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11  
12 **UNITED STATES DISTRICT COURT**  
13 **CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION**

14 JOHN C. EASTMAN,

15 *Plaintiff,*

16 vs.

17 BENNIE G. THOMPSON, *et al.*

18 *Defendants*

Case No.: 8:22-cv-00099-DOC-DFM

**PLAINTIFF’S BRIEF IN SUPPORT OF  
PRIVILEGE ASSERTIONS**

Date: March 9, 2022

Time: 9:00 a.m.

Judge: Hon. David O. Carter

Magistrate Judge: Hon. Douglas F.

McCormick

Crtrm.: 9D

Trial Date: not set

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## INTRODUCTION

1  
2 Plaintiff, Dr. John Eastman, is a nationally-recognized constitutional  
3 attorney and scholar. He is frequently called upon by Congress and state  
4 legislatures to provide expert testimony on important constitutional issues. For  
5 more than 20 years, he was a law professor at Chapman University's Fowler  
6 School of Law, holding an endowed professorship or chair for 15 of those years,  
7 and also served as the School's Dean from 2007 to 2010.

8 As previously noted in his reply brief in support of his application for  
9 temporary restraining order, Dr. Eastman's employment contract with Chapman  
10 University specifically included representation of clients, both through the law  
11 school clinic and outside clients through the Center for Constitutional  
12 Jurisprudence, a public interest law firm he operated in affiliation with a separate  
13 non-profit organization, the Claremont Institute. Corrected Reply Br. (ECF #35) at  
14 14, *citing* Eastman Decl. ¶ 5 and Ex. 1. (employment contract in which Chapman  
15 expressly "acknowledges that, separate and apart from his employment as a  
16 Faculty Member, Faculty Member may also direct a Center for Constitutional  
17 Litigation ...." (emphasis added)); *see also* 2nd Eastman Decl. ¶ 3 (attached hereto  
18 as Exhibit 1).

19 One such high-profile representation occurred in the aftermath of the 2000  
20 presidential election. Dr. Eastman was called upon by the Florida legislature to  
21 give expert testimony about constitutional issues arising under the elector and  
22 electoral college provisions of the Constitution; was retained by the Florida  
23 legislature to craft legislation that would protect that State's electoral votes; and  
24 participated as an attorney on behalf of the George W. Bush presidential campaign  
25

1 in post-election litigation in Florida. 2nd Eastman Decl. ¶ 4. With the full support  
2 and encouragement of the law school’s dean, Dr. Eastman utilized law students  
3 and library resources for these efforts, utilized his Chapman email address (which  
4 was also his professional bar address) and included his Chapman affiliation on the  
5 testimony he submitted to the Florida legislature. Dr. Eastman’s work was even  
6 touted by the Law School’s Rank and Tenure Committee when it recommended  
7 him for an early award of tenure, “as a once in a lifetime opportunity for a scholar  
8 with [Dr. Eastman’s] expertise to build a truly national reputation.” “It was in the  
9 Law School’s interest that Professor Eastman pursue this opportunity to the  
10 fullest,” the Committee added. 2nd Eastman Decl. ¶ 5.

11 That was not the only post-election litigation in which Dr. Eastman was  
12 involved during his tenure as a Chapman law professor and in which, pursuant to  
13 common law school practice, he utilized his professional Chapman University  
14 address, phone, and email account. In 2008, and utilizing students in the Law  
15 School’s constitutional jurisprudence clinic that Dr. Eastman co-directed, Dr.  
16 Eastman filed a brief in a post-election legal challenge to a California ballot  
17 initiative, using his professional Chapman University address. *Id.* ¶ 13. Other law  
18 professors, not affiliated with any Chapman law school clinic, filed a brief in  
19 support of the other side in the post-election dispute, explicitly on behalf of  
20 “individual Chapman University organizations, faculty, staff, and students,”  
21 thereby conveying the impression that the University itself was taking a position in  
22 that post-election legal challenge. *Id.* ¶ 14. Draft guidelines issued by the  
23 University’s general counsel thereafter proposed that in the future, “The words  
24  
25

1 ‘Chapman University’ may not appear on the brief *except as part of a c/o address*  
2 *for the author.*” *Id.* ¶ 15 (emphasis added).

3 Because of his election law and constitutional expertise, Dr. Eastman was  
4 retained by then- President Trump, in his capacity as a candidate for re-election, as  
5 well as Trump’s official campaign committee, Donald J. Trump for President, Inc.,  
6 in the fall of 2020 to represent President Trump “in federal litigation matters in  
7 relation to the 2020 presidential general election, including election matters related  
8 to the Electoral College.” *Id.* ¶¶ 23, 24. For purposes of the January 4-7, 2021,  
9 documents at issue in this brief, that engagement letter clearly demonstrates the  
10 existence of an attorney-client relationship between Dr. Eastman and Candidate  
11 Trump and the Trump campaign committee.

12 But to anticipate and hopefully forestall future disputes about materials  
13 generated prior to that formal engagement letter, Dr. Eastman’s election-related  
14 work on behalf of the President began three months earlier. On September 3,  
15 2020, Dr. Eastman was invited by Cleta Mitchell to join an Election Integrity  
16 Working Group to begin preparing for anticipated post-election litigation. Ms.  
17 Mitchell, one of the nation’s preeminent election law attorneys, had been asked by  
18 President Trump in late August 2020 to undertake such an effort. *Id.* ¶ 25. After  
19 joining the Election Integrity Working Group, Dr. Eastman began conducting legal  
20 research and collaborating with academic advisors and other supporters of the  
21 President about the myriad number of factual and legal issues he anticipated might  
22 arise following the election. *Id.* ¶ 26. All of that work is therefore classic attorney  
23 work product.  
24  
25



1 Many of the statistical experts and others with whom Dr. Eastman  
2 collaborated on his work product requested anonymity lest, in the hyper-partisan  
3 times in which we find ourselves, their livelihoods be put into jeopardy and they  
4 and/or their families be harassed (or worse). *Id.* ¶ 29. As the examples of Dr.  
5 Eastman himself and his co-counsel, Cleta Mitchell, demonstrate, these were not  
6 (and are not) unfounded speculative fears. Dr. Eastman's classes at the University  
7 of Colorado, where he was serving as a visiting professor, were abruptly canceled  
8 in January 2021 and he was banned from performing outreach or speaking at the  
9 University, and he was pressured to resign from his tenured position at Chapman  
10 University that same month, for his work on behalf of President Trump. *See, e.g.*,  
11 Michael T. Nietzel, *University of Colorado Takes Action Against John Eastman*,  
12 *Forbes* (Jan. 23, 2021);<sup>1</sup> Michael T. Nietzel, *John Eastman Retires from Chapman*  
13 *University*, *Forbes* (Jan. 13, 2021).<sup>2</sup> Cleta Mitchell's long relationship as a partner  
14 with the law firm of Foley & Lardner likewise came to an abrupt end when her  
15 representation of President Trump became public. *See, e.g.*, Alison Durkee, *Trump*  
16 *Attorney Cleta Mitchell Resigns From Law Firm After Participating in President's*  
17 *Georgia Call*, *Forbes* (Jan. 5, 2021).<sup>3</sup> The concerns about loss of livelihoods and  
18 risks of harassment and even violence expressed by several of the people with  
19 whom Dr. Eastman was collaborating in his preparation of work product give rise  
20 to significant First Amendment concerns should the identities of those individuals

21  
22 <sup>1</sup> Available at <https://www.forbes.com/sites/michaelnietzel/2021/01/23/university-of-colorado-takes-action-against-john-eastman/?sh=3eca7a8e2696>.

23 <sup>2</sup> Available at <https://www.forbes.com/sites/michaelnietzel/2021/01/13/john-eastman-retires-from-chapman-university/?sh=bdcd04865e76>.

24 <sup>3</sup> Available at <https://www.forbes.com/sites/alisondurkee/2021/01/05/trump-attorney-cleta-mitchell-resigns-from-law-firm-after-participating-in-presidents-georgia-phone-call/?sh=85752711f61f>.

1 be made public. *See, e.g., NAACP v. Alabama*, 357 U.S. 449 (1958); *Brown v.*  
2 *Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87 (1982); *Americans for*  
3 *Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021). By ordering that Dr.  
4 Eastman’s privilege logs, and the Select Committee’s objections, be filed under  
5 seal, this Court has already recognized the privacy concerns at issue.

6 Finally, the sheer breadth of the Select Committee’s subpoena at issue here  
7 demonstrates that the materials the Committee is seeking are far removed from any  
8 valid legislative purpose. All communications related in any way to the election  
9 aims at communications that are core political speech protected by the First  
10 Amendment. It also is the very definition of a “fishing expedition,” designed not  
11 to develop recommendations for legislation but to try to find some evidence that  
12 might implicate Dr. Eastman in some as-yet-unspecified crime. Such a subpoena is  
13 tantamount to a general warrant, the very thing that the Fourth Amendment was  
14 designed to prevent. Because Dr. Eastman has not previously had the opportunity  
15 to brief the significant First and Fourth Amendment issues at stake here, he does so  
16 below.

## 17 ARGUMENT

### 18 I. The Materials Identified in Plaintiff’s Log are All Covered by 19 Attorney Client and/or Work Product Privilege

20 Under the attorney-client privilege, confidential communications made by a  
21 client to an attorney to obtain legal services are protected from disclosure. *United*  
22 *States v. Hirsch*, 803 F.2d 493, 496 (9thCir. 1986).

23 The work product doctrine is a qualified privilege that protects from  
24 discovery documents and tangible things prepared by a party or his representative  
25

1 in anticipation of litigation. *Admiral Inc. Co. v. U.S. Dist. Ct.*, 881 F.2d 1486,  
2 1494 (9th Cir. 1989). The doctrine protects “mental processes of the attorney  
3 providing a privileged area within which he can analyze and prepare his client’s  
4 case. *United States v. Nables*, 422 U.S. 225, 237-39 (1975). It protects material  
5 prepared by agents for the attorney as well as those prepared by the attorney  
6 himself. *Id.* at 238-39.

7 The congressional defendants have already acknowledged in writing that Dr.  
8 Eastman “served as an attorney for President Trump in his capacity for re-  
9 election.” Ex. 2. Dr. Eastman has provided further details about his representation  
10 of President Trump in a declaration to this Court. Ex. 1, ¶¶ 19-30. The attorney-  
11 client relationship between Dr. Eastman and President Trump should be beyond  
12 dispute.

13 The communications in Dr. Eastman’s privilege log are covered by attorney  
14 client privilege and/or work product. As stated in Dr. Eastman’s declaration, his  
15 representation of then-President Trump covered “federal litigation matters in  
16 relation to the 2020 presidential general election, including election matters related  
17 to the Electoral College.” Ex. 1, ¶ 23 and Ex. A.

18 As provided for in Fed. R. Civ. Pro 26(b)(5)(A), plaintiff has provided  
19 defendants a series of logs of privileged materials “in a manner that, without  
20 revealing information itself privileged or protected, will allow the other parties to  
21 assess the claim.” As the notes to the various amendments of Rule 16 make clear,  
22 if there is a dispute about the privilege, the privileged materials themselves should  
23 be submitted for *in camera* review to protect the privilege. *See, e.g.*, Rule 26,  
24 Commentary to 1983 amendments (“Nor does the rule require a party or an  
25

1 attorney to disclose privileged communications or work product...[t]he provisions  
2 of Rule 26(c), including appropriate orders after in camera inspection by the court,  
3 remain available to protect a party claiming privilege or work product protection.”)

4 Pursuant to this Court’s order of January 26, 2021 (ECF #50), Plaintiff has  
5 already submitted the challenged documents themselves for *in camera* review. For  
6 further elaboration, plaintiff has submitted an *in camera* supplement to this filing  
7 to address some specifics about the documents previously produced to this Court *in*  
8 *camera*.

9 **II. Document by Document Detailed Response to Defendant’s**  
10 **Objections**

11 The Select Committee has objected to 132 of the 166 documents contained  
12 in Plaintiff’s privilege logs for January 4-7, 2021, documents. In all but 4 of those  
13 132 documents (Chapman005513, Chapman005514, Chapman005667, and  
14 Chapman005704), the Select Committee has objected on the grounds that there  
15 was insufficient information to determine whether the client was President Trump  
16 or the Donald J. Trump for President, Inc. campaign committee. That issue is  
17 addressed globally in section I above, and involves the following documents:

18 Chapman004493 Chapman004547 Chapman004594 Chapman004713 Chapman004766  
19 Chapman004494 Chapman004549 Chapman004631 Chapman004720 Chapman004767  
20 Chapman004496 Chapman004551 Chapman004632 Chapman004721 Chapman004788  
21 Chapman004539 Chapman004553 Chapman004669 Chapman004722 Chapman004789  
22 Chapman004540 Chapman004555 Chapman004670 Chapman004723 Chapman004790  
23 Chapman004541 Chapman004556 Chapman004707 Chapman004744 Chapman004791  
24 Chapman004545 Chapman004593 Chapman004708 Chapman004745 Chapman004792

1	Chapman004793	Chapman005017	Chapman005114	Chapman005261	Chapman005492
2	Chapman004794	Chapman005018	Chapman005130	Chapman005268	Chapman005498
3	Chapman004827	Chapman005023	Chapman005131	Chapman005283	Chapman005510
4	Chapman004828	Chapman005024	Chapman005134	Chapman005299	Chapman005515
5	Chapman004833	Chapman005045	Chapman005135	Chapman005300	Chapman005519
6	Chapman004834	Chapman005046	Chapman005154	Chapman005329	Chapman005547
7	Chapman004835	Chapman005061	Chapman005155	Chapman005338	Chapman005551
8	Chapman004839	Chapman005064	Chapman005156	Chapman005406	Chapman005578
9	Chapman004841	Chapman005066	Chapman005157	Chapman005412	Chapman005668
10	Chapman004963	Chapman005067	Chapman005158	Chapman005423	Chapman005672
11	Chapman004964	Chapman005068	Chapman005159	Chapman005424	Chapman005676
12	Chapman004976	Chapman005087	Chapman005160	Chapman005433	Chapman005677
13	Chapman004977	Chapman005088	Chapman005161	Chapman005477	Chapman005678
14	Chapman004979	Chapman005091	Chapman005177	Chapman005478	Chapman005680
15	Chapman004990	Chapman005094	Chapman005178	Chapman005484	Chapman005719
16	Chapman004992	Chapman005096	Chapman005248	Chapman005488	Chapman005720
17	Chapman005011	Chapman005097	Chapman005249	Chapman005489	Chapman005722
18	Chapman005012	Chapman005101	Chapman005251	Chapman005490	
19	Chapman005014	Chapman005113	Chapman005252	Chapman005491	

20 The Select Committee objected to 130 of the 132 documents on the ground  
21 that they were supposedly from an “Unauthorized use of Chapman University  
22 email account” or that there had been a “subject matter waiver.” (The Selection  
23 Committee has advised counsel for Plaintiff that it has withdrawn its objection to  
24 the remaining two documents, Chapman005667, and Chapman005704). The  
25

1 “unauthorized use” assertion is rebutted globally in Section V below; the “subject-  
2 matter waiver” objection is rebutted globally in Section IV below. Both objections  
3 involve the following documents:

4	Chapman004493	Chapman004670	Chapman004794	Chapman005017	Chapman005113
5	Chapman004494	Chapman004707	Chapman004827	Chapman005018	Chapman005114
6	Chapman004496	Chapman004708	Chapman004828	Chapman005023	Chapman005130
7	Chapman004539	Chapman004713	Chapman004833	Chapman005024	Chapman005131
8	Chapman004540	Chapman004720	Chapman004834	Chapman005045	Chapman005134
9	Chapman004541	Chapman004721	Chapman004835	Chapman005046	Chapman005135
10	Chapman004545	Chapman004722	Chapman004839	Chapman005061	Chapman005154
11	Chapman004547	Chapman004723	Chapman004841	Chapman005064	Chapman005155
12	Chapman004549	Chapman004744	Chapman004963	Chapman005066	Chapman005156
13	Chapman004551	Chapman004745	Chapman004964	Chapman005067	Chapman005157
14	Chapman004553	Chapman004766	Chapman004976	Chapman005068	Chapman005158
15	Chapman004555	Chapman004767	Chapman004977	Chapman005087	Chapman005159
16	Chapman004556	Chapman004788	Chapman004979	Chapman005088	Chapman005160
17	Chapman004593	Chapman004789	Chapman004990	Chapman005091	Chapman005161
18	Chapman004594	Chapman004790	Chapman004992	Chapman005094	Chapman005177
19	Chapman004631	Chapman004791	Chapman005011	Chapman005096	Chapman005178
20	Chapman004632	Chapman004792	Chapman005012	Chapman005097	Chapman005248
21	Chapman004669	Chapman004793	Chapman005014	Chapman005101	Chapman005249

1	Chapman005251	Chapman005338	Chapman005484	Chapman005513	Chapman005672
2	Chapman005252	Chapman005406	Chapman005488	Chapman005514	Chapman005676
3	Chapman005261	Chapman005412	Chapman005489	Chapman005515	Chapman005677
4	Chapman005268	Chapman005423	Chapman005490	Chapman005519	Chapman005678
5	Chapman005283	Chapman005424	Chapman005491	Chapman005547	Chapman005680
6	Chapman005299	Chapman005433	Chapman005492	Chapman005551	Chapman005719
7	Chapman005300	Chapman005477	Chapman005498	Chapman005578	Chapman005720
8	Chapman005329	Chapman005478	Chapman005510	Chapman005668	Chapman005722

9           The Select Committee also objected to all of the above documents on the  
10 ground that the information provided is insufficient to determine whether an  
11 exception to privilege, “such as crime-fraud,” is applicable. The Committee has  
12 offered no evidence, much less a "showing of a factual basis adequate to support a  
13 good faith belief" that an in camera review may reveal the existence of a crime-  
14 fraud exception, as required by *U.S. v. Zolin*, 491 U.S. 554, 572 (1989). An *in*  
15 *camera* review on this ground is therefore inappropriate.

16           The Select Committee objected to 5 of the 132 documents on the ground that  
17 they contained no “Sender” information. Each case appears to be the result of a  
18 glitch in the e-discovery platform’s upload of the \*.PST file from Chapman, which  
19 truncated the sender information. In each case, a duplicate of the document with  
20 the “sender” information included immediately follows the truncated document.

21 Those five documents are:

22	Chapman004670	Chapman004963	Chapman004964	Chapman005248	Chapman005249
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1 The Select Committee objected to 11 of the 132 documents on the ground  
2 that work product protection were “overcome by substantial/compelling need of  
3 Select Committee.” Yet it has offered no argument or evidence of the Select  
4 Committee’s need for any of these particular documents in pursuit of any valid  
5 legislative purpose, much less a need that would qualify as substantial or  
6 compelling in support of a legislative purpose. Moreover, the Select Committee  
7 agreed to the process of privilege review by Dr. Eastman and assessment of  
8 privilege by the Court that is being undertaken; the Select Committee should not be  
9 allowed to make that become an exercise in futility by its own assertion, after the  
10 fact, that it will override the Court’s determination of privilege. The documents  
11 objected to by the Select Committee on the ground that it has a substantial or  
12 compelling need for Dr. Eastman’s work product are as follows:

13 Chapman005023 Chapman005088 Chapman005477 Chapman005513  
14 Chapman005061 Chapman005178 Chapman005478 Chapman005514  
15 Chapman005087 Chapman005406 Chapman005510

16 The Select Committee objected to 90 of the 132 documents on the ground  
17 that they “include persons apparently outside the attorney-client relationship.” The  
18 people in 60 of those 90 documents whom the Select Committee believed to be  
19 “apparently outside the attorney-client relationship” were in fact attorneys working  
20 with the Trump legal team or in common interest with the Trump legal team.

21 Those are:

22 **Redacted**

23 **Redacted** reflects his



1 affiliation with the Trump campaign. The Select Committee's objected to

2 **Redacted** on communications for the following documents:

3 Chapman004707 Chapman004789 Chapman004964 Chapman005014 Chapman005261  
4 Chapman004722 Chapman004790 Chapman004976 Chapman005023 Chapman005268  
5 Chapman004723 Chapman004791 Chapman004977 Chapman005024 Chapman005484  
6 Chapman004744 Chapman004792 Chapman004979 Chapman005061 Chapman005510  
7 Chapman004745 Chapman004833 Chapman004990 Chapman005248 Chapman005578  
8 Chapman004766 Chapman004834 Chapman004992 Chapman005249  
9 Chapman004767 Chapman004835 Chapman005011 Chapman005251  
10 Chapman004788 Chapman004963 Chapman005012 Chapman005252

11 **Redacted**  
12  
13  
14  
15

16 2020). Those documents are:

17 Chapman004493 Chapman004793 Chapman004794

18 **Redacted**  
19  
20  
21  
22

1 understanding, but even if not, he was clearly not an “adversary” or “conduit to an  
2 adversary” who’s inclusion would constitute a waiver of a work product privilege.

3 *United States v. Sanmina Corp.*, 968 F.3d 1107, 1120 (9th Cir. 2020). The  
4 documents objected to by the Select Committee because **Redacted** as on the  
5 distribution list are Chapman005478 and Chapman005478, and the documents that  
6 included both **Redacted** are:

7 Chapman004539 Chapman004545 Chapman004555 Chapman004594 Chapman004669  
8 Chapman004540 Chapman004549 Chapman004556 Chapman004631  
9 Chapman004541 Chapman004551 Chapman004593 Chapman004632

10 **Redacted**

11  
12 documents objected to by the Select Committee because Clark and Morgan were  
13 on the distribution list are Chapman004549 and Chapman004551.

14 **Redacted** was one of the many volunteer attorneys working with the  
15 Trump legal team. The documents objected to by the Select Committee because  
16 **Redacted** was on the distribution list are Chapman005299 and Chapman005300.

17 **Redacted** is an attorney who reached out to Dr. Eastman offering to  
18 serve as a volunteer attorney helping with his efforts on behalf of President Trump.  
19 The email exchange between Dr. Eastman and **Redacted** contains a work product  
20 discussion. The documents objected to by the Select Committee because **Redacted**

1 was either the sender or recipient are Chapman005423, Chapman005424, and  
2 Chapman005433.

3 **Non-Attorney Work Product**

4 The person in another 8 of the 90 documents whom the Select Committee  
5 believed to be “apparently outside the attorney-client relationship,” **Redacted**  
6 **Redacted** providing expert advice to Dr. Eastman on behalf of a team of  
7 statistical experts that were conducting statistical analyses of election returns in a  
8 number of jurisdictions to aid Dr. Eastman and others on the Trump legal team  
9 with their work product in anticipation of litigation. The documents objected to by  
10 the Select Committee because **Redacted** either the sender or recipient are as  
11 follows:

12 Chapman004547	Chapman004841	Chapman005490	Chapman005492
13 Chapman004839	Chapman005488	Chapman005491	Chapman005498

14 The person in another 6 of the 90 documents whom the Select Committee  
15 believed to be “apparently outside the attorney-client relationship,”

16 **Redacted**  
17 **Redacted** who was following up with Dr.  
18 Eastman about a meeting he had had with forensic experts who had information  
19 that might have been useful in anticipated litigation. The documents objected to by  
20 the Select Committee because **Redacted** the sender or recipient are as  
21 follows:  
22  
23

1 Chapman005668 Chapman005676 Chapman005678

2 Chapman005672 Chapman005677 Chapman005680

3 Another 8 of the 90 documents whom the Select Committee believed to be  
4 “apparently outside the attorney-client relationship” were communications with  
5 scholars affiliated with The Claremont Institute where Dr. Eastman is a Senior  
6 Fellow: **Redacted**

7 **Redacted** They all worked with Dr.  
8 Eastman, either as sounding board or by offering ideas of their own, as Dr.

9 Eastman was developing work product in anticipation of election litigation. Two  
10 other individuals, **Redacted** with whom  
11 Dr. Eastman was working on election integrity efforts, and **Redacted**

12 **Redacted** were copied  
13 on one of the documents (Chapman005515), but because neither was an adversary  
14 nor a conduit to an adversary, their inclusion on the email exchange does not  
15 destroy the work product privilege. *United States v. Sanmina Corp.*, 968 F.3d  
16 1107, 1120 (9th Cir. 2020). The documents objected to by the Select Committee  
17 because any of these individuals were either the sender or recipient are as follows:

18 Chapman004494 Chapman005283 Chapman005338 Chapman005515

19 Chapman004496 Chapman005329 Chapman005489 Chapman005519

20 Four of the documents were emails or attachments sent by **Redacted** a  
21 data technology expert who was working with Dr. Eastman on work product in  
22

1 anticipation of litigation. Recipients were **Redacted** one of the volunteer  
2 Trump attorneys described above, and **Redacted**  
3 expert who was working with Oltmann. The documents objected to by the Select  
4 Committee because any of these individuals were either the sender or recipient are  
5 as follows:

6 Chapman005130 Chapman005131 Chapman005134 Chapman005135

7 Two of the documents – an email (Chapman005547) and an attached memo  
8 (Chapman005551) – were from **Redacted** of Dr.  
9 Eastman’s who had been communicating back and forth with Dr. Eastman since  
10 before the election about legal theories in anticipating of electoral college disputes  
11 and anticipated litigation over them. The exchanges contain mental impressions  
12 from Dr. Eastman about the legal theories and are therefore work product.

13 Finally, there are 24 documents for which we are withdrawing our assertion  
14 of privilege. Most were simply transmittals of filings in pending litigation that do  
15 not convey mental impressions. In addition, we inadvertently claimed Attorney-  
16 Client and Work-Product privilege over an email (Chapman005087) an attachment  
17 (Chapman005088) because the email recipients included **Redacted** and other  
18 members of the President’s staff and legal team. On further review, we withdraw  
19 our claims of privilege over these documents and will include them in the next  
20 production.

21 Chapman004493 Chapman004539 Chapman004540 Chapman004541 Chapman004545

1 Chapman004549 Chapman004593 Chapman004669 Chapman005177 Chapman005478  
2 Chapman004551 Chapman004594 Chapman004670 Chapman005178 Chapman005513  
3 Chapman004555 Chapman004631 Chapman005087 Chapman005406 Chapman005514  
4 Chapman004556 Chapman004632 Chapman005088 Chapman005477

5 **III. The Congressional Defendants Have Waived Their Right to Object**  
6 **to Privilege on the Basis of Public Statements by Dr. Eastman, the**  
7 **Particulars of Chapman University’s Email System, or Any Other**  
8 **“Generalized” Waiver Argument**

9 At the temporary restraining order hearing in this case, the congressional  
10 defendants initially argued that *no* privilege could exist in *any* of the Chapman  
11 materials. They argued that any attorney client privilege that existed in the  
12 Chapman materials had been waived by Dr. Eastman’s public statements about  
13 former President Trump. ECF 23-1 at 20-21. They also argued that use of  
14 Chapman’s email system constituted a waiver. *Id.* at 17-19.

15 However, following initial argument from both parties and some questioning  
16 from the Court, the congressional defendants conceded a privilege log was  
17 appropriate. Counsel for the congressional defendants stated:

18 **MR. LETTER:** Your Honor, I do want to say if this [a privilege review] is  
19 considered something that is important to do now, we would certainly  
20 entertain it. We would want – we think it would be essential that if the  
21

1 material is provided to Professor Eastman now there be a very quick  
2 schedule.

3 **THE COURT:** Let's stop at that point for a moment because I want to  
4 repeat back what I heard, and that is you would be willing at the present time  
5 to submit these materials to Dr. Eastman with the expectation that this would  
6 be a short turnaround time he could review these. Is that correct?

7 **MR. LETTER:** Yes, Your Honor--

8 ECF 44 (transcript of January 24, 2022 hearing) at 45.

9 By conceding that a privilege log is appropriate, the congressional  
10 defendants have necessarily conceded the possibility that at least some privileged  
11 content exists in the Chapman materials. They have waived their claim that any  
12 "generalized" waiver applies to the Chapman materials.

13 **IV. Plaintiff Did Not Waive Privilege Through Any Public Statements**

14 Even if the congressional defendants had not abandoned their "general  
15 waiver" arguments, it is clear that no public statements by Dr. Eastman effected  
16 such a waiver. As already briefed and argued to this Court in connection with the  
17 temporary restraining order hearing, Dr. Eastman did not waive privilege through  
18 any of his public statements.

19 As an initial matter, it is by no means clear that any statements by Dr.  
20 Eastman about President Trump revealed *any* privileged material, let alone  
21 constituted a complete waiver of such material, as the defendants contend. A  
22 lawyer's duty to protect a client's information is broader than the duty to protect  
23 privileged information. As California Rule of Professional Conduct Rule 1.6  
24 states:



1 The principle of lawyer-client confidentiality applies to information a  
2 lawyer acquires by virtue of the representation, *whatever its source*,  
3 and encompasses matters communicated in confidence by the client,  
4 and therefore protected by the lawyer-client privilege, matters  
5 protected by the work product doctrine, *and matters protected under*  
6 *ethical standards of confidentiality*, as established in law, rule and  
7 policy.

8 *Id.* at n. 2 (and cases cited therein, *e.g. Goldstein v. Lees*, 46 Cal.App. 3d 614, 621  
9 (1975) (italics added).

10 The statements about President Trump attributed to Dr. Eastman by the  
11 defendants make no reference to privilege. *See, e.g.,* Resp. to TRO at 28 (Dr.  
12 Eastman’s statement to Bob Woodward that the President had authorized him to  
13 “talk about these things.”). In fact, the defendants are only able to give Dr.  
14 Eastman’s public statements the superficial appearance of privilege waivers by  
15 omitting highly relevant facts. For example, the defendants attempt to characterize  
16 Dr. Eastman’s statement on the Peter Boyles Show that he had authority from the  
17 President to discuss a “private conversation.” Resp. at 20. Conveniently omitted  
18 by defendants are Dr. Eastman’s statements in the very same interview that the  
19 conversation in question occurred in the presence of three non-clients in addition to  
20 the President.<sup>4</sup> The “private conversation” of which Dr. Eastman spoke was  
21 therefore obviously unprivileged. The defendants attempt to characterize Dr.  
22 Eastman’s discussion of a *non-privileged conversation* as somehow a waiver of

23 \_\_\_\_\_  
24 <sup>4</sup> To hear Dr. Eastman’s description of this conversation, the reader is referred to minutes 12:00  
25 15:00 of the podcast cited in the defendants’ brief. *Peter Boyles Show*, 710KNUS News/Talk  
(May 5, 2021) (available <https://omny.fm/shows/peter-boyles-show/peter-boyles-may-5-8am-1>).



1 attorney client privilege is misleading in the extreme. At most, the statements  
2 show that the President had authorized Dr. Eastman to disclose a limited amount of  
3 confidential (as opposed to privileged) information. They provide this Court no  
4 basis to hold that Dr. Eastman has made any sort of privilege waiver with respect  
5 to former President Trump.

6 Even if Dr. Eastman had disclosed some sort of privileged information about  
7 the former President, it would be at most a limited waiver. Courts have long  
8 recognized that disclosure of privileged information on a particular subject does  
9 not necessarily imply a complete waiver of the privilege. *See, e.g., Weil v.*  
10 *Investment/Indicators, Research and Management, Inc.*, 647 F.2d 18, 25 (9th Cir.  
11 1981) (“We conclude, therefore, that the fund has waived its attorney-client  
12 privilege....only as to communications about the matter actually disclosed.”). It is  
13 publicly known that Dr. Eastman represented President Trump in several matters  
14 during the subpoena period. The government has merely quoted statements from  
15 Dr. Eastman relating to a legal memorandum and an unspecified “private  
16 conversation.” No reasonable interpretation of these statements could construe  
17 them as a total waiver of privilege between Dr. Eastman and the former president.

18 **V. Plaintiff Did Not Waive Privilege Through Use of Chapman**  
19 **University Email**

20 As stated above, the congressional defendants have waived the argument  
21 that there was a wholesale waiver of privilege through use of school email.  
22 However, even without this concession, it is clear that use of the email system was  
23 not a waiver.  
24

1           The congressional defendants relied during the TRO proceedings primarily  
2 on *Doe I v. George Washington Univ.*, 480 F. Supp. 3d 224 (D.D.C. 2020), which  
3 unlike the present case, involved use by *students* of the University’s email system,  
4 not use by law professors whose contractual duties include client representations.  
5 That distinction is of great significance, as it supports Dr. Eastman’s claim that he  
6 had a subjective expectation of confidentiality in his communications with or  
7 related to clients and prospective clients, and that his expectation of confidentiality  
8 is objectively reasonable. *Id.* at 226. The more relevant case is therefore the other  
9 case relied upon (somewhat inexplicably) by the congressional defendants,  
10 *Convertino v. U.S. Dep’t of Just.*, 674 F. Supp. 2d 97 (D.D.C. 2009). In that case,  
11 the same court that decided *Doe I* held that a Department of Justice employee’s  
12 emails to his outside private attorney, using the Department’s email system,  
13 retained their attorney-client privilege. “Although DOJ does have access to  
14 personal e-mails sent through his account, Mr. Turkel was unaware that they would  
15 be regularly accessing and saving emails sent from his account,” the Court noted.  
16 *Id.* at 110. As Chapman itself acknowledges, and just like the DOJ in *Convertino*,  
17 “Chapman does not make a practice of monitoring email” even though it reserves  
18 the right the right to retrieve the contents of emails “for legitimate reasons, such as  
19 to find lost messages, to comply with investigations of wrongful acts, to respond to  
20 subpoenas, or to recover from system failure.” DuMontelle Decl. ¶ 5. It is Dr.  
21 Eastman’s contention, and his subjective expectation, that such “legitimate  
22 reasons” would not include the University accessing emails protected by attorney-  
23 client and work product privileges without his authorization. Were the rule  
24 otherwise, then every single clinical professor—whether in the law school or in  
25

1 other departments with clients or patients—would be in breach of their ethical  
2 duties to protect client and patient confidences. *See, e.g.*, California Rules of  
3 Professional Conduct 3-100(A) (“A member shall not reveal information protected  
4 from disclosure by California Business and Professions Code § 6068, subdivision  
5 (e)(1) without the informed consent of the client, ...”); Cal. Evid. Code § 995  
6 (describing physician’s obligation to assert privilege on behalf of his patient’s  
7 confidential communications); Cal. Evid. Code § 1015 (same re psychotherapist  
8 obligation). *See also, generally*, Gregory C. Sisk & Nicholas Halbur, *A Ticking*  
9 *Time Bomb? University Data Privacy Policies and Attorney-Client Confidentiality*  
10 *in Law School Settings*, 2010 Utah L. Rev. 1277, 1293-94 (2010) (concluding that  
11 “attorneys practicing in the university law school environment may well be able to  
12 distinguish [cases in corporate settings] and successfully overcome a challenge to  
13 the privilege, even if the university does maintain a formal data privacy policy  
14 reciting that users have no expectation of privacy in data on university computers  
15 or messages sent through university networks.)

16 That Chapman has a policy—and perhaps even a banner warning<sup>5</sup>—  
17 announcing that emails sent across its system are subject to monitoring for certain  
18 specified purposes does not defeat Dr. Eastman’s reasonable expectation of  
19 confidentiality. Other cases involving similar banner warnings in circumstances  
20 where the expectation of privacy would be even lower than in a University setting  
21 with its strong commitment to academic freedom, have held that such a warning

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22 <sup>5</sup> Dr. Eastman disputes Chapman’s claim that a “splash screen” message appeared “every time  
23 Eastman logged on to Chapman’s network.” During his employment at Chapman, Dr. Eastman  
24 used a laptop computer, connecting through the University’s VPN. To his recollection, no such  
25 message ever appeared when he logged on to the network in that fashion, or when he accessed  
his Chapman email account via Outlook.

1 does not necessarily give rise to a waiver of confidentiality. *United States v. Long*,  
2 64 M.J. 57 (C.A.A.F. 2006), is particularly salient. There, the Court of Appeals for  
3 the Armed Forces held that a member of the military had a reasonable expectation  
4 of privacy in emails she sent and received using the Department of Defense’s email  
5 system, and which were stored on that system. There, like Chapman claims to be  
6 the case here, a banner appeared anytime a user logged on to the system notifying  
7 the user that the system was “provided only for authorized U.S. Government use”  
8 and that it “may be monitored for all lawful purposes, including to ensure that their  
9 use is authorized, for management of the system, to facilitate protection against  
10 unauthorized access, and to verify security procedures, survivability and  
11 operational security.” *Id.* at 60. Yet the Court nevertheless upheld the service  
12 member’s expectation of privacy in the personal emails she sent using the  
13 government system. There, as here, each individual user “had his or her own  
14 unique password known only to them.” *Id.* There, as here, users were told to  
15 change passwords frequently. *Id.* There, as here, network administrators did not  
16 have access to individual users’ passwords, *id.*, but could access the entire  
17 network, including personal email. If that was good enough for the expectation of  
18 confidentiality to be deemed reasonable in the context of the military and highly-  
19 secure Department of Defense computers, surely it is sufficient for Dr. Eastman’s  
20 expectation of confidentiality to be deemed reasonable in the context of a private  
21 University in which his duties included representation of clinic and other clients.

22 Defendant Chapman has previously intimated that Dr. Eastman’s use of the  
23 University’s email system was “unauthorized.” Chapman Opp. at 4. The  
24 congressional defendants take that intimation as an “indisputably” proven fact.  
25

1 Cong. Opp. at 22. It is not. Dr. Eastman’s duties specifically included  
2 representation of clients, both through the law school clinic and outside clients  
3 through the Center for Constitutional Jurisprudence, a public interest law firm he  
4 operated in affiliation with a separate non-profit organization, the Claremont  
5 Institute. Eastman Decl. ¶ 5 and Ex. 1. (employment contract in which Chapman  
6 expressly “acknowledges that, *separate and apart from his employment as a*  
7 *Faculty Member*, Faculty Member may also direct a Center for Constitutional  
8 Litigation ....” (emphasis added)). Like other law faculty, Dr. Eastman’s  
9 promotion and tenure decisions, and his annual performance reviews and merit pay  
10 increases, were based in part on scholarship and service that expressly included  
11 representation of outside clients in matters related to his scholarship or that served  
12 the public interest. That Dr. Eastman’s election integrity work at issue here easily  
13 qualified under established University practice is not speculative, but fully  
14 supported by nearly identical outside work Dr. Eastman performed early in his  
15 career at Chapman in the aftermath of the 2000 presidential election. Then, as  
16 now, he provided pro bono legal work in election challenges,<sup>6</sup> gave expert

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18  
19 <sup>6</sup> Chapman’s General Counsel intimates that such work may run afoul of IRS prohibitions on  
20 electioneering activity. DuMontelle Decl. ¶ 3; *see also* Chapman Br. at 3 (ECF #??). But the  
21 IRS prohibits non-profit organizations like Chapman “from directly or indirectly participating in,  
22 or intervening in, any political campaign on behalf of (or in opposition to) any candidate for  
23 elective public office.” It identifies “[c]ontributions to political campaign funds or public  
24 statements of position (verbal or written) made on behalf of the organization in favor of or in  
25 opposition to any candidate for public office” as things that “clearly violate the prohibition  
against political campaign activity.” It does not mention post-election legal disputes over  
election integrity, and we are aware of no instance where the IRS has challenged a University’s  
non-profit status because its law faculty have participated as counsel in post-election litigation  
despite that having occurred in some rather high-profile matters. *See, e.g.*, Brief of Respondent  
Albert Gore, Jr., *Bush v. Gore*, No. 00-949 (S.Ct. 2000) (listing Harvard Law Professor Laurence  
Tribe as “counsel of record” and depicting his official Harvard University office address).

1 testimony to a state legislature,<sup>7</sup> and was even retained by the state legislature to  
2 help craft legislation to protect its electoral votes. Eastman Decl. ¶ 6. For that  
3 “outside” work, Dr. Eastman utilized his Chapman address and Chapman email.  
4 He even utilized the research services of Chapman’s library and Chapman  
5 students. Far from being chastised for engaging in “unauthorized” work using  
6 Chapman’s resources, Chapman praised Dr. Eastman’s work, the national  
7 recognition of his expertise that it reflected, and the phenomenal opportunity it  
8 provided to his students.

9 Even if Dr. Eastman’s work here was somehow “unauthorized” under  
10 Chapman’s post-hoc interpretation of its rules, however, such would be irrelevant  
11 to the issue of whether Dr. Eastman and, as importantly, his clients, had a  
12 reasonable expectation of confidentiality in his email communications sent and  
13 received using Chapman’s email system. The privilege is held by the client, after  
14 all. Cal. Evid. Code § 953; *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (“the  
15 privilege is that of the client alone”).

16 **VI. The Privilege Was Not Waived Through Inclusion of Third Parties**  
17 **on Communications**

18 The congressional defendants have objected to many of Plaintiff’s work  
19 product designations on the ground that communications included parties outside  
20 the attorney client relationship. However, the defendants themselves have already  
21 conceded that “unlike the attorney-client privilege, the work product privilege is  
22

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23 <sup>7</sup> See Florida Legislature Select Joint Committee on the 2000 Presidential Election, Hearing on  
24 the Matter of the Appointment of Presidential Electors (Nov. 29, 2000), available at  
25 <https://www.c-span.org/video/?160847-1/manner-appointment-presidential-electors> (last visited  
Jan. 22, 2022).

1 not automatically waived by any disclosure to a third party.” ECF 23-1 at 21  
2 (response to plaintiff’s motion for temporary restraining order). Disclosures to a  
3 third party do not waive the work product privilege unless the third party is a  
4 “conduit” to the adversary. *United States v. Sanmina Corp.*, 968 F.3d 1107, 1120  
5 (9th Cir. 2020).

6 As set forth in Plaintiff’s declaration, none of the third parties included on  
7 work product communications were adversaries or conduits to adversaries. To the  
8 contrary, the third parties had interests aligned with Dr. Eastman’s client.  
9 Including such parties in work product communications does not waive the  
10 privilege.

11 **VI. This Court Should Revisit its TRO Holding on the First**  
12 **Amendment**

13 In deciding Plaintiff’s privilege claims, this Court should revisit whether the  
14 defendant’s subpoena violates the First Amendment. Although the Court denied  
15 this claim at the TRO stage, the issue had not been fully briefed. Moreover,  
16 Plaintiff at that point had no access to the Chapman materials which did not allow  
17 him to make a specific First Amendment claim. As the Court stated,

18 In contrast to the significant public interest, Dr. Eastman has identified  
19 neither any specific associational interest threatened by production of his  
20 Chapman communications, nor any particular harm likely to result from  
21 their production. Dr. Eastman has therefore failed to make the required  
22 prima facie showing that enforcement of the subpoenas will result in (1)  
23 harassment or (2) other consequences which objectively suggest an impact,  
24 on or chilling of, his associational rights.



1 ECF 43 at 13 (ellipses, quotes and brackets omitted).

2 Having reviewed a large portion of the Chapman materials, Plaintiff is now  
3 positioned to address this concern of the Court's.

4 *Watkins v. United States*, 354 U.S. 178 (1957), cited in this Court's January  
5 26 order, provides the best guidance to the Court, so we discuss it at some length.

6 In that case, the petitioner, a labor activist, had appeared before a subcommittee of  
7 the House UnAmerican Activities Committee (HUAC). *Id.* at 182. The petitioner  
8 answered some questions but refused to answer others. The petitioner stated:

9 I will answer any questions which this committee puts to me about  
10 myself. I will also answer questions about those persons whom I knew  
11 to be members of the Communist Party and whom I believe still are. I  
12 will not, however, answer any questions with respect to others with  
13 whom I associated in the past. I do not believe that any law in this  
14 country requires me to testify about persons who may in the past have  
15 been Communist Party members or otherwise engaged in Communist  
16 Party activity but who to my best knowledge and belief have long  
17 since removed themselves from the Communist movement.

18 *Id.* at 185.

19 The petitioner was convicted of contempt and appealed. In considering  
20 petitioner's claim, the Court held that, "[c]learly, an investigation is subject to the  
21 command that the Congress shall make no law abridging freedom of speech or  
22 press or assembly." *Id.* at 197. The Court held further that, "when First  
23 Amendment rights are threatened, *the delegation of power to the committee must*



1 *be clearly revealed in its charter.” Id. at 198 citing, United States v. Rumley, 345*  
2 *U.S. 41 (1943) (italics added).*

3 The Court then turned to HUAC’s charter, which it quoted as follows:

4 The Committee on Un-American Activities, as a whole or by  
5 subcommittee, is authorized to make from time to time investigations  
6 of (1) the extent, character, and objects of un-American propaganda  
7 activities in the United States, (2) the diffusion within the United  
8 States of subversive and un-American propaganda that is instigated  
9 from foreign countries or of a domestic origin and attacks the  
10 principle of the form of government as guaranteed by our  
11 Constitution, and (3) all other questions in relation thereto that would  
12 aid Congress in any necessary remedial legislation.

13 *Id. at 202.* The Supreme Court was rightly troubled by the breadth of this  
14 commission, stating “[i]t would be difficult to imagine a less explicit authorizing  
15 resolution. Who can define the meaning of ‘un-American’?” *Id. at 202.*

16 HUAC claimed that this resolution gave them broad powers sufficient  
17 to cover the petitioner’s refused testimony, arguing that, “[the Court]  
18 must view the matter hospitably to the power of the Congress—that if  
19 there is any legislative purpose which might have been furthered by  
20 the kind of disclosure sought, the witness must be punished for  
21 withholding it.”

22 *Id. at 204.* This is the same argument the congressional defendants raise  
23 here, and have raised in many cases across the country.

24 The Supreme Court was rightly skeptical of this argument, stating that:  
25

1 The consequences that flow from this situation are manifold...[t]he  
2 Committee is allowed, in essence, to define its own authority, to  
3 choose the direction and focus of its activities. In deciding what to do  
4 with the power that has been conferred upon them, members of the  
5 Committee may act pursuant to motives that seem to them to be the  
6 highest. *Their decisions, nevertheless, can lead to ruthless exposure of*  
7 *private lives in order to gather data that is neither desired by the*  
8 *Congress nor useful to it.*

9 *Id.* at 204-05 (italics added).

10 In this case, the Select Committee’s resolution poses the same First  
11 Amendment risks of unrestrained congressional power that the Supreme Court  
12 identified in *Watkins*. In addition to tasking the Select Committee with  
13 investigating January 6 itself, the authorizing resolution has several phrases every  
14 bit as nebulous as those in the HUAC resolution, including those empowering the  
15 committee:

16 To investigate the facts, circumstances, and the causes relating to the  
17 January 6, 2021 domestic terrorist attack...*as well as the influencing*  
18 *factors* that fomented such an attack on American representative  
19 democracy while engaged in a constitutional process.

20 \*\*\*

21 To build upon the investigations of other entities...*including*  
22 *investigating influencing factors related to such an attack.*

23 H.Res. 503, § 3 (italics added).

1           This broad resolution raises the exact same concerns which the Supreme  
2 Court identified in the HUAC authorizing resolution. What possible limit could  
3 there be in a charge to investigate the “influencing factors” of a historical event  
4 such as Jan 6? For example, some commentators have suggested that certain  
5 religious beliefs contributed to January 6. *See, e.g.* Thomas B. Edsall, *The Capitol*  
6 *Insurrection Was as Christian Nationalist as it Gets*, New York Times (Jan. 28,  
7 2021). Is the January 6 committee therefore entitled to exercise its investigative  
8 authority to pry into the religious beliefs of certain Americans? Other  
9 commentators have posited a link between individual financial struggles and  
10 participation in January 6. *See, e.g.*, Todd C. Frankel, *A majority of the people*  
11 *arrested for Capitol riot had a history of financial trouble*, Washington Post (Feb.  
12 10, 2021). Is the committee therefore empowered to pry into the financial lives of  
13 Trump supporters?

14           The potential scope of the committee’s authority is not merely theoretical. It  
15 is clearly illustrated in the present case. The concern for First Amendment  
16 freedoms expressed by the *Watkins* Court in the 1950’s is magnified many times  
17 over in the digital age. Here, the select committee is using its investigatory power  
18 to seize tens of thousands of emails and attached documents from Dr. Eastman. As  
19 is apparent from plaintiff’s *in camera* productions, the committee’s broad request  
20 has necessarily swept up private information from dozens of individuals. Although  
21 these persons had no substantial connection with January 6 itself, the  
22 communications in question reveal much about these persons identities,  
23 associational choices, political beliefs and other protected First Amendment areas.  
24 In certain social and professional circles these days, having disfavored views on  
25

1 the 2020 election can be as personally damaging as being labeled a communist was  
2 in the 1950's. Disclosing this information to a committee comprised of politicians  
3 hostile to these views could expose these individuals to public scorn, job loss,  
4 harassment and even death threats. It will have an unconstitutional chilling effect  
5 on the First Amendment.

6 **VII. This Court Should Revisit the TRO Holding on the Fourth**  
7 **Amendment**

8 Plaintiff's complaint alleges that the congressional defendants' subpoena  
9 violates his Fourth Amendment Rights. Although this Court denied this claim  
10 following the TRO hearing, the issue had not been fully briefed nor, as explained  
11 below, had the full scope of the committee's subpoena been made clear.

12 In denying Plaintiff's Fourth Amendment claim at the TRO stage, this Court  
13 relied on two historic Supreme Court cases applying a simple overbreadth standard  
14 for Fourth Amendment analysis of congressional subpoenas. *Oklahoma Press*  
15 *Pub. Co. v. Walling*, 327 U.S. 186, 209 (1946); *McPhaul v. United States*, 364 U.S.  
16 372, 382 (1960).

17 *McPhaul* and *Oklahoma Press* both predate the Supreme Court's important  
18 Fourth Amendment decisions in *Katz v. United States*, 389 U.S. 347 (1967), and  
19 *Carpenter v. United States*, 138 S. Ct. 2206 (2018). These two decisions expanded  
20 Fourth Amendment protections. *Katz* held that the Fourth Amendment applies  
21 where an individual has a reasonable expectation of privacy, regardless of whether  
22 there is a physical trespass. 389 U.S. 347 (1967). *Carpenter* held that a warrant  
23 was required to access historical cell site data in the possession of a third party  
24

1 phone company. 138 S. Ct. 2206 (2018). If *McPhaul* and *Oklahoma Press* were to  
2 be decided today they would be likely to come out quite differently.

3 In fact, at least one court has already implicitly recognized the *de facto*  
4 obsolescence of *McPhaul* and *Oklahoma Press*. In *Senate Select Committee on*  
5 *Ethics v. Packwood*, the D.C. district court considered a challenge from a sitting  
6 Senator to a congressional subpoena seeking his personal diary entries. 845  
7 F.Supp 17 (D.C. Dist. Ct. 1994). The Senator argued the subpoena violated his  
8 right to privacy under the Fourth Amendment *Id.* at 21. Instead of simply applying  
9 the *McPhaul* “overbreadth” standard, the Court “balanc[ed] Senator Packwood’s  
10 expectations of privacy in his personal diaries against the Ethics Committee’s  
11 interest in examining them for evidence of misconduct, and the nature of the  
12 scrutiny it proposes to give them.” *Id.* at 22. Although the court ultimately upheld  
13 the subpoena, it’s analysis shows that by 1994 the *McPhaul* standard had already  
14 been recognized as superseded by more recent developments in 4th amendment  
15 law like *Katz*.

16 Here, it is clear that Dr. Eastman’s Fourth Amendment expectations of  
17 privacy outweigh the needs of the committee.

18 The defendants’ subpoena represents a major invasion of Dr. Eastman’s  
19 private papers. The subpoena, by its terms, seeks emails from Dr. Eastman, “that  
20 are related in any way to the 2020 election or the January 6, 2021 Joint Session of  
21 Congress...during the time period November 3, 2020 to January 20, 2021.” But,  
22 as proceedings before this Court have revealed, the subpoena is actually a great  
23 deal broader than that. As discussed at the TRO hearing, Chapman reported to the  
24 congressional defendants that there were approximately 30,000 emails “within the  
25

1 date range.” ECF 44 at 79 The committee provided Chapman with a list of search  
2 terms. *Id.* Chapman “ran terms that were provided by the Committee and we  
3 didn’t really have any decision making process.” *Id.* at 78. Running the search  
4 terms reduced the number of emails from 30,000 to 19,620. *Id.*

5 The fact that Chapman “didn’t really have any decision making process” and  
6 simply produced documents in the date range which contained a search term is  
7 highly significant. It effectively excised the clause “related in any way to the 2020  
8 election or the January 6, 2021 Joint Session of Congress” from the subpoena and  
9 replaced it with “any email within the date range that contains a search term.”

10 The search term procedure has been represented to this court as narrowing  
11 the subpoena but in fact the opposite is true. The search terms (provided to  
12 plaintiff by defendants) are in no way limited to the election or the Joint Session of  
13 Congress. *See* Ex. 3. They greatly expanded the scope of the subpoena beyond its  
14 original terms. The search terms are not limited to Dr. Eastman’s legal theories  
15 about the electoral college or his brief remarks on January 6. For example, the  
16 search terms included “.gov”, “antifa”, “Cruz”, “Hawley”, “China”, “Luttig”, and  
17 many other terms which might naturally return documents completely unrelated to  
18 the election or the certification of results. The subpoena is in reality a license for  
19 the committee to sift through several months of Dr. Eastman’s political and  
20 personal communications which may have no connection to January 6. It is a  
21 major invasion of his Fourth Amendment expectation of privacy.

22 Meanwhile, the congressional defendants have not demonstrated a  
23 compelling interest in accessing these communications. As the recent *Trump v.*  
24 *Thompson* decision reminded us, the purpose of congressional investigations is to  
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1 write laws. 20 F.4th 10, 41-42 (D.C. Cir. Dec. 9, 2021). There is no  
2 congressional “power to expose for the sake of exposure.” *Watkins*, 354 U.S. at  
3 200. Despite several chances to do so over the course of this case, the  
4 congressional defendants have identified no piece of legislation that is being  
5 unduly delayed through want of access to Dr. Eastman’s emails. They have  
6 certainly not identified legislation which depends upon access to Dr. Eastman’s  
7 correspondence about “antifa”, “China”, “Venezuela”, or any of the other search  
8 terms. This Court should hold that any congressional interest in Dr. Eastman’s  
9 private papers that were retained (unknownst to Eastman) in stored archives by  
10 Chapman University is outweighed by Dr. Eastman’s strong Fourth Amendment  
11 expectation of privacy.

### 12 13 CONCLUSION

14  
15 For the foregoing reasons, plaintiff requests this Court order that the  
16 materials identified on plaintiff’s privilege logs are protected from disclosure to the  
17 defendants by the attorney client and work product privileges.

18  
19 February 22, 2022

Respectfully submitted,

20 /s/Anthony T. Caso

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**CERTIFICATE OF SERVICE**

I have served this filing on all counsel through the Court's ECF system.

Respectfully submitted,

/s/ Charles Burnham

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