mr. Eastman argued that Mr. Pence “should at least try the maneuver of not certifying the Biden electors on Jan. 6, because it had never been done before, and so had not been ruled on by the courts.”²⁵

On January 5, Mr. Eastman met with the Vice President’s aides, Mr. Short and Mr. Jacob, at the Eisenhower Executive Office Building. According to the *Post*, Mr. Eastman was the only

¹⁸ The Thinking Conservative, *supra*.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Andrew Kaczynski & Em Steck, *Trump lawyer John Eastman said 'courage and the spine' would help Pence send election to the House in comments before January 6*, CNN (Oct. 30, 2021), <https://www.cnn.com/2021/10/30/politics/kfile-john-eastman-said-pence-could-throw-election-to-house/index.html>.

²² The Larry Elder Show, *Trump’s Attorney John Eastman Has Good News About Georgia*, YouTube (Jan. 4, 2021), https://www.youtube.com/watch?v=U85pYxNGXqI&ab_channel=TheLarryElderShow

²³ Josh Dawsey et al., *During Jan. 6 riot, Trump attorney told Pence team the vice president’s inaction caused attack on Capitol*, Wash. Post (Oct. 29 2021), https://www.washingtonpost.com/investigations/eastman-pence-email-riot-trump/2021/10/29/59373016-38c1-11ec-91dc-551d44733e2d_story.html.

²⁴ *Id.*

²⁵ *Id.* Mr. Eastman claimed that he did not recall making “any such statement.”

Trump attorney in that meeting.²⁶ Mr. Eastman reportedly began the meeting by arguing that the Vice President should reject the Biden electors.²⁷ Mr. Jacob subsequently wrote (in his draft opened that he ultimately did not seek to have published) that the Trump lawyer in the meeting (i.e., Mr. Eastman) conceded that “not a single member of the Supreme Court would support his position,” that “230 years of historical practice were firmly against it,” and that “no reasonable person would create a rule that invested a single individual with unilateral authority to determine the validity of disputed electoral votes for President of the United States.”²⁸ According to the *Post*, it was not until the end of the two-hour meeting that Mr. Eastman “had conceded that having Pence reject Biden electors was not a good plan.”²⁹

Later on January 5, Mr. Eastman had additional telephone calls with the Vice President’s staffers. During those calls, Mr. Eastman proposed that Mr. Pence take Mr. Eastman’s second option of delay, “sending [the election] back to the states” for the states to investigate fraud claims. According to the *Post*, Mr. Eastman told the advisers repeatedly that Mr. Pence could do so because the courts would invoke “the political question doctrine” and not intervene.³⁰

We wrote at length about Mr. Eastman’s January 6 speech in our October 4 Complaint, but new information has also come to light about Mr. Eastman’s further activities that day. After the Secret Service escorted Mr. Pence out of the Senate because of the incoming violent insurrectionist mob, Mr. Jacob emailed Mr. Eastman to criticize him for pushing the Vice President to stop the proper certification of those votes. Mr. Jacob wrote to Mr. Eastman, “Thanks to your bull---, we are now under siege.”³¹ Mr. Eastman responded: “[t]he ‘siege’ is because YOU and your boss did not do what was necessary to allow this to be aired in a public way so that the American people can see for themselves what happened,” apparently referring to former-President Trump’s false claims of voter fraud.³²

After the insurrectionists were finally cleared from the Capitol building and Mr. Pence and the Joint Session of Congress returned to the House chamber, Mr. Eastman still did not relent. Instead, he kept up his pressure campaign, writing another email to Mr. Jacob saying that Mr. Pence still should not certify the results, using the insurrection as a new justification. Given the insurrectionist attack on the Capitol, lawmakers had spoken about the attack before they returned to counting the votes. Mr. Eastman told the *Post* that the point of his email “was they had already violated the [E]lectoral [C]ount [A]ct by allowing debate to extend past the allotted two hours, and by not reconvening ‘immediately’ in joint session after the vote in the objection . . . [it] seemed that had already set the precedent that it was not an impediment.” In his draft opened, Mr. Jacob wrote that by sending the email at that moment, Mr. Eastman “displayed a shocking lack of awareness of how those practical implications were playing out in real time.”³³

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

C. New Information About Mr. Eastman’s Defense of His Actions

Since we filed our complaint on October 4, Mr. Eastman has also made a number of (often contradictory) statements about his role in the events that took place in December and January.

1. *October 7 Sacramento Bee Piece*

On October 7, the *Sacramento Bee* published a piece by Mr. Eastman defending his conduct.³⁴ He claimed that the Christmas Eve two-page memorandum “was a preliminary and incomplete one.” He also asserted that “neither version of the memo reflects the advice I gave to then-Vice President Mike Pence.”³⁵ He claimed that he told Mr. Pence, in response to a question, that it would be foolish to reject the Biden electors “in the absence of certifications of alternate Trump electors from the contested states’ legislatures.”³⁶ Mr. Eastman claimed that he had merely told Mr. Pence to delay the proceedings and asserted that this was “[h]ardly an attempt to ‘overthrow the government’ or ‘stage a coup.’”³⁷

2. *October 22 Interview with National Review*

On October 22, 2021, the *National Review* published a piece based on two interviews with Mr. Eastman.³⁸ This was an important interview in Mr. Eastman’s ever-changing narrative about his actions in December 2020 and January 2021, so it is worth discussing it in some detail. As we have discussed previously, Mr. Eastman’s two-page memorandum had advocated for Mr. Pence to reject the electoral votes from any state where Mr. Eastman claimed there was an alternate slate of electors. But in the *National Review* interview, Mr. Eastman sharply criticized the theory he had pushed in the two-page memorandum saying, “[s]o anybody who thinks that that’s a viable strategy is crazy.”³⁹ Yet as discussed above, that was the strategy Mr. Eastman had advocated on Mr. Bannon’s program on January 2, on Mr. Elder’s program on January 4, and, according to the *Post*, also to open the meeting with Mr. Short and Mr. Jacob on January 5.

Mr. Eastman claimed to the *National Review* that he could not recall who asked him to write the two-page memorandum, saying, “[i]t was somebody in the legal team. I just don’t recall.”⁴⁰ He claimed that this person asked him “if this was the view of the law that were adopted by the court, how would it play out?”⁴¹ And then he reiterated one more time that “[t]he memo was not being provided to Trump or Pence as my advice”; instead, he claimed that “[t]he

³⁴ John Eastman, *John Eastman: Here’s the advice I actually gave Vice President Pence on the 2020 election*, *Sacramento Bee* (Oct. 7, 2021), <https://www.sacbee.com/article254812552.html>.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ McCormack, *supra*.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

memo was designed to outline every single possible scenario that had been floated, so that we could talk about it.”⁴²

Mr. Eastman told the *National Review* that the two-page memorandum did not truly represent either his own views or his legal advice to the former-President and Vice President even though the memorandum begins, “so here is the scenario *we propose*” (emphasis added), and despite the fact that, as discussed above, recent reporting shows that Mr. Eastman was simultaneously pushing that theory in meetings with Mr. Pence and his staff and on radio interviews. Mr. Eastman told the *National Review* that his memoranda “were internal discussion memos for the legal team. I had been asked to put together a memo of all the available scenarios that had been floated.”⁴³ Mr. Eastman went on to say, “I was asked to kind of outline how each of those scenarios would work and then orally present my views on whether I thought they were valid or not, so that’s what those memos did.”

Most important, in the *National Review* interview, Mr. Eastman sought to walk back the line from both of his memoranda that falsely claimed as follows: “*The fact is that the Constitution assigns this power to the Vice President as the ultimate arbiter. We should take all of our actions with that in mind*” (emphases added). Mr. Eastman now told the *National Review*, “This is where I disagree. I don’t think that’s true.”⁴⁴ And he said that “the argument that [the Vice President] is the final say is the weaker argument.”⁴⁵ Mr. Eastman himself acknowledged one reason this argument “doesn’t make a whole lot of sense” was because “we know the vice president is very likely to be one of the contenders for the office that he’ll be deciding.”⁴⁶

The *National Review* asked Mr. Eastman why both of his memoranda said that it was a “fact that the Constitution assigns this power to the Vice President as the ultimate arbiter. We should take all of our actions with that in mind.” Mr. Eastman falsely claimed that he had only written that line in the two-page memorandum that he claimed was “preliminary.”⁴⁷ He said again, “I don’t think that’s the strongest legal argument or scenario. So that was just the first piece that I’d been asked to look at and put together how that would work if that condition was true. And it was that condition that I specifically told them I thought was the weaker argument, which is why I’m going to give you a more complete assessment of all the various scenarios.”⁴⁸ But that language was not only in the two-page memorandum; the identical language was also in the longer six-page memorandum. When confronted with that fact, Mr. Eastman changed his argument yet again and admitted that the line was also in the longer memorandum. Mr. Eastman then implausibly argued that he did not mean it was a fact that Mr. Pence was the ultimate arbiter of which electoral votes to count, but rather whether Mr. Pence was the ultimate arbiter of which ballots to open in a contested election. Mr. Eastman claimed to the *National Review* that he now believed that Congress “most likely” was responsible for the final substantive decision.⁴⁹ This

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

belated justification does not square with the plain text of the memoranda Mr. Eastman wrote or the information laid out above.

The *National Review* reported that “the position of Trump and some of his advisers was initially to pressure Pence to reject outright the count of the Electoral College votes in decisive states.”⁵⁰ As a source close to former-Vice President Pence put it, “[t]heir position was to reject.”⁵¹ That same source told the *National Review* “I think [Mr. Eastman] always caveated it as an experiment, like, ‘We can try that.’”⁵²

And that was consistent with Mr. Trump’s public positions on the question. On the day after the Oval Office meeting with Mr. Eastman, Mr. Trump, and Mr. Pence, former-President Trump tweeted: “The Vice President has the power to reject fraudulently chosen electors.”⁵³ Later that day, former-President Trump again pressed to the Vice President that he “could and should throw Biden’s electors out” and let “the House decide the election.”⁵⁴

According to the source close to Mr. Pence, it was not until the last 24 hours before the joint session on January 6 that it became “crystal clear” to Mr. Trump and his advisors that Mr. Pence was not going to follow the plan to throw out the properly certified Biden electors “even though the vice president had been telling them this for three weeks.” Once it “finally sunk in he wasn’t going to do that,” then “their position moved to: *Well, would you delay it and send it back [to the state legislatures]?*”⁵⁵ Mr. Eastman admitted to the *National Review* that this change in strategy from outright rejection to delay had in fact occurred, and he claimed (without evidence) that he should actually be called a hero for this change, even though he had written the original legal memorandum, marked as attorney-client privileged, advocating for outright rejection.⁵⁶ As Mr. Eastman said, “[c]all me the white-knight hero here, talking [Mr. Trump] down from the more aggressive position.”⁵⁷ But the source close to Mr. Pence told the *National Review* that Mr. Eastman only conceded that the argument for rejection was weaker than delay under “cross-examination.”⁵⁸

Finally, Mr. Eastman also falsely claimed to the *National Review* that he “never had any dealings” with Senator Mike Lee about his memo. But the book *Peril* reports that Senator Lee and Mr. Eastman did speak in December, and Mr. Eastman told Senator Lee, “There’s a memo

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ Donald Trump (@realDonaldTrump), Twitter (Jan. 5, 2021, 11:06 am), <https://www.thetrumparchive.com/?searchbox=%22%5C%22fraudulently+chosen+electors%5C%22%22>.

⁵⁴ McCormack, *supra*.

⁵⁵ *Id.* (emphases added).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

about to be developed I'll get it to you as soon as I can.”⁵⁹ When confronted with yet another falsehood, Mr. Eastman admitted that he actually did talk to Senator Lee.⁶⁰

3. *October 23 Claremont Institute Gala*

On October 23, the day after the *National Review* published its article, Mr. Eastman attended a gala put on by his employer—the Claremont Institute.⁶¹ A woman named Lauren Windsor recorded a conversation she had with Mr. Eastman where she pretended to be a supporter of his. ⁶²During this conversation, Mr. Eastman changed his story yet again. Ms. Windsor began talking about Eastman’s memoranda and said that “all your legal reasoning is totally solid” and Mr. Eastman agreed saying, “yeah. There’s no question.” When Ms. Windsor asked, “why do you think that Mike Pence didn’t do it?” Mr. Eastman said that Mr. Pence had not taken his advice because “Mike Pence is an establishment guy at the end of the day” and “[a]ll of the establishment Republicans that you see bought into this myopic view that Trump was destroying the Republican party.”⁶³

4. *October 29 Washington Post Interview*

For an October 29 *Washington Post* piece, Mr. Eastman claimed that he never advocated for Mr. Pence to reject the electors outright, and he denied making the concession that Mr. Jacob had attributed to him about how unprecedented his proposals were.⁶⁴

5. *October 30 CNN interview*

Finally, Mr. Eastman spoke to CNN in advance of an October 30 CNN piece in an attempt to explain why, on Steve Bannon’s podcast, he had said that Mr. Pence had the authority to reject the Biden electors and that whether Mr. Pence took action would depend on whether he had the necessary “courage and spine.” In trying to explain this statement, Mr. Eastman told CNN that “[m]y statement on Bannon on January 2 acknowledges that that was one of the scenarios that was being discussed.” But he claimed that he told Mr. Pence that “I happen to

⁵⁹ Bob Woodward and Robert Costa, *Peril* 203 (2021); When Lee did receive and read the memo, he reportedly responded, “[y]ou might as well make your case to Queen Elizabeth II. Congress can’t do this. You’re wasting your time.” Bob Woodward and Robert Costa, *Peril* 222 (2021).

⁶⁰ McCormack, *supra* (emphasis added).

⁶¹ *Claremont Institute’s Annual Gala*, Claremont Institute (last visited Nov. 16, 2021), <https://claremontgala.com/>.

⁶² Lauren Windsor (@lawindsor), Twitter (Oct. 26, 2021, 5:27 pm), <https://twitter.com/lawindsor/status/1453110960638496770?s=20>

⁶³ Lauren Windsor (@lawindsor), Twitter (Oct. 26, 2021, 5:27 pm), *supra*; Lauren Windsor (@lawindsor), Twitter (Oct. 26, 2021, 11:30 pm), <https://twitter.com/lawindsor/status/1453202435242004480?s=20>. Windsor also spoke to Claremont Institute President Williams who said that Mr. Eastman is “still very involved with a lot of the state legislators and advising them on election integrity stuff.” Lauren Windsor (@lawindsor), Twitter (Oct. 27, 2021, 5:43 pm), <https://twitter.com/lawindsor/status/1453477418245574656>.

⁶⁴ Dawsey et al., *supra*.

think it's the weaker argument, which is true. And that's why I recommended that he delay rather than taking that step." But when Mr. Eastman was questioned about why he did not explain that rejecting the Biden electors was the weaker option during Mr. Bannon's show, he had no explanation, saying simply, "That's right. Because it was a radio show."⁶⁵

Mr. Eastman also had no explanation for why he called the Vice President's power "very compelling" on Larry Elder's program on January 4 when they were discussing rejecting electors.⁶⁶ He claimed that he could not recall what he meant by that and he simply said again that "throwing the election to the House" was the weaker of the arguments.⁶⁷

Part II: The Additional Information Strongly Supports the Claim That Mr. Eastman's Advice Was Dishonest

Much of the information that has emerged since the filing of our complaint relates to the charge that Mr. Eastman gave dishonest advice to the President and Vice President. In two memoranda that Mr. Eastman wrote, he advised that it was a "fact" that the Constitution assigned the Vice President exclusive and unreviewable authority (1) to violate the Electoral Count Act of 1887 (and the Concurrent Resolution of Congress incorporating it) by (2) rejecting certificates from governors of states that Biden had carried, even if there were no competing slates of electors from that state ("unopposed certificates") and (3) adjourning the Joint Session, (4) over the objection of both Houses of Congress and without subsequent judicial review.

The October 4 Complaint alleges that advice was materially false and misleading, and that Mr. Eastman knew of—or was recklessly indifferent to—its false and misleading character.⁶⁸

In public statements since the filing of the complaint, Mr. Eastman has offered three defenses to this charge: first, the memoranda do not accurately reflect the advice he actually gave; second, the advice he gave was accurate; and third, he gave the advice in good faith. We consider each of those defenses in turn.

A. The Additional Information Confirms that the Memoranda Accurately Reflect Mr. Eastman's Advice

Mr. Eastman has made multiple claims suggesting that the memoranda mean something other than what they say, do not in fact say what they say, or that they do not accurately reflect his advice. But the available information confirms that Mr. Eastman's memoranda accurately reflect his legal advice.

First, Mr. Eastman has claimed that the memoranda were "not being provided to Trump or Pence as my advice."⁶⁹ But that claim is belied by the plain text of the two-page memorandum which begins, "here is the scenario we propose," and ends with "[t]he fact is that the Constitution

⁶⁵ Kaczynski & Steck, *supra*.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Bundy & States United Democracy Center, *supra*, at 12-15, 21-24.

⁶⁹ McCormack, *supra*.

assigns this power to the Vice President as the ultimate arbiter. *We should take all of our actions with that in mind.*”⁷⁰ Moreover, this averment is inconsistent with the actions taken by Mr. Trump’s “war room,” which were guided by and taken in evident reliance upon that advice.

Second, Mr. Eastman has claimed that the memoranda are “internal memoranda for the legal team,”⁷¹ but the public record shows that they were distributed to people not on that team, including Senator Lee, and that Mr. Eastman also falsely denied having contact with Mr. Lee.⁷²

Third, Mr. Eastman has claimed that the memoranda differ on the question of the Vice President’s authority, that the first memorandum was “preliminary,” and that the second memorandum contains a more nuanced account of that authority that more accurately reflects his views.⁷³ This claim is obviously false: the two memoranda are identical in describing the Vice President’s ultimate power.⁷⁴

Fourth, Mr. Eastman has stated that it was always anticipated that the memoranda would be supplemented by oral advice, and that his oral advice to the Vice President, at least concerning the power to exclude ballots, was different from the position reflected in the memoranda. In particular, he has claimed that on January 4, he orally advised Mr. Pence, in response to a direct question, that the question of the Vice President’s power to unilaterally exclude electoral votes was an open one, that the view that Mr. Pence had authority to do so was the weaker position, and that it would be foolish to exercise that authority in the absence of certifications of alternative Trump electors from the contested states legislatures.⁷⁵ Indeed, he has even suggested that he should be called “the white-knight hero here, talking [Mr. Trump] down from the more aggressive position.”⁷⁶ He sometimes links these defenses with a concession that the advice reflected in the memoranda is “crazy” or “not viable.”⁷⁷

As several scholars have noted, it is deeply implausible for a lawyer to claim that he put “‘crazy’ wrong theories in a legal memo from him to be distributed to others, without even noting that the arguments are weak or don’t represent his own views” because “no respectable lawyer does that in giving legal advice.”⁷⁸ As Scott Cummings, the Robert Henigson Professor of Legal Ethics at the UCLA School of Law put it:

⁷⁰ *READ: Trump Lawyer’s Memo on Six-step Plan for Pence to Overturn the Election, supra* (emphasis added).

⁷¹ McCormack, *supra*.

⁷² *Id.*; Woodward & Costa, *supra*, at 203.

⁷³ McCormack, *supra*.

⁷⁴ *Id.*

⁷⁵ John Eastman, *John Eastman: Here’s the advice I actually gave Vice President Pence on the 2020 election, supra*; McCormack, *supra*.

⁷⁶ McCormack, *supra*.

⁷⁷ *Id.*

⁷⁸ Rick Hasen (@rickhasen), Twitter (Oct. 22, 2021, 10:08 am), https://twitter.com/rickhasen/status/1451551051417473027?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1451551051417473027%7Ctwgr%5E%7Ctwcon%5Es1_&ref

By asking that the bar judge a lawyer's written legal advice not based on what it explicitly recommends but rather on what the lawyer may (or may not) have orally stated in a client meeting, Mr. Eastman's defense threatens the rule of law, both because it ignores the fact that lawyers have an affirmative obligation to ensure their legal opinions analyze options provided to clients, and because it would provide an all-too-easy end run around professional regulation.⁷⁹

Indeed, as Cummings explains, "if that were enough to avoid professional sanction for a written legal product, then every smoking gun memo demonstrating lawyer misconduct could be waved away by the same convenient disclaimer that the advice on the page was not what the lawyer *really* meant to convey."⁸⁰

Consistent with those observations, in our initial complaint we identified information strongly suggesting that this account of Mr. Eastman's oral advice on the power to exclude Biden electors is itself false or misleading, and that Mr. Eastman and Mr. Trump in fact led with and pressed the power-to-exclude claim, abandoning it only when it was clear that Mr. Pence was not having any of it.⁸¹ The new information strongly confirming that conclusion includes:

- Mr. Eastman's unqualified January 2 statement on the Steve Bannon radio show that the Vice President had the power not to count the electors;⁸²
- Mr. Eastman's unqualified statements on the Larry Elder Show on January 4, the day he first met with Mr. Pence, that the "buck stops with the Vice President,"⁸³ and that the case for the Vice President's power to reject electors was "very compelling," because "this level of corruption just can't be allowed to stand,"⁸⁴
- The *Post's* and *National Review's* accounts, that the initial position of Mr. Trump and his advisers was to reject the Biden electors and that any subsequent concessions that Mr. Eastman made concerning the power to reject were made only after push back from Mr. Pence and his staff;⁸⁵
- The personal recollection of Mr. Pence's chief counsel, who describes the initial advice given by Mr. Trump's outside lawyers, including Mr. Eastman, as "snake oil," states that, to his knowledge, Mr. Eastman never told the President, his client, of the theory's

[url=https%3A%2F%2Fwww.alternet.org%2F2021%2F10%2Fjohn-Mr.%20Eastman-2655347453%2F.](https://www.alternet.org/2021/10/john-mr-eastman-2655347453/)

⁷⁹ Scott Cummings, *The Lawyer Behind Trump's Infamous Jan. 6 Memo Has a Galling New Defense*, Slate (Oct. 20, 2021), <https://slate.com/news-and-politics/2021/10/eastman-jan-6-trump-memo-defense.html> (emphasis in original).

⁸⁰ *Id.*

⁸¹ Bundy & States United Democracy Center, *supra*, at 23.

⁸² The Thinking Conservative, *supra*.

⁸³ The Larry Elder Show, *supra*.

⁸⁴ Kaczynski & Steck, *supra*.

⁸⁵ McCormack, *supra*; Dawsey et al., *supra*.

“overwhelming drawbacks and limitations,” and suggests that any more moderate version of Mr. Eastman’s advice on the exclusion point was wrung from him as a concession;⁸⁶

- Mr. Trump’s tweet, on January 5, that the Vice President has the power to reject fraudulently chosen electors;⁸⁷ and
- Mr. Trump’s January 5 pressuring of Mr. Pence to throw the Biden electors out.⁸⁸

This information demonstrates conclusively that the question of what advice Mr. Eastman actually gave on the exclusion of votes issue cannot be resolved without an investigation. It also strongly suggests that in an effort to minimize his conduct and advice to Mr. Trump, Mr. Eastman has engaged in additional acts of dishonesty, an issue which we discuss further in Part III.

Finally, Mr. Eastman has not backed away at all from his memoranda’s unqualified claim that the Constitution also gave the Vice President unreviewable authority to adjourn the Joint Session and postpone the count, in violation of the Electoral Count Act and the Concurrent Resolution, over congressional objection. In fact, with the benefit of new information, we can now see that Mr. Eastman pressed that claim strongly in a meeting with Mr. Jacob on January 5,⁸⁹ in his speech at the National Mall on January 6,⁹⁰ and in subsequent email communications renewing the argument when the Joint Session resumed after the violent attack on the Capitol, which sought to use the brief timing delays that were a direct consequence of the attack as an additional basis for Mr. Pence to violate the law.⁹¹

B. The Additional Information Confirms that Mr. Eastman’s Advice was False and Misleading

The additional information provided herein also strongly reinforces our October 4 Complaint’s allegations that Mr. Eastman’s advice was false or misleading, claiming to be based on a constitutional “fact” that had little or no basis in actual fact or law. Mr. Eastman’s advice that the Vice President could unilaterally disregard provisions of the Electoral Count Act to exclude certified presidential electors—and necessarily disenfranchise tens of millions of voters—had no basis in any plausible interpretation of the law. Likewise, Mr. Eastman’s fallback advice that Mr. Pence could unilaterally delay the counting of electoral votes by adjourning the Joint Session of Congress—without the assent of Congress—is similarly false and misleading. Moreover, Mr. Eastman predicated his legal advice on factual allegations concerning pending disputes and “dual slates of electors”⁹² that were demonstrably untrue. The reality was that each state had sent only one slate of electors to the Joint Session.

⁸⁶ *Read: Pence aide Greg Jacob’s draft opinion article denouncing Trump’s outside lawyers, supra.*

⁸⁷ Trump (@realDonaldTrump), *supra*.

⁸⁸ McCormack, *supra*.

⁸⁹ Dawsey et al., *supra*.

⁹⁰ Bundy & States United Democracy Center, *supra*, at 16-17, 23.

⁹¹ Dawsey et al., *supra*.

⁹² *READ: Trump Lawyer’s Full Memo on Plan for Pence to Overturn the Election, supra.*

1. *Unilateral Power to Exclude*

Since the filing of the Complaint, scholars and lawyers have analyzed the accuracy of Mr. Eastman’s advice concerning the “fact” of the Vice President’s unilateral power to override the provisions of the Electoral Count Act and the Concurrent Resolution to exclude votes, wholly disenfranchising the people of seven states. The uniform conclusion has been that that advice was both false and misleading.⁹³ The reasons for that conclusion include, among others:

First, Mr. Eastman’s arguments for the unconstitutionality of the Electoral Count Act were either irrelevant or directly refuted by the Constitution itself.⁹⁴

Second, the theory that the Vice President had unilateral power here violates the bedrock constitutional principle that “[n]o man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.”⁹⁵ Indeed, Mr. Eastman himself has acknowledged, belatedly, that one reason this argument “doesn’t make a whole lot of sense” was because “we know the vice president is very likely to be one of the contenders for the office that he’ll be deciding.”⁹⁶

Third, the theory relies on language in the 12th Amendment that is properly understood as implicitly *denying* the Vice President unilateral authority over any aspect of the electoral count.⁹⁷

Fourth, the theory is inconsistent with historical practice at the time of the 12th Amendment, which shows that congressional tellers had a substantial role in the counting of votes and that, when legislation was considered to clarify how disputes about the count should be resolved, Congress, rather than the President of the Senate, was viewed as having constitutional power to resolve disputes about the count.⁹⁸

⁹³ Indeed, as we noted in our October 4 Complaint, 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. *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 (Jan. 4, 2021), <https://statesuniteddemocracy.org/wp-content/uploads/2021/01/VPP-Guide-to-Counting-Electoral-Votes.pdf>.

⁹⁴ Matthew A. Seligman, *The Vice President’s Non-Existent Power to Reject Electoral Votes* 9-12 (Draft Essay, October 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3939020.

⁹⁵ The Federalist No. 10, *supra*; Seligman, *supra*, at 29-30.

⁹⁶ McCormack, *supra*.

⁹⁷ Seligman, *supra*, at 11-13.

⁹⁸ *Id.* at 13-25. This practice is entirely consistent with the Framers’ view of the role of the Vice President when acting as President of the Senate. Article I, Section 3 is the only explicit grant of authority to the Vice President in the Constitution, and even there he is only given the very limited power to vote in the event of a tie in the Senate. U.S. Const. Article I, Sec. 3, Cl. 4. The Framers and the drafters of the 12th Amendment were aware of how to draft provisions that give the Vice President substantive power to determine outcomes. They did not do so with regard to counting electoral votes.

Fifth, the theory misinterprets the actions of Vice Presidents John Adams and Thomas Jefferson in connection with the electoral counts in 1797 and 1801, respectively, a point discussed further below.

Sixth, the theory casts aside more than 200 years of practice in which only Congress has ever attempted to exercise the power to exclude votes from an unopposed slate of electors, and in which that power has been fully exercised only rarely (and never in the past 148 years) and then only in circumstances not remotely at issue here: to exclude a fraction of a state's electoral votes that had been cast for a dead man, and even then by a closely divided vote.⁹⁹

Seventh, Mr. Eastman's advice fails to mention any of the overwhelming and predictable legal, factual, and practical objections to his position.¹⁰⁰

Since we filed our complaint, Mr. Eastman has at times appeared to agree that the theory is beyond the pale, describing the claim of unilateral power to exclude as “crazy,”¹⁰¹ or even admitting that the Vice President does not have that power.¹⁰² But at other times, he has claimed that his advice was correct and was rejected solely because of Mr. Pence's “establishment” values.¹⁰³

On those occasions when Mr. Eastman has chosen to defend his advice, he has cited to three earlier elections in which, he claims, the Vice President exercised unilateral authority to determine the validity of disputed electoral votes: 1797 (John Adams), 1801 (Thomas Jefferson), and 1961 (Richard Nixon), and “several scholarly articles written after the 2000 election.”¹⁰⁴

As others have shown in detail,¹⁰⁵ however, the three earlier elections provide no support whatsoever for Mr. Eastman's claim. First, none of those decisions were made unilaterally.

⁹⁹ This history is recounted in Vasana Kesavan, *Is the Electoral Count Act Unconstitutional*, 80 N.C. L. Rev. 1653, 1664-92 (2002). According to that account, the sole case of full exclusion involved three of Georgia's eleven electoral votes in the election of 1872, which had been cast for Horace Greeley, the Liberal Democratic candidate. Greeley had died between Election Day and the electoral college vote. *Id.* at 1687. On two other occasions, Congressional objections to votes from states that had been admitted to the Union after the Electoral College vote led to a conditional count, in which the final tallies were reported both including and excluding the challenged votes. Because the contested electoral votes turned out not to be outcome determinative, the controversies were never fully resolved. *Id.* at 1681-85.

¹⁰⁰ Ned Foley, *Initial Reaction to the Eastman Memo*, Election Law Blog (Sept. 21, 2021), <https://electionlawblog.org/?p=124705>.

¹⁰¹ McCormack, *supra*.

¹⁰² *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/>; Lawrence Lessig, *Dear John Eastman: Not So Fast* (October 10, 2021) <https://medium.lessig.org/dear-john-eastman-not-so-fast-7f65ab1c7485>.

¹⁰³ Windsor (@lawindsor), Twitter (Oct. 26, 2021, 5:27 pm), *supra*.

¹⁰⁴ John Eastman, *John Eastman: Here's the advice I actually gave Vice President Pence on the 2020 election*, *supra*.

¹⁰⁵ Seligman, *supra*, at 13-25; Lessig, *supra*.

Congressional tellers participated directly and substantially in all three cases, and in 1961 Vice President Richard Nixon explicitly sought and obtained the consent of the Joint Session to the counting. Second, in none of the three cases was there a dispute regarding the decision to count the votes. Although the facts concerning the three returns were known to all, and in two of the elections the votes counted were outcome determinative, not a single member of the Joint Session objected to counting the votes. Third, and most critically, none of the three cases involved the grave decision to disallow a single slate of electors from a state, thereby depriving the people of that state of any voice in the selection of a President. Instead, in all three cases the effect of the decision was to admit votes that all present recognized as accurately reflecting the political preferences of the state in question. None of these cases even remotely suggest that the Constitution gives the Vice President unilateral, unreviewable authority to disallow a single slate of electors from a state, disenfranchising the people of that state, even if Congress opposes that decision.

Mr. Eastman has also pointed to “several articles written after the 2000 election” as supporting his claim. One reason he may have been motivated to choose that date is that during the 2000 election he gave expert testimony stating, without qualification, that the Constitution delegated the power to resolve disputes about the electoral count to Congress.¹⁰⁶ He has not identified those articles, but we have reviewed the existing scholarly literature with his claims in mind. Our review found no scholar who endorses Mr. Eastman’s claims about the Vice President’s unilateral and unreviewable power to disenfranchise the voters of a state on the basis of claims that have been rejected in court and in the face of a contrary determination by Congress. Indeed, we have found only one scholar who explicitly considered the possibility that a Vice President might be tempted to follow the course that Mr. Eastman urged here by refusing to count an unopposed slate of electors from a state over Congressional objection.¹⁰⁷ His conclusion: such a claim would be “far-fetched to beyond the stretch of imagination” and “impossible” for Mr. Pence to win.¹⁰⁸

Mr. Eastman’s advice about the Vice President’s power to exclude was thus false and misleading in two ways: first, it announced as a “fact” a legal theory that had little or no support and was “far-fetched beyond the stretch of imagination;” and, second, it omitted all of the legal objections to, and practical problems with, that theory.

Indeed, the criticism of Mr. Eastman’s analysis is not just recent. Two well-known conservative lawyers—former federal Judge J. Michael Luttig and former Justice Department

¹⁰⁶ Bundy & States United Democracy Center, *supra*, at 14.

¹⁰⁷ Edward B. Foley, *Preparing for a Disputed Presidential Election: An Exercise in Election Risk Assessment and Management*, 51 Loy. U. Chi. L. J. 309, (2020).

¹⁰⁸ *Id.* at 329 & n. 46, 330. There is striking internal textual evidence that Mr. Eastman used this article in preparing his memoranda, while ignoring its conclusions. Professor Foley describes the “howls of protest by the Democrats” in response to a different scenario in which truly competing electoral slates are presented from a state and the Vice President rules that neither can be counted. *Id.* at 336. In discussing the Democratic reaction to the same scenario in his first memorandum, Mr. Eastman writes: “Howls, of course, from the Democrats.” Mr. Eastman edited this language out of the second memorandum.

official John Yoo—contemporaneously advised Mr. Pence’s staff that Mr. Eastman’s theories were unsupportable.¹⁰⁹ John Yoo told the *Washington Post* that he “advised that there was no factual basis for Mike Pence to intervene and overturn the results of the election,” particularly because no state had sent two different slates of electors.¹¹⁰ And Judge J. Michael Luttig, a well-known former Fourth Circuit judge for whom Mr. Eastman had clerked early in his career, told Mr. Pence’s staff, both on January 4 and subsequently, that Mr. Eastman’s two-page memo was “incorrect,” that his legal analysis and advice was wrong “at every turn,” and that Mr. Eastman’s suggestion that the Vice President could delay the electoral vote count was also wrong.¹¹¹

2. *Adjourning the Joint Session*

In defending his conduct, Mr. Eastman has presented his claim that the Vice President had unilateral power to ignore the timing provisions of the Electoral Count Act and adjourn the Joint Session as a minor matter.¹¹² But in fact, it is equally false and dangerous.

The Constitution, the Electoral Count Act, the standing rules of both Houses, and the Concurrent Resolution regulate adjourning, recessing, or dissolving Congress, including when it is in Joint Session.¹¹³ The Electoral Count Act provides that “joint meeting shall not be dissolved until the count of electoral votes shall be completed and the result declared.”¹¹⁴ And it limits the power to declare a recess to situations where “a question shall have arisen in regard to counting any such votes, or otherwise under this subchapter” and the Houses have divided to address it.¹¹⁵ Where such a question has arisen, either House may “direct a recess of such House not beyond the next calendar day, Sunday excepted, at the hour of 10 o’clock in the forenoon.”¹¹⁶ The statutory authorization to declare an overnight recess is limited. If the count has not been completed “before the fifth calendar day next after such first meeting of the two Houses, no further or other recess shall be taken by either House.”¹¹⁷ These provisions of the Act are incorporated by reference in the Concurrent Resolution enacted to govern the Joint Session.¹¹⁸ Any effort by Mr. Pence to adjourn the Joint Session would have violated this portion of the statute and the Concurrent Resolution. Such a violation could only have been justified if the Constitution clearly vested the power to adjourn in the Vice President. Mr. Eastman’s memorandum suggested that was the case and that the Vice President should exercise his “authority under the 12th Amendment” to declare the statute void. This argument, however, had no legal support. The 12th Amendment says nothing about adjournments of the Joint Session or

¹⁰⁹ Alemany et al., *Ahead of Jan. 6*, *supra*.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² John Eastman, *John Eastman: Here’s the advice I actually gave Vice President Pence on the 2020 election*, *supra*.

¹¹³ 3 U.S.C. §16.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ S. Con. Res. 1, 117th Cong. (2021).

who has power to make them happen, and the only power it expressly confers on the President of the Senate is the power to open the certificates, prior to counting.¹¹⁹

The reality is that all relevant constitutional and legal authority indicates that Congress, and not the Executive, determines when Congress will recess or adjourn. The Framers were keenly aware that the British Crown had the power to prorogue or dissolve Parliament and had regularly used that power strategically to frustrate the operation of representative government and consolidate its own power.¹²⁰ Thus, the Constitution *explicitly* vests the power to adjourn Congress in that body. In fact, it is so protective of the adjournment power that neither chamber can adjourn for longer than three days without the consent of the other, and it explicitly states that adjournment resolutions are *not* to be presented to the President.¹²¹ The role of the executive in adjournments is narrowly and precisely limited to one situation only: “[t]he “President can only adjourn the national legislature in the single case of disagreement [between the Houses] about the time of adjournment.”¹²² No President has ever exercised this power.

Article I, Section 5, Cl. 2 of the Constitution also confers each House of Congress the power to make its own rules. By rule, each House of Congress has chosen to exercise its constitutional power to adjourn as a collective body.¹²³ The President of the Senate’s *only* role in the process is to break tie votes on adjournment.¹²⁴

The Joint Session was governed by a Concurrent Resolution which, in turn, expressly incorporated provisions of the Electoral Count Act, including the timing discussed above, which give the President of the Senate no role in adjournment.¹²⁵ Those timing rules therefore have the same constitutional force as those that the two Houses adopt for the conduct of their regular business.

These textual and structural arguments against the unilateral power to adjourn theory have special force in the case of an adjournment of the Joint Session to count electoral votes, because, as the drafters of the relevant language in Article I, II, and the 12th Amendment recognized, that meeting was central to the orderly transition of power, and delay in conducting it increased the risk that the process would be corrupted by domestic intrigue and foreign influence or by an incumbent President seeking to extend his tenure.¹²⁶ The timing provisions of

¹¹⁹ U.S. Const. amend. XII

¹²⁰ The Federalist No. 69 (Alexander Hamilton).

¹²¹ U.S. Const. art. I, § 5, cl. 4; art. 1, § 7, cl. 3.

¹²² U.S. Const. art. II, § 3; *see also* The Federalist No. 69, *supra*.

¹²³ S. Doc. No. 101-28, *Riddick’s Senate Procedure: Precedents and Practices*, at 1-23 (1992).

¹²⁴ U.S. Const. art. I, § 3. *See also* S. Doc. No. 101-28 at 1394-96, *id.* We could not find a record of a Vice President ever voting on an adjournment resolution.

¹²⁵ S. Con. Res. 1, 117th Cong. (2021).

¹²⁶ 10 Annals of Cong. 138 (1800) (remarks of Senator Pinckney, adjournment would expose the process to “secret and artful attacks” on its integrity); 2 The Records of the Federal Convention of 1787, at 502 (Max Farrand ed., Yale Univ. Press, 1911) (Remarks of James Wilson, citing the danger of corruption from delay); Horatius, *The Presidential Knot*, Wash. Federalist, Jan. 6, 1801) (adjournment increases the risk of “intrigue and corruption”). This concern was expressly

the Electoral Count Act, also incorporated in the Concurrent Resolution governing the Joint Session, clearly reflect those concerns. Giving the Vice President, a subordinate and ally of the sitting President, exclusive power to declare those provisions unconstitutional, and to unilaterally adjourn the Joint Session would have been radically inconsistent with all of those authorities. In effect, it would have allowed a sitting President, facing certain defeat, to postpone the day of reckoning while seeking to engineer a reversal of fortune, creating fertile soil for precisely the kind of corruption that the Framers sought to prevent. This was, of course, precisely what Mr. Trump and Mr. Eastman aimed to achieve.

In short, Mr. Eastman's claim that it was a "fact" that the Constitution conferred authority on the Vice President to adjourn the Joint Session, in violation of the Constitution, the Electoral Count Act, the Concurrent Resolution, and without regard for Congress's assent, appears to have no legal foundation at all.

Mr. Eastman's response is not to defend this advice on the merits but instead to argue that the issue is a technical one and that any delay would have been brief, on the order of one week.¹²⁷ By January 6, more than two months had passed since the election without any proof of widespread fraud, and the inauguration was two weeks away. Moreover, a delay of a week would have been entirely insufficient to conduct "a comprehensive audit/investigation of the election returns in their states," as Mr. Eastman called for in his six-page memorandum.¹²⁸ Any "comprehensive audit/investigation" by state legislators likely would have taken months to complete. This is confirmed by the purported election reviews led by proponents of Mr. Trump's false claims of election fraud that have taken place in states around the country in 2021. Many are still ongoing more than a year after the election.¹²⁹

stated in connection with the need for immediacy in holding the vote of the House of Representatives in the event that no candidate achieved a majority. But it obviously applies to adjournments more broadly.

¹²⁷ Sandy Rios in the Morning, *Tracey Miller Discusses Pfizer Vaccine Used is Not Fully FDA Approved and John Eastman Discusses January 6th Incidents and Aftermath*, American Family Radio (Oct. 15, 2021) <https://afr.net/podcasts/sandy-rios-in-the-morning/2021/october/tracey-miller-discusses-pfizer-vaccine-used-is-not-fully-fda-approved-and-john-eastman-discusses-january-6th-incidents-and-aftermath/>.

¹²⁸ *READ: Trump Lawyer's Full Memo on Plan for Pence to Overturn the Election, supra.*

¹²⁹ The so-called election review in Maricopa County was supposed to be completed by the middle of May, but the final report was not released until the end of September, nearly eleven months after the election and more than five months later than promised. Jane C. Timm, *Months behind schedule, Arizona election auditors extend lease again*, NBC News (July 1, 2021), <https://www.nbcnews.com/politics/elections/months-behind-schedule-arizona-election-auditors-extend-lease-again-n1272948>; Eric Bradner & Anna-Maja Rappard, *Final report from partisan Arizona review confirms Biden defeated Trump in Maricopa County last November*, CNN (Sept. 24, 2021), <https://www.cnn.com/2021/09/24/politics/arizona-election-review-results/index.html>. An election review led by Trump loyalists in Wisconsin has also been beset by delays and now the Speaker of the House there says that the investigation could continue until sometime in 2022, well more than a year after the election. Scott Bauer, *Vos says more subpoenas, longer election*

Even modest delays in the count pose grave constitutional dangers. As a matter of long-standing tradition and constitutional design, the electoral count is supposed to happen expeditiously. It comes after an extended period in which the candidates have been free to challenge the election results in all the ways available to them, after a recognized safe harbor period has passed, and only a short time before the formal transition of power. At that point, any delay in the count has the potential to be profoundly damaging to national interests, not just because it puts in question who is, or will be, the commander in chief, but because a delay opens up the orderly and lawful process for selecting the President to late-stage interference at the hands of a sitting President who still controls all the levers of the national government.

The danger of delay has been demonstrated by Mr. Trump's actions in the year since the election. Mr. Trump has still refused to accept the outcome, highlighting the extreme danger of Mr. Eastman's actions. As evidenced in Georgia, Arizona, Pennsylvania and elsewhere, former-President Trump has shown he will seize on any false claim to incorrectly declare that he was the rightful winner of the election, even nearly a year after the election.

In September 2021, more than ten months after the election, former-President Trump sent Georgia Secretary of State Brad Raffensperger a letter falsely asserting that there had been fraud in the Georgia election and demanding that Secretary Raffensperger “start the process of decertifying the Election, or whatever the correct legal remedy is, and announce the true winner.”¹³⁰ This was a continuation of the pressure that Mr. Trump had infamously put on Secretary Raffensperger prior to the January 6 certification when then-President Trump called Secretary Raffensperger and pressured him to “find” 11,780 votes—one more than Joe Biden's margin of victory in Georgia. During the call, then-President Trump told Secretary Raffensperger that “there's nothing wrong with saying, you know, that you've recalculated.”¹³¹

And in Arizona, the widely discredited Cyber Ninjas report concluded that even by its own measures Joe Biden won Maricopa County.¹³² But that still did not stop former-President

probe possible, Associated Press (Oct. 26, 2021), <https://apnews.com/article/elections-wisconsin-presidential-elections-election-2020-subpoenas-a6f4deba4667cac699bb14485b8a0335>. And a similar election review in Pennsylvania seeking the personal records of 9 million voters in the state has also been ongoing for months with no end in sight more than a year after the election; the Committee investigating has not even selected the vendor it will use for its “audit” yet. *Marley Parish, Pa. GOP lawmaker vowed transparency, but negotiations for election probe are private*, Pennsylvania Capital-Star (Oct. 20, 2021), <https://www.penncapital-star.com/government-politics/pa-gop-lawmaker-vowed-transparency-but-negotiations-for-election-probe-are-private/>.

¹³⁰ Liz Harrington (@realLizUSA), Twitter (Sept. 17, 2021, 11:22 AM), <https://twitter.com/realLizUSA/status/1438886054380154884/photo/1>.

¹³¹ John Bowden, *Trump asked Georgia secretary of state to 'find' 11.7k ballots, recalculate election result*, The Hill (Jan. 3, 2021), <https://thehill.com/homenews/administration/532433-trump-asked-georgia-secretary-of-state-to-find-116k-ballots>.

¹³² See *Analysis of Senate Review: Ballots (Section 5)*, Maricopa County (last updated Oct. 6, 2021), <https://recorder.maricopa.gov/justthefacts/pdf/Maricopa%20County%20Analysis%20of%20Sena>

Trump from declaring at a rally in late September, nearly eleven months after the election, that: “[i]t is clear, in Arizona that they must decertify the election, you heard the numbers.”¹³³

Further, at the end of October, nearly one full year after the election, the former President wrote a letter to the editor published in the *Wall Street Journal* asserting baseless conspiracy theories, and arguing that Pennsylvania’s election “was rigged” due to “determinative [sic] voter fraud,” “corruption,” and “voter irregularities.”¹³⁴ Shortly after publishing the letter, the *Wall Street Journal* ran an editorial debunking former-President Trump’s claims and explaining why those claims were “bananas.”¹³⁵

Mr. Eastman’s suggestion that delaying the constitutionally required counting of the Electoral College votes would have been a minor or technical matter confirms his indifference to the constitutional, legal, and ethical principles at stake. And he was, at a minimum, willfully blind to how his client, Mr. Trump, would utilize those delays in his quest to stay in power despite the results of the election.

3. *Grounds for Investigation*

Our October 4 Complaint showed how Mr. Eastman’s memoranda offered multiple false and misleading factual claims that were intended to provide cover for the lawless course of action he wanted Mr. Pence to take, including false assertions of outright fraud, false claims concerning ongoing disputes, and false claims concerning dual slates of electors in the swing states. Since the filing of the Complaint, we have been able to identify additional information concerning those issues.

a. *False Claims of Continuing Disputes*

Mr. Eastman’s second memorandum sought to justify the lawless course that he was advising with baseless charges of fraud and illegality in six states, while omitting any mention of the many legal cases where those claims had been rejected. In addition, he sought to strengthen those more general allegations by providing “a sampling of the more significant violations” of

[te%20Review%20%E2%80%93%20Cyber%20Ninja%20Report.pdf](https://www.azcentral.com/story/news/politics/elections/2021/10/11/new-arizona-audit-review-shows-cyber-ninjas-ballot-count-off-312-k/6094144001/); Robert Anglen, *New Arizona audit review shows Cyber Ninjas didn’t count 312k ballots, double counted 23k*, *The Arizona Republic* (Oct. 11, 2021), <https://www.azcentral.com/story/news/politics/elections/2021/10/11/new-arizona-audit-review-shows-cyber-ninjas-ballot-count-off-312-k/6094144001/>; Michael Wines & Nick Corasaniti, *Arizona Vote Review ‘Made Up the Numbers,’ Election Experts Say*, *N.Y. Times* (Oct. 1, 2021), <https://www.nytimes.com/2021/10/01/us/arizona-election-review.html>.

¹³³ Jeremy Herb & Fredreka Schouten, *‘We won’: Trump and his allies barrel ahead with election lies despite Arizona review confirming his loss*, *CNN* (Sept. 27, 2021), <https://www.cnn.com/2021/09/27/politics/arizona-trump-election-lies/index.html>.

¹³⁴ Donald Trump, *President Trump Responds on Pennsylvania’s 2020 Election*, *Wall Street Journal* (Oct. 27, 2021), https://www.wsj.com/articles/president-donald-trump-2020-election-fraud-pennsylvania-ballots-11635280347?mod=article_inline.

¹³⁵ See Editorial Board, *The Facts on Trump’s Fraud Letter*, *Wall Street Journal* (Oct. 28, 2021), <https://www.wsj.com/articles/the-facts-on-donald-trumps-fraud-letter-2020-election-11635449578>.

state election law that he claimed warranted action by the Vice President.¹³⁶ The implication of this presentation was that there continued to be active, meritorious, and timely disputes implicating the legality of the relevant state's elections that could provide Mr. Pence with a basis for rejecting those ballots as "disputed."

The reality, however, was that by the time of his memorandum, essentially every significant legal challenge to the election that could have conceivably altered the award of presidential electors had been resolved. To make his argument, Mr. Eastman had to conceal that fact. So he systematically omitted any information that would have tended to show that the claims he described either lacked merit or were untimely.

In some cases, Mr. Eastman omitted information that would have shown that the claims involved had already been heard and rejected on the merits. For instance, in his description of the open issues in the federal case of *Trump v. Kemp*, Mr. Eastman asserted that the Georgia Secretary of State had unlawfully "altered signature verification requirements via an unauthorized settlement agreement." Mr. Eastman omitted the fact that that claim had already been rejected by a federal court.¹³⁷ Similarly, Mr. Eastman claimed that in Michigan, absentee ballots were unlawfully mailed to "every registered voter, contrary to statutory requirement that voter [sic] apply for absentee ballots," while omitting that the claim had already been rejected.¹³⁸

In other cases, Mr. Eastman omitted information showing that the claims described were untimely. For instance, Mr. Eastman's description of the allegations in *Trump v. Kemp* alleges that in Georgia a court had refused "to even assign a judge to hear the statutorily-authorized election challenge brought by the Trump campaign on Dec. 4," while omitting the fact that the Trump campaign had delayed over two weeks before filing any challenge, had subsequently withdrawn its motion for emergency relief, and had then failed to take basic steps to perfect its claim. A federal court subsequently noted that the Trump campaign was "dilatatory" in seeking to contest the election.¹³⁹

Similarly, Mr. Eastman's claim that there were continuing disputes in Pennsylvania relied on a consolidated petition for certiorari that he had personally filed on December 20, while not disclosing that the underlying decisions in the lower courts had been handed down in the Pennsylvania Supreme Court on October 23, November 17 and November 23, and that the cases had then been effectively abandoned by the Trump campaign before Mr. Eastman decided to

¹³⁶ READ: *Trump Lawyer's Full Memo on Plan for Pence to Overturn the Election, supra*.

¹³⁷ *Wood v. Raffensperger*, 501 F. Supp. 3d 1310, 1328 (N.D. Ga. 2020), *aff'd*, 981 F.3d 1307 (11th Cir. 2020).

¹³⁸ Mr. Eastman's assertion that absentee *ballots* were sent to every registered voter in Michigan is false. See Amy Sherman, *Trump falsely claims Michigan illegally sent ballots to all voters*, PolitiFact (May 20, 2020), <https://www.politifact.com/factchecks/2020/may/20/donald-trump/trump-falsely-claims-michigan-sent-ballots-all-vot/>. To the extent Mr. Eastman was asserting that absentee ballot *applications* were improperly sent to all registered voters, that claim was litigated and rejected. See, e.g., *Davis v. Secretary of State*, 963 N.W.2d 653, 661 (Mich. Ct. App. 2020) (holding that Secretary of State was authorized to send absent-voter ballot applications to all registered voters in Michigan).

¹³⁹ See *Trump v. Kemp*, 511 F. Supp. 3d 1325, 1329, 1332 (N.D. Ga. 2021).

revive them. Unsurprisingly, the U.S. Supreme Court denied Mr. Eastman’s motion for expedited consideration¹⁴⁰ and then summarily denied the petition for certiorari.¹⁴¹

Finally, Mr. Eastman’s claim that there were continuing disputes in Wisconsin relied on a claim that Wisconsin had illegally used “human drop boxes” at a “Democracy in the Park” event from September 23 to October 23 in Madison, Wisconsin, without disclosing that those claims had already been rejected by the Wisconsin Supreme Court on the ground that Mr. Trump’s “delay in raising these issues was unreasonable in the extreme, and the resulting prejudice to the election officials, other candidates, voters of the affected counties, and to voters statewide, is obvious and immense.”¹⁴²

b. False Claims of Dual Slates of Electors

Both of Mr. Eastman’s memoranda also falsely state that there were “dual slates of electors from 7 states.” Mr. Eastman asserts that “Trump electors in the above 6 states (plus in New Mexico) met on December 14, cast their electoral votes, and transmitted those votes to” Vice President Pence. This claim was false.

Federal law is clear about the formal process to qualify as a state’s slate of electors. It is “the duty of the executive of each State, as soon as practicable after the conclusion of the appointment of the electors in such State by the final ascertainment, under and in pursuance of the laws of such State” to send a “certificate of ascertainment of the electors appointed, setting forth the names of such electors,” to the Archivist of the United States.¹⁴³

The groups of Trump supporters who met on December 14, 2020 and declared themselves presidential electors did not meet these legal requirements.¹⁴⁴ State legislatures and executives did not certify the alternate slates put forward by Mr. Trump’s allies in Wisconsin or any other state. Rather, in the words of a complaint filed with the Wisconsin Elections Commission, they “met without any legal mandate whatsoever and proceeded to undertake the duties Wisconsin and federal law assign to the state’s Presidential Electors.”¹⁴⁵ Thus, the alternate electors were nothing but Trump supporters claiming, without any legal authority, to be electors. Mr. Eastman’s statement to the contrary was plainly false.

¹⁴⁰ *Donald J. Trump for President, Inc. v. Boockvar*, 141 S. Ct. 1044 (2021).

¹⁴¹ *Donald J. Trump for President, Inc. v. Degraffenreid*, 141 S. Ct. 1451 (2021).

¹⁴² *Trump v. Biden*, 394 Wis. 2d 629, 639 (2020).

¹⁴³ See 3 U.S.C. § 6.

¹⁴⁴ Nick Corasaniti & Jim Rutenberg, *No, there aren’t ‘alternate electors’ who can vote for President Trump*, N.Y. Times (Dec. 15, 2020),

<https://www.nytimes.com/2020/12/15/technology/fake-dueling-slates-of-electors.html>.

¹⁴⁵ Complaint, *Sickel v. Hitt, et al.*, No. EL 21-12 (W.E.C. Feb. 15, 2021), available at <https://static1.squarespace.com/static/5f88891b1bd57b085dc121d1/t/602b1a26da388b185d7afc7d/1613437480065/Full+Sworn+Complaint+Paul+Sickel+SEIU+EL-1100+2.15.21.pdf>; Holmes Lybrand, *Fact check: Mr. Eastman’s arguments on overturning the 2020 election are pure fantasy*, CNN (Sept. 22, 2021), <https://www.cnn.com/2021/09/22/politics/trump-pence-election-memo-fact-check/index.html>.

C. The Additional Information Confirms that Mr. Eastman’s Advice Was Dishonest

Our October 4 complaint identified a number of reasons for concluding that Mr. Eastman’s advice was not only inaccurate, but dishonest. One of those reasons was the gravity, number, and systematic tilt of the factual and legal misstatements and omissions in Mr. Eastman’s advice. A second was the fact that, given those misstatement and omissions, the advice fell far short of even minimum standards of professional competence and independent judgment, let alone the high standards of professional expertise and scholarly knowledge to which Mr. Eastman professed to adhere and that Mr. Trump, with Mr. Eastman’s knowledge and consent, used to market his advice. These facts, we argued, when coupled with Mr. Eastman’s intelligence, strong credentials, and extensive experience, and his evident single-minded drive to overturn the election, supported an inference that his misstatements and omissions were deliberate.

The additional information presented above strengthens the claim that Mr. Eastman’s misstatements and omissions were knowing or reckless, in part because it confirms the severity and frequency and systematic tilt of his misstatements and omissions and the degree to which his advice departed from even minimal professional standards.

But the additional information also provides striking evidence of Mr. Eastman’s bad faith both from his own mouth and from eyewitnesses to his conduct:

- ***Mr. Eastman’s own conduct surrounding the events of January 6:*** Mr. Eastman claimed during his speech at the National Mall that Mr. Pence’s failure to adjourn the Joint Session would demonstrate that he was unworthy to hold the office of Vice President. He sent an email after the attack on the Capitol while Mr. Pence and his staff were still hiding from the mob, claiming that Mr. Pence’s decision to comply with the law rendered him responsible for that attack.¹⁴⁶ Later he sought to use the disruptions created by the attack as a further justification for the unlawful course he was urging on the Vice President. These are not the words and actions of a person who has participated in good faith in a respectful and honest discussion of legal issues. They are, however, wholly consistent with intentional or reckless indifference to the truth.
- ***Mr. Eastman’s Statements in His Own Defense:*** Mr. Eastman’s own implausible and constantly shifting account of his conduct provides additional reason to doubt his good faith. Significant elements of that account have been shown to be false—and much of the rest is directly contradicted by the other available sources of information.
- ***The Statements of Percipient Witnesses:*** Mr. Pence’s Chief Counsel, Greg Jacob, an experienced attorney, was an eyewitness to Mr. Eastman’s oral advice, which Mr. Eastman claims would exonerate him. But Mr. Jacob’s written account strongly confirms the allegations of the complaint. Mr. Jacob states that Mr. Eastman failed to meet his basic ethical obligations to his client “to ensure the President understood all of the legal

¹⁴⁶ Dawsey et al., *supra*.

and practical implications.”¹⁴⁷ That is especially true in a matter of this gravity. Jacob also suggests that this failure was wholly inconsistent with what one would have expected of a lawyer of Mr. Eastman’s claimed professional and scholarly standing. Finally, consistent with the complaint, he indicates his belief that this conduct was deliberate, describing Mr. Eastman’s advice as “snake oil” and likening him and his colleagues to Gríma Wormtongue, a literary character from J.R.R. Tolkien’s *Lord of the Rings* who is recognized as “an archetypal sycophant, flatterer, liar, and manipulator.”¹⁴⁸ Like our October 4 complaint, Jacob closes by suggesting the need for a state bar investigation.

Part III: The Additional Information Points to Additional Allegations Requiring Investigation

The information that has become public since our initial submission provides a strong basis for investigation of additional allegations of dishonesty against Mr. Eastman under Rule 4.1 (a), Rule 8.4 (c), and Business and Professions Code Sections 6068 (d) and 6106.

Since the filing of the complaint, Mr. Eastman has engaged in a wide-ranging public defense of his conduct that appears to be intended to forestall the proposed investigation. That defense, however, is riddled with material misstatements, omissions and half-truths, including misrepresentations of what the memoranda actually said, and false claims that the memoranda were “not being provided to Trump or Pence as my advice.”¹⁴⁹ Perhaps most important is Mr. Eastman’s repeated claim that the memoranda do not represent the advice that he actually gave to Mr. Pence on the question of the Vice President’s power to exclude votes. Since he published that defense, information has emerged from credible witnesses that Mr. Eastman’s initial advice to Mr. Pence was consistent with the memoranda, and that he moderated that advice involuntarily and only under cross examination. That would render his published defense of his conduct at best a half-truth, and one that was almost certainly intentional.

The additional information also provides substantial grounds to investigate whether, in preparing and delivering his advice, which was presented not just to his client Mr. Trump but to others such as Senator Lee and Mr. Pence and his staff, Mr. Eastman also violated Rule 1.1(a) by failing, through gross negligence, to perform legal services competently and Rule 2.1 by failing to “exercise independent judgment and render candid advice.” In that connection, in addition to the many misstatements and omissions in that advice detailed above, we note Professor Cummings’ assertion that the memoranda represent “egregiously bad lawyering” and fail to “demonstrate independent legal judgment,”¹⁵⁰ and Mr. Jacob’s point that Mr. Eastman’s advice

¹⁴⁷ *Read: Pence aide Greg Jacob’s draft opinion article denouncing Trump’s outside lawyers, supra.*

¹⁴⁸ *Gríma Wormtongue*, Wikipedia (last visited Nov. 16, 2021), https://en.wikipedia.org/wiki/Gr%C3%ADma_Wormtongue.

¹⁴⁹ McCormack, *supra*.

¹⁵⁰ Cummings, *supra*.

failed to address, in even the most minimal way the many objections to and practical problems with his position.¹⁵¹

Part IV: Additional Witnesses and Evidence that the Bar Should Consider as Part of its Investigation

The additional information described above points to a wealth of non-public information, not available to complainants, that the Bar should pursue as part of its investigation.

First, Mr. Eastman has made a series of inconsistent statements about the advice that he gave to Mr. Trump, Mr. Pence, and others in the days leading up to January 6, 2020, raising significant questions concerning his credibility.¹⁵² The State Bar need not and should not take those statements at face value. Rather, the State Bar should require Mr. Eastman to produce documents and answer questions about his work for Mr. Trump and any advice he provided concerning the electoral count. The attorney-client privilege will not be a bar to such inquiries because Mr. Trump has waived it. According to Mr. Eastman, Mr. Trump has authorized him to speak publicly about the memoranda and “January 6 scenario” he proposed.¹⁵³ Evidently, pursuant to that authorization, Mr. Eastman has already disclosed significant parts of the confidential advice he gave to Mr. Trump by releasing the six-page memorandum (marked as “PRIVILEGED AND CONFIDENTIAL”) and in his interviews and his own opinion piece.¹⁵⁴ Under the privilege law of every relevant jurisdiction, these extensive disclosures waive the privilege, making the content of all their communications on the subject discoverable by the State Bar.¹⁵⁵

¹⁵¹ *Read: Pence aide Greg Jacob’s draft opinion article denouncing Trump’s outside lawyers, supra.*

¹⁵² *See, e.g., Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001) (noting that “ordinary techniques of credibility evaluation” include “any inconsistent statements” in testimony (cleaned up)).

¹⁵³ *Discussing the John Eastman Memo with John Eastman, supra* (Mr. Eastman stated that Mr. Trump “has authorized me to talk about these things.”); *Peter Boyles May 5 8am*, Peter Boyles Show Podcast, at 14:07 (May 5, 2021) (streamed using Omny Studio), <https://omny.fm/shows/peter-boyles-show/peter-boyles-may-5-8am-1> (“I have express authorization from my client, the President of the United States at the time to describe what occurred.”); *see also* Letter from Chairman Bennie G. Thompson to John Eastman, *supra* (“In fact, you have stated publicly that President Trump has authorized you to discuss the matters at issue, thus waiving any applicable attorney-client and attorney work product privileges.”)

¹⁵⁴ John Eastman, *John Eastman: Here’s the advice I actually gave Vice President Pence on the 2020 election, supra.*

¹⁵⁵ *See* Cal. Evid. Code § 912; *see also Edmond J. Flynn Co. v. LaVay*, 431 A.2d 543, 551 (D.C. Ct. of Appeals 1981) (“Where a party authorizes the partial disclosure of materials otherwise subject to a valid claim of attorney-client privilege, the privilege must be treated as waived.”); *see also* Letter from Chairman Bennie G. Thompson to John Eastman, *supra* (“In fact, you have stated publicly that President Trump has authorized you to discuss the matters at issue, thus waiving any applicable attorney-client and attorney work product privileges.”)

Second, the State Bar should consider using its investigatory powers to contact others who were percipient witnesses of Mr. Eastman’s factual and legal representations in the lead up to January 6. These witnesses include:

- Greg Jacob, former Chief Counsel to then-Vice President Mike Pence who (as discussed above) had conversations with Mr. Eastman about Mr. Pence’s authority and wrote a draft op-ed about Mr. Eastman’s advice.
- Marc Short, former Chief of Staff to then-Vice President Pence, who (as discussed above) had conversations with Mr. Eastman about Mr. Pence’s authority; and
- Rudy Giuliani, who was also counsel to former-President Trump at the time and worked with Mr. Eastman.

Third, although there is more than sufficient independent evidence to justify opening an investigation, as the State Bar is undoubtedly aware, the House Select Committee on the January 6 insurrection recently issued a subpoena to Mr. Eastman. The subpoena seeks documents and testimony from Mr. Eastman because of his apparent role in “advising President Trump that Vice President Pence could determine which electors were recognized on January 6, a view that many of those who attacked the Capitol apparently also shared.”¹⁵⁶ Any information published by the Committee will likely be relevant to the State Bar’s evaluation of the Complaint.

* * *

For the reasons set forth above and in our October 4, 2021 Complaint, we respectfully reiterate our request that the State Bar of California open an ethics investigation into Mr. Eastman’s conduct.

Very Truly Yours,

Stephen Bundy (SBN 253017)
Professor of Law (Emeritus)*
University of California, Berkeley *and*
Former Chair of the State Bar of
California’s Committee on
Professional Rules and Conduct

* Titles and affiliations
for identification purposes only

STATES UNITED DEMOCRACY
CENTER

Christine P. Sun (SBN 218701)
Legal Director
Joanna Lydgate**
Chief Executive Officer
Norman Eisen**
Executive Chair, Board of Directors

Aaron Scherzer, Senior Counsel**
Katie Reisner, Senior Counsel**
Zack Goldberg, Counsel**

**Not admitted to the California Bar

¹⁵⁶Letter from Chairman Bennie G. Thompson to John Eastman, *supra*.

APPENDIX A

A chronological timeline of revelations of Mr. Eastman’s reported involvement follows:

10/2020	Claremont Institute War Game	<ul style="list-style-type: none"> • Mr. Eastman participates in a “war game” with the Claremont Institute where they predict that there may be a “struggle right up to the Jan. 6 joint session of Congress where the Electors’ ballots are unsealed. Uncertainty could extend even beyond this as decisions for both the presidency and vice presidency are battled out in Congress and before the U.S. Supreme Court.”¹⁵⁷
12/1/20 12/3/20	Eastman testifies before Georgia state senators	<ul style="list-style-type: none"> • Mr. Eastman testifies that this was a “failed election,” and that it was the “duty” of the Legislature to “adopt a slate of electors yourself.”¹⁵⁸
12/1/20	Eastman files motion to intervene in <i>Texas v. Pennsylvania</i>	<ul style="list-style-type: none"> • 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.”¹⁵⁹
12/25/20	Eastman writes a two-page memo labeled “privileged and confidential” ¹⁶⁰	<p>Mr. Eastman writes “here’s the scenario we propose:” and then lays out the following scenario:</p> <ul style="list-style-type: none"> • Vice President Pence would refuse to count ballots from each of seven unnamed states that had voted for President Biden on the basis of a false claim that there were “multiple slates of electors” in those states • In one option, “Pence then gavel[s] President Trump as re-elected.”¹⁶¹ • In the alternative, Mr. Pence would declare that no candidate had achieved the necessary majority,

¹⁵⁷ 79 Days to Inauguration Taskforce, *79 Days Report*, Claremont Institute & Texas Public Policy Foundation 2 (2020), <https://www.texaspolicy.com/wp-content/uploads/2020/10/79-Days-Report-8.pdf>.

¹⁵⁸ Claremont Institute, *John Eastman Testimony During Georgia Senate Election Hearing*, *supra*.

¹⁵⁹ Bill of Complaint at 6, *Texas v. Pennsylvania*, 141 S. Ct. 1230 (2020) (No. 22O155).

¹⁶⁰ *READ: Trump Lawyer’s Memo on Six-step Plan for Pence to Overturn the Election*, *supra*.

¹⁶¹ *Id.*

		<p>throwing the vote into the House, where then-President Trump would prevail.</p> <ul style="list-style-type: none"> • The 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. We should take all of our actions with that in mind”¹⁶²
1/2/21	Eastman, Trump, and Rudolph Giuliani speak to 300 state legislators	<ul style="list-style-type: none"> • Mr. Eastman, Mr. Trump, and Mr. Giuliani encourage the state legislators to decertify the properly appointed slate of electors and appoint new ones.¹⁶³ • Mr. Eastman told them that it was “the duty of the legislatures to fix this, this egregious conduct, and make sure that we’re not putting in the White House some guy that didn’t get elected.”¹⁶⁴
1/2/21	Eastman appears on Steve Bannon’s Radio Program	<p>Mr. Eastman said:</p> <ul style="list-style-type: none"> • “I think if the vice president as presiding over the joint session would at least agree that because those ongoing contests have not been resolved, we can’t count those electors, that means that nobody has a majority of the electors.” • “And either they delay things so those constitutional challenges are resolved. Or they say, Okay, well, we don’t have electors from those states that nobody has a majority this is going to the House.”¹⁶⁵ • And after saying that Mr. Pence had the authority to reject the Biden electors, Mr. Eastman said that whether Mr. Pence took action would depend on whether he had the necessary “courage and spine.”¹⁶⁶
1/3/21	Eastman writes six-page memo	<ul style="list-style-type: none"> • This memo elaborated on the scheme laid out in the two-page memo without altering the essential claim that “the Constitution assigns this power to the Vice President as the ultimate arbiter.”¹⁶⁷ • It includes a number of scenarios where then-Vice President Pence helps then-President Trump to prevail

¹⁶² *Id.*

¹⁶³ Alemany et al., *Ahead of Jan. 6*, *supra*.

¹⁶⁴ Letter from Chairman Bennie G. Thompson to John Eastman, *supra*.

¹⁶⁵ The Thinking Conservative, *supra*.

¹⁶⁶ *Id.*

¹⁶⁷ READ: Trump Lawyer’s Memo on Six-step Plan for Pence to Overturn the Election, *supra*.

		<p>in the election by either rejecting the electors from seven states that voted for Joe Biden or unilaterally adjourning the Joint Session of Congress without counting the votes.</p> <ul style="list-style-type: none"> • 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 flout existing election laws for partisan advantage,” and that “we’re no longer playing by Queensbury Rules, therefore.”¹⁶⁸
1/3/21-1/8/21	Eastman participates in war room at Willard Hotel	<ul style="list-style-type: none"> • Mr. Eastman joined what he called the “war room” at the Willard Hotel. • According to the Washington Post, the war room “sought to make the case to Pence and ramp up pressure on him to take actions on Jan. 6 that Mr. Eastman suggested were within his powers.”¹⁶⁹
1/4/21	Eastman appears on Larry Elder’s Radio Program	<ul style="list-style-type: none"> • In talking about the Vice President’s power to reject electors, Mr. Eastman said, “[t]his level of corruption just can’t be allowed to stand. And I think that makes, I think that makes the exercise of the vice president’s power here very compelling.”¹⁷⁰ • He also said that the “buck stops with the Vice President.”¹⁷¹
1/4/21	Oval Office Meeting	<ul style="list-style-type: none"> • Mr. Eastman argued that Pence “should at least try the maneuver of not certifying the Biden electors on Jan. 6, because it had never been done before, and so had not been ruled on by the courts.”¹⁷² • Mr. Eastman later claims that he argued in favor of delay during this meeting and that he tried to talk Mr. Trump out of encouraging Mr. Pence to reject the Biden electors. • Indeed, Mr. Eastman said, “[c]all me the white-knight hero here, talking [Trump] down from the more aggressive position.”¹⁷³ • But a source close to Pence told the National Review that Mr. Eastman only conceded that the argument for

¹⁶⁸ READ: *Trump Lawyer’s Full Memo on Plan for Pence to Overturn the Election, supra.*

¹⁶⁹ Alemany et al., *Ahead of Jan. 6, supra.*

¹⁷⁰ Kaczynski & Steck, *supra.*

¹⁷¹ The Larry Elder Show, *supra.*

¹⁷² Dawsey et al., *supra.* Mr. Eastman told The Post he did not recall making “any such statement.”

¹⁷³ McCormack, *supra.*

		rejection was weaker than delay under “cross-examination.” ¹⁷⁴
1/5/21	Meeting at the EEOB between Mr. Eastman and Pence aides Short and Jacob	<ul style="list-style-type: none"> • Mr. Eastman began the meeting by arguing that Pence should reject the Biden electors.¹⁷⁵ • According to Greg Jacob, former-Vice President Pence’s chief counsel, Mr. Eastman conceded that “not a single member of the Supreme Court would support his position,” that “230 years of historical practice were firmly against it,” and that “no reasonable person would create a rule that invested a single individual with unilateral authority to determine the validity of disputed electoral votes for President of the United States.”¹⁷⁶ Mr. Eastman denies that he said this.¹⁷⁷ • According to the Washington Post, it was not until the end of the two-hour meeting that Mr. Eastman “had conceded that having Pence reject Biden electors was not a good plan.”¹⁷⁸
1/5/21	Follow-up phone calls between Mr. Eastman and Pence staffers	<ul style="list-style-type: none"> • At this point, after it was clear that Mr. Pence would not reject the Biden electors, Mr. Eastman proposed that Pence take Mr. Eastman’s second option of delay. According to the Washington Post, Mr. Eastman told the advisers repeatedly that Pence could do so because the courts would invoke “the political question doctrine” and not intervene.¹⁷⁹
1/6/21	Mr. Eastman’s Speech on the National Mall	<ul style="list-style-type: none"> • Mr. Eastman claimed 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 [in Georgia], and it happened on November 3rd as well.”¹⁸⁰

¹⁷⁴ *Id.*

¹⁷⁵ Dawsey et al., *supra*.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *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> . 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>.

		<ul style="list-style-type: none"> • 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 our government, or not.”¹⁸¹ • Referring directly to Mr. Pence,¹⁸² 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.”¹⁸³
1/6/21	Mr. Eastman Emails Pence’s Chief Counsel Greg Jacob During the Insurrection	<ul style="list-style-type: none"> • He wrote: “[t]he ‘siege’ is because YOU and your boss did not do what was necessary to allow this to be aired in a public way so that the American people can see for themselves what happened.”¹⁸⁴
1/6/21	Mr. Eastman Sends Another Email to Jacob After the Insurrection	<ul style="list-style-type: none"> • The email argued that Pence should still not certify the results, using the insurrection itself as a new justification for doing so. • According to Mr. Eastman, “they had already violated the [E]lectoral [C]ount [A]ct by allowing debate to extend past the allotted two hours, and by not reconvening ‘immediately’ in joint session after the vote in the objection....[it] seemed that had already set the precedent that it was not an impediment.”¹⁸⁵
10/7/21	Mr. Eastman Writes <i>Sacramento Bee</i> Piece	<ul style="list-style-type: none"> • Eastman says that his two-page memo was “preliminary” and “incomplete.” He also asserted that

¹⁸¹ *Rudy Giuliani Speech Transcript at Trump’s Washington, D.C. Rally: Wants ‘Trial by Combat, supra.*

¹⁸² *Trump lawyer John Eastman: Rally, insurrection not connected, CNN, at 6:15 (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).*

¹⁸³ *Rudy Giuliani Speech Transcript at Trump’s Washington, D.C. Rally: Wants ‘Trial by Combat,’ supra.*

¹⁸⁴ Dawsey et al., *supra.*

¹⁸⁵ Dawsey et al., *supra.*

		“neither version of the memo reflects the advice I gave to then-Vice President Mike Pence.” ¹⁸⁶
10/22/21	Interview with <i>National Review</i>	<ul style="list-style-type: none"> • Mr. Eastman sharply criticized the theory he’d put forward in the two-page memo saying, “[s]o anybody who thinks that that’s a viable strategy is crazy.”¹⁸⁷ • “The memo was not being provided to Trump or Pence as my advice”; instead, he claimed that “[t]he memo was designed to outline every single possible scenario that had been floated, so that we could talk about it.”¹⁸⁸ • Mr. Eastman was asked about the line in both of his memos that read, “<i>The fact is that the Constitution assigns this power to the Vice President as the ultimate arbiter. We should take all of our actions with that in mind</i>” (emphases added). Mr. Eastman now said regarding the sentence he wrote, “This is where I disagree. I don’t think that’s true.”¹⁸⁹ And then he reiterated that “the argument that he is the final say is the weaker argument” and falsely claimed that he had only put that sentence in his two-page memo, when in reality the exact same sentence was in both memos.¹⁹⁰
10/23/21	Claremont Institute Gala	<ul style="list-style-type: none"> • Activist journalist Lauren Windsor taped a conversation with Mr. Eastman where she said that “all your legal reasoning [from his memoranda] is totally solid” and Mr. Eastman agreed saying, “yeah. There’s no question.” When Windsor asked “why do you think that Mike Pence didn’t do it?” Mr. Eastman said that Pence hadn’t taken his advice because “Mike Pence is an establishment guy at the end of the day.”¹⁹¹
10/29/21	<i>Washington Post</i> Interview	<ul style="list-style-type: none"> • Mr. Eastman claimed that he never advocated for Pence to reject the electors outright.¹⁹²
10/30/21	CNN Interview	<ul style="list-style-type: none"> • When questioned about why Mr. Eastman did not explain that rejecting the Biden electors was the weaker option during Bannon’s show on January 2, he had no explanation for why, saying simply, “That’s right. Because it was a radio show.”¹⁹³

¹⁸⁶ John Eastman, *John Eastman: Here’s the advice I actually gave Vice President Pence on the 2020 election, supra.*

¹⁸⁷ McCormack, *supra.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ Windsor (@lawindsor), Twitter (Oct. 26, 2021, 5:27 pm), *supra.*

¹⁹² Dawsey et al., *supra.*

¹⁹³ Kaczynski & Steck, *supra.*