

1 Anthony T. Caso (Cal. Bar #88561)
Email: atcaso@ccg1776.com
2 CONSTITUTIONAL COUNSEL GROUP
3 174 W Lincoln Ave # 620
4 Anaheim, CA 92805-2901
5 Phone: 916-601-1916
Fax: 916-307-5164

6 Charles Burnham (D.C. Bar# 1003464)*
7 Email: charles@burnhamgorokhov.com
BURNHAM & GOROKHOV PLLC
8 1424 K Street NW, Suite 500
9 Washington, D.C. 20005
Telephone: (202) 386-6920
10 * *admitted pro hac vice*

11 *Attorneys for Plaintiff*

12
13 **UNITED STATES DISTRICT COURT**
14 **CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION**
15

16 JOHN C. EASTMAN,

17 *Plaintiff,*

18 vs.

19 BENNIE G. THOMPSON, *et al.*

20 *Defendants*

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

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

Judge: Hon. David O. Carter
Magistrate Judge: Hon. Douglas F.
McCormick

Crtrm.: 9D

Trial Date: not set

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INTRODUCTION

1
2 The Select Committee has accused Dr. Eastman and his client of acting to
3 obstruct the Joint Session of Congress with corrupt intent, based on its claim that
4 Dr. Eastman and his client (and others) engaged in the “big lie” about election ille-
5 gality and fraud. But that claim, that premise, is itself false. One might even say
6 that the assertion of a “big lie” is itself the actual big lie.

7 The issue at the time the communications subject to the instant subpoena
8 were made was not whether there had been illegality and fraud in the election—
9 there was ample evidence of that at the time, and the evidence on that score has
10 only grown since—but whether it was of sufficient scope to have altered the out-
11 come of the election, warranting reversal,¹ or at least called it into question, warn-
12 ing a new election.² As is evident from the already-public materials, Dr. Eastman’s
13 efforts on behalf of his client, whether in litigation, or in urging legislative action,
14 or in advice he gave about the conduct of the Joint Session of Congress, were all
15 based on the well-grounded premise that illegality and fraud had occurred, and that
16 further investigation was essential to determine the true winner of the 2020 elec-
17 tion.

18 Ignoring this volume of evidence (and shielding from discovery similar evi-
19 dence that is quite obviously in its possession), the Select Committee has crafted a
20 counter narrative based on snippets from transcripts of depositions conducted with-
21 out adversarial cross-examination, innuendo, hearsay, and outright lies. This
22 Court, accepting the Government’s representations, as it should be able to do (and
23 historically has been able to do), found that Dr. Eastman and his client “more
24 likely than not” made false statements in order to obstruct the Joint Session of
25 Congress and prevent the peaceful transition of power to a duly-elected President,
26 thereby undermining Democracy itself.

27 ¹ *Cf. Marks v. Simpson*, 1994 U.S. Dist. LEXIS 5273 (E.D. Pa. April 26, 1994).

28 ² *See* Andrew Hay, “North Carolina orders new U.S. House election after ‘tainted’ vote,” Reuters (Feb. 21, 2019), <https://www.reuters.com/article/us-usa-election-north-carolina/north-carolina-orders-new-u-s-house-election-after-tainted-vote-idUSKCN1QA1QG>.

1 That prior holding makes the veracity of the Select Committee’s accusations
2 all the more important, and a key issue underlying this dispute over privileged doc-
3 uments. For if, as seemed clear to Dr. Eastman and his client at the time, there was
4 illegality and fraud in the election of sufficient magnitude to have altered the out-
5 come of the election, then far from “undermining” Democracy, Dr. Eastman’s ac-
6 tions and advice must be seen for what they were—a legitimate attempt to prevent
7 a stolen election. Perhaps Dr. Eastman was wrong about that. But even if he was,
8 being wrong about factual claims is not and never has been criminal—indeed, it is
9 constitutionally protected, *see New York Times v. Sullivan*, 376 U.S. 254 (1964)—
10 unless the claims were known to be false when made. The Select Committee’s evi-
11 dence on that score is simply that news accounts and some government officials
12 (including a few high-ranking ones) had belittled the substantial fraud and illegal-
13 ity evidence as false. But given the false claims, outright lies, and even docu-
14 mented efforts by many of those same sources to spy on and otherwise thwart the
15 former President from fulfilling his constitutional duties for the entire four years of
16 his term as President, one should hardly be surprised that President Trump did not
17 take such claims at face value and preferred instead to rely on trusted advisors out-
18 side of the normal channels.

19 More importantly for present purposes, the mounting evidence about the
20 scope of illegality and fraud in the 2020 election further undercuts any claim that
21 the statements on that score made by Dr. Eastman and his client were made “cor-
22 ruptly” or “dishonestly.”

23 Dr. Eastman could have produced all of his communications at the outset, as
24 others have done. As this Court should know from its own *in camera* review, there
25 is ample evidence in those communications of illegality, fraud, and statistical
26 anomalies in the election results that lend significant support to the statements
27 made by Dr. Eastman and his client. But Dr. Eastman was and remains duty bound
28 by the rules of professional conduct to preserve the confidences of his clients at

1 every peril to himself, Cal. Bus & Prof Code § 6068, and also to fight to protect the
2 work product of those who were assisting in the litigation efforts challenging ille-
3 gality and fraud in the election. The claims by the commentators on social media,
4 magnified by the major corporate legacy media (what one late commentator used
5 to describe, with reason, as the “drive-by media”), that Dr. Eastman was “hiding”
6 his documents (and, impliedly, trying to shield nefarious conduct) simply ignores
7 those bedrock ethical commands, and would in fact jettison them in service of a
8 current political agenda and narrative.

9 Misrepresentations by the press are one thing, but this Court should not
10 countenance such misrepresentations when made to this Court in formal pleadings.
11 Even government attorneys representing members of Congress, who may them-
12 selves be shielded by the Speech and Debate Clause from being held to account for
13 misrepresentations and lies, have a duty of candor to the courts.

14 In the prior round of briefing, Dr. Eastman raised numerous objections to the
15 false statements of fact contained in the Select Committee’s brief and submitted a
16 separate statement of disputed issues of fact. The objections were not ruled upon,
17 and the Court in many instances simply accepted as true the Select Committee’s
18 assertions—based in many instances on unsupported newspaper articles and hear-
19 say—of hotly disputed facts. Perhaps the Court should be able to rely on represen-
20 tations made by government attorneys (or private attorneys representing the gov-
21 ernment). Like prosecutors, they should have a high obligation on that score not
22 only as as officers of the Court but as representatives of the government. *See* ABA
23 Model Rule of Professional Conduct Rule 3.8. But at some point, as here, the
24 claims are so manifestly false, or so distorted, or so taken utterly out of context,
25 that the normal presumptions simply cannot stand.

26 And yet, the misrepresentations made by the Select Committee have colored
27 every element in dispute here. They have put a heavy thumb on the scale in favor
28 of the claims of obstruction rather than a constitutionally-permitted right to petition

1 the government for redress of grievances, for example. They have induced a find-
2 ing of “corrupt intent” when there was none. They have given rise to a holding of
3 illegal advice instead of acknowledgement that the advice was based on valid or at
4 least colorable constitutional arguments. And, most sensationally, they have pro-
5 vided ground for a finding of “undermining Democracy” when, at every turn, Dr.
6 Eastman’s efforts were designed to protect Democracy by ensuring that illegality
7 and fraud did not alter the results of the election, and that full and transparent in-
8 vestigations into the serious anomalies would be had, even if the outcome of those
9 investigations simply confirmed the initial certifications. A proper assessment of
10 the factual circumstances in which Dr. Eastman’s representations and advice were
11 made is therefore essential to the proper resolution of the privilege claims at issue
12 here.

13 It would require book-length treatment to address all of the factual misrepre-
14 sentations that have been pushed by the Select Committee. Indeed, several books,
15 such as Mollie Hemingway’s *Rigged*, have already begun to plow that ground. A
16 sampling here should be enough to make the point. One of the biggest misrepre-
17 sentations is the Select Committee’s claim, based on unsubstantiated news stories
18 and other untested sources, that President Trump’s claims of election illegality and
19 fraud were “without basis,” Opp. at 3, that he repeatedly pressed “false and unsub-
20 substantiated claims of election fraud,” *id.* at 8, that Dr. Eastman’s efforts were “based
21 on these same fraudulent claims,” *id.* at 7, and that he “spread proven falsehoods,”
22 *id.* at 1. These assertions by the Select Committee are demonstrably false, or at the
23 very least hotly disputed. *See, e.g.*, Statement of Disputed Facts (Dkt. 185-1).

24 Countless examples of election illegality and fraud, and expert opinion indi-
25 cating a high likelihood of fraud, were available to President Trump and Dr. East-
26 man at the time. Much of this information is available to this Court via its *in cam-*
27 *era* review, but much of it is also available publicly, including in sworn affidavits
28

1 and verified complaints submitted in court actions that never were considered on
2 the merits.³

3 *Trump v. Raffensperger*, No. 2020CV343255 (Ga. Ct., Fulton Cnty.), is a
4 good example. The thorough, 64-page verified complaint,⁴ supported by sworn
5 eyewitness and expert affidavits, documents scores of violations of Georgia elec-
6 tion law that, together, affected as much as a half million votes in an election that
7 was determined by less than 12,000 votes. Signature verification requirements
8 adopted by the Legislature pursuant to its plenary authority under Article II of the
9 federal constitution to direct the “manner” for choosing presidential electors were
10 unconstitutionally altered by the Secretary of State without approval of the legisla-
11 ture. The resulting decline in the disqualification rate of absentee ballots from
12 2.9% in 2016 and 3.46% in 2018 to .34% in 2020 means that, as alleged in the
13 complaint, the lax rules unconstitutionally agreed to by the Secretary of State al-
14 lowed between 38,000 and 45,000 ballots that should have been disqualified to be
15 submitted and counted. Georgia Complaint ¶¶ 150-161. The complaint and its
16 supporting expert analysis also identified more than 66,000 underage individuals
17 were allowed to register to vote before the time allowed by Georgia law, and then
18 did vote, *id.* ¶¶ 63, 64, and Ex. 3; more than 40,000 voters who moved to another
19 county more than 60 days before the election yet voted in their prior county in vio-
20 lation of Georgia law, *id.* ¶¶ 84-86 and Ex. 4; and more than 10,000 deceased indi-
21 viduals who had votes cast in their names, *id.* ¶¶ 101-03 and Ex. 3. The complaint
22 also documents that a deceased voter’s registration was changed from “deceased”
23 to “active” 8 days *after* he passed away, *id.* ¶ 110 and Ex. 6—tip-of-the-iceberg ev-
24 idence that suggests a more wide-spread scheme of fraud. Another example of tip-
25 of-the-iceberg evidence was provided in sworn testimony by a Georgia Tech

26 ³ That point implicates another misrepresentation made by the Select Committee, namely, that the courts
27 overwhelming ruled “against Trump’s claims of election misconduct,” *Opp.* at 5. In almost every in-
28 stance, the cases were decided on jurisdictional grounds without ever reaching the merits of the claims of
illegality and fraud. *See, e.g.*, 2020 US Presidential Election Related Lawsuits, [https://election-integ-](https://election-integrity.info/2020_Election_Cases.htm)
[rity.info/2020_Election_Cases.htm](https://election-integrity.info/2020_Election_Cases.htm), for a good summary.

⁴ https://cdn.donaldjtrump.com/public-files/press_assets/verified-petition-to-contest-georgia-election.pdf

1 college student, who discovered upon showing up at her polling place that some-
2 one had applied for an absentee ballot in her name, had it delivered to an address
3 unknown to her, and fraudulently cast the ballot on her behalf. *See* The Chair-
4 man’s Report of the Election Law Study Committee, Summary of Testimony From
5 Dec. 3, 2020 Hearing (“Ligon Report”), at 12.⁵ This evidence was known by Dr.
6 Eastman and his client at the time, but it has recently been lent additional support
7 by revelations contained in a new documentary film by Dinesh D’Souza, 2000
8 Mules, supported by exhaustive analysis of geospatial cell phone data and drop box
9 video surveillance footage, of a massive and illegal ballot harvesting scheme. *See*,
10 *e.g.*, TTV and 2000 Mules: Frequently Asked Questions (May 12, 2022).⁶

11 Other examples of election illegality and potential fraud that were known at
12 the time, and subsequently confirmed, abound. As documented in an election chal-
13 lenge filed in Wisconsin, for example, Wisconsin election officials altered or sus-
14 pended key anti-fraud provisions of Wisconsin state law without the approval of
15 the legislature, as constitutionally required by Article II of the U.S. Constitution.
16 As alleged in the complaint and then reiterated in the petition for writ of certiorari
17 that was subsequently filed (and then dismissed without confronting the merits of
18 the claims, just as the state supreme court below had done with respect to all but
19 one of the claims), that illegal conducted affected more than 50,000 ballots, well in
20 excess of the 20,000 vote margin in the state. That, too, was known at the time,
21 and recently confirmed by a Special Counsel hired by the Wisconsin Legislature to
22 investigate allegations of illegality and fraud in the election. The interim report
23 submitted by the Special Counsel on March 1, 2022, identified numerous viola-
24 tions of state law (specifically including state laws designed to prevent fraud) that
25 cast “grave doubt on Wisconsin’s 2020 Presidential election certification.” Office
26
27
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⁵ http://www.senatorligon.com/THE_FINAL%20REPORT.PDF

⁶ <https://www.trueethevote.org/ttv-2000mules-faqs/>

1 of the Special Counsel, Second Interim Investigative Report on the Apparatus &
2 Procedures of the Wisconsin Elections System, at 9 (Mar 1, 2022).⁷

3 Similarly, a Pennsylvania Court has recently held that the no-excuse mail-in
4 balloting utilized in the 2020 election violated the Pennsylvania Constitution.
5 *McLinko v. Pennsylvania*, No. 244 M.D. 2021 (Commonwealth Ct. of PA. Jan. 28,
6 2022) (decision stayed pending appeal). The law had been successfully (though
7 preliminarily) challenged in the aftermath of the election and certification prelimi-
8 nary enjoined, *Kelly v. Commonwealth*, No. 620 M.D. 2020, 2020 WL 7224280, at
9 *6 (Pa. Commw. Ct. Nov. 27, 2020), but that decision was then vacated by the
10 Pennsylvania Supreme Court on *laches* jurisdictional grounds, without reaching
11 the merits of the challenge. *Kelly v. Commonwealth*, 240 A.3d 1255, 1256 (Pa.
12 2020), *cert. denied sub nom. Kelly v. Pennsylvania*, 141 S. Ct. 1449 (2021).

13 These are just a few of the cases where election challenges, based on exten-
14 sive evidence, were brought but dismissed without the merits of the claims being
15 addressed. But there is much more. Statistical evidence, contained in Dr. East-
16 man’s privileged email exchanges, *see, e.g.*, Cons. Priv. Log 15965, 17416, 63119,
17 but also that which was publicly available at the time, strongly indicated “the in-
18 tense improbability of the accuracy of the present Biden lead.” Steve Cortes, The
19 Statistical Case Against Biden’s Win, The National Pulse (Nov. 9, 2020);⁸ *see also*
20 Here is the Evidence (Dec. 11, 2020, last updated Jan. 5, 2021) (summarizing some
21 of the statistical evidence)⁹; Protecting American Election Integrity¹⁰ (containing
22 links to a number of statistical reports that highlighted significant enough anoma-
23 lies to cast doubt on the election or at least to have warrant further investigation
24 and audit). As one of the experts noted to Dr. Eastman following his team’s re-
25 view of the absentee ballot patterns in the Georgia Senate runoff election of Janu-
26 ary 5, 2021, “it reeks of a computer algorithm.” Cons. Priv. Log 63479.

27 ⁷ <https://legis.wisconsin.gov/assembly/22/brandtjen/media/1552/osc-second-interim-report.pdf>

28 ⁸ <https://thenationalpulse.com/2020/11/09/case-against-biden-win/>

⁹ <https://hereistheevidence.com/election-2020/stats/>

¹⁰ <https://election-integrity.info/>

1 State legislators, too, weighed in, highlighting significant illegalities and ir-
2 regularities in their elections. A study subcommittee of the Georgia Senate Judici-
3 ary Committee, for example, found after an extensive hearing with sworn witness
4 and expert testimony that the 2020 election was “chaotic and the results cannot be
5 trusted,” that state and county election officials violated several provisions of
6 Georgia election law, and that it had received “ample evidence that the 2020 Geor-
7 gia General Election was so compromised by systemic irregularities and voter
8 fraud that it should not be certified.” Ligon Report at 12. The President Pro Tem
9 of the Pennsylvania Senate, joined by a large number of his colleagues, advised
10 Congress that because of “unlawful violations” of Pennsylvania election law,
11 Pennsylvania’s “election results should not have been certified.” Letter from PA
12 Senate President Pro Tempore Jake Corman, *et al.* (Jan. 4, 2021).

13 The Select Committee has relied on statements to the contrary, of course, but
14 the inaccuracy of the statements is manifest. It touted a November 12, 2020 state-
15 ment by the Department of Homeland Security’s Cybersecurity and Infrastructure
16 Security Agency that “[t]he November 3rd election was the most secure in Ameri-
17 can history,” and “[t]here [wa]s no evidence that any voting system deleted or lost
18 votes, changed votes, or was in any way compromised.” Opp. at 5 n.11. The fo-
19 rensic audit conducted in Antrim County proved that statement to be false, as even
20 the State’s own expert acknowledged that votes were switched in the machine due
21 to an improper software upgrade.¹¹ The Select Committee has also touted a media
22 statement by former Attorney General William Barr that the “U.S. Justice Depart-
23 ment ha[d] uncovered no evidence of widespread voter fraud that could change the
24 outcome of the 2020 election,” but as we have subsequently learned, the Depart-
25 ment did very little in the way of investigations of election illegality and fraud.

26
27 ¹¹ Allied Security Operations Group, Antrim Michigan Forensics Report (Dec. 12, 2020),
28 <https://www.michigan.gov/-/media/Project/Websites/sos/30lawens/Antrim.pdf?rev=fbfe881cdc0043a9bb80b783d1bb5fe9>; J. Alex Halderman, “Analysis of the Antrim County, Michigan November 2020 Election Incident,” p. 22 (Mar. 26, 2021), <https://www.michigan.gov/-/media/Project/Websites/sos/30lawens/Antrim.pdf?rev=fbfe881cdc0043a9bb80b783d1bb5fe9>

1 Finally, we should correct the record on the Select Committee’s claim that
2 Dr. Eastman has acknowledged that there was no support for his legal positions
3 about the unconstitutionality of the Electoral Count Act’s provisions intruding on
4 whatever powers the Vice President has directly from the Constitution, and that he
5 would lose any case brought in the Supreme Court 9-0. As seems to be a common
6 tactic of the Select Committee, Eastman’s acknowledgement is taken out of con-
7 text. It referred to the suggestion that had been made by others, and which (as has
8 been public reported¹²) Eastman contended in his January 4, 2021 oval office meet-
9 ing with President Trump and Vice President Pence would be foolish to do, was
10 that the Vice President simply reject electoral votes and declare Trump re-elected.
11 But as for the more limited proposal Dr. Eastman actually made, namely, that the
12 Vice President to simply accede to requests by numerous state legislators to delay
13 proceedings for a week or ten days to allow them time to assess the impact of
14 acknowledged illegality in the election, Eastman noted to Jacob on January 6, 2021
15 that he “remain[ed] of the view not only would that have been the most prudent
16 course, but also had a fair chance of being approved (or at least not enjoined) by
17 the Courts.” 5394.

18 In sum, there is ample evidence on which Dr. Eastman and his client could
19 credibly rely to support the statements they made about election illegality and
20 fraud, and colorable legal arguments about the meaning of ambiguous constitu-
21 tional provisions and an untested though quite arguably unconstitutional statute, to
22 demonstrate not only that Eastman had a good faith basis in fact and law for his
23 statements and recommendations, but that even if he was wrong, they do not rise to
24 the level of “corrupt intent” or “dishonesty” that the Select Committee must
25 demonstrate by a preponderance of the evidence to avail itself of a crime-fraud ex-
26 ception to Dr. Eastman’s claims of privilege that might remain at issue.

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¹² See “He Drafted Plan To Keep Trump In White House,” New York Times (Oct. 3, 2021) (

1 **I. Dr. Eastman’s Attorney-Client Relationship with former Presi-**
2 **dent Trump Extended to the time periods at issue here.**

3 This Court has already found that “[t]he evidence clearly supports an attor-

4 ney-client relationship between President Trump, his campaign, and Dr. Eastman

5 during January 4-7, 2021.” Order at 15 (Dkt. 260). In addition to the draft retainer

6 agreement spelling out the terms of the attorney-client relationship already in

7 place, *see* 2nd Eastman Decl. ¶ 23 and Ex. A (Dkt. 132-1), that evidence included

8 Dr. Eastman’s court appearances on behalf of then-President Trump and his cam-

9 paign, meetings with and on behalf of President Trump, and public statements con-

10 firming the attorney-client relationship. Order at 14-15 (Dkt. 260). The same or

11 similar evidence, together with sworn declarations by Dr. Eastman (Dkt. 132-1)

12 and others (e.g., Klukowski Decl. ¶ 3; Olsen Decl. ¶ 3), also conclusively supports

13 the existence of the attorney-client relationship for the remainder of time period

14 covered by the subpoena, November 3, 2020, through January 20, 2021.

15 On December 9, 2020, Dr. Eastman filed on President Trump’s behalf a mo-

16 tion to intervene in the original action Texas had filed in the Supreme Court two

17 days earlier. *Texas v. Pennsylvania*, No. 220155 (S.Ct., filed Dec. 7, 2020). Two

18 weeks later, he appeared again in the Supreme Court of the United States as coun-

19 sel of record on the petition for writ of certiorari he filed on behalf of President

20 Trump’s campaign committee, seeking review of three election-related decisions

21 of the Pennsylvania Supreme Court. *Donald J. Trump for President, Inc. v.*

22 *Brookvar*, No. 20-845 (S.Ct., filed Dec. 23, 2020). That case remained pending

23 until February 22, 2021, more than a month after the latest date covered by the sub-

24 poena at issue here. *See* Order List, at 17, 592 U.S. -- (Feb. 22, 2021, *cert. denied*

25 *sub nom. Donald J. Trump for President, Inc. v. Brookvar*).¹³ For these matters,

26 Dr. Eastman also communicated directly with President Trump by phone and by

27 email through his assistant or attorney agents. 3rd Eastman Decl. ¶ 3; *see also, e.g.,*

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¹³ At https://www.supremecourt.gov/orders/courtorders/022221zor_2cp3.pdf.

1 24324, 27492, 61631 (documents produced to Select Committee). He also made
2 public statements about the representation.¹⁴

3 Moreover, as noted in his Declaration, Dr. Eastman’s attorney-client rela-
4 tionship with President Trump as candidate began two months before the Novem-
5 ber 3, 2020 election (the beginning date of the materials sought by the Select Com-
6 mittee’s subpoena) when he was invited by Cleta Mitchell to join an Election In-
7 tegrity Working Group to begin preparing for anticipated litigation, and kicked into
8 high gear when he was asked to meet with the campaign’s legal team in Philadel-
9 phia on November 7, 2020 to assist with the preparation of an election challenge
10 being prepared. Eastman Decl. ¶¶ 25-27 (Dkt. 132-1). That case, *Donald J.*
11 *Trump for President, Inc. et al. v. Boockvar et al.*, No. 4:20-cv-02078 (M.D. Pa.),¹⁵
12 was filed two days later. Email correspondence among members of the Trump
13 campaign legal team and Dr. Eastman conveying privileged information about le-
14 gal claims under consideration at the time, which has been produced to the Select
15 Committee or listed on Dr. Eastman’s privilege log, further confirms that an attor-
16 ney-client relationship was understood by the campaign legal team to have existed
17 in early November 2020 as well. *See, e.g.*, 7394 (produced to Select Committee),
18 Consolidated Privilege Log (Dkt. 342), Nos. 7402, 7403, 7414; *see also* Klukowski
19 Decl. ¶ 3; Olsen Decl. ¶ 3.

20 In addition, as this Court has already acknowledged, Dr. Eastman formally
21 appeared *pro hac vice* on behalf of the President in *Trump v. Kemp, et al.*, No.
22 1:20-cv-05310 (N.D. Ga., filed Dec. 31, 2020). *See* Order of March 28, 2022, pp.
23 14-15 (Dkt. 260). And, as noted in his Declaration and confirmed by entries in his
24 privilege log, Dr. Eastman also provided legal advice on behalf of the President as

25 ¹⁴ *See, e.g., Another Way: Discussing the John Eastman Memo with Eastman*, Equal Citizens (Sept. 27,
26 2021), <https://equalcitizens.us/discussing-the-john-eastman-memo-with-john-eastman/>; M. Schmidt, *The*
27 *Lawyer Behind the Memo on How Trump Could Stay in Office*, N.Y. Times (Oct. 2, 2021),
28 <https://perma.cc/9BQQ-5Y39>; John C. 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/opin-](https://www.sacbee.com/opinion/op-ed/article254812552.html)
[ion/op-ed/article254812552.html](https://www.sacbee.com/opinion/op-ed/article254812552.html); *Peter Boyles Show: Peter Boyles May 5 8am*, 710KNUS News/Talk
(May 5, 2021), <https://perma.cc/Q6YE-KD5F>.

¹⁵ https://cdn.donaldjtrump.com/public-files/press_assets/2020-11-09-complaint-as-filed.pdf.

1 candidate and his campaign committee in several other legal challenges that were
2 brought in December 2020, including *Donald J. Trump, et al. v. Brad Raffens-*
3 *berger, et al.*, No. 2020-CV-343255 (Super. Ct. of Fulton Cnty, Ga, filed Dec. 4,
4 2020); *Donald J. Trump, et al. v. Joseph Biden, et al.*, No. 20-882 (S.Ct., filed Dec.
5 29, 2020); and *Donald J. Trump v. Wisconsin Elections Bd.*, No. 20-883 (S.Ct.,
6 filed Dec. 29, 2020). 2nd Eastman Decl. ¶ 28; *see also, e.g.*, Consolidated Privi-
7 lege Log Nos. 21814, 55012, and 60478. By withdrawing its objections to at least
8 some of these materials, *see, e.g.*, Feb 16 Privilege Log No. 21815 (Dkt. 119) (“At-
9 tachment [to email dated 12/3/20]: Draft Complaint”); Apr 8 Privilege Log No.
10 60746 (Dkt. 302) (email dated 12/31/20), the Select Committee has apparently rec-
11 ognized the validity of Dr. Eastman’s privilege claims and, hence, his attorney-cl-
12 ient relationship.

13 **II. The Communications Are Manifestly Privileged.**

14 Dr. Eastman has asserted attorney-client privilege (in addition to work-prod-
15 uct protection) over 113 documents containing communications with agents of for-
16 mer President Trump or with other attorneys working on Trump’s legal team.¹⁶

17 Six of those¹⁷ were communications with the President of the non-profit or-
18 ganization with which Dr. Eastman’s public interest law firm is affiliated and its
19 outside non-profit counsel, to determine whether Eastman would undertake the
20 representation under the auspices of that organization. Although the exchange in-
21 dicates that the particular representation had not yet been determined, the Califor-
22 nia Evidence Code defines as a client not just one who has retained counsel but
23 also one who is seeking counsel. Cal. Evid. § 951. Federal common law also rec-
24 ognizes that the privilege attaches to communications with prospective clients

25 ¹⁶ Some of the email exchanges include logistical or other discussions that are arguably not themselves
26 privileged (though they may be protected work product, *see In re LDK Solar Sec. Litig.*, No. C07-5182
27 WHA (BZ), 2010 U.S. Dist. LEXIS 6474 (N.D. Cal. Jan. 7, 2010)). 23421, 23554, 23826, 23852, 24310,
28 61357, 61371, 61517, 61531, 61555, 61560, 61561, 61562, 61563, 61565. Because they are part of email
threads that include privileged information, we have withheld the entire thread because the non-privileged
portions (to the extent there are any) are innocuous. If, after its *in camera* review, the Court disagrees, we
can produce any non-privileged portions of these emails with the privileged portions redacted.

¹⁷ 23056, 23060, 23107, 23113, 23233, 23240

1 seeking legal advice. *See United States v. Layton*, 855 F.2d 1388, 1406 (9th Cir.
2 1988) (overruling on other grounds recognized in *People of Territory of Guam v.*
3 *Ignacio*, 10 F.3d 608, 612 n.2). The exchange includes a limited amount of privi-
4 leged information, but the California Evidence Code also provides that a disclosure
5 made in confidence to a third party – here, the non-profit President and its outside
6 counsel – does not waive the privilege where “disclosure is reasonably necessary
7 for the accomplishment of the purpose for which the lawyer” was consulted. Cal.
8 Evid. § 912(d); *United States v. Christensen*, 828 F.3d 753, 802-03 (9th Cir. 2015);
9 *Nat.-Immunogenics Corp. v. Newport Trial Grp.*, No. 815CV02034JVSJCGX,
10 2017 WL 10562991, at *4 (C.D. Cal. Sept. 18, 2017). The limited disclosure at is-
11 sue, pursuant to the organization’s case approval process, was “reasonably neces-
12 sary” to determine in which capacity Dr. Eastman would undertake the representa-
13 tion, and was therefore not a waiver of the privilege.

14 Seventy-two of the documents over which Dr. Eastman has asserted attor-
15 ney-client privilege are communications between Dr. Eastman (or Dr. Eastman and
16 other attorneys on the Trump legal team) and one or more of six conduits to or
17 agents of the former President with whom Dr. Eastman dealt.¹⁸ “The attorney-cli-
18 ent privilege may extend ... to communications with third parties ‘acting as agent’
19 of the client.” *United States v. Sanmina Corp.*, 968 F.3d 1107, 1116 (9th Cir. 2020)
20 (quoting *United States v. Landof*, 591 F.2d 36, 39 (9th Cir. 1978)). The Third Re-
21 statement recognizes as “privileged persons” covered by the attorney-client privi-
22 lege agents of either the client or the lawyer “who facilitate communications be-
23 tween them.” Restatement (Third) of the Law Governing Lawyers ¶ 70. “A per-
24 son is a confidential agent for communication if the person’s participation is rea-
25 sonably necessary to facilitate the client’s communication with a lawyer ... and if

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¹⁸ 23289, 23290, 23291, 23292, 23306, 23308, 23310, 23325, 23326, 23333, 23343, 23344, 23549,
23550, 23554, 23555, 23556, 25167, 25170, 25220, 25905, 28487, 28530, 30038, 30118, 49527, 49528,
55012, 55029, 55039, 55050, 55112, 55127, 55141, 55152, 55457, 55569, 60113, 60114, 60117, 60118,
60120, 60123, 60126, 60131, 60149, 60153, 60183, 60193, 60362, 60453, 60475, 60478, 60487, 60498,
60526, 60528, 60565, 61296, 61356, 61357, 61371, 61424, 61449, 61452, 61531, 61555, 61560, 61561,
61562, 61563, 61565.

1 the client reasonably believes that the person will hold the communication in confi-
2 dence.” *Id.* Comment f; *see also, e.g., In re Teleglobe Commc'ns Corp.*, 493 F.3d
3 345, 359 (3d Cir. 2007), as amended (Oct. 12, 2007); *Symetra Life Ins. Co. v. JJK*
4 *2016 Ins. Tr.*, No. CV-1812350-MASZNQ, 2019 WL 4931231, at *3 (D.N.J. Oct.
5 7, 2019); *S.E.C. v. Wyly*, No. 10 CIV. 5760 SAS, 2011 WL 3366491, at *1
6 (S.D.N.Y. July 27, 2011) (subsequent modifications on other grounds omitted)
7 (“the privilege can apply to communications with agents of an individual where the
8 agent is necessary to the lawyer's representation—on an analogy to *Upjohn Co. v.*
9 *United States*, 449 U.S. 383 (1981)).

10 Three of the individuals had formal roles with former President Trump’s
11 campaign committee, as evidenced by their @donaldtrump.com email addresses,
12 and are also attorneys. *See, e.g., Cons. Priv. Log* 55012, 55457; *see also* Order re
13 Redactions at 2 (Dkt 139) (noting @donaldtrump.com email address reflects affili-
14 ation with the Trump campaign); Order re Privilege at 21 (Dkt 260) (suggesting
15 that agent status could be inferred from a @donaldtrump.com email address). The
16 other three were members of former President Trump’s immediate staff, one of
17 whom is also an attorney. 3rd Eastman Decl. ¶ 3; *see also, e.g., Cons. Priv. Log*
18 49527. While Dr. Eastman could (and did) communicate directly with former
19 President Trump at times, 3rd Eastman Decl. ¶ 3, many of his communications with
20 the President were necessarily through these agents. Given that Dr. Eastman’s cli-
21 ent was the *President of the United States*, the use of these intermediaries easily
22 qualifies as “reasonably necessary to facilitate the client’s communication with a
23 lawyer.”

24 Two of the documents¹⁹ were communications from another attorney work-
25 ing with the campaign to the Trump Campaign manager outlining a potential legal
26 challenge. The campaign manager was an agent both of the Campaign and of the
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¹⁹ 15944, 16194. The Attorney-Client assertion for 15944 was inadvertently omitted from the Consoli-
dated Privilege Log. Dr. Eastman seems to have been blind copied on 16194.

1 former President as candidate; in either case, the communication is attorney-client
2 privileged.

3 The remaining 33 documents over which Dr. Eastman has asserted attorney-
4 client privilege were communications among attorneys working on the Trump le-
5 gal team either relaying confidential communications from former President
6 Trump or discussing advice to be provided to him.²⁰ Such communications be-
7 tween co-counsel discussing confidential communications from the client or advice
8 to be given to the client are as privileged as communications between counsel and
9 client. *United States v. Garrison*, 888 F.3d 1057, 1062 n.2 (9th Cir. 2018) (noting
10 that privilege extends to attorneys of different clients); *Natta v. Zletz*, 418 F.2d
11 633, 637 n.3 (7th Cir. 1969) (“insofar as inter-attorney communications or an attor-
12 ney’s notes contain information which would otherwise be privileged as communi-
13 cations to him from a client, that information should be entitled to the same degree
14 of protection from disclosure”); *SmithKline Beecham Corp. v. Apotex Corp.*, 232
15 F.R.D. 467, 481 (E.D. Pa. 2005) (holding that “confidential communications be-
16 tween co-counsel forwarding information and legal advice for the purpose of for-
17 mulating further legal advice and providing legal services” are privileged).

18 Twenty-one of the documents identified above are attachments to the email
19 communications. Most are legal analysis memos (and their supporting data)²¹ or
20 drafts of pleadings,²² quintessential privileged material (as well as work product).
21 Two include hand-written notes from former President Trump about information
22 that he thought might be useful for the anticipated litigation²³—again, quintessen-
23 tial privileged material. Six of the attachments are otherwise public documents,²⁴
24 but as the California courts have recognized, “the privilege covers the *transmission*
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26 ²⁰ 23421, 23826, 23833, 23839, 23845, 23852, 23858, 23862, 23866, 23870, 23875, 23880, 23885,
27 23894, 23899, 23906, 23910, 23918, 24310, 24732, 24739, 24746, 24752, 24803, 24866, 25167, 25170,
28 26836, 26869, 26874, 26885, 48373, 61176, 61186, 61517

²¹ 23291, 23292, 23306, 23308, 23310, 23550, 55039, 55569

²² 60487, 60498, 60526, 60528, 61186

²³ 23555, 25905

²⁴ 23326, 23344, 23556, 25167, 25170, 49528,

1 of documents which are available to the public, and not merely information in the
2 sole possession of the attorney or client. In this regard, it is the actual fact of the
3 transmission which merits protection, since discovery of the transmission of spe-
4 cific public documents might very well reveal the transmitter's intended strategy.
5 *Solin v. O'Melveny & Myers, LLP*, 89 Cal. App. 4th 451, 457 (2001) (emphasis
6 added) (citing *In re Jordan*, 12 Cal.3d 575, 580 (1974)).

7 **III. Dr. Eastman's Communications With Other Clients Are Also**
8 **Privileged.**

9 Among the 601 documents still in dispute, Dr. Eastman has also asserted at-
10 torney-client privilege over fifty documents²⁵ where the client (or potential client)
11 was other than former President Trump or his campaign committee. (He also as-
12 serted attorney-client privilege and/or work product protection over nearly 600 ad-
13 ditional documents totaling more than 3500 pages for communications with more
14 than 60 other clients, to which the Select Committee did not object but which
15 Chapman University had advised Dr. Eastman it was going to produce before this
16 lawsuit was initiated). Those 50 documents include attorney-client privileged
17 communications with 9 different clients or potential clients who were seeking Dr.
18 Eastman's legal advice regarding the constitutional authority of state legislatures to
19 deal with election illegality and fraud. Seven were themselves state legislators;
20 one was a party committeewomen and also agent of one of the legislators; and the
21 last was a citizen coordinating information sessions for state legislators. Confiden-
22 tial communications between an attorney and his client are protected even if unre-
23 lated to litigation. *See Admiral Ins. Co. v. U.S. Dist. Court for Dist. of Arizona*,

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²⁵ 23532, 23539, 23542, 23551, 23552, 23582, 23584, 23591, 23631, 23638, 24727, 24730, 24760,
24762, 24778, 24795, 24797, 24893, 24897, 25035, 51402, 51403, 51407, 51408, 52958, 53452, 59448,
60185, 60188, 61695, 61697, 61701, 61767, 61768, 61904, 61905, 62674, 62675, 62698, 62706, 62776,
62841, 62842, 62844, 62858, 62859, 62861, 62863, 62865, 62868. The attorney-client privilege assertion
was inadvertently omitted from 24778, 61904, and 61905 in the Consolidated Privilege Log. In addition,
"Trump" is incorrectly identified as the client in 24778; it should be Burt Jones and Brandon Beach.

1 881 F.2d 1486, 1492 (9th Cir. 1989). The requirement is that the communication
2 is made for obtaining “legal advice of any kind.” *Id.*²⁶

3 **IV. Dr. Eastman’s Communications As A Potential Client Seeking Le-**
4 **gal Representation Are Also Privileged.**

5 Among the 601 documents over which the Select Committee has objected to
6 Dr. Eastman’s assertion of privilege are three in which Dr. Eastman was seeking
7 legal representation *for himself* in a potential case asserting breach of contract and
8 violation of constitutional rights.²⁷ Although the representation did not materialize,
9 that fact is immaterial, for both the model rules and California law afford attorney-
10 client privileged protection to communications from *prospective* clients. ABA
11 Model Rule 1.18; Cal. Evid. § 951; *Barton v. U.S. Dist. Ct. for Cent. Dist. of Cal.*,
12 410 F.3d 1104, 1108 (9th Cir. 2005) (“under California law the privilege applied to
13 pre-employment communications with an attorney by a prospective client with a
14 view to employing the attorney”). The same is true under the federal common law.
15 *United States v. Layton*, 855 F.2d at 1406; See *Matter of Bevill, Bresler & Schul-*
16 *man Asset Mgmt. Corp.*, 805 F.2d 120, 124 (3d Cir. 1986); *Baird v. Koerner*, 279
17 F.2d 623, 635 (9th Cir.1960).

18 **V. This Court’s Prior Ruling That Dr. Eastman’s Use of His Chap-**
19 **man Email Account Did Not Waive Privilege Is Controlling.**

20 Despite this Court’s March 28 holding that Dr. Eastman’s use of the Chap-
21 man University email system “did not destroy attorney-client privilege” or work
22 product protection, Order at 16, 20, 29, the Select Committee has continued to ob-
23 ject to Dr. Eastman’s attorney-client privilege and work-product claims with re-
24 spect to every document still in dispute on the ground, *inter alia*, that they were
25 waived due to a supposedly “unauthorized use of Chapman University email ac-
26 count.” See Consolidated Priv. Log. 52452 through 65452. It did not move for
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28 ²⁶ Dr. Eastman has also asserted work product protection over 39 of these documents. That issue is ad-
dressed in Section **Error! Reference source not found.**, *infra*.

²⁷ 64305, 64331, 64715

1 reconsideration of this Court’s ruling, and in any event has offered no new evi-
2 dence that would undercut the Court’s prior holding or warrant reconsideration.
3 Moreover, the Court’s reasoning for the holding with respect to the January 4-7
4 documents that were then at issue is equally applicable to the remainder of the doc-
5 uments now at issue. Dr. Eastman’s use of his Chapman University email did not
6 constitute a waiver of either attorney-client privilege or work product protection.

7 **VI. Work Product Protection Applies to Work Created by Attorneys**
8 **as Well as Experts and Consultants Working With Them.**

9 Dr. Eastman has asserted work product protection over 557 of the 601 docu-
10 ments still in dispute, including 150 for which he also asserted attorney-client priv-
11 ilege (addressed above). Of those, 472 involve client work product on behalf of
12 former President Trump and/or his campaign committee, Donald J. Trump for
13 President, Inc.

14 **a. Work Product Related to Specific Matters**

15 380 of the Trump work product documents are related to specific matters
16 (set out below). 309 documents are work product communications exclusively
17 among lawyers working with the Trump legal team, either as formally retained or
18 as volunteer attorneys. Another 69 constitute communications on these specific
19 matters among attorneys and non-attorney experts or consultants assisting with the
20 litigation of those specific matters, and 2 involved communications with lawyers
21 representing states considering joining one of the lawsuits in support of then-Presi-
22 dent Trump.²⁸

23 The specific matters and their related work-product documents are as fol-
24 lows:

25 • ***Donald J. Trump for President, Inc. v. Boockvar***, No. 4:20-cv-02078 (M.D.
26 Pa., filed Nov. 9, 2020). There are 45 documents over which Dr. Eastman has

27 ²⁸ Communications with experts and others to assist in the representation of potential client are protected
28 under the attorney-client privilege as well. *See Christensen*, 828 F.3d at 802-03 (communications with
private investigator are protected by the attorney-client privilege); *United States v. Judson*, 322 F.2d 460,
462 (9th Cir. 1963) (privilege covers communications with accountant).

1 asserted work product protection related to an election challenge filed in the Mid-
2 dle District of Pennsylvania. 29 documents²⁹ are work-product communications
3 either in anticipation of or during the pendency of the case exclusively among the
4 following attorneys (in addition to Dr. Eastman), all of whom made formal appear-
5 ances or otherwise assisted with the litigation.³⁰ Another 14 documents³¹ involve
6 communications among one or more of those attorneys and a team of experts and
7 attorneys conducting statistical and other technical analyses in support of the litiga-
8 tion. 3rd Eastman Decl. ¶ 11. The remaining 2 documents³² are communications
9 between one of the attorneys and the agent for the campaign committee that are
10 both attorney-client privileged and work product.

11 • ***Trump v. Raffensperger***, No. 2020CV343255 (Ga. Ct., Fulton Cnty.). Dr.
12 Eastman has assert work product protection over 15 documents containing commu-
13 nications related to the election challenge filed in the Fulton County, Georgia Su-
14 perior Court. 9 of the documents³³ were communications exclusively among law-
15 yers working with the Trump legal team who entered appearances in or otherwise
16 assisted with the case. One document³⁴ was an email communication from one of
17 those attorneys requesting a legal assessment from Dr. Eastman, on which, in addi-
18 tion to his law partner, a non-lawyer officer of the non-profit with which they are
19 affiliated, and who cannot be viewed as a conduit to an adversary, was copied. *See*
20 *Sanmina*, 968 F.3d at 1121. Two other email communications³⁵ included several
21 non-attorney individuals who were either employed by the Trump campaign or
22 working under agreement with the Trump legal team to assist in gathering

23
24 ²⁹ 03268, 03269, 03270, 03271, 06854, 07100, 07101, 07106, 07177, 07254, 07320, 07402, 07403,
25 07414, 07416, 07419, 07650, 07652, 16892, 16893, 16894, 16895, 16901, 17124, 18270, 22912, 23042,
30666, 30669

26 ³⁰ See Parties and Attorneys, <https://www.courtlistener.com/docket/18618673/parties/donald-j-trump-for-president-inc-v-boockvar/>; Klukowski Decl. ¶ 4; Hilbert Decl. ¶ 4.

27 ³¹ 11779, 15393, 16182, 16184, 16285, 16349, 16350, 16354, 16561, 17416, 18110, 18592, 18593, 23905

28 ³² 15944, 16194

³³ 28853, 29007, 15960, 15584, 15636, 20142, 24905, 28952, 21814

³⁴ 30111.

³⁵ 21854, 62657.

1 information for the anticipated litigation. The final 3 documents³⁶ are communica-
2 tions among the team of statistical and other experts providing assistance to the le-
3 gal team on the litigation. Hilbert Decl. ¶ 4-6.

4 • ***Texas v. Pennsylvania, et al.***, No. 22O155 (S.Ct. filed Dec. 7, 2020). Dr.
5 Eastman has asserted work product protection over 160 documents containing
6 communications related to the original action Texas filed in the Supreme Court and
7 then-President Trump’s motion to intervene³⁷ in that action. 122 documents³⁸ are
8 work-product communications either in anticipation of or during the pendency of
9 the Original action. Ten of the attorneys included on the communications (in addi-
10 tion to Dr. Eastman) were working on behalf of then-President Trump or his cam-
11 paign committee directly³⁹), and the other three were assisting Dr. Eastman sepa-
12 rately.⁴⁰ Olson Decl. ¶ 3; Eastman Decl. ¶ 7. 6 of the documents⁴¹ are the commu-
13 nications with the President of the non-profit organization with which Dr. East-
14 man’s public interest law firm is affiliated and its outside non-profit counsel

15 _____
16 ³⁶ 18901, 18902, 18919

17 ³⁷ https://www.supremecourt.gov/DocketPDF/22/22O155/163234/20201209155327055_No.%2022O155%20Original%20Motion%20to%20Intervene.pdf

18 ³⁸ 28104, 31209, 23156, 23244, 23248, 24899, 23047, 23049, 23101, 23998, 24906, 25031, 25108,
19 25111, 25553, 26757, 26869, 26885, 28074, 28078, 30013, 30015, 30176, 23285, 23349, 23421, 23431,
20 23434, 23774, 23819, 23833, 23839, 23845, 23852, 23870, 23875, 23899, 23918, 24133, 24218, 24310,
21 24732, 24739, 24752, 24866, 29444, 28399, 28426, 24332, 24618, 24653, 24697, 29783, 21760, 23383,
22 24931, 23160, 23910, 24703, 29420, 30052, 29560, 28168, 23893, 24714, 24725, 24776, 24800, 24802,
23 25908, 23048, 23061, 23242, 23324, 23408, 23426, 23673, 23740, 23777, 23826, 23858, 23862, 23866,
24 23880, 23885, 23894, 23898, 23906, 24212, 24234, 24698, 24716, 24746, 24777, 24803, 24895, 24947,
25 25028, 25033, 25900, 26385, 26452, 26789, 26836, 26874, 26884, 28064, 28075, 28148, 28154, 28783,
26 29397, 29457, 29734, 29791, 30012, 30039, 30040, 30048, 30175, 31213, 23674

27 ³⁹ One of these individuals, through his attorney, has advised Dr. Eastman (after *someone* provided him
28 with information from Dr. Eastman’s privilege log, which this Court had ordered to be filed under seal)
that he was not co-counsel on these matters. As the Court will see from its *in camera* review, that asser-
tion is not consistent with the nature of the communications, but even if that individual was not involved
as an attorney, he was at the very least an agent or conduit to the President for those who were attorneys
representing the former President, and his participation was “reasonably necessary to facilitate the client’s
communication with a lawyer.” Restatement (Third) of the Law Governing Lawyers ¶ 70. His inclusion
on these communications therefore would not waive attorney-client privilege, much less the work product
protection at issue here.

⁴⁰ Dr. Eastman has also asserted Attorney-Client Privilege over 29 of these documents, 23421, 23826,
23833, 23839, 23845, 23852, 23858, 23862, 23866, 23870, 23875, 23880, 23885, 23894, 23899, 23906,
23910, 23918, 24310, 24732, 24739, 24746, 24752, 24803, 24866, 26836, 26869, 26874, 26885. But
these three individuals are not copied on any of those documents.

⁴¹ 23056, 23060, 23107, 23113, 23233, 23240

1 addressed above as attorney-client privileged; they also contain work product. 21
2 of the documents⁴² contain work product as well as attorney-client privileged com-
3 munications (discussed above) transmitted to then-President Trump through his ex-
4 ecutive assistant. 2 documents⁴³ involve communication by the executive assistant
5 of one of the other attorneys on the matter forwarding a legal memo to Dr. East-
6 man over which the Select Committee has held its objection in abeyance. The in-
7 clusion of members of an attorney’s staff on work product does not waive the pro-
8 tection. *Sanmina*, 968 F.3d at 1120 (noting that the “overwhelming majority” of
9 circuits to consider the question holds that work product privilege is *only* waived
10 by sharing the information with an adversary). Similarly, another 7 documents⁴⁴
11 involve communications between Dr. Eastman and another attorney with whom he
12 was collaboratively discussing legal issues in the litigation, transmitted via inter-
13 mediaries (a family member of the lawyer and a mutual friend). Neither of the in-
14 termediaries could be said to be a conduit to an adversary, *see id.* at 1120, and the
15 Select Committee has held in abeyance its objections over the legal memos them-
16 selves. The remaining 2 documents⁴⁵ generated with respect to the original action
17 are communications with the Solicitor General of a State seeking to intervene in
18 the action. On further review, Dr. Eastman is withdrawing his assertion of work
19 product and will produce the documents to the Select Committee.

20 • ***Donald J. Trump for President, Inc. v. Boockvar***, No. 20-845 (S.Ct.). 30 of
21 the still-contested documents relate to the petition for writ of certiorari Dr. East-
22 man (together with Bruce Marks) filed on behalf of the Donald J. Trump for Presi-
23 dent, Inc. campaign committee seeking review of three decisions of the Pennsylva-
24 nia Supreme Court. 19 of the documents⁴⁶ are work-product communications

26 ⁴² 23289, 23290, 23291, 23292, 23306, 23308, 23310, 23325, 23326, 23333, 23343, 23344, 23549,
23550, 23554, 23555, 23556, 25220, 25905, 28487, 28530

27 ⁴³ 23052, 23110

28 ⁴⁴ 29233, 29273, 29322, 29352, 29417, 32015, 32021

⁴⁵ 28070, 28071

⁴⁶ 31640, 32079, 32106, 33360, 47433, 47436, 48373, 60648, 60832, 60862, 60889, 60891, 60897,
61035, 61134, 61231, 61373, 61437, 61763.

1 either in anticipation or during the pendency of the cert petition exclusively among
2 attorneys working on the case. The attorneys involved in these communications
3 represented Donald J. Trump for President, Inc. campaign committee, then-Presi-
4 dent Trump, or both. Marks Decl. ¶ 6; Olsen Decl. ¶ 3. The remaining 11 docu-
5 ments⁴⁷ involve communications between Dr. Eastman and two other attorneys –
6 one with whom he has regularly collaborated in the past and the attorney with
7 whom he was collaboratively discussing legal issues in the litigation, transmitted
8 via intermediaries (a family member of the lawyer and members of Dr. Eastman’s
9 staff). Neither the attorneys nor the intermediaries could be said to be a conduit to
10 an adversary, *Sanmina*, 968 F.3d at 1120, and the Select Committee has withdrawn
11 its objections over the legal memos themselves.

12 • ***Donald J. Trump, et al. v. Joseph Biden, et al.***, No. 20-882 (S.Ct.) and
13 ***Donald J. Trump v. Wisconsin Elections Bd.***, No. 20-883 (S.Ct.). 13 documents⁴⁸
14 involve work-product communications among the attorneys working on behalf of
15 then-President Trump (in his capacity as candidate) in anticipation or during the
16 pendency of two cert petitions that were filed from election cases in Wisconsin. In
17 addition to Dr. Eastman, those attorneys include three who are listed on the *Trump*
18 *v. Biden* cert petition,⁴⁹ the Counsel of Record in *Trump v. Wisconsin Elections*
19 *Board*,⁵⁰ five other attorneys representing candidate Trump and/or his campaign
20 committee, and three attorneys affiliated with the campaign itself. See Marks Decl.
21 ¶ 6. These communications are also protected by attorney-client privilege. See *In*
22 *re Pac. Pictures Corp.*, 679 F.3d 1121, 1129 (9th Cir. 2012) (communications in
23 pursuit of a joint strategy protected under attorney-client privilege).

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26 ⁴⁷ 38210, 43503, 49668, 46183, 47297, 45886, 46154, 49527, 49528, 55453. The latter document in-
volves a “dual role” attorney, and is further addressed in Section VIII, *infra*.

27 ⁴⁸ 55012, 55029, 55039, 55050, 55112, 55127, 55141, 55152, 55457, 55569, 61666, 61862, 61868.

28 ⁴⁹ https://www.supremecourt.gov/DocketPDF/20/20-882/164938/20201229165341814_No.%2020-__PetitionForAWritOfCertiorari.pdf

⁵⁰ https://www.supremecourt.gov/DocketPDF/20/20-883/165018/20201230144119028_20-__Petition-ForWritOfCertiorari.pdf.

1 • *Trump v. Kemp, et al.*, No. 1:20-cv-05310 (N.D. Ga.). Dr. Eastman has as-
2 serted work-product protection over 117 documents related to the federal action
3 filed on December 31, 2020 in the Northern District of Georgia, for which he
4 served as co-counsel. 111 of those documents⁵¹ are work-product communications
5 exclusively among attorneys representing then-President Trump (as candidate) in
6 the case, working directly as an in-house attorney for the Trump campaign com-
7 mittee, or working directly for the President.⁵² The remaining 6⁵³ communications
8 involved one or more of the above attorneys and the President’s close staff,
9 through whom the lawyers communicated with their client.

10 **b. Work Product In Anticipation of Litigation More Broadly**

11 The remaining 100 of the Trump work product documents are related to
12 other litigation efforts with which Dr. Eastman was peripherally involved, or ge-
13 neric development of statistical and other evidence that was prepared in anticipa-
14 tion of litigation. 12 documents⁵⁴ relate to the Wisconsin recount and related elec-
15 tion litigation, and include both attorneys working on the cases and a team of ex-
16 pert analysts. Another 12 documents⁵⁵ relate to pending litigation in Michigan
17 and a potential cert petition, and include both attorneys working on the cases and a
18 team of expert analysts. 2 documents⁵⁶ were a communication between Dr. East-
19 man and one of the other Trump attorneys about a possible original action in the
20
21

22 ⁵¹ 53065, 53537, 53565, 53826, 55522, 56070, 56115, 57872, 57889, 57908, 57961, 58684, 59210,
23 59222, 59253, 59418, 59452, 59485, 59498, 59500, 59504, 59506, 59510, 59613, 59651, 59685, 59691,
24 59729, 59799, 59802, 59813, 59825, 59834, 59844, 59855, 59867, 59874, 59895, 59902, 59916, 59924,
25 59931, 59946, 59962, 59970, 59978, 59987, 60033, 60070, 60097, 60106, 60113, 60114, 60117, 60118,
26 60120, 60123, 60126, 60131, 60142, 60145, 60149, 60153, 60155, 60163, 60183, 60193, 60201, 60210,
60230, 60353, 60362, 60453, 60456, 60465, 60475, 60478, 60487, 60498, 60526, 60528, 60565, 60578,
60587, 60748, 60758, 60798, 60803, 60812, 61068, 61078, 61176, 61186, 61259, 61296, 61309, 61356,
61357, 61359, 61371, 61397, 61424, 61449, 61452, 61517, 61531, 61543, 61560, 61561, 61562, 61563,
61565, 61580, 62749, 62761, 62778

27 ⁵² On the latter’s role, *see supra* note 39.

28 ⁵³ 61356, 61424, 61555, 61357, 61449, 61452

⁵⁴ 06855, 07799, 08739, 08742, 17247, 18550, 18552, 18684, 18793, 18796, 18797, 19889

⁵⁵ 18858, 18863, 18887, 18897, 18406, 18865, 26075, 20826, 18875, 19169, 48793, 49452

⁵⁶ 17197, 17257

1 Pennsylvania Supreme Court, while another 12⁵⁷ involved analysis of the legal is-
2 sues in another pending Pennsylvania case. Two emails⁵⁸ sought information on
3 the status of a legislative subpoena in Arizona and the related enforcement litiga-
4 tion. Another⁵⁹ addressed issues about the pending cert petition in an Arizona
5 case. 8 documents⁶⁰ involved attorney deliberations about a possible lawsuit in the
6 District of Columbia, and 4⁶¹ addressed the legal issues in a suit filed in Texas. 9
7 address electors or legislatures⁶² (discussed below, *infra* Section VII), and 1 ad-
8 dresses issues about a possible new representation.⁶³ The remaining 24 docu-
9 ments⁶⁴ involved statistical and other technical analyses that were being prepared
10 for possible use as needed in election litigation. Some are specially marked “At-
11 torney Work Product privilege” in the subject line.⁶⁵ Others expressly ask about
12 the gameplan for getting the analyses “for legal to review and present” (16181), or
13 indicate that the statistical analysis demonstrates “evidence of fraud that the courts
14 cannot ignore” (18554), thereby demonstrating that the analyses contained or dis-
15 cussed in all of these documents were being conducted in anticipation of litigation.

16 **VII. Work Product Protection Should Apply to Legislative Proceed-**
17 **ings That Are Adjudicatory in Nature.**

18 While this Court has previously rejected Dr. Eastman’s claims of work prod-
19 uct privilege over his communications with members of Congress and the various
20 state legislatures, the circumstances and context of the communications, as well as
21 case law on this issue, are sufficient to warrant reversal of that finding.

23 ⁵⁷ 21094, 21105, 21106, 21111, 21112, 21113, 21116, 21117, 21122, 21124, 21126, 55486. These com-
24 munications also involved a “dual role” attorney, and are discussed further in Section VIII, *infra*.

⁵⁸ 61724, 61764

⁵⁹ 50327

⁶⁰ 51017, 51290, 51291, 51311, 51316, 51759, 52452, 55271

⁶¹ 51303, 56980, 57425, 57790.

⁶² 30119, 31598, 31602, 31628, 31634, 31635, 32071, 32072, 51059

⁶³ 64995

⁶⁴ 15965, 15966, 15968, 15980, 15982, 16022, 16181, 16301, 16334, 16379, 16381, 16458, 18554,
28 18813, 18814, 18821, 18822, 18920, 18956, 19686, 19888, 20163, 22679, 28479. Identification of
“Trump” as client was inadvertently omitted from the Consolidated Privilege Log.

⁶⁵ *See, e.g.*, 16022, 16334. *Cf.* 16182, 16184 (similar analyses deployed in the Pennsylvania litigation).

1 **a. Dr. Eastman’s Communications with Congressmen and State**
2 **Legislators are subject to the work product privilege and this**
3 **Court should reconsider its finding.**

4 In its Order Re Privilege of Documents Dated January 4-7, 2021 [Docket
5 No. 260] (the “Order”), this Court rejected many of Dr. Eastman’s claims of work
6 product privilege because the documents were not made in anticipation of litiga-
7 tion, but only in anticipation of various legislative proceedings – specifically, state
8 electoral certification and the congressional electoral count. Order at 22, 23.⁶⁶ The
9 documents at issue do not pertain to ordinary legislative proceedings, however, but
10 to proceedings in which Congress is acting in an adjudicative capacity. They are
11 therefore the direct subject of the legislative equivalent of litigation.

12 **b. The congressional electoral count and state electoral selection**
13 **pursuant to 3 U.S.C. § 2 are adjudicative proceedings, and doc-**
14 **uments prepared for them are prepared in anticipation of liti-**
15 **gation.**

16 President Trump’s legal team brought legal challenges to the election results
17 in a number of key states. President Trump’s legal team and others also asked
18 courts in those states to adjudicate the validity of the disputed certifications of elec-
19 tors. These overtures were rejected due, in no small part, to the finding that Article
20 III courts are not the properly empowered bodies to adjudicate electoral certifica-
21 tion. *Trump v. Kemp*, 511 F. Supp. 3d 1325, 1335 (N.D. Ga. 2021); *see also*
22 *Gohmert v. Pence*, 510 F. Supp. 3d 435, 438 (E.D. Tex. 2021). Specifically, the
23 court in *Trump v. Kemp* held that “The Sole Remedy for Objecting to the Counting
24 of Electoral Votes After Certification Lies with the Congress of the United States.”
25 *Id.*

26 _____
27 ⁶⁶ Ironically, the Select Committee has itself recently claimed work product protection on response to a
28 Department of Justice request for transcripts. Kipp Jones, “Jan. 6 Committee Chair Bennie Thompson
Refuses DOJ Request for Transcripts: ‘We’re Not Giving Anyone Access,’” *MediaItc* (May 17, 2022)
 (“‘They made a request. We told them that as a committee, our work product was ours, and we’re not giving
anyone access to the work product,’ Thompson reportedly said Tuesday”).

1 The court’s reasoning for rejecting President Trump’s claim rested squarely
2 on the finding that the Electoral Count Act and the 12th Amendment place Con-
3 gress in an adjudicative capacity with respect to the validity of the states’ electors.
4 This concept is not entirely novel, as the Electoral Count Act specifies the precise
5 procedure whereby both houses of Congress are to make factual findings and judge
6 (by either accepting or rejecting) the validity of each state’s electors.⁶⁷ Moreover,
7 while it is certainly not common for Congress to act in an adjudicative capacity,
8 the electoral count is not the only circumstance in which Congress does so –the
9 Senate’s role in “trying” impeachment proceedings is another notable example.
10 *Nixon v. United States*, 506 U.S. 224, 113 (1993).

11 Additionally, if the terms of the Electoral Count Act are followed, state leg-
12 islatures likewise serve as adjudicatory bodies with respect to their own electors.
13 This is explicit in 3 U.S.C. § 2, which confers adjudicative power to state legisla-
14 tures in the event of a failed election in that state.

15 Furthermore, and more significantly, if, as the court in *Trump v. Kemp* con-
16 tends, asking a body other than Congress to adjudicate the matter “presumes that
17 the federal statutory remedy under 3 U.S.C. § 14 is inadequate,” then not only is
18 Congress an adjudicative body for the purposes of electoral certification, but the fi-
19 nal arbiter of it as well. This, too, would be consistent with other circumstances in
20 which Congress acts in an adjudicative capacity, and, indeed, the Supreme Court
21 has found that congressional standards for adjudication in such contexts are not
22 subject to judicial review. *Nixon*, 506 U.S. at 113.

23 **c. The documents at issue here over which Dr. Eastman has claim**
24 **work product protection were prepared in anticipation of ad-**
25 **judicatory proceedings in Congress and/or the state legisla-**
26 **tures.**

27 ⁶⁷ Dr. Eastman has previously contended that the Electoral Count Act is unconstitutional to the extent it
28 intrudes on powers the 12th Amendment vests in the Vice President. But even if unconstitutional, it re-
flects the understanding that the 12th Amendment, which the Act was adopted to implement, itself envi-
sions an adjudicative function.

1 There are 39 documents⁶⁸ involving communications with state legislators
2 and another 4 more involving communications containing advice for President
3 Trump about electors⁶⁹ over which Dr. Eastman has asserted work product protec-
4 tion. Because he has also asserted attorney-client privilege over these communica-
5 tions, the issue whether the state legislature’s functions under 3 U.S.C. § 2 and/or
6 Article II, or the function of the Vice President and/or Congress under the 12th
7 Amendment and the Electoral Count Act being adjudicative in nature may not need
8 to be resolved with respect to these documents. But there are 4 other documents⁷⁰
9 addressing this issue for which attorney-client privilege does not apply, and there-
10 fore whether or not they qualify as work product because generated in anticipation
11 of the legislative equivalent of litigation is squarely at issue.

12 **VIII. Communications with “Dual Role” Attorneys or Advisors Do Not**
13 **Lose Work Product Protection.**

14 As this Court recognized in its earlier privilege order (Dkt. 260), “work
15 product protection is only waived when attorneys disclose their work to “an adver-
16 sary or a conduit to an adversary in litigation.” Order at 29, citing *Sanmina*, 968
17 F.3d at 1121; *United States v. Nobles*, 422 U.S. 225, 239 (1975). The Select Com-
18 mittee previously contended that “Plaintiff cannot claim work product protection
19 over an email with a journalist,” Opp. at 34, but this court ordered the production
20 of two communications (4494) and (4496) “with ... an opinion editor at
21 Newsweek,” *id.*, not because he was a journalist, as the Select Committee had
22 urged, but because the email indicated the material had been prepared for select
23 members of Congress rather than in anticipation of litigation. *Compare* Opp. at 34
24 (Dkt. 165-1) with Order at 27 (Dkt. 260).

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26
27 ⁶⁸ 23582, 23584, 23591, 23631, 23638, 24727, 24730, 24760, 24762, 24778, 24795, 24797, 24893,
28 24897, 25035, 51402, 51403, 51407, 51408, 52958, 59448, 60185, 60188, 61695, 61697, 61701, 61767,
61768, 61904, 61905, 62674, 62675, 62698, 62706, 62844, 62858, 62859, 62861, 62863

⁶⁹ 30119, 31598, 32071, 32072.

⁷⁰ 31602, 31628, 31634, 31635

1 This Court also ordered production of a “memo that had been disclosed to
2 the media,” Order at 30 (Doc. 4713), but that ruling does not appear to have
3 adopted the blanket position urged by the Select Committee that any communica-
4 tion with a member of the media waives work product protection. Nor should it.
5 Many members of the modern “media” have multiple roles. The opinion editor is a
6 good example, for in addition to being an “opinion editor at Newsweek,” he is also
7 a research fellow at the Edmund Burke Foundation (4494) and a former John Mar-
8 shall Fellow at the Claremont Institute.⁷¹ Dr. Eastman has previously produced
9 one email clearly sent to him in his media role (64527), but others, dealing with
10 him in his research fellow role, were withheld as non-responsive and not objected
11 to by the Select Committee.⁷²

12 In such “dual role” situations, the courts have routinely analyzed both attor-
13 ney-client and work product issues in light of the role that was being played at the
14 time. This frequently arises in the context of in-house counsel, who often serve
15 both as attorney and business advisor, and attorney-client privilege and work prod-
16 uct protections apply only when the counsel is acting in the former role. *See, e.g.,*
17 *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984); *United States v. ChevronTex-*
18 *aco Corp.*, 241 F. Supp. 2d 1065, 1076 (N.D. Cal. 2002). It arises in the context of
19 fact witnesses who are also litigation consultants. *See, e.g., Northfield Ins. Co. v.*
20 *Royal Surplus Lines Ins. Co.*, No. SACV 03-0492-JVS, 2003 WL 25948971, at *2
21 (C.D. Cal. July 7, 2003). And it arises in the context of experts serving both as liti-
22 gation consultants and testifying experts. *See, e.g., Construction Industry Services*
23 *Corp. v. The Hanover Ins. Co.*, 206 F.R.D. 43, 52 (E.D.N.Y. 2001). In such cir-
24 cumstances, “the work product doctrine may be invoked to protect work completed
25 by the expert in [his] consultative capacity as long as there exists a clear distinction
26 be the two roles.” *Friedman v. 24 Hour Fitness USA, Inc.*, No. CV 06-6282-

27
28 ⁷¹ 2018 Marshall Fellows, <https://www.claremont.org/featured/former-john-marshall-fellows/>

⁷² 6646, 6677, 6683, 6689, 18101, 18190, 20895, 20902, 20901, 20927, 20943, 20990, 21011, 26341, 26370.

1 AHM(CTX), 2008 WL 11336834, at *3 (C.D. Cal. Nov. 4, 2008) (quoting *Construction Industry Services Corp.*, 206 F.R.D. at 52). A “court must determine
2 which ‘hat’ the [individual] was wearing at the time the communication was
3 made.” *Wells Fargo Bank, N.A., Tr. v. Konover*, No. 3:05CV01924, 2010 WL
4 814894, at *2 (D. Conn. Mar. 5, 2010) (citing *In re Brokers, Inc.* No. 04-06074,
5 2006 WL 897137, at *2 (Bankr. M.D.N.C. Mar. 27, 2006)). Because “[l]awyers
6 often wear two hats ... it is often necessary to determine in what capacity the par-
7 ticular communication was made.” *Henry v. Quicken Loans, Inc.*, No. 04-40346,
8 2008 WL 2610180, at *4 (E.D. Mich. June 30, 2008), *aff’d*, 263 F.R.D. 458 (E.D.
9 Mich. 2008) (quoting Edna Selan Epstein, *The Attorney-Client Privilege and the*
10 *Work-Product Doctrine* (2008), § 1.III.E4.F.1).

11
12 While Plaintiff has not located any case addressing the work product in the
13 specific context of “dual role” attorneys who are also members of the media, the
14 reasoning of the above cases is equally applicable. And it should control the thir-
15 teen documents at issue here that involved work product communications with at-
16 torneys who also wear media “hats.”

17
18 Twelve of those documents⁷³ involved communications between Dr. East-
19 man and another individual who, in addition to his role as a radio talk show host, is
20 also an attorney, former long-time President (and current board Chairman) of a
21 public interest law firm, and also a former fellow at The Claremont Institute. Dr.
22 Eastman has collaborated on litigation matters with him in the past, and the twelve
23 documents at issue here, addressed to his personal email address rather than his
24 media address, were communications in that capacity. 3rd Eastman Decl. ¶ 13.
25 Three other communications with this individual at an email address that clearly
26 indicates his media role (***.show@citcomm.com), have been produced. (55413,
27 55415, and 55461).

28

⁷³ 021105, 21094, 21106, 21111, 21112, 21113, 21116, 21117, 21122, 21124, 21126, 55486.

1 The remaining communication at issue (55453) was likewise addressed to a
2 “dual role” attorney wearing his attorney rather than media hat. 3rd Eastman Decl.
3 ¶ 13. Indeed, it was specifically designated as “between you and me, please,”
4 which is to say, confidential. *Id.* The attorney involved has long been an informal
5 advisor and sounding board for Dr. Eastman. *Id.* And, as the privilege log notes,
6 the communication addressed a potential jurisdictional issue in pending litigation.

7 In its prior order, this Court noted, at 29, that “The Ninth Circuit makes two
8 inquiries to assess whether disclosure to “a conduit to an adversary” constitutes
9 waiver: whether the party selectively disclosed materials, and whether the party
10 reasonably believed that the recipient would keep the disclosed documents confi-
11 dential.”¹⁸⁷, citing *Sanmina*. Despite their media roles, Dr. Eastman reasonably
12 believed that the communications with these two individuals in their attorney roles
13 would be kept confidential (and they have in fact been so kept. Work product was
14 therefore not waived.

15 **IX. The Fact that a Client Has Not Yet Been Determined Does Not**
16 **Undermine Work Product.**

17 46 of the documents⁷⁴ are communications between Dr. Eastman and a
18 group of statisticians working with him conducting statistical analyses of the Geor-
19 gia Senate Runoff election in anticipation of election litigation that did not materi-
20 alize. Although Dr. Eastman did not yet have a client for that litigation, it is rela-
21 tively common for public interest attorneys to begin preparation of a potential case
22 before securing a client. The strength of the factual and legal case will often deter-
23 mine whether the prospective client wishes to pursue the litigation. Eastman Decl.
24 ¶ 11. Such preparatory work, whether fact development or legal assessment, is
25 nonetheless work product, which applies not just to the client but to the attorneys
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27
28 ⁷⁴ 62940, 62944, 62948, 62951, 62955, 62958, 62984, 62987, 62996, 63000, 63054, 63058, 63081,
63084, 63091, 63095, 63103, 63114, 63119, 63125, 63131, 63139, 63146, 63154, 63194, 63407, 63416,
63425, 63438, 63448, 63449, 63450, 63451, 63479, 63503, 63512, 63515, 63518, 63519, 63520, 63717,
63919, 63920, 63973, 63974, 63977

1 and their experts and consultants. *Admiral Ins.*, 881 F.2d at 1494 (citing Fed. R.
2 Civ. P. 26(b)(3)).

3 **X. The Congressional Defendants’ Subpoena is Unconstitutional as it**
4 **Applies to Protected First Amendment Activity**

5 In the first brief on privilege assertions, Plaintiff argued that the Select Com-
6 mittee’s subpoena violates the First Amendment. Dkt. 132 at 31-36. Relying pri-
7 marily on *Watkins v. United States*, Plaintiff argued that the Select Committee’s
8 overbroad charter created an unconstitutional chilling effect on First Amendment
9 rights. 354 U.S. 178 (1957). Plaintiff reasserts those arguments here. *See*, Dkt.
10 343 at 2 (“The parties may cross reference...arguments made in their previous
11 briefings.”).

12 A group of thirty emails⁷⁵ from the current *in camera* production bring this
13 argument into sharp relief. The documents all relate to a group of civic minded citi-
14 zens of a conservative viewpoint who meet semi-regularly⁷⁶ to socialize and dis-
15 cuss issues of public concern. The meetings also seem to have a religious aspect,
16 as the agendas indicate each meeting closed with a prayer.

17 During the relevant period, many of the group’s discussions naturally in-
18 volved the presidential election, although some did not. On two occasions, the
19 group invited Dr. Eastman to make a brief guest appearance to offer his perspec-
20 tive on current events. Many members, organizers, and “special guests” are men-
21 tioned by name in the email correspondence with Dr. Eastman.

22 The Supreme Court has long held that such activity is deserving of First
23 Amendment protection. *See, e.g. NAACP v. Alabama*, 357 U.S. 449, 460 (1958)
24 (“Effective advocacy of both public and private points of view, particularly contro-
25 versial ones, is undeniably enhanced by group association.”). As recently as July
26 2021 the Supreme Court reversed on First Amendment grounds a Ninth Circuit

27 ⁷⁵ As indicated on the consolidated privilege log, these documents are: 21115, 21119, 21120, 21242,
28 21243, 21245, 21253, 21429, 21430, 22779, 22780, 23038, 23956, 24948, 24950, 25165, 25438, 25558,
25877, 26072, 26091, 26790, 26791, 26793, 26903, 26910, 28376, 30032, 31471, 31537.

⁷⁶ All meetings mentioned on the email were virtual, presumably due to COVID.

1 decision requiring a conservative charitable foundation to disclose its donors to the
2 state. *Americans for Prosperity v. Bonta*, 141 S.Ct. 2373 (2021). In doing so, the
3 Supreme Court employed an “exacting scrutiny” test formulated as follows:

4 [E]xacting scrutiny requires that there be a substantial relation be-
5 tween the disclosure requirement and a sufficiently important govern-
6 mental interest, and that the disclosure requirement be narrowly tai-
7 lored to the interest it promotes.

8 *Bonta*, 141 S.Ct. 2373 at 2385 (internal quotations and citations omitted).

9 This Court’s *in camera* review will make clear that the congressional de-
10 fendants’ subpoena cannot survive exacting scrutiny as it applies to the emails in
11 question. First, the Select Committee does not have a strong interest in acquiring
12 these materials. The materials predate January 6 and do not discuss demonstra-
13 tions at the Capitol on that or any other day. In fact, the emails contain little sub-
14 stance at all, consisting mostly of scheduling, agenda setting, and communicating
15 login information. The emails are of little use to the Select Committee’s investiga-
16 tion.

17 Whatever slight interest the Select Committee may have in these emails is
18 easily outweighed by the “seriousness of the actual burden” imposed on the indi-
19 viduals involved. The emails show that the group in question put a premium on
20 confidentiality of its discussions. The group is described as “small ... off the rec-
21 ord ... cone of silence.” 021120. Members were required to provide a phone num-
22 ber in advance “[f]or the security of the Zoom meeting.” 021242. Several emails
23 contained a footer stating “[t]his invitation is Not Transferable.” Other emails
24 stated “[w]e are careful about who is on the phone and who is in the room and we
25 do not leak what happens, what is said or who is in the meeting – ever!” *See, e.g.*
26 21430 (emphasis in original).

27 Allowing disclosure of the group’s communications to a politically misa-
28 ligned congressional committee would manifestly discourage membership and

1 chill any discussion among the members who remained. *Cf., Republican National*
2 *Committee v. Nancy Pelosi*, 1:22cv659-TJK (D.D.C.) (Dkt. 33 at 39, district
3 court’s statement that “the [RNC’s First Amendment] argument has some force,
4 especially given that the Select Committee is dominated by members of the Demo-
5 cratic Party.”). This is especially true because the Select Committee has stated
6 publicly and in Court filings that it is planning a series of sensational public hear-
7 ings to “present the conclusions of its investigation to the public.” Dkt. 336 (May
8 6, 2022 Status Report by Congressional Defendants).⁷⁷ Much of this information
9 has been leaked to the press already. *See, e.g. Nicholas, Peter, Avalanche of Leaks*
10 *Imperils Jan. 6 Committee’s Delivering on Blockbuster Hearings*, nbcnews.com
11 (May 1, 2022).⁷⁸ Plaintiff himself has received correspondence (readily producible
12 *in camera* upon request) that this Court’s under seal privilege logs themselves have
13 been leaked to third parties. Moreover, any individuals included in these emails
14 may be subject to congressional subpoena and forced to suffer unwanted public ex-
15 posure and significant legal costs.⁷⁹ It is manifestly clear that enforcing the Select
16 Committee’s subpoena as to the emails in question would violate the First Amend-
17 ment rights of the individuals involved.

18 The fact that the district court denied the First Amendment challenge in *RNC*
19 *v. Pelosi* does not change this conclusion. The two situations are distinct and the
20 analysis of *RNC v. Pelosi* clearly supports finding a First Amendment violation
21 here. First, in denying RNC’s first amendment challenge, the court relied on the
22 Select Committee’s need to evaluate whether RNC’s mass email campaigns to
23 thousands of citizens contributed to January 6. *RNC*, ECF 33 at 45. The commit-
24 tee has no such need here, where there are only 30 emails in dispute, circulated
25 among at most a couple dozen persons.

26 _____
27 ⁷⁷ As we discuss elsewhere in this brief, the Select Committee has a pattern of releasing information with-
out the proper context.

28 ⁷⁸ <https://www.nbcnews.com/politics/congress/avalanche-leaks-risks-jan-6-committee-delivering-block-buster-hearings-rcna26549>

⁷⁹ Even for those who do not retain counsel, costs may be significant. The Select Committee does not pay for flights and hotels, even for witnesses who live far from Washington, D.C.

1 Second, the First Amendment intrusion is greater here than in *RNC v. Pelosi*.
2 There, the Select Committee was “not seeking any information that would individ-
3 ually identify any of the RNC’s donors, volunteers, or email recipients.” *Id.* at 33.
4 Here, names and identities *will* be disclosed. Moreover, much of the RNC’s confi-
5 dential information had already been disclosed (*Id.* at 33), which is not the case
6 here. In sum, the Select Committee’s need for the materials in question is much
7 weaker here than it was in *RNC v. Pelosi*, whereas the threat to First Amendment
8 freedoms is much greater.

9 *Perry v. Scharzenegger* is a factually similar Ninth Circuit case which rein-
10 forces the conclusion that the Select Committee’s subpoena violates the First
11 Amendment as to the emails in question. 591 F.3d 1147 (9th Cir. 2010). The case
12 involved a challenge to Proposition 8, a California ballot initiative defining mar-
13 riage as between a man and a woman. *Id.* at 1152. The plaintiff challengers served
14 discovery on “the official Proposition 8 campaign committee.” *Id.* The discovery
15 sought among other things “internal campaign communications concerning strat-
16 egy and messaging.” *Id.* The campaign committee objected on First Amendment
17 grounds. *Id.* The campaign committee submitted a sample of the documents to the
18 district court for *in camera* review. *Id.* The district court ordered the documents
19 disclosed. On appeal, the Ninth Circuit held that it was “self-evident” that “im-
20 portant First Amendment interests are implicated by the plaintiffs’ discovery re-
21 quest” and that the campaign had therefore “made a prima facie showing of in-
22 fringement.” *Id.* at 1164. The same is true here.

23 **XI. Crime Fraud Exception Is Inapplicable For The Documents Still**
24 **in Dispute.**

25 **a. The Court’s Previous Crime Fraud Finding Does Not Apply to**
26 **the Current *In Camera* Documents**

27 In its March 28 order, this Court found that Dr. Eastman and former Presi-
28 dent Trump had more likely than not violated two federal criminal statutes by

1 conspiring to obstruct the joint session of congress. Dkt. 260 at 36-40. The Court
2 ordered one otherwise privileged document produced pursuant to this finding. *Id.*
3 at 42. As stated in this filing and elsewhere, Dr. Eastman respectfully but strenu-
4 ously disagrees with the Court’s decision. However, even accepting this Court’s
5 crime-fraud finding, it is clear the Court’s analysis does not apply to any of the
6 documents in the current *in camera* production.

7 Part of this Court’s finding was that “pursuing legal recourse itself did not
8 advance any crimes.” *Id.* at 41. The Court therefore did not order documents in-
9 volving “litigation purposes” disclosed because “legal recourse itself did not ad-
10 vance any crimes.” *Id.* Most of the documents in the current *in camera* production
11 deal directly with litigation.

12 With respect to the electoral college and the authority of a sitting Vice Presi-
13 dent, this Court drew a distinction between one document which “discuss[ed] Vice
14 President Pence’s refusal to reject or delay the electoral count [but] was not itself
15 in furtherance of the plan” and a second document which this Court found to be
16 “the first time members of President Trump’s team transformed a legal interpreta-
17 tion of the Electoral Count Act into a day-by-day plan of action.” *Id.* at 41 (internal
18 quotations omitted and emphasis in original); *see also, In re Richard Roe, Inc.*, 68
19 F.3d 38, 40 (2d Cir. 1995) (crime fraud applies where communication or work
20 product “was itself in furtherance of the crime or fraud) (emphasis in original).
21 The Court ordered the second document produced pursuant to crime fraud but not
22 the first. *Id.*

23 All documents involving the electoral college in the current *in camera* mate-
24 rials fall decidedly in the former category. They are discussions of legal issues as
25 opposed to a concrete plan. Documents fitting this description include (without
26 limitation) the following:

- 1 • 51759, 52452 – Legal discussion regarding authority of Vice President.
2 Variety of views expressed and no specific plan of action offered. Also
3 relates to potential litigation.
- 4 • 57425, 51316 – Opinions offered on litigation strategy and Vice Presi-
5 dential authority. No concrete plan of action.
- 6 • 55050, 55127 – Discussing various scenarios for Jan 6 but offering no
7 concrete proposal. Also relates to litigation.
- 8 • 55141 – Discussing need to pursue election integrity litigation even in the
9 event of Trump loss for the good of the country.

10 All of these documents (as well as others) show no more than what would be
11 expected from legal advisers to any presidential candidate or campaign – brain-
12 storming the relevant legal issues to identify any viable strategy that might benefit
13 the client. This Court may disagree with some of the views tentatively expressed
14 in these discussions, but that does not bring them within the ambit of the previous
15 crime fraud finding.

16 **b. Legal and Factual Issues with this Court’s Prior Crime Fraud**
17 **Ruling**

18 As argued above, the *in camera* documents here do not present a crime fraud
19 question even under the terms of this Court’s March 28 order. However, if this
20 Court concludes that any of the documents do come within the ambit of that ruling,
21 Plaintiff continues to insist respectfully that several aspects of the March 28 crime
22 fraud findings were legally and factually flawed, including the following:

23 **i. The Alleged Conduct is Not “Obstructive” As a Matter**
24 **of Law Under 18. U.S.C. § 1512**

25 This Court previously found that former President Trump obstructed an offi-
26 cial proceeding (the electoral count). Dkt. 260 at 33. The Court’s finding was
27 based on a series of meetings, tweets, phone calls and public statements during
28

1 which the President urged the Vice President to refer the electoral certification
2 back to the states for further examination of claims of fraud and illegality. *Id.* at 32.

3 However, at least one district judge has cast serious doubt on whether such
4 acts can constitute “obstruction” as that term is used in 18 U.S.C. § 1512. Section
5 1512 defines obstruction in two ways:

6 (1) Alters, destroys, mutilates, or conceals a record, document, or other
7 object, or attempts to do so, with intent to impair the object’s integrity for use in an
8 official proceeding; or

9 (2) Otherwise obstructs, influences or impedes any official proceeding,
10 or attempts to do so.

11 The congressional intent behind these two clauses is not immediately clear.
12 Subsection one is very specific, referring only to tampering with documents or ob-
13 jects, whereas subsection two is extraordinarily broad. Did congress merely in-
14 clude subsection one as an example of conduct that would violate subsection two?
15 Or should subsection two be limited by subsection one, i.e. limited to conduct in-
16 volving tampering with documents or other evidence involved in an official pro-
17 ceeding?

18 These questions were recently put before a district judge in one of the Janu-
19 ary 6th criminal cases by the defendant’s motion to dismiss the obstruction charge.
20 *United States v. Garrett Miller*, 1:21-cr-0119-CJN (D.D.C.), ECF 72. The district
21 judge undertook an exhaustive analysis of the statute, related caselaw, and legisla-
22 tive history. *Id.* at 10-28 (18 pages). Ultimately, the court concluded that the
23 statute suffered from “serious ambiguity.” *Id.* at 28. Relying on the long tradition
24 of judicial “restraint in assessing the reach of a federal criminal statute,” the court
25 gave §1512 a narrow construction. Specifically, the court held that:

26 §1512(c)(2) must be interpreted as limited by subsection (c)(1), and
27 thus requires that the defendant have taken some action with respect
28

1 to a document, record, or other object in order to corruptly obstruct,
2 impede or influence an official proceeding.

3 *Id.*

4 To be sure, as the defendants have pointed out (Dkt. 201), Judge Nichols is
5 the only judge to dismiss a § 1512(c) charge in the January 6 cases on this basis.
6 However, Plaintiff submits that the *Miller* decision is the most well-grounded not
7 only in law, but in common sense and sound public policy. If Section 1512(c) is
8 read as the Select Committee suggests, it will expose anyone who anyone who
9 speaks out, criticizes, or even “tweets” about an official proceeding to prosecution
10 if the authorities can somehow come up with an argument that they did so with
11 corrupt intent. Judge Nichols was rightly hesitant to construe this statute to give the
12 Department of Justice such power to prosecute those involved in the political pro-
13 cess.

14 **ii. No Proof of “Deceitful or Dishonest Means” Under 18**
15 **U.S.C. § 371**

16 In finding that Dr. Eastman and President Trump likely violated 18 U.S.C. §
17 371, this Court acknowledged that that statute requires proof of obstruction of a
18 lawful government function by “deceit, craft or trickery, or at least means that are
19 dishonest.” Dkt. 260 at 38 (citing *Hammerschmidt v. United States*, 256 U.S. 182,
20 188 (1924)). This Court found that intent requirement satisfied because “the evi-
21 dence demonstrat[ed] that Dr. Eastman likely knew the plan was unlawful.” *Id.*

22 Dr. Eastman of course disagrees with the Court’s finding of “likely”
23 knowledge of illegality—there are serious scholars who believe, as he does, that
24 the Electoral Count Act is unconstitutional to some extent. But even accepting that
25 Eastman knew is recommendation would violate a constitutionally-valid Electoral
26 Count Act, that is not sufficient to show the requisite intent. In *United States v.*
27 *Caldwell*, the Ninth Circuit held as follows:
28

1 The Supreme Court has made it clear that “defraud” is limited only to
2 wrongs done by deceit, craft or trickery, or at least by means that are
3 dishonest. Obstructing government functions in other ways—for ex-
4 ample, by violence, robbery or advocacy of illegal action—can’t con-
5 stitute “defrauding.”

6 989 F.2d 1056, 1059 (9th Cir. 1993) (internal quotations and citations omitted)
7 (italics added). Thus, even if Dr. Eastman knew the advice he offered to the Presi-
8 dent and Vice President was unlawful, that would be insufficient. To find “de-
9 frauding” for § 371 purposes, this Court would have to conclude not simply that
10 Dr. Eastman proposed an unlawful course of conduct, but rather that he intended to
11 somehow “trick” the Vice President. Clearly, the record does not support such a
12 finding. Vice President Pence is an experienced politician who, the record of this
13 case shows, was closely attended by capable lawyers. There can be no inference
14 that Dr. Eastman intended to somehow deceive him. If Dr. Eastman’s views were
15 to prevail, it would have to be done through persuasion and argument, rather than
16 trickery.

17 Of course, Dr. Eastman’s position remains that his legal theories, controver-
18 sial though they may have been, were not unlawful. They were not foreclosed by
19 the Constitution or Supreme Court precedent. Throughout this litigation, neither
20 the congressional defendants nor the Court have produced a Supreme Court case
21 passing upon the constitutionality of the Electoral Count Act or the limits of the
22 constitutional authority of the Vice President during electoral college proceedings.
23 There were and remain open questions. Dr. Eastman’s alleged admission that his
24 argument would be “unanimously rejected by the Supreme Court” (Dkt. 260 at 7)
25 is not only an inaccurate characterization of his position, *see supra* at 9, but it does
26 not change this conclusion. On average the Supreme Court decides 48% of its case
27 unanimously and the losing party is not typically accused of having criminally ob-
28 structed a government function.

1 Phone: 916-601-1916; Fax: 916-307-5164
2 Email: atcaso@ccg1776.com

3 /s/ Charles Burnham

4 Charles Burnham (D.C. Bar # 1003464)

5 BURNHAM & GOROKHOV PLLC

6 1424 K Street NW, Suite 500

7 Washington, D.C. 20005

8 Email: charles@burnhamgorokhov.com

9 Telephone: (202) 386-6920

10 *Counsel for Plaintiff*

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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

Charles Burnham

BURNHAM & GOROKHOV PLLC

1424 K Street NW, Suite 500

Washington, D.C. 20005

Telephone: (202) 386-6920

Email: charles@burnhamgorokhov.com

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