

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION**

**JOHN C. EASTMAN,
Plaintiff,**

vs.

**BENNIE G. THOMPSON,
SELECT COMMITTEE TO
INVESTIGATE THE JANUARY 6
ATTACK ON THE US CAPITOL, AND
CHAPMAN UNIVERSITY,
Defendants.**

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

**ORDER RE PRIVILEGE OF 599
DOCUMENTS DATED NOVEMBER 3,
2020 - JANUARY 20, 2021**

Table of Contents

1

2

3

4 I. BACKGROUND 3

5 II. LEGAL STANDARD 4

6 III. DISCUSSION 4

7 A. Work Product 5

8 1. Anticipation of litigation 5

9 2. Preparation by or for a client’s representative..... 10

10 3. Waiver of protection 11

11 4. Substantial or compelling need exception..... 12

12 B. Attorney-Client Privilege 13

13 1. Clients seeking legal advice from attorneys..... 13

14 2. Confidentiality 17

15 C. Crime-fraud exception..... 19

16 1. Timeframe..... 20

17 2. Emails related to and in furtherance of the crimes 21

18

19

20

21 D. First Amendment 21

22 IV. DISPOSITION 26

23

24

25

26

27

28

1 Plaintiff Dr. John Eastman (“Dr. Eastman”), a former law school dean at Chapman
2 University (“Chapman”), is a “political conservative who supported former President [Donald]
3 Trump” and a self-described “activist law professor.”¹ While he was a professor at Chapman,
4 Dr. Eastman worked with President Trump and his campaign on legal and political strategy
5 regarding the November 3, 2020 election.

6 This case concerns the House of Representatives Select Committee to Investigate the
7 January 6 Attack on the US Capitol’s (“Select Committee”) attempt to obtain Dr. Eastman’s
8 emails from his Chapman email account between November 3, 2020 and January 20, 2021. The
9 parties disagree on whether those documents are privileged, and thus protected from disclosure.

10
11 **I. BACKGROUND**

12 In its prior Order, the Court extensively detailed the events of January 6, 2021, and Dr.
13 Eastman and President Trump’s actions leading up to and on that day.² Accordingly, the Court
14 discusses only the case’s procedural history here.

15 Dr. Eastman filed his Complaint in this Court on January 20, 2022. On January 31, the
16 Court ordered Dr. Eastman to begin his production with documents dated January 4-7, 2021.³
17 On March 28, 2022, after briefing and a hearing, the Court ordered Dr. Eastman to disclose 101
18 of those 111 documents to the Select Committee.⁴ Dr. Eastman produced the 101 documents in
19 the first week of April 2022.⁵

20 Dr. Eastman completed his privilege review of the remaining documents on April 19,
21 and the parties then cooperated to reduce their privilege claims and objections. On May 2, Dr.
22 Eastman produced to the Select Committee 933 documents and a consolidated privilege log
23 identifying 2,018 documents over which he claims privilege.⁶ The Select Committee withdrew
24 its objections to 721 documents and reserved the right to raise objections to 576 documents at a

25
26 ¹ Complaint (Dkt. 1) ¶¶ 5–6.

27 ² Order Re: Privilege of Documents Dated January 4-7, 2021 (“Order”) (Dkt. 260) at 3-12.

28 ³ Dkt. 63.

⁴ Order at 44.

⁵ Dkt. 286.

⁶ Dkt. 336.

1 later date. After receiving the final list of disputed documents, the Court immediately began
2 reviewing the documents while the parties submitted briefing on their claims.

3 On May 19, 2022, Dr. Eastman filed his Brief supporting his privilege assertions over
4 the remaining 599 documents.⁷ The Select Committee filed its Opposition (“Opp’n”) on March
5 2, 2022.⁸ Dr. Eastman filed his Reply on May 31, 2022.⁹

6 7 **II. LEGAL STANDARD**

8 Federal common law governs the attorney-client privilege when courts adjudicate issues
9 of federal law.¹⁰ “As with all evidentiary privileges, the burden of proving that the attorney-
10 client privilege applies rests not with the party contesting the privilege, but with the party
11 asserting it.”¹¹ The “party asserting the attorney-client privilege has the burden of establishing
12 the relationship *and* the privileged nature of the communication.”¹² The party must assert the
13 privilege “as to each record sought to allow the court to rule with specificity.”¹³ “Because it
14 impedes full and free discovery of the truth, the attorney-client privilege is strictly construed.”¹⁴
15 The same burden applies to the party asserting work product protection.¹⁵

16 17 **III. DISCUSSION**

18 The Court will first consider work product protection, then attorney-client privilege, and
19 finally the First Amendment. For documents where Dr. Eastman claims both work product and
20 attorney client privilege, the Court will only address attorney-client privilege if it finds that
21 work product protection does not apply. The Court draws substantially on its reasoning in its
22 prior Order, which addressed many of the same legal and factual issues.

23
24

⁷ Dkt. 345. Dr. Eastman withdrew his claims of privilege over two documents in his Brief. Brief at 21.

25 ⁸ Dkt. 350.

26 ⁹ Dkt. 353.

27 ¹⁰ *United States v. Ruehle*, 583 F.3d 600, 608 (9th Cir. 2009).

28 ¹¹ *Weil v. Inv./Indicators, Rsch. & Mgmt., Inc.*, 647 F.2d 18, 25 (9th Cir. 1981) (citations omitted).

¹² *Ruehle*, 583 F.3d at 607 (citation omitted) (emphasis in original).

¹³ *Clarke v. Am. Com. Nat. Bank*, 974 F.2d 127, 129 (9th Cir. 1992).

¹⁴ *United States v. Martin*, 278 F.3d 988, 999 (9th Cir. 2002).

¹⁵ *See Hernandez v. Tanninen*, 604 F.3d 1095, 1102 (9th Cir. 2010).

1 **A. Work Product**

2 Dr. Eastman claims 555 documents are protected work product, and he also claims
3 attorney-client privilege over 152 of those 555 documents. For documents where Dr. Eastman
4 asserts both privileges, the Court will first decide whether work product protection applies. If a
5 document is not protected work product, the Court will then determine whether attorney-client
6 privilege prevents disclosure.

7 Documents are protected work product if they are (1) “prepared in anticipation of
8 litigation or for trial,” and (2) “prepared ‘by or for another party or by or for that other party’s
9 representative.’”¹⁶ The Court considers each requirement in turn.

10 **1. Anticipation of litigation**

11 Documents qualify for work product protection if they were “prepared in anticipation of
12 litigation or for trial.”¹⁷ However, some litigation documents are also prepared for a second,
13 non-litigation purpose. Those documents are protected when they were “created *because of*
14 anticipated litigation, and would not have been created in substantially similar form *but for the*
15 prospect of that litigation.”¹⁸

16 The Court groups its analysis of the 555 documents into six categories: ongoing suits,
17 the Electoral Count Act plan, state elections, documents for Congress, connecting third parties,
18 and news articles.

19 **a. Draft filings related to ongoing suits**

20 360 of the 555 documents relate to ongoing litigation in state or federal court. Eleven of
21 those documents seek or send legal research for case filings,¹⁹ and another fifty-seven
22 documents make recommendations or edits to court filings or forward draft filings.²⁰ 292

24 _____
¹⁶ *In re Cal. Pub. Utils. Comm’n*, 892 F.2d 778, 780–81 (9th Cir. 1989) (quoting Fed. R. Civ. P. 26(b)(3)).

25 ¹⁷ Fed. R. Civ. P. 26(b)(3).

26 ¹⁸ *In re Grand Jury Subpoena (Mark Torf/Torf Envtl. Mgmt.) (“Torf”)*, 357 F.3d 900, 908 (9th Cir. 2003) (internal
quotation omitted) (emphasis added).

27 ¹⁹ 7101; 18110; 23285; 23674; 23839; 31640; 55569; 60106; 60155; 60163; 60210.

28 ²⁰ 21814; 22912; 23160; 23289; 23325; 23326; 23333; 23343; 23344; 23549; 23450; 24234; 24332; 24618;
24653; 25028; 25553; 26452; 28426; 28487; 28783; 29734; 30048; 46154; 47436; 48373; 49527; 49528; 51017;
52452; 53065; 57872; 59418; 59613; 60478; 60487; 60498; 60526; 60528; 60648; 60758; 60798; 60803; 60832;
60862; 60891; 60897; 61078; 61186; 61231; 61356; 61357; 61371; 61531; 62749; 62761; 62778.

1 documents discuss litigation strategy for ongoing cases.²¹ All of these 360 documents were
2 clearly prepared in anticipation of litigation.

3 **b. Electoral Count Act plan**

4 Eleven of the 555 documents relate to Dr. Eastman’s proposal for Vice President Pence
5 to reject or delay counting electoral votes on January 6, 2021.²² As discussed in the Court’s
6 prior Order, the plan was intended “to proceed without judicial involvement” and thus emails
7 pertaining to the plan were not made in anticipation of litigation.²³

8 Five of those eleven emails discuss actions to support the plan to disrupt the Joint
9 Session.²⁴ One forwards a now-public November memo about the plan,²⁵ and one discusses
10 actions that Vice President Pence could take on January 6.²⁶ Three documents discuss actions
11 for alternate state electors to take in the days leading up to January 6.²⁷ Because these
12 documents only relate to the political plan for January 6, they were not made in anticipation of
13 litigation and thus are not protected.

14 Three of the eleven documents discuss suits brought by third parties about the legality of

15
16 ²¹ 3268; 3269; 3270; 3271; 7100; 7106; 7177; 7254; 7320; 7402; 7403; 7414; 7416; 7419; 15960; 15965; 15966;
17 15968; 15980; 15982; 16022; 16194; 16285; 16334; 16350; 17197; 17257; 18270; 19889; 20826; 21094; 21760;
18 21854; 23042; 23047; 23048; 23049; 23052; 23056; 23060; 23061; 23101; 23107; 23110; 23113; 23156; 23233;
19 23240; 23242; 23244; 23248; 23324; 23349; 23383; 23408; 23421; 23426; 23431; 23434; 23554; 23555; 23556;
20 23673; 23740; 23774; 23777; 23819; 23826; 23833; 23845; 23852; 23858; 23862; 23866; 23870; 23875; 23880;
21 23885; 23894; 23898; 23899; 23906; 23910; 23918; 24133; 24212; 24218; 24310; 24697; 24698; 24703; 24714;
22 24725; 24727; 24732; 24739; 24746; 24752; 24776; 24777; 24797; 24800; 24803; 24866; 24895; 24899; 24931;
23 24947; 25031; 25033; 25108; 25111; 25220; 25900; 25908; 26385; 26757; 26789; 26836; 26869; 26874; 26884;
24 26885; 28064; 28074; 28075; 28078; 28148; 28154; 28168; 28399; 28530; 28853; 28952; 29007; 29233; 29273;
25 29322; 29352; 29397; 29417; 29420; 29444; 29457; 29560; 29783; 29791; 30012; 30013; 30015; 30039; 30040;
26 30052; 30111; 30175; 30176; 30666; 31213; 32015; 32021; 32079; 32106; 33360; 38210; 43503; 45886; 46183;
27 46474; 47297; 47433; 48793; 49452; 49668; 50327; 51290; 51291; 51303; 51311; 51316; 51759; 53537; 53565;
28 53826; 55012; 55029; 55039; 55050; 55127; 55141; 55152; 55271; 55453; 55457; 55486; 55518; 55522; 56070;
56115; 57889; 57908; 57961; 58684; 59210; 59222; 59253; 59448; 59452; 59485; 59498; 59500; 59504; 59506;
59510; 59651; 59685; 59691; 59729; 59799; 59802; 59813; 59825; 59834; 59844; 59855; 59867; 59874; 59895;
59902; 59924; 59931; 59946; 59962; 59970; 59978; 59987; 60033; 60070; 60097; 60113; 60114; 60117; 60118;
60120; 60123; 60126; 60131; 60142; 60145; 60149; 60153; 60183; 60185; 60188; 60193; 60201; 60230; 60353;
60362; 60453; 60456; 60465; 60475; 60578; 60587; 60748; 60812; 60889; 61035; 61068; 61134; 61176; 61259;
61296; 61309; 61359; 61373; 61397; 61424; 61437; 61449; 61452; 61517; 61543; 61555; 61560; 61561; 61562;
61563; 61565; 61580; 61763; 64995.

²² 23998; 24716; 24905; 24906; 51059; 55112; 56980; 57425; 57790; 59916; 60565.

²³ Order at 23.

²⁴ 23998; 24716; 24905; 24906; 51059.

²⁵ 23998.

²⁶ 51059.

²⁷ 24716; 24905; 24906.

1 the Electoral Count Act.²⁸ These emails do not discuss how this litigation might affect the
 2 participants' existing lawsuits; they only consider how these suits could disrupt their plan for
 3 January 6. As the Court previously described, "[t]he true animating force behind these emails
 4 was advancing a political strategy: to persuade Vice President Pence to take unilateral action on
 5 January 6."²⁹ Because these documents were not created in anticipation of litigation, they are
 6 not protected.

7 In contrast, three of the eleven documents place the January 6 plan in the context of
 8 litigation strategy.³⁰ Two of those documents are separate email chains discussing strategy for a
 9 filing in an election-related case and its potential effects on the January 6 plan.³¹ Similarly, one
 10 document is an email chain discussing the viability of election-related lawsuits after January
 11 6.³² While these emails relate to the January 6 plan, the team's ongoing and future litigation
 12 "animate[d] every document,"³³ such that they were created in anticipation of litigation.

13 Accordingly, the Court finds that eight of these eleven documents were not made in
 14 anticipation of litigation and thus ORDERS them to be disclosed to the Select Committee.

15 c. State election-related documents

16 Dr. Eastman claims work product protection over 170 documents relating to alleged
 17 fraud in state elections.

18 Fifty-four of those emails are Dr. Eastman advising state legislators or circulating his
 19 theories on their authority.³⁴ Thirty-seven of those coordinate meetings with state legislators or
 20 other third parties to discuss alleged election fraud and certifying electors.³⁵ Another fifteen
 21

22 ²⁸ 56980; 57425; 57790.

23 ²⁹ Order at 24.

24 ³⁰ 55112; 59916; 60565.

25 ³¹ 59916; 60565.

26 ³² 55112.

27 ³³ *Torf*, 357 F.3d at 908.

28 ³⁴ 16181; 16301; 16349; 16379; 16381; 16458; 20142; 21105; 21106; 21111; 21112; 21113; 21116; 21117;
 21122; 21124; 21126; 23582; 23584; 23631; 23638; 24730; 24760; 24762; 24778; 24795; 24802; 24893; 24897;
 25035; 26075; 31598; 32071; 32072; 51402; 51403; 51407; 51408; 61697; 61724; 61764; 61767; 61768; 61904;
 61905; 62674; 62675; 62698; 62706; 62844; 62858; 62859; 62861; 62863.

³⁵ 16181; 16301; 16349; 16379; 16381; 16458; 20142; 21105; 21106; 21111; 21112; 21113; 21116; 21117;
 21122; 21124; 21126; 23582; 23638; 24730; 24760; 24762; 24778; 24795; 24802; 24893; 24897; 25035; 31598;
 32071; 32072; 62706; 62844; 62858; 62859; 62861; 62863.

1 documents send or discuss information for state legislators about their legislative authority.³⁶
 2 Two documents include Dr. Eastman’s request for updates on state legislative subpoenas.³⁷ All
 3 fifty-four documents do not relate to or mention anticipated litigation and are thus not
 4 protected.

5 Four of the 170 documents relate to President Trump’s views on state elections.³⁸ One is
 6 a communication from President Trump about a state campaign rally.³⁹ Three documents
 7 discuss President Trump’s potential press releases on state electors.⁴⁰ These documents do not
 8 reference litigation and Dr. Eastman fails to provide context as to how they could pertain to
 9 litigation. Accordingly, these four documents are not protected.

10 Forty-two of the 170 documents are reports or analyses of alleged state election
 11 irregularities.⁴¹ Review of the emails shows that these documents served several purposes: they
 12 were distributed to state and federal legislators, discussed in public hearings, and also used to
 13 support election-related litigation. The reports are largely statistical analyses; they make no
 14 reference to litigation and have no indication of being tailored for potential suits. Because these
 15 forty-two documents would “have been created in substantially similar form” without the
 16 prospect of litigation, they are not protected work product.⁴²

17 Seventy of the 170 documents are emails discussing the election data reports discussed
 18 above.⁴³ Forty-six of these are emails between various attorneys discussing statistical data in
 19 the context of state election litigation.⁴⁴ These emails would not have been made in the same

20 ³⁶ 23584; 23631; 26075; 51402; 51403; 51407; 51408; 61697; 61767; 61768; 61904; 61905; 62674; 62675;
 21 62698.

21 ³⁷ 61724; 61764.

22 ³⁸ 25905; 30038; 30118; 30119.

22 ³⁹ 25905.

23 ⁴⁰ 30038; 30118; 30119.

24 ⁴¹ 18814; 18822; 18956; 23291; 23591; 23905; 28479; 62958; 63054; 63058; 63081; 63084; 63091; 63095;
 24 63103; 63114; 63119; 63125; 63131; 63139; 63146; 63154; 63194; 63407; 63416; 63425; 63438; 63448; 63449;
 24 63450; 63451; 63479; 63503; 63512; 63515; 63518; 63519; 63520; 63717; 63920; 63974; 63977.

25 ⁴² *Torf*, 357 F.3d at 908.

26 ⁴³ 7650; 7652; 7799; 8739; 8742; 11779; 15393; 15584; 15636; 15944; 16182; 16184; 16354; 16561; 16892;
 26 16893; 16894; 16895; 16901; 17124; 17247; 17416; 18406; 18550; 18552; 18554; 18684; 18793; 18796; 18797;
 27 18813; 18821; 18858; 18863; 18865; 18875; 18887; 18901; 18902; 18919; 18920; 19169; 19686; 19888; 20163;
 27 22679; 23290; 23292; 23306; 23308; 23310; 28104; 30669; 31602; 31628; 31634; 31635; 61695; 61701; 62940;
 27 62944; 62948; 62951; 62955; 62984; 62987; 62996; 63000; 63919; 63973.

28 ⁴⁴ 7650; 7652; 7799; 8739; 8742; 11779; 15393; 15584; 15636; 15944; 16182; 16184; 16354; 16561; 16892;
 28 16893; 16894; 16895; 16901; 17124; 17247; 17416; 18406; 18550; 18552; 18554; 18684; 18793; 18796; 18797;

1 form if not for litigation and are thus protected. Eighteen other emails are predominantly Dr.
 2 Eastman and statisticians discussing election analyses that they used for both litigation and
 3 political purposes.⁴⁵ Like the contents of the reports themselves, these discussions would have
 4 had the same form without the prospect of litigation and thus are not protected. Dr. Eastman
 5 admits that an additional six emails discussing election reports⁴⁶ were created for “adjudicatory
 6 proceedings in Congress and/or the state legislatures,” not litigation.⁴⁷ Although he argues that
 7 adjudication of electors is analogous to litigation, his only support for this novel claim is a
 8 district court case that did not address the issue.⁴⁸ Accordingly, these twenty-four documents
 9 are not protected.

10 Of these 170 state election-related documents, 124 were not made in anticipation of
 11 litigation and thus are not protected work product. Because Dr. Eastman also claims attorney-
 12 client privilege over thirty-seven of those 124 documents,⁴⁹ the Court discusses those attorney-
 13 client claims below. The remaining eighty-seven documents⁵⁰ were not created in anticipation
 14 of litigation and have no attorney-client privilege claim, so the Court ORDERS them to be
 15 disclosed.

16 **d. Documents for Congress**

17 Three documents are email chains gathering information for members of Congress.⁵¹
 18 Two of those documents do not mention litigation and solely collect materials for Congress.⁵²

19 _____
 20 18858; 18863; 18865; 18875; 18887; 18901; 18902; 18919; 19169; 23290; 23292; 23306; 23308; 23310; 28104;
 30669.

21 ⁴⁵ 18813; 18821; 18920; 19686; 19888; 20163; 22679; 62940; 62944; 62948; 62951; 62955; 62984; 62987;
 62996; 63000; 63919; 63973.

22 ⁴⁶ 31602; 31628; 31634; 31635; 61695; 61701.

23 ⁴⁷ Brief at 26-27.

24 ⁴⁸ *Id.* at 25.

25 ⁴⁹ 23291; 23582; 23584; 23591; 23631; 23638; 24730; 24760; 24762; 24778; 24795; 24893; 24897; 25035;
 26 25905; 30038; 30118; 51402; 51403; 51407; 51408; 61695; 61697; 61701; 61767; 61768; 61904; 61905; 62674;
 62675; 62698; 62706; 62844; 62858; 62859; 62861; 62863.

27 ⁵⁰ 16181; 16301; 16349; 16379; 16381; 16458; 18813; 18814; 18821; 18822; 18920; 18956; 19686; 19888;
 28 20142; 20163; 21105; 21106; 21111; 21112; 21113; 21116; 21117; 21122; 21124; 21126; 22679; 23905; 24802;
 26075; 28479; 30119; 31598; 31602; 31628; 31634; 31635; 32071; 32072; 61724; 61764; 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.

⁵¹ 52958; 61666; 62657.

⁵² 52958; 62657.

1 The third email chain discusses litigation plans, but also includes a paragraph recommending
2 talking points for members of Congress on their alleged authority to delay the electoral count.⁵³
3 This paragraph is not in anticipation of litigation and must be disclosed, with the remainder of
4 the document redacted.

5 Dr. Eastman also claims attorney-client privilege over one of the three documents
6 discussed in this section,⁵⁴ so the Court discusses that document below. Accordingly, the Court
7 ORDERS that the other two documents⁵⁵ must be disclosed.

8 **e. Connecting third parties**

9 Four documents connect third parties to Dr. Eastman.⁵⁶ Two of those connect Dr.
10 Eastman to state legislators and their attorneys.⁵⁷ The other two emails are people reaching out
11 to Dr. Eastman to offer suggestions or praise.⁵⁸ As was the case for similar documents
12 discussed in the prior Order, none of these documents relate to or implicate litigation.
13 Accordingly, these four documents are not protected and the Court ORDERS them to be
14 disclosed.

15 **f. News articles**

16 Seven documents share news articles or Twitter posts.⁵⁹ These public articles and posts
17 were not created for litigation, and the minimal commentary contained in the emails is
18 unrelated to litigation. As such, these seven documents are not protected work product.

19 Dr. Eastman also claims attorney-client privilege over two of the seven documents,⁶⁰ so
20 the Court discusses those below. Accordingly, the Court ORDERS the other five documents⁶¹
21 to be disclosed.

22 **2. Preparation by or for a client's representative**

23 The Court now examines whether the 409 documents that were created in anticipation of

24 ⁵³ List item 4 in 61666.

25 ⁵⁴ 52958.

26 ⁵⁵ 61666; 62657.

27 ⁵⁶ 23893; 31209; 61862; 61868.

28 ⁵⁷ 61862; 61868.

⁵⁸ 23893; 31209.

⁵⁹ 6854; 6855; 18592; 18593; 18897; 25167; 25170.

⁶⁰ 25167; 25170.

⁶¹ 6854; 6855; 18592; 18593; 18897.

1 litigation were created by or for a party or “party’s representative (including the other party’s
2 attorney, consultant, . . . or agent),” which is the second requirement for work product
3 protection.⁶² Accordingly, documents are protected if they were prepared by or for President
4 Trump or another client, or by or for Dr. Eastman or another representative of those clients.⁶³

5 404 of these 409 documents relate to representing President Trump or his campaign. All
6 404 documents were prepared and/or sent by or for members of the White House and campaign
7 staff, attorneys of record in court cases (including Dr. Eastman), and those attorneys’ staff.
8 Because these documents were created by or for agents of President Trump or his campaign,
9 they are protected work product.

10 The other five documents relate to Dr. Eastman advising Georgia legislators on potential
11 lawsuits.⁶⁴ All of those emails were prepared by the clients’ agents, Dr. Eastman or the
12 legislators’ other counsel, so they are protected work product.

13 3. Waiver of protection

14 The Court now considers whether Dr. Eastman waived his privilege over any of the 409
15 documents that the Court concluded above were protected work product. Unlike attorney-client
16 privilege, which is waived if not kept completely confidential, work product protection is only
17 waived when attorneys disclose their work to “an adversary or a conduit to an adversary in
18 litigation.”⁶⁵

19 As the Court previously ruled, Dr. Eastman’s use of his Chapman University email
20 address did not destroy Dr. Eastman’s privilege over his communications.⁶⁶

21 Dr. Eastman did not disclose any of the 409 documents to a conduit to an adversary in
22 litigation. The documents were all exchanged between members of President Trump and his
23 campaign’s litigation teams; President Trump’s staff; and likeminded experts, consultants, and
24 volunteers. Moreover, many of the documents were labeled confidential or “attorney work

25 ⁶² Fed. R. Civ. P. 26(b)(3); *see United States v. Nobles*, 422 U.S. 225, 238 (1975).

26 ⁶³ Below, the Court expands upon its reasoning in the prior Order and finds that Dr. Eastman and President Trump
27 and his campaign had an established attorney-client relationship during entire the period of the subpoena. Thus,
28 Dr. Eastman is a representative of President Trump and his campaign for purposes of the work product doctrine.

⁶⁴ 24727; 24797; 59448; 60185; 60188.

⁶⁵ *Sanmina*, 968 F.3d 1107, 1121 (9th Cir. 2020)ren; *Nobles*, 422 U.S. at 239.

⁶⁶ Order at 17-20, 29-30.

1 product,” reinforcing Dr. Eastman’s assertion that his team did not intend for these documents
2 to be disclosed to adversaries.

3 **4. Substantial or compelling need exception**

4 As was the case in the Court’s prior decision, all of the 409 protected documents are
5 ‘opinion’ work product because they include attorneys’ thoughts and legal theories. Opinion
6 work product “is virtually undiscoverable.”⁶⁷ A court may compel disclosure of opinion work
7 product only in the rare situation “when mental impressions are *the pivotal issue* in the current
8 litigation and the need for the material is compelling.”⁶⁸

9 As the Court previously found, review of the 409 protected documents shows that none
10 are “pivotal” to the Select Committee’s investigation. The majority of the documents include
11 opinions and discussions about trial strategy in ongoing or anticipated lawsuits. As discussed
12 above, this litigation was a “legitimate form of recourse, and is not tied to the investigation’s
13 core purpose, which is to ‘investigate and report upon the facts, circumstances, and causes
14 relating to the January 6, 2021, domestic terrorist attack upon the United States Capitol.’”⁶⁹
15 Accordingly, none of these 409 non-“pivotal” litigation-related documents shall be disclosed
16 based on compelling need.

17 * * *

18 Having evaluated each element of work product protection, the Court finds that 409
19 documents are protected work product and 146 documents are not protected work product. Dr.
20 Eastman also claims attorney client privilege over 40 of the 146 documents that are not
21 protected work product,⁷⁰ so the Court will determine disclosure for these 40 documents under
22 attorney-client privilege below. Thus, the Court ORDERS the other 106 documents to be
23

24 _____
25 ⁶⁷ *Republic of Ecuador v. Mackay*, 742 F.3d 860, 869 n.3 (9th Cir. 2014) (quoting *United States v. Deloitte LLP*,
610 F.3d 129, 136 (D.C. Cir. 2010)); Fed. R. Civ. P. 26(b)(3)(B).

26 ⁶⁸ *Holmgren v. State Farm Mutual Auto. Ins. Co.*, 976 F.2d 573, 577 (9th Cir. 1992) (emphasis added); *see also*
Upjohn Co. v. United States, 449 U.S. 383, 401–02 (1981) (noting that opinion work product is discoverable only
upon “a far stronger showing of necessity and unavailability by other means”).

27 ⁶⁹ Order at 43 (quoting H.R. Res. 503 § 3).

28 ⁷⁰ 23291; 23582; 23584; 23591; 23631; 23638; 24730; 24760; 24762; 24778; 24795; 24893; 24897; 25035;
25167; 25170; 25905; 30038; 30118; 51402; 51403; 51407; 51408; 52958; 61695; 61697; 61701; 61767; 61768;
61904; 61905; 62674; 62675; 62698; 62706; 62844; 62858; 62859; 62861; 62863.

1 disclosed.⁷¹

2
3 **B. Attorney-Client Privilege**

4 The Court now moves from work product protection to Dr. Eastman’s claims of
5 attorney-client privilege. The attorney-client privilege protects confidential communications
6 between attorneys and clients for the purpose of legal advice.⁷² However, “advice on political,
7 strategic, or policy issues” is not protected.⁷³ The privilege extends to communications with
8 agents of the clients and third parties assisting the attorney.⁷⁴

9 Dr. Eastman claims attorney-client privilege over 166 documents. Because the Court
10 found above that 112 of those documents were protected work product, the Court here
11 considers the remaining fifty-four documents.⁷⁵

12 **1. Clients seeking legal advice from attorneys**

13 Below, the Court considers whether an attorney-client relationship existed and whether
14 the client was seeking legal advice when communicating with their attorney.

15 **a. President Trump as client**

16 The Court previously found that Dr. Eastman had an attorney-client relationship with
17 President Trump between January 4-7, 2021.⁷⁶ Dr. Eastman was counsel of record on several
18 cases representing President Trump and his campaign in post-election litigation beginning in
19

20 ⁷¹ 6854; 6855; 16181; 16301; 16349; 16379; 16381; 16458; 18592; 18593; 18813; 18814; 18821; 18822; 18897;
21 18920; 18956; 19686; 19888; 20142; 20163; 21105; 21106; 21111; 21112; 21113; 21116; 21117; 21122; 21124;
22 21126; 22679; 23893; 23905; 23998; 24716; 24802; 24905; 24906; 26075; 28479; 30119; 31209; 31598; 31602;
23 31628; 31634; 31635; 32071; 32072; 51059; 56980; 57425; 57790; 61666; 61724; 61764; 61862; 61868; 62657;
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.

24 ⁷² *Upjohn*, 449 U.S. at 389; *see also United States v. Graf*, 610 F.3d 1148, 1156 (9th Cir. 2010).

25 ⁷³ *In re Lindsey*, 148 F.3d 1100, 1106 (D.C. Cir. 1998).

26 ⁷⁴ *See Sanmina*, 968 F.3d at 1116 (internal citations omitted). In some instances, the Ninth Circuit has found
communications between an attorney and their associates privileged. *See United States v. Rowe*, 96 F.3d 1294,
1296 (9th Cir. 1996).

27 ⁷⁵ 23291; 23532; 23539; 23542; 23551; 23552; 23582; 23584; 23591; 23631; 23638; 24730; 24760; 24762;
24778; 24795; 24893; 24897; 25035; 25167; 25170; 25905; 30038; 30118; 51402; 51403; 51407; 51408; 52958;
53452; 61695; 61697; 61701; 61767; 61768; 61904; 61905; 62674; 62675; 62698; 62706; 62776; 62841; 62842;
28 62844; 62858; 62859; 62861; 62863; 62865; 62868; 64305; 64331; 64715.

⁷⁶ Order at 14-15.

1 November 2020.⁷⁷ In that capacity he communicated with members of the campaign and White
2 House staff, and their emails confirm that they viewed him as President Trump’s attorney. An
3 attorney-client relationship between Dr. Eastman and President Trump thus existed throughout
4 the subpoena’s time period.

5 For five of the fifty-four documents, Dr. Eastman claims attorney-client privilege
6 involving his representation of President Trump.⁷⁸ Three of the five documents are news
7 articles or photos from President Trump sent by his Executive Assistant to Dr. Eastman.⁷⁹ Dr.
8 Eastman does not explain how these seek legal advice. Although Dr. Eastman’s privilege log
9 claims that the photo is President Trump’s “handwritten note re issues for anticipated
10 litigation,” the note simply celebrates the size of President Trump’s campaign rallies.⁸⁰ The
11 other two documents discuss how to frame President Trump’s potential press statement on
12 certifying alternate electors in swing states.⁸¹ These documents do not discuss any legal
13 questions about the statement, but rather focus on framing. Because these five documents were
14 not created for legal advice, they are not protected and the Court ORDERS them to be
15 disclosed.

16 **b. Legislators as potential clients**

17 Forty of the fifty-four documents involve state legislators as potential clients.⁸² The
18 attorney-client privilege extends to potential clients who seek legal advice from an attorney.⁸³
19 Dr. Eastman submits his sworn declaration attesting that these legislators were potential
20 clients,⁸⁴ and the contents of the emails support his assertion.

21 Fifteen of the forty documents are email communications between Dr. Eastman, two
22

23 ⁷⁷ *Donald J. Trump for President, Inc., v. Boockvar*, No. 4:20-cv-02078 (M.D. Pa., filed Nov. 9, 2020); *see also*
24 Declaration of John Eastman (“Eastman Decl.”) (Dkt. 346-2) ¶ 5.

25 ⁷⁸ 25167; 25170; 25905; 30038; 30118.

26 ⁷⁹ 25167; 25170; 25905.

27 ⁸⁰ Privilege log, 25905; 25905.

28 ⁸¹ 30038; 30118.

⁸² 23532; 23539; 23542; 23551; 23552; 23582; 23584; 23591; 23631; 23638; 24730; 24760; 24762; 24778;
24795; 24893; 24897; 25035; 51402; 51403; 51407; 51408; 52958; 53452; 61767; 61768; 62674; 62675; 62698;
62706; 62776; 62841; 62842; 62844; 62858; 62859; 62861; 62863; 62865; 62868.

⁸³ *United States v. Layton*, 855 F.2d 1388, 1406 (9th Cir. 1988).

⁸⁴ Eastman Decl. ¶¶ 15-20.

1 Pennsylvania state legislators, and an agent of those legislators.⁸⁵ The first email is the
2 legislators' agent asking Dr. Eastman for legal advice, which Dr. Eastman describes as
3 "regarding the constitutional authority of state legislatures to deal with election illegality and
4 fraud."⁸⁶ Two documents are an email chain containing this inquiry and Dr. Eastman's initial
5 response, which are protected; the remainder of the chain is not for legal advice, so Dr.
6 Eastman must disclose redacted versions of the two documents.⁸⁷ Two more documents are Dr.
7 Eastman's attachments to his response, which are protected attorney-client communications.⁸⁸
8 The eleven documents constituting the remainder of the chain schedule Zoom meetings or
9 discuss state politics.⁸⁹ Those emails were not for the purpose of legal advice and so must be
10 disclosed.

11 Nine of the forty documents involve Georgia legislators.⁹⁰ Six documents include
12 Georgia state legislators making explicit legal inquiries to Dr. Eastman and are therefore for the
13 purpose of legal advice.⁹¹ One additional document merely seeks a Zoom link and is thus not
14 protected.⁹² Two documents share a draft petition by Georgia state legislators but do not seek
15 legal advice and are therefore not protected.⁹³

16 Nine of the forty documents involve Arizona state legislators.⁹⁴ Four of those include a
17 state legislator asking for Dr. Eastman's advice on a draft resolution and are therefore for the
18 purpose of legal advice.⁹⁵ One document includes an email asking about the intersection of
19 state and federal election law and thus seeks legal advice; the rest of the document is not for
20

21
22 ⁸⁵ 23532; 23539; 23542; 23551; 23552; 23582; 23584; 23591; 23631; 23638; 24760; 24762; 24893; 24897;
25035.

23 ⁸⁶ Brief at 16.

24 ⁸⁷ 23582 (the Court refers here to the email on page 23582, sent on December 5, 2020, at 5:50 pm MST); 25035
(the Court refers here to the email on page 25036, sent on December 5, 2020, at 9:17 am). Dr. Eastman should
25 redact these four fully or partially protected documents wherever they appear in other documents.

25 ⁸⁸ 23584; 23631.

26 ⁸⁹ 23532; 23539; 23542; 23551; 23552; 23591; 23638; 24760; 24762; 24893; 24897.

26 ⁹⁰ 24730; 24778; 24795; 61767; 61768; 62674; 62675; 62698; 62706.

27 ⁹¹ 24730; 24778; 24795; 62674; 62675; 62698.

27 ⁹² 62706. Dr. Eastman should redact the other protected emails in this thread.

27 ⁹³ 61767; 61768.

28 ⁹⁴ 51402; 51403; 51407; 51408; 62776; 62841; 62842; 62865; 62868.

28 ⁹⁵ 51402; 51403; 51407; 51408.

1 legal advice, so Dr. Eastman must disclose the unprotected portions.⁹⁶ Four documents
2 coordinate scheduling calls and are therefore not for the purpose of legal advice,⁹⁷ so they must
3 be disclosed.

4 Five of the forty documents circulate a Zoom invitation and discuss strategy pertaining
5 to election investigations and strategy in several states.⁹⁸ One of the documents is protected
6 because it contains two emails seeking legal advice from Dr. Eastman about legislative
7 authority.⁹⁹ Four of the documents do not seek legal advice,¹⁰⁰ so they are not protected.

8 Two of the forty documents seek and provide information to encourage Members of
9 Congress to object to certain electoral slates.¹⁰¹ While these emails refer to alleged violations of
10 state law, the purpose of the exchange is to encourage Members to object, not to seek legal
11 advice. Accordingly, these two documents are not protected.

12 The Court finds that twenty-seven of these forty state legislator-related documents are
13 not protected and ORDERS them to be disclosed.

14 **c. Dr. Eastman as client**

15 For three of the fifty-four documents, Dr. Eastman is the potential client.¹⁰² In these
16 emails, Dr. Eastman discusses with another attorney whether to bring a suit for “breach of
17 contract and violation of constitutional rights.”¹⁰³ Dr. Eastman’s sworn declaration confirms the
18 same.¹⁰⁴ These documents explicitly seek legal advice and representation.

19 **d. No client relationship**

20 Six of the fifty-four documents include no client or involve third parties without
21 supported client relationships.¹⁰⁵

22
23 ⁹⁶ 62776. The Court refers here to the email sent on January 31, 2021 at 8:45 am MST. The other email in this
document is not protected and must be disclosed.

24 ⁹⁷ 62841; 62842; 62865; 62868.

25 ⁹⁸ 62844; 62858; 62859; 62861; 62863.

26 ⁹⁹ 62863. The Court refers here to the emails sent on January 3, 2021 at 4:03 pm MST and January 3, 2021 at 3:06
pm MST.

27 ¹⁰⁰ 62844; 62858; 62859; 62861.

28 ¹⁰¹ 52958; 53452.

¹⁰² 64305; 64331; 64715.

¹⁰³ Brief at 17.

¹⁰⁴ Eastman Decl. ¶ 21.

¹⁰⁵ 23291; 61904; 61905; 61695; 61697; 61701.

1 One of the six documents is a report on alleged state election irregularities,¹⁰⁶ which
2 does not contain or seek legal advice. Thus, this document is not protected.

3 Another two of the six documents are between Dr. Eastman and a third party asking for
4 information on Michigan election law violations.¹⁰⁷ Dr. Eastman provides no information about
5 this third party to link him to any existing or potential client. Accordingly, Dr. Eastman has not
6 met his burden to demonstrate that these two documents are protected.

7 Three of the six documents include an email planning a call for state legislators about
8 decertifying electors and attaching two related memos.¹⁰⁸ While these documents contain some
9 brief legal references, no client appears to have sought this legal information. The majority of
10 the documents do not offer legal advice but aim to persuade legislators to take political action.
11 Accordingly, these three documents are not protected.

12 Since these six documents are not protected, the Court ORDERS them to be disclosed.

13 2. Confidentiality

14 The Court found above that nineteen full or partial documents were communications
15 between an attorney and client for the purpose of seeking legal advice.¹⁰⁹ In order for these
16 communications to be privileged, they must also have been kept confidential.¹¹⁰ The presence of
17 a third party does not necessarily destroy confidentiality if that third party is an agent of the
18 client or attorney.¹¹¹ But the third party's "shared desire to see the same outcome in a legal
19 matter is insufficient" to maintain confidentiality.¹¹²

20 Nine of the nineteen documents are solely between the client, the client's agent, and
21 confirmed counsel.¹¹³ Accordingly, these nine documents are protected.

23 ¹⁰⁶ 23291.

24 ¹⁰⁷ 61904; 61905.

25 ¹⁰⁸ 61695; 61697; 61701.

26 ¹⁰⁹ 23582; 23584; 23631; 24730; 24778; 24795; 25035; 51402; 51403; 51407; 51408; 62674; 62675; 62698;
27 62776; 62863; 64305; 64331; 64715.

28 ¹¹⁰ *In re Pac. Pictures Corp.*, 679 F.3d 1121, 1126–27 (9th Cir. 2012); *see also Reiserer v. United States*, 479 F.3d
1160, 1165 (9th Cir. 2007) ("there is no confidentiality where a third party . . . either receives or generates the
documents").

¹¹¹ *United States v. Landof*, 591 F.2d 36, 39 (9th Cir. 1978); *Richey*, 632 F.3d at 566.

¹¹² *In re Pac. Pictures Corp.*, 679 F.3d at 1129.

¹¹³ 23582; 23584; 23631; 24730; 25035; 62776; 64305; 64331; 64715.

1 Four of the nineteen documents are between Dr. Eastman and a third party who is in
2 communication with an Arizona state senator.¹¹⁴ Dr. Eastman submits a sworn declaration that
3 this third party is an agent of the state senator, and the contents of the emails confirm the agent
4 relationship. Accordingly, these four documents are confidential and thus protected.

5 Two of the nineteen documents involve a potential representation of two Georgia state
6 senators.¹¹⁵ Those emails are between the two potential clients, their counsel, Dr. Eastman, and a
7 third party. The attorney for the legislators submitted a sworn declaration that the third party was
8 an attorney working as his agent in this matter.¹¹⁶ Accordingly, those emails are confidential and
9 therefore privileged.

10 Three of the nineteen emails involve a potential representation of a different Georgia
11 state senator.¹¹⁷ While Dr. Eastman provided a sworn declaration that he offered pro bono legal
12 advice to this senator, there are four other people on the emails whom Dr. Eastman identifies as
13 “attorneys working with the Trump legal team.”¹¹⁸ However, the client in this case was not
14 President Trump or his campaign. Without further evidence specifying the relationship between
15 these Trump attorneys and this state legislator, the Court cannot find these communications to
16 be confidential. Accordingly, these three emails are not privileged and must be disclosed.

17 Similarly, the final of the nineteen documents is an email between a third party and Dr.
18 Eastman relating to a potential representation of a state legislator.¹¹⁹ Dr. Eastman’s declaration,
19 briefing, and privilege log all fail to provide any support for this third party’s relationship to the
20 potential client. Because the email is not confidential, it is not privileged and must be disclosed.

21 Accordingly, the Court ORDERS Dr. Eastman to disclose the four of the nineteen
22 documents that are not confidential.¹²⁰

23 * * *

24 Having evaluated each element of attorney-client privilege, the Court finds that 12

25 ¹¹⁴ 51402; 51403; 51407; 51408.

26 ¹¹⁵ 24778; 24795.

27 ¹¹⁶ Declaration of Robert D. Cheeley (Dkt. 346-1) ¶ 5.

28 ¹¹⁷ 62674; 62675; 62698.

¹¹⁸ Privilege log, 62674.

¹¹⁹ 62863.

¹²⁰ 62674; 62675; 62698; 62863.

1 documents are privileged and 42 documents are not privileged. Thus, the Court ORDERS the
2 42 documents to be disclosed.¹²¹

3 4 **C. Crime-fraud exception**

5 Based on the Court’s previous analysis, the Court has required disclosure of 148
6 unprotected communications. 421 documents are protected either by work product or attorney-
7 client privilege, so the Court now considers whether those documents should be disclosed under
8 the crime-fraud exception.

9 The crime-fraud exception applies when (1) a “client consults an attorney for advice that
10 will serve [them] in the commission of a fraud or crime,”¹²² and (2) the communications are
11 “sufficiently related to” and were made “in furtherance of” the crime.¹²³ It is irrelevant whether
12 the scheme was ultimately successful.¹²⁴ An attorney’s wrongdoing alone may pierce the
13 privilege, regardless of the client’s awareness or innocence.¹²⁵ The exception extinguishes both
14 the attorney-client privilege and the work product doctrine.¹²⁶

15 The majority of the remaining protected documents are clearly legitimate legal or
16 litigation communications. However, five documents reference the plan to delay or stop the
17 electoral count on January 6, 2021, and therefore present a close call as to whether they fall
18

19 ¹²¹ 23291; 23532; 23539; 23542; 23551; 23552; 23582; 23591; 23638; 24760; 24762; 24893; 24897; 25035;
20 25167; 25170; 25905; 30038; 30118; 52958; 53452; 61695; 61697; 61701; 61767; 61768; 61904; 61905; 62674;
21 62675; 62698; 62706; 62776; 62841; 62842; 62844; 62858; 62859; 62861; 62863; 62865; 62868. As described
above, Dr. Eastman should redact the privileged parts of documents 23582, 25035, and 62776.

22 ¹²² *In re Grand Jury Investigation*, 810 F.3d 1110, 1113 (9th Cir. 2016).

23 ¹²³ *In re Grand Jury Proc. (Corp.)*, 87 F.3d 377, 381–83 (9th Cir. 1996).

24 ¹²⁴ *Id.* at 382.

25 ¹²⁵ *See In re Sealed Case*, 107 F.3d 46, 49 n.2 (D.C. Cir. 1997) (“[T]here may be rare cases . . . in which the
attorney’s fraudulent or criminal intent defeats a claim of privilege even if the client is innocent.”); *In re*
26 *Impounded Case (Law Firm)*, 879 F.2d 1211, 1213 (3d Cir. 1989) (“We cannot agree” that “the crime-fraud
exception does not apply to defeat the client’s privilege where the pertinent alleged criminality is solely that of the
law firm”).

27 ¹²⁶ *In re Int’l Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1242 (5th Cir. 1982) (“Every court of appeals that
has addressed the crime-fraud exception’s application to work product has concluded that it does apply.”); *In re*
28 *John Doe Corp.*, 675 F.2d 482, 492 (2d Cir. 1982) (“where so-called work-product is in aid of a criminal scheme,
fear of disclosure may serve a useful deterrent purpose and be the kind of rare occasion on which an attorney’s
mental processes are not immune.”). Indeed, “conduct by an attorney that is merely unethical, as opposed to
illegal, may be enough to vitiate the work product doctrine.” *United States v. Christensen*, 828 F.3d 763, 805 (9th
Cir. 2015).

1 within the crime-fraud exception.¹²⁷

2 **1. Timeframe**

3 The Court previously held that from January 4-7, 2021, President Trump and Dr.
4 Eastman likely committed obstruction of an official proceeding, in violation of 18 U.S.C.
5 § 1512(c)(2), and conspiracy to defraud the United States, in violation of 18 U.S.C. § 371,
6 when they attempted to disrupt the Joint Session of Congress on January 6, 2021.¹²⁸ Because
7 the remaining protected documents pre-date that time period, the Court now determines
8 whether those attempted crimes began earlier.

9 The previously disclosed documents indicate that Dr. Eastman and President Trump’s
10 plan to disrupt the Joint Session was fully formed and actionable as early as December 7, 2020.
11 On that day, Dr. Eastman forwarded a memo explaining why January 6 was the “Hard
12 Deadline” that was “critical to the result of this election” for the Trump Campaign.¹²⁹ A week
13 later, on December 13, President Trump’s personal attorney received a more robust analysis of
14 January 6’s significance, which was potentially “the first time members of President Trump’s
15 team transformed a legal interpretation of the Electoral Count Act into a day-by-day plan of
16 action.”¹³⁰

17 The current set of documents also confirm that the plan was established well before
18 January 6, 2021. In an email on December 22, 2020, an attorney with the Trump legal team
19 referred to the “the January 6 strategy” as a known plan to eight other people.¹³¹ Two days
20 later, Dr. Eastman explained that the worst case for the plan was receiving a court decision that
21 constrained Vice President Pence’s authority to reject electors.¹³² Dr. Eastman and President
22 Trump’s plan to stop the count was not only established by early December, it was the ultimate
23 goal that the legal team was working to protect from that point forward.

24
25
26 ¹²⁷ 51291; 51759; 55112; 59916; 60565.

27 ¹²⁸ Order at 36, 45.

28 ¹²⁹ Opp’n Ex. B (Dkt. 350-3).

¹³⁰ Opp’n Ex. A (Dkt. 350-2); Order at 41.

¹³¹ 51291; *see also* 51759.

¹³² 55112, 55114.

1 **2. Emails related to and in furtherance of the crimes**

2 Four of these five documents consider how filing certain election lawsuits might affect
3 the January 6 plan.¹³³ In these emails, Dr. Eastman and his colleagues discuss how to frame
4 their legal filings in light of what they considered a near-zero chance of success in the D.C.
5 courts.¹³⁴ Attorneys reference January 6 not as the day to enact the plan, but as a deadline to
6 bring timely and effective lawsuits. As the Court noted in its prior Order, “pursuing legal
7 recourse itself did not advance any crimes.”¹³⁵ Accordingly, these four emails did not further
8 the January 6 plan and therefore are not subject to the crime-fraud exception.

9 In the fifth email, dated December 22, 2020, an attorney goes beyond strategizing
10 litigation outcomes. This email considers whether to bring a case that would decide the
11 interpretation of the Electoral Count Act and potentially risk a court finding that the Act binds
12 Vice President Pence.¹³⁶ Because the attorney concluded that a negative court ruling would
13 “tank the January 6 strategy,” he encouraged the legal team to avoid the courts.¹³⁷ This email
14 cemented the direction of the January 6 plan. The Trump legal team chose not to seek recourse
15 in court—instead, they forged ahead with a political campaign to disrupt the electoral count.
16 Lawyers are free not to bring cases; they are not free to evade judicial review to overturn a
17 democratic election. Accordingly, this portion of the email¹³⁸ is subject to the crime-fraud
18 exception and must be disclosed.

19
20 **D. First Amendment**

21 Dr. Eastman claims that the First Amendment protects thirty documents involving a
22 group of “civic minded citizens of a conservative viewpoint who meet semi-regularly to
23
24

25 ¹³³ 51759; 55112; 59916; 60565.

26 ¹³⁴ 51759.

27 ¹³⁵ Order at 41.

28 ¹³⁶ 51291.

¹³⁷ The Court here refers to the first paragraph of the email. Dr. Eastman should redact the remainder of the email before disclosing it to the Select Committee.

¹³⁸ The Court refers to the first paragraph of the email on 51291. Dr. Eastman should redact the remainder of this document.

1 socialize and discuss issues of public concern.”¹³⁹ Dr. Eastman contends that disclosure would
2 deter people from participating in potentially controversial groups.

3 Disclosing information related to political associations can “have a profound chilling
4 effect on the exercise of political rights.”¹⁴⁰ The Supreme Court has therefore held that
5 disclosure is only appropriate when there is “a sufficiently important governmental interest.”¹⁴¹
6 Courts must then balance the government’s interest and the group members’ privacy
7 interests.¹⁴² Ultimately, disclosure requirements must be “narrowly tailored to the government’s
8 asserted interest.”¹⁴³

9 The thirty documents at issue here are emails that include invitations for Dr. Eastman to
10 speak about election litigation, meeting agendas, or Zoom information.¹⁴⁴ Dr. Eastman argues
11 that the Select Committee does not have a strong interest in these documents because they
12 “consist[] mostly of scheduling, agenda setting, and communicating login information.”¹⁴⁵ The
13 Court’s *in camera* review shows that twenty of the thirty documents match Dr. Eastman’s
14 description: they are entirely logistical or plan updates on state post-election litigation, which
15 the Court has already found to be a legitimate form of recourse.¹⁴⁶ The potential chilling effect
16 on the participants outweighs the Select Committee’s interest because the documents are at
17 most minimally relevant to its investigation. Accordingly, those twenty documents are
18 protected from disclosure.

19
20
21 ¹³⁹ Brief at 31.

22 ¹⁴⁰ *Perry v. Schwarzenegger*, 591 F.3d 1147, 1156 (9th Cir. 2010) (citing *Gibson v. Fla. Legislative Investigation*
Comm., 372 U.S. 539, 557 (1963)).

23 ¹⁴¹ *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383 (2021) (plurality opinion) (quoting *Doe v.*
Reed, 561 U.S. 186, 196 (2010) (internal quotation marks omitted)).

24 ¹⁴² *Barenblatt v. United States*, 360 U.S. 109, 126 (1959).

25 ¹⁴³ *Bonta*, 141 S. Ct. at 2383 (majority opinion). While the Select Committee proposes using only *Barenblatt*’s
balancing test, Opp’n at 24, the Court finds that *Barenblatt* and *Bonta* articulate effectively the same test. *See*
Republican Nat’l Comm. v. Pelosi, No. 22-cv-00659-TJK, ___ F. Supp. 3d ___, 2022 WL 1294509, at *20 (D.D.C.
26 May 1, 2022) (finding minimal or no differences between the tests).

27 ¹⁴⁴ 21115; 21119; 21120; 21242; 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.

28 ¹⁴⁵ Brief at 32.

¹⁴⁶ 21115; 21119; 21120; 21242; 21243; 21245; 21253; 21429; 21430; 23956; 25165; 25438; 25877; 26790;
26793; 26903; 26910; 28376; 31471; 31537.

1 However, the Court’s review reveals that the other ten of the thirty documents are more
2 closely tied to the Select Committee’s investigation and present a closer question.¹⁴⁷ All of
3 these documents relate to three meetings in the first two weeks of December 2020, which all
4 included presentations on topics related to the election and the group’s broader interests.

5 Four documents pertain to a meeting on December 8, 2020: two emails are the group’s
6 high-profile leader inviting Dr. Eastman to speak at the meeting, and two contain the meeting’s
7 agenda.¹⁴⁸ Based on the agenda, Dr. Eastman discussed “State legislative actions that can
8 reverse the media-called election for Joe Biden.”¹⁴⁹ Another speaker gave an “update on [state]
9 legislature actions regarding electoral votes.”¹⁵⁰

10 Five documents include the agenda for a meeting on December 9, 2020.¹⁵¹ The agenda
11 included a section entitled “GROUND GAME following Nov 4 Election Results,” during
12 which a sitting Member of Congress discussed a “[p]lan to challenge the electors in the House
13 of Representatives.”¹⁵²

14 One document contains the agenda for a meeting on December 16, 2020.¹⁵³ This meeting
15 similarly had a section on the “GROUND GAME following Nov 4 Election Results.” In this
16 segment, an elector for President Trump analyzed “The Constitutional implications of the
17 Electoral College Meeting and What Comes Next.”¹⁵⁴

18 The Select Committee has a substantial interest in these three meetings because the
19 presentations furthered a critical objective of the January 6 plan: to have contested states certify
20 alternate slates of electors for President Trump.¹⁵⁵ The week before these meetings, Dr.
21 Eastman sent memos to high-level White House staff explaining that the January 6 plan
22 required legislators “to determine the manner of choosing electors, even to the point of
23

24 ¹⁴⁷ 22779; 22780; 23038; 24948; 24950; 25558; 26072; 26091; 26791; 30032.

25 ¹⁴⁸ 22779; 22780; 25558; 26091.

26 ¹⁴⁹ 25558.

27 ¹⁵⁰ *Id.*

28 ¹⁵¹ 23038; 24948; 24950; 26072; 26791.

¹⁵² 26791.

¹⁵³ 30032.

¹⁵⁴ *Id.*

¹⁵⁵ *See* Order at 4-5, 41.

1 adopting a slate of electors themselves.”¹⁵⁶ In the same two week period, Dr. Eastman reached
2 out to sympathetic state legislators in Pennsylvania, Georgia, and Arizona, urging them to
3 decertify Biden electors and certify alternate Trump electors. Just three days after the third
4 meeting, Dr. Eastman admitted that his January 6 plan hinged on “electors get[ting] a
5 certification from their State Legislators”—without it, the dueling slates would be “dead on
6 arrival in Congress.”¹⁵⁷ Dr. Eastman’s actions in these few weeks indicate that his and President
7 Trump’s pressure campaign to stop the electoral count did not end with Vice President Pence—
8 it targeted every tier of federal and state elected officials. Convincing state legislatures to
9 certify competing electors was essential to stop the count and ensure President Trump’s
10 reelection.

11 Dr. Eastman argues that the Select Committee’s interests are weak, but his claims are
12 unconvincing with respect to these ten documents. He contends that the documents do not
13 further the Committee’s investigation as they “predate January 6 and do not discuss
14 demonstrations at the Capitol on that or any other day.”¹⁵⁸ But Dr. Eastman incorrectly limits
15 the Select Committee’s mandate, which extends to the “facts, circumstances, and causes
16 relating to the January 6, 2021, domestic terrorist attack . . . [and] the interference with the
17 peaceful transfer of power.”¹⁵⁹

18 The Court now considers whether the Select Committee’s interests outweigh the
19 associational interests of the participants. Several courts have suggested that the First
20 Amendment bars disclosure when it results in “extensive interference with political groups’
21 internal operations and with their effectiveness.”¹⁶⁰ For example, the Supreme Court found that
22 NAACP members facing “economic reprisal, loss of employment, [and] threat of physical
23 coercion” outweighed the government’s need for disclosure of membership lists.¹⁶¹ On the
24 other hand, another district court recently found that the Select Committee’s interest

25 ¹⁵⁶ Opp’n Ex. J (Dkt. 350-11) at 6.

26 ¹⁵⁷ Opp’n Ex. D (Dkt. 350-5).

27 ¹⁵⁸ Brief at 32.

28 ¹⁵⁹ H.R. Res. 503 § 3(2), 117th Cong. (2021).

¹⁶⁰ *AFL-CIO v. Fed. Election Comm’n*, 333 F.3d 168, 177 (D.C. Cir. 2003) (citing several Supreme Court cases);
see also Pelosi, __ F. Supp. 3d __, 2022 WL 1294509, at *19.

¹⁶¹ *NAACP v. Alabama*, 357 U.S. 449, 462 (1958).

1 outweighed “the subpoena’s interference with the [Republican National Committee’s] ability to
2 pursue political goals such as winning elections and advocating for its policies.”¹⁶²

3 Here, Dr. Eastman argues that the risks of disclosure outweigh the Select Committee’s
4 interest. Dr. Eastman warns that group members risk being “subject to congressional
5 subpoena,” “forced to suffer unwanted public exposure,” and “chill[ed]” from engaging in
6 further discussion with other members.¹⁶³ Dr. Eastman contends that his concerns are
7 compounded when “a politically misaligned congressional committee”¹⁶⁴ has engaged in leaks
8 and publication of private documents.

9 While Dr. Eastman has legitimate concerns, they are not as weighty as either the RNC’s
10 fears or those of NAACP members. First, the risk of third parties receiving future subpoenas
11 cannot be sufficient to justify noncompliance with an existing subpoena. Second, disclosing the
12 documents would not reveal a full membership list of the group; the emails blind copied all
13 recipients, so their information is not accessible. Eight of the ten documents are meeting
14 agendas, so group members’ names only appear if they were scheduled to speak. To mitigate
15 any chilling effect, the Court can order redaction of the names of presenters on topics unrelated
16 to the January 6 plan. Third, although the Court “must presume that the committees of
17 Congress will exercise their powers responsibly and with due regard for the rights of affected
18 parties,”¹⁶⁵ there have been leaks and public disclosures from the Select Committee in this case
19 already.¹⁶⁶ But as the *RNC* court found, the balancing still tips in the Select Committee’s favor,
20 even when the Court considers the likelihood of disclosure to the public.¹⁶⁷

21 Having considered the parties’ arguments, the Court finds that disclosure of these ten
22 key documents is “narrowly tailored to the government’s asserted interest.”¹⁶⁸ Accordingly, the
23
24

25 _____
¹⁶² *RNC*, __ F. Supp. 3d __, 2022 WL 1294509, at *23 (internal quotation marks omitted).

26 ¹⁶³ Brief at 32-33.

27 ¹⁶⁴ *Id.*

¹⁶⁵ *Exxon Corp. v. Fed. Trade Comm’n*, 589 F.2d 582, 589 (D.C. Cir. 1978).

28 ¹⁶⁶ Brief at 33.

¹⁶⁷ *RNC*, __ F. Supp. 3d __, 2022 WL 1294509, at *20.

¹⁶⁸ *Bonta*, 141 S. Ct. at 2383.

1 Court ORDERS Dr. Eastman to disclose those ten documents.¹⁶⁹ Dr. Eastman should redact the
2 names of all participants listed as speakers besides those mentioned by the Court.¹⁷⁰

3
4 **IV. DISPOSITION**

5 For the reasons explained above, the Court finds that 440 documents are privileged. The
6 Court **ORDERS** Dr. Eastman to disclose the other 159 documents to the House Select
7 Committee by 2:00 p.m. Pacific Time on Wednesday, June 8, 2022.¹⁷¹

8
9 DATED: June 7, 2022



10 _____
11 DAVID O. CARTER
12 UNITED STATES DISTRICT JUDGE
13
14
15
16
17
18
19
20
21
22
23
24
25

26 _____
27 ¹⁶⁹ 22779; 22780; 23038; 24948; 24950; 25558; 26072; 26091; 26791; 30032.

28 ¹⁷⁰ The Court here refers to unmentioned participants listed on the agendas in 23038, 24948, 24950, 25558, 26072, 26091, 26791, and 30032.

¹⁷¹ It is Dr. Eastman's responsibility to redact protected emails when they appear in otherwise-disclosed documents.