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STATE BAR COURT OF CALIFORNIA

9

HEARING DEPARTMENT – LOS ANGELES

10

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In re: JOHN EASTMAN

CASE NO.: SBC-23-O-30029

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Hon. Yvette D. Roland

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Courtroom B

14

**RESPONDENT JOHN CHARLES EASTMAN'S
ANSWER TO NOTICE OF DISCIPLINARY
CHARGES**

15

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Initial Status Conference Date: February 27, 2023

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Time: 1:30pm

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20 **TO THE STATE BAR OF CALIFORNIA:**

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Pursuant to Rule 5.43 of the Rules of Procedure of the State Bar of California, respondent
22 John Charles Eastman ("Respondent") answers the allegations of the Notice of Disciplinary
23 Charges, dated January 26, 2023 ("NDC"), as follows:

24

JURISDICTION

25

1. John Charles Eastman ("respondent") was admitted to the practice of law in the State of
26 California on December 15, 1997. Respondent was a licensed attorney at all times pertinent to
27 these charges and is currently a licensed attorney of the State Bar of California.

28

**RESPONDENT JOHN CHARLES EASTMAN'S
ANSWER TO NOTICE OF DISCIPLINARY CHARGES**

FILED

J.H.

2/15/2023

**STATE BAR COURT
CLERK'S OFFICE
LOS ANGELES**

1 Respondent **ADMITS** the allegations in Paragraph 1 of the NDC.

2
3 **INTRODUCTION**

4 2. In or about December 2020, respondent began working with President Donald Trump
5 (“Trump”) and his campaign to develop a legal and political strategy to dispute the results of the
6 November 3, 2020 election, in which President Trump had lost his bid for reelection, by promoting
7 the idea that the election was tainted by fraud, disregard of state election law, and misconduct by
8 election officials.

9
10 Respondent objects to the allegations in Paragraph 2 of the NDC on the grounds that they are
11 conclusory, compound, ambiguous, vague, imprecise, overbroad, and intertwined with legal
12 conclusions/argument. Notwithstanding these objections, Respondent **DENIES** that he
13 “began working with President Donald Trump (“Trump”) and his campaign” “in or about
14 December 2020.” Respondent was engaged by and began working with an Election Integrity
15 effort requested of client President Trump in early September 2020, and with the Trump
16 campaign legal team in early November 2020. Respondent **DENIES** that he was retained to
17 assist “in disputing the results of the ... 2020 election” but to provide legal advice, among
18 legal advisers and others engaged by President Trump and his campaign, to assess legal
19 options available to both arising out of the 2020 Presidential election results. Respondent
20 **ADMITS** that Joseph R. Biden, Jr., was sworn in as President and took office on January 20,
21 2021, but whether President Trump had lost his bid for reelection was and remains hotly
22 disputed, and depends on whether the significant evidence of illegality and fraud outlined in
23 Respondent’s response to the bar investigators (attached hereto as Exhibit A) and elsewhere
24 affected the results of the election. Respondent **ADMITS** that during the course of his
25 engagement as legal advisor to Trump and his campaign he identified and evaluated
26 examples of violations of state election law and misconduct by state election officials,
27 contrary to the Constitution’s assignment of plenary power to the state legislatures to direct
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1 the manner of choosing presidential electors. Respondent **ADMITS** that there was
2 compelling, substantial, reliable, and credible evidence that the election had been tainted by
3 fraud, violations of state election law, and misconduct by state election officials.
4

5 3. In the months following the election, however, the Trump campaign received
6 information from numerous credible sources, including Attorney General of the United States
7 William Barr and members of Trump’s inner circle of advisors, that there was no evidence of
8 widespread election fraud or illegality that could have affected the outcome of the election. On or
9 about December 1, 2020, Attorney General Barr, who headed the United States Department of
10 Justice, which had monitored state elections for fraud and illegality, publicly stated that “to date,
11 we have not seen fraud on a scale that could have effected a different outcome in the election.”
12

13 Respondent objects to the allegations in Paragraph 3 of the NDC on the grounds that they are
14 conclusory, compound, ambiguous, vague, imprecise, overbroad, and intertwined with legal
15 conclusions/argument. Notwithstanding these objections, Respondent **DENIES** for lack of
16 personal knowledge whether the “Trump campaign received information from numerous
17 credible sources ... that there was no evidence of widespread election fraud or illegality.”
18 During the course of his engagement, Respondent was made aware of the opposite.
19 Respondent **ADMITS**, based on news accounts, that Attorney General Barr publicly stated
20 that “to date, we have not seen fraud on a scale that could have effected (sic) a different
21 outcome in the election.” Respondent **DENIES** that the statement was credible, given the
22 large amount of contradictory evidence from credible sources, such as: Georgia State
23 Senator William Ligon¹ and Pennsylvania Representative Francis Ryan² identifying
24

25 ¹ Hon. Wm. Ligon, *The Chairman’s Report of the Election Law Study Subcommittee of the*
26 *Standing [Georgia] Senate Judiciary Committee*, at 12 (Dec. 17, 2020) (“ample evidence that the
2020 Georgia General Election was so compromised by systemic irregularities and voter fraud that
it should not be certified.”), at http://www.senatorligon.com/THE_FINAL%20REPORT.PDF.

27 ² Letter to Rep. Scott Perry, cc: to all members of Congress, of December 4, 2020 (signed
28 by 15 members of the Pennsylvania Legislature) (“The general election of 2020 in Pennsylvania
was fraught with inconsistencies, documented irregularities and improprieties associated with

1 numerous instances of illegality and fraud in the conduct of the elections in Georgia and
2 Pennsylvania elections, much greater than the margins in those states; the sworn testimony
3 of Heidi Stirrup asserting that AG Barr admitted that the Department of Justice did not
4 investigate allegations of fraud and illegality; the written statement of former U.S.
5 Attorney William McSwain asserting that AG Barr had privately instructed him *not* to
6 investigate allegations of election illegality and fraud; and the volume of evidence,
7 including sworn eyewitness affidavits and expert analysis, submitted in conjunction with
8 the *Trump v. Raffensperger* lawsuit in Georgia. Respondent **DENIES** for lack of personal
9 knowledge that the Department of Justice “had monitored state elections for fraud and
10 illegality. Respondent **DENIES** that AG Barr had claimed that there was no evidence of
11 “illegality,” as his statement refers only to “fraud.” Respondent **DENIES** that whatever
12 sources had claimed there was no evidence of widespread election fraud or illegality were
13 credible, given the extensive evidence of illegality and/or fraud known at the time – and
14 much of which has subsequently been confirmed.

15
16 4. Moreover, by early January 2021, more than 60 courts had dismissed cases alleging
17 fraud in the presidential election. Many of the cases were dismissed based on lack of standing or
18 procedural issues. But approximately 30 of the cases were dismissed or had injunctive relief
19 denied based on determinations by a judge that the pleadings failed to allege facts sufficient to
20 state a claim or that no actual evidence of election fraud had been presented, or after an evidentiary
21 hearing and a finding that the evidence presented by the plaintiffs was insufficient on the merits.
22 For example, on or about November 6, 2020, in Michigan, a court denied a request for injunctive
23 relief, concluding that the plaintiffs’ motion was “based upon speculation and conjecture” and that
24 there was “no evidence to support accusations of voter fraud.” (*Stoddard v. City Election Comm’n*,

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26 mail-in balloting, pre-canvassing, and canvassing that the reliability of the mail-in votes in the
27 Commonwealth of Pennsylvania is impossible to rely upon.”); (“the mail-in ballot process in the
28 Commonwealth of Pennsylvania in the 2020 General Election was so defective that it is essential
to declare the selection of presidential electors for the Commonwealth to be in dispute.”);

1 No. 20-014604-CZ, slip op. at 3, 4 (Mich. Cir. Ct. Nov. 6, 2020).). On or about November 21,
2 2020, in Pennsylvania, a court granted a motion to dismiss some claims based on lack of standing
3 but others for failure to state a claim, concluding that the allegations of election fraud rested on
4 “strained legal arguments without merit and speculative accusations, unpled in the operative
5 complaint and unsupported by evidence.” (*Donald J. Trump for President, Inc. v. Boockvar*, 502 F.
6 Supp. 3d 899, 906 (M.D. Pa.), aff’d sub nom. *Donald J. Trump for President, Inc. v. Secretary of*
7 *Pennsylvania* (3d Cir. 2020) 830 Fed.Appx. 377.) On or about December 8, 2020, in Arizona, the
8 state’s Supreme Court concluded that the trial court was correct in its determination, after an
9 evidentiary trial, that the plaintiff had failed “to present any evidence of ‘misconduct,’ ‘illegal
10 votes’ or that the Biden Electors ‘did not in fact receive the highest number of votes for office,’ let
11 alone establish any degree of fraud or a sufficient error rate that would undermine the certainty of
12 the election results.” (*Ward v. Jackson*, No. CV-20-0343-AP/EL, 2020 WL 8617817, at *2 (Ariz.
13 Dec. 8, 2020).)

14
15 Respondent objects to the allegations in Paragraph 4 of the NDC on the grounds that they are
16 conclusory, compound, ambiguous, imprecise, overbroad, and intertwined with legal
17 conclusions/argument. The allegations are also vague. For example, although Trial Counsel
18 asserts that “more than 60 courts had dismissed cases alleging fraud in the presidential
19 election” and that “approximately 30 of the cases were dismissed or had injunctive relief
20 denied,” Trial Counsel only cites to three cases. Whether considered alone or together,
21 those three cases do not foreclose assessments (backed by credible and reliable evidence)
22 made, and arguments crafted, by Respondent as part of his engagement by his clients.
23 Further, Trial Counsel omits citation or even reference to state supreme court cases,
24 opinions filed in cases by Justices of the United States Supreme Court, and cases granted
25 review by the United States Supreme Court that demonstrate that the legal assessments and
26 advice advanced by Respondent on behalf of his client were viable, tenable, advanced in
27 good faith, and in many cases had substantial merit.

1 Using the standard set for sanctions under Federal Rule of Civil Procedure 11, a
2 legal argument is not frivolous so long as a competent attorney can make plausible, good
3 faith argument. *Riverhead Sav. Bank v. Nat’l Mortg. Equity Corp.*, 893 F.2d 1109, 1115
4 (9th Cir. 1990). This is true even when the legal argument is contrary to a state court
5 ruling. *Id.* The argument need not even be supported by controlling case law. *Hawaiian*
6 *Crow (‘Alala) v. Lujan*, 906 F. Supp. 549, 552 (D. Haw. 1991) (Denying sanctions for
7 naming a bird as a plaintiff in a “citizen’s suit.”). Only a ruling by an appellate court in the
8 same jurisdiction as the litigation that is directly on point can foreclose a legal argument.
9 *Milwaukee Concrete Studios, Ltd. v. Fjeld Mfg. Co.*, 8 F.3d 441, 449; *Neighborhood Rsch.*
10 *Inst. v. Campus Partners for Cmty Urb. Dev.*, 212 FRD 374, 379 (S.D. Ohio 2002). Even
11 if there is a case on point, a party has the right to seek reconsideration of that prior
12 decision. *See Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1081 (7th Cir.
13 1987). Similarly, in California, a claim is unsupported by probable cause **only if** any
14 reasonable attorney would agree that it is **totally and completely without merit**. *Sheldon*
15 *Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 874.

16 None of the three cases cited by Trial Counsel forecloses the arguments made by
17 Respondent on behalf of his client. *Stoddard v. City Election Comm’n* was not a decision
18 on the merits. Instead, it was denial of a motion for preliminary injunction. *Stoddard v.*
19 *City Election Commission*, No. 20-01-014604-CZ, Opinion and Order at 1 (Michigan
20 Circuit Court 2020). Rulings on motions for preliminary injunctions are not rulings on the
21 merits under Michigan law. *Cf. Detroit Fire Fighters Ass’n v. City of Detroit*, 753 NW2d
22 579, 588 (Mich. Supreme Court 2008) (“if a trial court ... chooses to issue a [preliminary]
23 injunction, it must promptly decide the merits”). The ruling on the preliminary injunction
24 is limited to whether the party seeking the injunction has demonstrated, and that early stage
25 of the case, a likelihood of success and whether they have established the likelihood of
26 irreparable harm. *Id.* at 587. In *Stoddard*, the court ruled that the plaintiff failed to
27 produce evidence at that early stage establishing a likelihood of success and in any event
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1 that plaintiff could not show irreparable harm since Michigan law provided other remedies.
2 *Stoddard*, Opinion and Order at 2-3. The decision was limited to the allegations regarding
3 counting of absentee ballots in Wayne County. *Id.* at 4.

4 The Arizona decision in *Ward v. Jackson* also does not support the Trial Counsel’s
5 allegation. As the Arizona Supreme Court noted, there was only a difference of 10,457
6 votes out of a total of more than 3.3 million votes cast for the electors of the two
7 presidential candidates. *Ward v. Jackson*, 2020 WL 8617817 at *1 (2020). The case
8 focused on 27,869 “duplicate ballots” from Maricopa County. *Id.* These ballots are
9 created when the ballot cast is damaged so that it cannot be tabulated by machine. *Id.* This
10 “damage” includes “overvotes” which are “votes for more than one candidate.” *Id.* The
11 court noted that there was “credible testimony” from a “number of witnesses” that there
12 were errors in the duplicate ballots that “did not accurately reflect the voter’s apparent
13 intent.” *Id.* Yet of the more than 27,000 duplicate ballots at issue, only 1,626 ballots were
14 allowed to be reviewed. The court did not permit additional time or opportunity to review
15 more of the challenged ballots because the plaintiff could not *prove* that the review would
16 result in a change in the vote count. *Id.* at *2. The Arizona Supreme Court only ruled that
17 the “trial judge did not abuse his discretion in denying the request ... to permit additional
18 inspection of the ballots.” *Id.* This is not a ruling on the merits that forecloses good faith
19 arguments disputing the results.

20 Trial Counsel’s reliance on *Donald J. Trump for President, Inc. v. Boockvar*, 5502
21 F.Supp.3d 889 (MD Penn. 2020) is of particular concern because Trial Counsel fails to cite
22 to opinions of Supreme Court Justices that demonstrate that the arguments put forward by
23 Respondent on behalf of his client were meritorious or at least tenable. *Boockvar* was one
24 of a number of cases that questioned the authority of state and local election authorities to
25 invite individuals to “cure” otherwise invalid ballots. *Id.* at 907. The District Court noted
26 that this procedure was not authorized by the Pennsylvania Election Code. *Id.* The court
27 further noted that the Pennsylvania Supreme Court “declined to explicitly answer” whether
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1 this statutorily unauthorized practice was forbidden. *Id.* Thus, the issue in Pennsylvania is
2 whether the executive has the authority to make rules governing a federal election that are
3 contrary to the rules established by the legislature pursuant to its plenary power under
4 Article II of the Constitution to direct the manner of choosing presidential electors. This
5 issue was brought into sharp focus when the Pennsylvania Supreme Court issued a ruling
6 that altered the unambiguous deadline for receipt of absentee ballots set forth by the
7 Legislature. Justice Alito, writing for himself and Justices Thomas and Gorsuch, noted
8 that the Federal Constitution confers authority for regulating federal elections on state
9 legislatures. *Republican Party of Pennsylvania v. Boockvar*, 141 S.Ct. 1(2020) (Statement
10 of Alito, J. on Motion to Expedite Consideration of the Petition for Writ of Certiorari).
11 The issue of whether courts or executive branch officials can add to or alter the procedures
12 dictated by the state legislature is an important issue that “calls out for review” by the
13 Supreme Court, Justice Alito wrote. *Id.* That issue is now before the Supreme Court in
14 *Moore v. Harper*, No. 21-1271, which was argued in December 2022. The Court is
15 specifically considering whether, consistent with Article I, §4, cl.1 of the United States
16 Constitution (which, like its counterpart in Article II regarding presidential electors,
17 assigns to the state *legislatures* the power to direct the manner for conducting federal
18 elections), a state court can alter the regulations for the manner of holding a federal
19 election prescribed by the state legislature. This is the issue raised by Respondent on
20 behalf of his client that Trial Counsel asserts is violative of the California Rules of
21 Professional Conduct. Yet, the opinions of the Justices of the United States Supreme
22 Court and the decision of that Court to grant review of the issue demonstrate that the
23 arguments pressed by Respondent are meritorious or at least tenable. Indeed,
24 Respondent’s arguments have carried the day in Wisconsin where the Supreme Court has
25 ruled that the Wisconsin Elections Commission had no legal authority to establish
26 unstaffed ballot drop boxes that were used during the 2020 presidential election. *Teigen v.*
27 *Wisconsin Elections Commission*, 976 N.W.2d 519, 525 (Wis. 2022). Hundreds of these
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1 boxes were set up and “thousands of votes have been cast via this unlawful method ...
2 directly harming Wisconsin voters.” *Id.* at ¶ 24 (Opinion of Bradley, J., joined by Ziegler,
3 C.J. and Roggensack, J.). As the justices noted, all lawful voters are harmed when the
4 commission does not follow the law and leaves “the results in question.” *Id.* The action
5 by the commission bypassed the security concerns of the legislature, leaving the election
6 open to the “potential for fraud and abuse.” *Id.* at ¶ 71. In addition to unstaffed drop
7 boxes, the election commission also allowed individuals other than the voter (i.e., ballot
8 harvesters) to deposit the ballot into the drop box. *Id.* at ¶ 73. All of this violated the
9 legislature’s carefully crafted procedures that were designed to avoid fraud and abuse.

10 The decision in *Teigen* conflicts with the earlier decision in *Trump v. Biden*, 951
11 N.W.2d 568 (Wis. 2020), where the Wisconsin Supreme Court had permitted the actions of
12 the election commission that had no warrant in Wisconsin statutory law. *Teigen*, at 677 (¶
13 117) (Bradley, J., concurring). The concurring justices in *Teigen* noted that ballots cast in
14 contravention of the procedures set down by the legislature cannot be counted and if they
15 are counted then that count cannot be included in the certified results of the election. *Id.* at
16 ¶134 (Bradley, J., concurring). But the *Teigen* court acknowledged that ballots *were* cast
17 in violation to the procedures set forth by the legislature, those ballots *were* counted, and
18 that count *was* included in the certified results. This decision supports the arguments that
19 Respondent was making on behalf of his client. Trial Counsel, however, failed to advise
20 this court of “legal authority in the controlling jurisdiction known to the [Trial Counsel] to
21 be directly adverse” to its position and contentions in paragraph 4. Cal. Rule of Prof.
22 Conduct 3.3 (a)(2).

23
24 5. As a result of information received from credible sources and numerous court rulings,
25 by no later than on or about December 9, 2020, respondent knew, or was grossly negligent in not
26 knowing, that there was no evidence upon which a reasonable attorney would rely of election fraud
27 or illegality that could have affected the outcome of the election, and that there was no evidence
28 upon which a reasonable attorney would rely that the election had been “stolen” by the Democratic

1 Party or other parties acting in a coordinated conspiracy to fraudulently “steal” the election from
2 Trump.

3
4 Respondent objects to the allegations in Paragraph 5 of the NDC on the grounds that
5 they are conclusory, compound, ambiguous, imprecise, overbroad, vague and intertwined
6 with legal conclusions/argument. Notwithstanding these objections, Respondent **DENIES**
7 the allegations in Paragraph 5 of the NDC. The statement that there was “no evidence ... of
8 election fraud or illegality that could have affected the outcome of the election” is false.
9 Indeed, elected officials in several states had expressly advised that, due to violations of
10 state law and serious allegations of fraud, the elections were “in dispute” and the certified
11 results could not be relied upon. *See, e.g.,* Pennsylvania H. Res. 1094 (Nov. 30, 2020)³;
12 Hon. Wm. Ligon, *The Chairman’s Report of the Election Law Study Subcommittee of the*
13 *Standing [Georgia] Senate Judiciary Committee*, at 12 (Dec. 17, 2020) (“ample evidence
14 that the 2020 Georgia General Election was so compromised by systemic irregularities and
15 voter fraud that it should not be certified.”)⁴ It is noteworthy that, in the investigate
16 process, Respondent provided to the bar investigators extensive evidence from numerous
17 credible sources demonstrating or strongly suggesting that the outcome of the election may
18 well have been affected by illegality and/or fraud, rendering the assertions by Trial Counsel
19 in the NDC that much more unsubstantiated.⁵ The statement that there was “no evidence ...
20 that the election had been ‘stolen’ by Democratic Party or other parties acting in a

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23 <https://www.legis.state.pa.us/cfdocs/legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2019&sessInd=0&billBody=H&billTyp=R&billNbr=1094&pn=4634>

24 ⁴ http://www.senatorligon.com/THE_FINAL%20REPORT.PDF.

25 ⁵ Indeed, were an attorney to make such demonstrably and knowingly false statements in
26 pleadings before any other court, that would constitute a violation of the ethical duty not to
27 make a false statement of fact to the court, Bus. & Prof. Code § 6068(d), and a sanctionable “act
28 involving moral turpitude, dishonesty or corruption” in violation of Bus. & Prof. Code § 6106.
Similarly, the complaints filed by States United Democracy Center and Lawyers Defending
American Democracy, both of which include signatories who are members of the California Bar,
likewise contain numerous false statements that run afoul of those ethical obligations.

1 coordinated conspiracy to fraudulently ‘steal’ the election from Trump” is also false. As for
2 whether the illegality and fraud resulted from a strategic Democrat plan to systematically
3 flout existing election laws, there was significant evidence of that claim at the time,
4 including evidence in Pennsylvania of election officials providing advance notice of
5 defective mail-in ballots to Democrat operatives in violation of 25 P.S. § 3146.8, which
6 prohibits “pre-canvassing” of ballots before 7:00 a.m. on election day; an apparently
7 collusive suit between a Democrat-leaning NGO and the Democrat Secretary of State in
8 Pennsylvania to eliminate signature verification, *League of Women Voters of Pennsylvania v.*
9 *Boockvar*, No. 2:20-cv-03850 (E.D. Pa., filed Aug. 7, 2020); coordination between the Biden
10 campaign and Democrat county election officials of an illegal “human drop box” ballot
11 harvesting effort in Wisconsin dubbed “Democracy in the Park,” *see Trump v. Biden*, 951
12 N.W.2d 568, 590 (Dec. 14, 2020) (Roggensack, J., dissenting,⁶ joined by) (noting that “the
13 17,271 ballots that were collected in Madison parks did not comply with the statutes”); M.
14 D. Kittle, *Is Biden sponsoring Madison city voter event?*, Empower Wisconsin (Sept. 25,
15 2020).⁷ These and other efforts were subsequently described in an important, eye-opening
16 Time Magazine article by Molly Ball as a “conspiracy” by leftist groups and anti-Trump
17 Republicans. Headed by Mike Podhorzer, long-time Democrat activist and senior advisor to
18 the President of the AFL-CIO, one of the Democrat parties strongest allies, Ball described
19 the “conspiracy” as “a well-funded cabal of powerful people, ranging across industries and
20 ideologies, working together behind the scenes to influence perceptions, change rules and
21 laws, steer media coverage and control the flow of information,” not to “rig” the election,
22 they claimed, but to “fortify” it against Trump and his supposed “assault on democracy.”
23 Molly Ball, *The Secret History of the Shadow Campaign that Saved the 2020 Election*, Time
24 (Feb. 4, 2021).

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26 ⁶ The four justices in the majority found the challenge barred by laches and did not address
the legality of the program.

27 ⁷ Available at <https://empowerwisconsin.org/is-bidensponsoring-madison-city-voter-event/>
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1 6. Nevertheless, from on or about December 9, 2020, and continuing to at least on or
2 about January 6, 2021, respondent continued to work with Trump and others to promote the idea
3 that the outcome of the election was in question and had been stolen from Trump as the result of
4 fraud, disregard of state election law, and misconduct by election officials. In doing so, respondent
5 violated his obligations as an attorney in two ways. First, he provided legal advice, formulated
6 legal strategies, and engaged in litigation based on, and made public statements propounding,
7 allegations of election fraud that he knew, or was grossly negligent in not knowing, were false.
8 Second, based on misinterpretations of historical sources, misinterpretations of law review articles,
9 and law review articles that he knew or was grossly negligent in not knowing were themselves
10 fundamentally flawed, he provided, and proposed actions based on, legal advice regarding the
11 unilateral authority of the Vice President to disregard or delay the counting of electoral votes that
12 he knew, or was grossly negligent in not knowing, was contrary to and unsupported by the
13 historical record and established legal authority and precedent, including the Electoral Count Act
14 and the Twelfth Amendment, such that no reasonable attorney with expertise in constitutional or
15 election law would have concluded that the Vice President was legally authorized to take the
16 actions respondent proposed.

17
18 Respondent objects to the allegations in Paragraph 6 of the NDC on the grounds that
19 they are conclusory, compound, ambiguous, vague, imprecise, overbroad, and intertwined
20 with legal conclusions/argument. Notwithstanding these objections, Respondent **DENIES**
21 that the legal assessments and conclusions he drew of fraud and illegality were false, or
22 anything remotely close. If any such allegations were incorrect, Respondent **DENIES** that
23 he knew or was grossly negligent in not knowing they were false. Respondent **DENIES** that
24 he misinterpreted historical sources or law review articles and further **DENIES** that if he did
25 so that he did so knowingly or with gross negligence. Indeed, by alleging that the law
26 review articles upon which Respondent relied were “fatally flawed,” the Bar investigator
27 appears to acknowledge that the law review articles supported Respondent’s legal
28 interpretation. Respondent **DENIES** that he provided advice to “disregard ... the counting

1 of electoral votes,” but even if he had provided such advice, he **DENIES** that the contention
2 that the

3 Vice President alone, pursuant to the language of the Twelfth Amendment and its
4 predecessor language in Article II, has the power to make judgments about whether
5 contested electoral votes should be opened and counted, “was contrary to and unsupported
6 by the historical record and established legal authority and precedent, including the
7 Electoral Count Act and the Twelfth Amendment.” He further **DENIES** “that no
8 reasonable attorney with expertise in constitutional or election law would have concluded
9 that the Vice President was legally authorized to take the actions respondent proposed.”
10 Numerous prominent constitutional scholars have either contended that the Constitution
11 provides such authority to the Vice President or acknowledged the plausibility of the
12 argument. *See, e.g.,* John Yoo and Robert Delahunty, *What Happens if No One Wins?*,
13 *American Mind* (Oct. 19, 2020) (“Though the 12th Amendment describes the counting in the
14 passive voice, the language seems to envisage a single, continuous process in which the Vice
15 President both opens *and* counts the votes. ... And if ‘counting’ the electors’ votes is the
16 Vice President’s responsibility, then the inextricably intertwined responsibility for judging
17 the validity of those votes must also be his. ... [W]e think the better reading is that Vice
18 President Pence would decide between competing slates of electors chosen by state
19 legislators and governors, or decide whether to count votes that remain in litigation.”)⁸;
20 Bruce Ackerman and David Fontana, *Thomas Jefferson Counts Himself Into the Presidency*,
21 *90 Va. L. Rev.* 551, 608 (2004) (“After all, the Constitution delegated to Jefferson [as
22 President of the Senate], and only Jefferson, an affirmative role in the vote-counting ritual.
23 While it is debatable whether the text gave him the authority to make a decisive ruling [to
24 count facially defective certificates from Georgia], it is abundantly clear that the tellers
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27 ⁸ <https://americanmind.org/salvo/what-happens-if-no-one-wins/>.

1 [appointed by the House and Senate] had absolutely no authority to resolve the matter”⁹;
2 Vasan Kesavan, *Is the Electoral Count Act Unconstitutional*. 80 N.C. L. Rev. 1653 (2002)
3 (“The Framers clearly thought that the counting function was vested in the President of the
4 Senate alone.”)¹⁰; Edward B. Foley, *Preparing for A Disputed Presidential Election: An*
5 *Exercise in Election Risk Assessment and Management*, 51 Loyola Chi. L. J. 309, 322, 325
6 (2019) (noting “that at least some recent law journal scholarship has supported this position”
7 and that the Twelfth Amendment’s textual ambiguity “opens up the possibility of
8 interpreting it to provide that the ‘President of the Senate’ has the exclusive constitutional
9 authority to determine which ‘certificates’ to ‘open’ and thus which electoral votes ‘to be
10 counted.’”)¹¹; Nathan L. Colvin and Edward B. Foley, *The Twelfth Amendment: A*
11 *Constitutional Ticking Time Bomb*, 64 U. Miami L. Rev. 475, 480 (2010) (“from 1789 to
12 1821, the power [to count and/or determine the validity of votes] was generally thought
13 vested in the states or the President of the Senate”).¹² Because Respondent had previously
14 provided all of this scholarly research to the Bar investigators, the statement that “no
15 reasonable attorney with expertise in constitutional or election law would have concluded
16 that the Vice President was legally authorized to take the actions respondent proposed” is not
17 only false but knowingly false.

18 ///

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21 _____
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23 [https://openyls.law.yale.edu/bitstream/handle/20.500.13051/399/ThomasJeffersonCountsHimselfI
24 ntothepresidency.pdf?sequence=2&isAllowed=y](https://openyls.law.yale.edu/bitstream/handle/20.500.13051/399/ThomasJeffersonCountsHimselfI
24 ntothepresidency.pdf?sequence=2&isAllowed=y)

25 ¹⁰ <https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=4003&context=nclr>.

26 ¹¹ [https://www.luc.edu/media/lucedu/law/students/publications/lj/pdfs/vol-51/issue-
27 2/7_Foley%20\(309-362\).pdf](https://www.luc.edu/media/lucedu/law/students/publications/lj/pdfs/vol-51/issue-
27 2/7_Foley%20(309-362).pdf)

28 ¹² <https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1204&context=umlr>

COUNT ONE

Case No. 21-O-11801
Business and Professions Code section 6068(a)
[Failure to Support the Constitution and Laws of the United States]

7. Beginning no later than on or about December 23, 2020 and continuing to at least on or about January 6, 2021, respondent violated his obligation under Business and Profession Code section 6068(a) to uphold the Constitution and the laws of the United States by engaging in a course of conduct that included the acts set out in paragraphs 8 through 30 below to plan, promote, execute, and assist Trump in executing a strategy for Trump to overturn the legitimate results of the election by obstructing the count of electoral votes of certain states, which strategy respondent knew, or was grossly negligent in not knowing, was not supported by either the facts or law.

Respondent objects to the allegations in Paragraph 7 of the NDC on the grounds that they are conclusory, compound, ambiguous, vague, imprecise, overbroad, and intertwined with legal conclusions/argument. Notwithstanding these objections, Respondent **DENIES** that he sought to “overturn the legitimate results of the election” because whether the election results were “legitimate” was and remains hotly contested, based as they were on acknowledged illegality and serious allegations of fraud in the conduct of the election. Respondent **DENIES** that his legal analysis and factual allegations were not supported by the facts or the law, and even if they were not, **DENIES** that he made such analysis and factual assertions knowing them to be false or grossly negligent in not knowing them to be false.

8. On or about December 23, 2020, respondent wrote and sent to an attorney and strategic advisor to Trump’s 2020 presidential campaign, with the intent of providing legal advice to Trump and Vice-President Michael Pence (“Pence”), a two-page legal memorandum (the “two-page memo”) that, based on what the memo asserted to be Pence’s legal authority to take unilateral action with respect to the electoral votes of certain states at the Joint Session of Congress to count

1 electoral votes on January 6, 2021, outlined alternative strategies for action based on Pence
2 refusing to count the electoral votes from seven states that had voted for candidate Joe Biden
3 (“Biden”). Those seven states were Arizona, Georgia, Michigan, Pennsylvania, Nevada, New
4 Mexico, and Wisconsin.

5
6 Respondent objects to the allegations in Paragraph 8 of the NDC on the grounds that
7 they are conclusory, compound, ambiguous, vague, imprecise, overbroad, and intertwined
8 with legal conclusions/argument. Notwithstanding these objections, Respondent **DENIES**
9 that he prepared the 2-page memo with the “intent of providing legal advice to Trump and
10 Vice-President Michael Pence.” As he has noted to the Bar investigators and elsewhere,
11 the 2-page memo was but a preliminary draft of a portion of larger memo outlining all the
12 various scenarios that were being discussed in public discourse. Respondent **ADMITS**
13 that Biden had been declared the winner in the seven listed states, but **DENIES** that those
14 declarations were conclusive, as litigation was still pending at the time in several of the
15 contested states.

16
17 9. With respect to these seven states, respondent proposed that Pence “announce [] that he
18 has multiple slates of electors, and so is going to defer decision on that until finishing the other
19 States.” Respondent then proposed two alternative courses of action. Under the first, Pence would
20 “announce [] that because of the ongoing disputes in the 7 States, there are no electors that can be
21 deemed validly appointed in those States.” Without electors appointed for those states, Trump’s
22 228 electoral votes would constitute a majority of the 454 appointed electors. Respondent advised
23 “Pence [to] then gavel [] President Trump as re-elected.” Under the second course of action, after
24 “[h]owls, of course, from the Democrats,” Pence would concede that 270 electoral votes were
25 required for a majority. Under the Twelfth Amendment, when no candidate receives a majority of
26 votes cast by the appointed electors, the House of Representatives chooses the President voting by
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1 state delegation. Because Republicans controlled 26 state delegations, respondent advised that
2 “President Trump is re-elected there as well.”

3
4 Respondent objects to the allegations in Paragraph 9 of the NDC on the grounds that
5 they are conclusory, compound, ambiguous, vague, imprecise, overbroad, and intertwined
6 with legal conclusions/argument. Notwithstanding these objections, Respondent **ADMITS**
7 that the draft memo contains the language quoted in Paragraph 9 of the NDC, but **DENIES**
8 that *he* “proposed” the alternatives set out in the memo, as the memo was for internal
9 discussion purposes and but one part of a larger memo outlining numerous scenarios.
10 Respondent **DENIES** that he “advised Pence to take these actions.”

11
12 10. Respondent advised Pence to take these actions based on the two-page memo’s
13 assertion that the “7 states have transmitted dual slates of electors to the President of the Senate.”
14 Respondent knew, or was grossly negligent in not knowing, that this assertion was false and
15 misleading, in that, as respondent knew at the time: (a) pursuant to 3 U.S.C. § 6, the governor of
16 each of those states had submitted a certificate of ascertainment indicting that the Biden electors,
17 not the Trump electors, had been appointed because the Biden electors received more votes in
18 those state’s election; (b) no other state official of any of those states had submitted a purported
19 certificate of ascertainment naming Trump electors; and (c) as a result, no legal authority on behalf
20 of any state had taken any action to support the contention that Trump electors were the legitimate
21 electors for any of the seven states. Indeed, subsequently, on or about January 10, 2021,
22 respondent acknowledged in an email that the purported Trump electors from these seven states,
23 who had met on December 14, cast their electoral votes, and themselves transmitted those votes to
24 the Vice President, “had no authority” because “[n]o legislature [had] certified them.”

25
26 Respondent objects to the allegations in Paragraph 10 of the NDC on the grounds
27 that they are conclusory, compound, ambiguous, vague, imprecise, overbroad, and
28

1 intertwined with legal conclusions/argument. Notwithstanding these objections, Respondent
2 **DENIES** that he “advised Pence to take these actions.” Respondent **DENIES** that the
3 claim in the memo regarding dual slates of electors from 7 states was false and misleading,
4 or that Respondent knew or was grossly negligent in not knowing it to be false and
5 misleading. The statement was in fact true, just as there were “dual slates of electors” from
6 Hawaii in 1960 – the Vice President Nixon electors who had been certified as victors, and
7 the Senator Kennedy electors, both sets of which met on the designated day in December
8 1960, cast their electoral votes, and transmitted those votes to the President of the Senate.
9 Respondent **ADMITS** that the Biden electors had been certified by the respective
10 Governors, just as the Nixon electors had been certified by Hawaii’s Governor in 1960.
11 Respondent **ADMITS** that Biden electors had received more reported votes, but **DENIES**
12 that the results accurately recorded lawful (as opposed to unlawful) votes, a factual
13 controversy that was at the time (and remains) very much in dispute. Indeed, elected
14 officials in several states had expressly advised that, due to violations of state law and
15 serious allegations of fraud, the elections were “in dispute” and the certified results could
16 not be relied upon. *See, e.g.,* Pennsylvania H. Res. 1094 (Nov. 30, 2020)¹³; Hon. Wm.
17 Ligon, *The Chairman’s Report of the Election Law Study Subcommittee of the Standing*
18 *[Georgia] Senate Judiciary Committee*, at 12 (Dec. 17, 2020) (“ample evidence that the
19 2020 Georgia General Election was so compromised by systemic irregularities and voter
20 fraud that it should not be certified.”)¹⁴ Respondent **ADMITS** that, at the time the memo
21 was drafted, no other state authority had certified the Trump electors, just as no other state
22 authority had certified the Kennedy electors at the time those electors met in December and
23 cast their electoral votes. Respondent **ADMITS** that absent subsequent certification,
24 whether by a Governor after a successful election challenge (as happened in Hawaii in

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26 <https://www.legis.state.pa.us/cfdocs/legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2019&sessInd=0&billBody=H&billTyp=R&billNbr=1094&pn=4634>

27 ¹⁴ http://www.senatorligon.com/THE_FINAL%20REPORT.PDF.

1 early 1961), or by a court, or by the Legislature, the alternate electors would have no
2 authority, but at the time the memo was written, efforts with respect to each of those
3 scenarios were still pending.
4

5 11. On or about January 2, 2021, respondent appeared on the “Bannon’s War Room” radio
6 program, during which he was interviewed by program host Steve Bannon. According to Bannon,
7 the radio program had tens of millions of listeners. Respondent stated that there was “massive
8 evidence” of fraud involving absentee ballots in the November 3, 2020, presidential election,
9 “most egregiously in Georgia and Pennsylvania and Wisconsin.” Respondent further stated that
10 there had been “more than enough” absentee ballot fraud “to have affected the outcome of the
11 election.” Respondent made these statements with the intent to encourage the audience listening to
12 the radio program and the general public to question the legitimacy of the election results.
13 Respondent knew, or was grossly negligent in not knowing, that these allegations regarding
14 absentee ballot fraud were false and misleading, as respondent knew at the time that there was no
15 evidence upon which a reasonable attorney would rely of absentee ballot fraud in any state in
16 sufficient numbers that could have affected the outcome of the election. In fact, respondent was
17 informed by numerous credible sources, including the Attorney General of the United States, that
18 there was no evidence of widespread election fraud or illegality that could have affected the
19 outcome of the election.
20

21 Respondent objects to the allegations in Paragraph 11 of the NDC on the grounds
22 that they are conclusory, compound, ambiguous, vague, imprecise, overbroad, and
23 intertwined with legal conclusions/argument. Notwithstanding these objections, Respondent
24 has no knowledge about, and therefore **DENIES**, the claim regarding the number of listeners
25 to Steve Bannon’s radio program. Respondent **ADMITS** that he made the statements
26 attributed to him. Respondent **ADMITS** that American Citizens have the right to question
27 illegality and fraud in the conduct of their elections, and that his intent in making those
28

1 statements was to expose such illegality and fraud, as was his constitutional right under the
2 First Amendment. Respondent **DENIES** that his statements were false or misleading, or that
3 he knew or was grossly negligent in not knowing that they were false or misleading.
4 Respondent **DENIES** that he was ever directly informed by the Attorney General of the
5 United States or any other credible source that there was no evidence of widespread election
6 fraud or illegality. Respondent **ADMITS** that Attorney General Barr made a public
7 statement to that affect regarding fraud, but **DENIES** that the statement referenced
8 illegality. Respondent further **DENIES** that Attorney General Barr’s statement was
9 credible, given the large amount of contradictory evidence from credible sources, such as:
10 Georgia State Senator William Ligon and Pennsylvania Representative Francis Ryan,
11 identifying numerous instances of illegality and fraud in the conduct of the elections in
12 Georgia, Pennsylvania, and elsewhere much greater than the margins in those states; and
13 the volume of evidence, including sworn eyewitness affidavits and expert analysis,
14 submitted in conjunction with the *Trump v. Raffensperger* lawsuit in Georgia.

15
16 12. On or about January 3, 2021, respondent wrote and sent to an attorney and strategic
17 advisor to Trump’s 2020 presidential campaign, with the intent of providing legal advice to Trump
18 and Pence, a six-page legal memorandum (the “six-page memo”) that, based on what the memo
19 asserted to be Pence’s legal authority to take unilateral action with respect to the electoral votes of
20 certain states on January 6, 2021, elaborated on the legal theory and strategies for action by Pence
21 initially presented in the two-page memo. The six-page memo advised that Pence had legal
22 authority to take various actions, including “determin[ing] on his own which [slate of electors] is
23 valid” or “adjourn[ing] the joint session of Congress.” The advice in the six-page memo was again
24 based on the assertion that there were “7 states with multiple ballots.” Respondent knew, or was
25 grossly negligent in not knowing, that this assertion was false and misleading, in that, as
26 respondent knew at the time: (a) pursuant to 3 U.S.C. § 6, the governor of each of those states had
27 submitted a certificate of ascertainment indicting that the Biden electors, not the Trump electors,
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1 had been appointed because the Biden electors received more votes in the election; (b) no other
2 state official of any of those states had submitted a purported certificate of ascertainment naming
3 Trump electors; and (c) as a result, no legal authority on behalf of any state had taken any action to
4 support the contention that Trump electors were the legitimate electors for any of the seven states.
5 Indeed, subsequently, on or about January 10, 2021, respondent acknowledged in an email that the
6 purported the Trump electors from these seven states, who had met on December 14, cast their
7 electoral votes, and themselves transmitted those votes to the Vice President, “had no authority”
8 because “[n]o legislature [had] certified them.”

9 Respondent objects to the allegations in Paragraph 12 of the NDC on the grounds
10 that they are conclusory, compound, ambiguous, vague, imprecise, overbroad, and
11 intertwined with legal conclusions/argument. Notwithstanding these objections, Respondent
12 **ADMITS** that he sent a six-page memo to an attorney/strategic advisor outlining numerous
13 scenarios for the counting of electoral votes during the joint session of Congress on January
14 6, 2021. Respondent **DENIES** that the memo advised the adoption of any particular
15 scenario. Respondent **DENIES** that the claim in the memo regarding dual slates of electors
16 from 7 states was false and misleading, or that Respondent knew or was grossly negligent
17 in not knowing it to be false and misleading. The statement was in fact true, just as there
18 were “dual slates of electors” from Hawaii in 1960 – the Vice President Nixon electors
19 who had been certified as victors, and the Senator Kennedy electors, both sets of which
20 met on the designated day in December 1960, cast their electoral votes, and transmitted
21 those votes to the President of the Senate. Respondent **ADMITS** that the Biden electors
22 had been certified by the respective Governors, just as the Nixon electors had been
23 certified by Hawaii’s Governor in 1960. Respondent **ADMITS** that, at the time the memo
24 was drafted, no other state authority had certified the Trump electors, just as no other state
25 authority had certified the Kennedy electors at the time those electors met in December
26 1960 and cast their electoral votes. Respondent **ADMITS** that absent subsequent
27 certification, whether by a Governor after a successful election challenge (as happened in
28

1 Hawaii in early 1961), or by a court, or by the Legislature, the alternate electors would
2 have no authority, but at the time the memo was written, efforts with respect to each of
3 those scenarios were still pending.

4
5 13. The six-page memo asserted that the election was tainted by “outright fraud (both
6 traditional ballot stuffing and electronic manipulation of voting tabulation machines).”
7 Respondent knew, or was grossly negligent in not knowing, that this assertion was false and
8 misleading because there was no evidence upon which a reasonable attorney would rely of
9 “outright fraud,” including either “traditional ballot stuffing” or “electronic manipulation of the
10 voting tabulation machines,” in any state involving enough votes to affect the outcome of the
11 election.

12
13 Respondent objects to the allegations in Paragraph 13 of the NDC on the grounds
14 that they are conclusory, compound, ambiguous, vague, imprecise, overbroad, and
15 intertwined with legal conclusions/argument. Notwithstanding these objections, Respondent
16 **ADMITS** that the memo asserts, as an aside, that the election was tainted by “outright fraud
17 (both traditional ballot stuffing and electronic manipulation of voting tabulation machines,”
18 as asserted in paragraph 13 of the NDC. Respondent **DENIES** that the memo asserts that
19 there was “outright fraud” in any state involving enough votes to affect the outcome of the
20 election, as the memo mentions “fraud” only as an aside, focusing instead on the
21 documented evidence of illegality in the conduct of the election. Even with respect to
22 “illegality,” or “illegality” in combination with “fraud,” Respondent **DENIES** that the memo
23 makes any assertion about whether enough votes to affect the outcome of the election were
24 involved. Rather, the memo expressly reserves that issue for further investigation. *See*
25 Memo ¶ III.c.ii (“based on all the evidence and the letters from state legislators *calling into*
26 *question* the executive certifications, decides to count neither slate of electors”); *id.* ¶ III.d.i
27 (“If, after investigation, proven fraud and illegality is insufficient to alter the results of the
28

1 election, the original slate of electors would remain valid. **BIDEN WINS.**” (emphasis in
2 original)). Respondent **DENIES** that the assertions of fraud were false or misleading, or that
3 he knew or was grossly negligent in not knowing that they were false or misleading. The
4 evidence of “fraud” was hotly contested at the time and remains so. Indeed, criminal
5 convictions of “outright fraud” in a ballot harvesting scheme have already been obtained in
6 Pima County, Arizona. Expert analysis identified statistical anomalies that “reek of a
7 [machine] algorithm” that altered results. As for whether these hotly disputed factual claims
8 involved enough votes to affect the outcome of the election, expert analysis in the then-still-
9 pending Georgia litigation (*Trump v. Raffensperger*, No. 2020CV343255 (Fulton Cnty., Ga.
10 Super. Ct., filed Dec. 4, 2020), *dismissed as moot* (Jan. 7, 2021)) had identified nearly
11 80,000 votes that, according to the state’s own records, appeared to have been cast and
12 counted in violation of Georgia law, well more than the 11,779-vote margin. Similar
13 evidence of illegality and/or fraud affecting more votes than the margin, supported by sworn
14 affidavits and expert analysis, was still being litigated at the time in Wisconsin and
15 Pennsylvania. *See, e.g., Trump v. Biden*, 951 N.W.2d 568 (Wis. 2020), *cert. petition filed*,
16 No. 20-882 (S.Ct. Dec. 29, 2020), *cert. denied* (Feb. 22, 2021); *Pa. Democratic Party v.*
17 *Boockvar*, No. 133 MM 2020, 2020 WL 5554644 (Sept. 17, 2020), *cert. petition filed sub.*
18 *nom., Republican Party of Pennsylvania v. Boockvar*, No. 20-542 (S.Ct., Oct. 23, 2020),
19 *cert. denied* (Feb. 22, 2021).

20
21 14. The six-page memo presented alternative scenarios for action under the heading “War
22 Gaming the Alternatives.” Those scenarios included several in which Pence, as the “ultimate
23 arbiter,” either unilaterally counted no electors for each of the seven states that had purportedly
24 submitted “dual slates of electors,” unilaterally sent the election to the House of Representatives
25 under the procedures established by the Twelfth Amendment, or unilaterally adjourned the Joint
26 Session without counting the electoral votes in the hope that Republican legislatures in the seven
27 states would later appoint or certify a slate of Trump electors.

1 Respondent objects to the allegations in Paragraph 14 of the NDC on the grounds
2 that they are conclusory, compound, ambiguous, vague, imprecise, overbroad, and
3 intertwined with legal conclusions/argument. Notwithstanding these objections, Respondent
4 **DENIES** that the memo asserts “the hope that Republican legislatures in the seven states
5 later appoint or certify a slate of Trump electors,” as claimed in Paragraph 14 of the NDC.
6 The “adjourn” scenario discussed in the memo is expressly grounded on the fact that
7 “election challenges” were still “ongoing” and that state legislatures would, as more than a
8 hundred state legislators had requested, then have the time to “order a comprehensive
9 audit/investigation of the election returns in the states, and then determine whether the slate
10 of electors initially certified is valid, or whether the alternative slate of electors should be
11 certified.” Memo ¶ III.d. Moreover, the memo then expressly set out two potential paths
12 based on the results of that investigation, without expressing a preference or “hope” for
13 either one of them. First, “If, after investigation, proven fraud and illegality is insufficient to
14 alter the results of the election, the original slate of electors would remain valid. **BIDEN**
15 **WINS.**” Memo ¶ III.d.i (emphasis in original). Second, “If, on the other hand, the
16 investigation proves to the satisfaction of the legislature that there was sufficient fraud and
17 illegality to affect the results of the election, the Legislature certifies the Trump electors.
18 Upon reconvening the Joint Session of Congress, those votes are counted and **TRUMP**
19 **WINS.**” Memo ¶ III.d.ii.

20
21 15. The six-page memo stated that the proposed plan was “BOLD” but further stated that
22 “this Election was Stolen by a strategic Democrat plan to systematically flout existing election
23 laws for partisan advantage; we’re no longer playing by Queensbury Rules, therefore.”
24 Respondent knew, or was grossly negligent in not knowing, that this assertion was false and
25 misleading because there was no evidence upon which a reasonable attorney would rely of any
26 widespread election fraud or illegality, much less any widespread election fraud or illegality
27 resulting from a strategic Democrat plan to systematically flout existing election laws, that could
28 have affected the outcome of the election.

1 Respondent objects to the allegations in Paragraph 15 of the NDC on the grounds
2 that they are conclusory, compound, ambiguous, vague, imprecise, overbroad, and
3 intertwined with legal conclusions/argument. Notwithstanding these objections, Respondent
4 **ADMITS** that the memo contains the passages quoted in Paragraph 15 of the NDC.
5 Respondent **DENIES** that the statements were false and misleading, or that he knew or was
6 grossly negligent in not knowing that they were false and misleading. Although Respondent
7 **DENIES** that the memo makes any assertion about whether the illegality and fraud “affected
8 the outcome of the election,” he **ADMITS** that the memo outlines significant evidence of
9 both illegality and fraud in the election, all of which claims were true. As for whether the
10 illegality and fraud resulted from a strategic Democrat plan to systematically flout existing
11 election laws, there was significant evidence of that claim at the time, including evidence in
12 Pennsylvania of election officials providing advance notice of defective mail-in ballots to
13 Democrat operatives before the law allowed; an apparently collusive suit between a
14 Democrat-leaning NGO and the Democrat Secretary of State in Pennsylvania to eliminate
15 signature verification; coordination between the Biden campaign and Democrat county
16 election officials of an illegal “human drop box” ballot harvesting effort in Wisconsin
17 dubbed “Democracy in the Park,” *see Trump v. Biden*, 951 N.W.2d 568, 590 (Dec. 14, 2020)
18 (Roggensack, J., dissenting,¹⁵ joined by) (noting that “the 17,271 ballots that were collected
19 in Madison parks did not comply with the statutes”); M. D. Kittle, *Is Biden sponsoring*
20 *Madison city voter event?*, Empower Wisconsin (Sept. 25, 2020).¹⁶ These and other
21 efforts were subsequently described in an important, eye-opening Time Magazine article by
22 Molly Ball as a “conspiracy” by leftist groups and anti-Trump Republicans. Headed by
23 Mike Podhorzer, long-time Democrat activist and senior advisor to the President of the AFL-
24 CIO, one of the Democrat parties strongest allies, Ball described the “conspiracy” as “a well-

25 _____
26 ¹⁵ The four justices in the majority found the challenge barred by laches and did not
address the legality of the program.

27 ¹⁶ Available at [https://empowerwisconsin.org/is-bidensponsoring-madison-city-voter-](https://empowerwisconsin.org/is-bidensponsoring-madison-city-voter-event/)
28 [event/](https://empowerwisconsin.org/is-bidensponsoring-madison-city-voter-event/)

1 funded cabal of powerful people, ranging across industries and ideologies, working together
2 behind the scenes to influence perceptions, change rules and laws, steer media coverage and
3 control the flow of information,” not to “rig” the election, they claimed, but to “fortify” it
4 against Trump and his supposed “assault on democracy.” Molly Ball, *The Secret History of*
5 *the Shadow Campaign that Saved the 2020 Election*, Time (Feb. 4, 2021).

6
7 16. The six-page memo advised that if Pence “determine[d] that the ongoing election
8 challenges must conclude before ballots can be counted, and adjourns the joint session of
9 Congress,” then “[t]aking the cue, state legislatures [could] convene, order a comprehensive
10 audit/investigation of the election returns in their states, and then determine whether the slate of
11 electors initially certified is valid, or whether the alternative slate of electors should be certified by
12 the legislature.” Respondent cited 3 U.S.C. § 2 as the statutory basis for state legislatures’
13 purported legal authority to appoint or certify electors after Election Day. Respondent knew, or
14 was grossly negligent in not knowing, that 3 U.S.C. § 2 did not authorize any state legislature to
15 appoint or certify electors after Election Day in the factual circumstances present in the 2020
16 election.

17
18 Respondent objects to the allegations in Paragraph 16 of the NDC on the grounds
19 that they are conclusory, compound, ambiguous, vague, imprecise, overbroad, and
20 intertwined with legal conclusions/argument. Notwithstanding these objections,
21 Respondent **ADMITS** that the memo contains the passages quoted in Paragraph 16 of the
22 NDC. Respondent **DENIES** the assertion “that 3 U.S.C. § 2 did not authorize any state
23 legislature to appoint or certify electors after Election Day in the factual circumstances
24 present in the 2020 election.” Respondent further **DENIES** that he knew, or was grossly
25 negligent in not knowing, that 3 U.S.C. § 2 does not authorize legislative action after a failed
26 election such as one conducted in unconstitutional violation of the “manner” for choosing
27 presidential electors set out by the state legislature in the exercise of the plenary power
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1 conferred upon it by Article II of the U.S. Constitution. 3 U.S.C. § 2 expressly provides that
2 “Whenever any State has held an election for the purpose of choosing electors, and has
3 failed to make a choice on the day prescribed by law, the electors may be appointed on a
4 subsequent day in such a manner as the legislature of such State may direct.” Furthermore,
5 Article II of the Constitution assigns to the “Legislatures” of the States plenary power to
6 direct the manner of choosing presidential electors. The Supreme Court has noted that the
7 Legislatures can re-claim that power “at any time.” *McPhearson v. Blacker*, 146 U.S. 1, 35
8 (1892) (citing with approval Sen. Rep. 1st Sess. 43rd Cong. No. 395). When, as occurred
9 here, the election was conducted in a manner contrary to the manner specified by the
10 legislature, the election itself is invalid and the state legislature has the authority, under
11 both Article II and 3 U.S.C. § 2, to determine how to proceed in the appointment of
12 electors. This was the holding by the U.S. Court of Appeals for the Seventh Circuit in
13 *Trump v. Wisconsin Election Commission*, which expressly held that Trump had standing
14 because “A favorable ruling [to Trump’s claims that state election officials had violated the
15 “manner” for conducting the election set out by the Legislature] would provide the
16 opportunity for the appointment of a new slate of electors. From there, it would be for the
17 Wisconsin Legislature to decide the next steps in advance of Congress’s count of the
18 Electoral College’s votes on January 6, 2021.” *Trump v. Wisconsin Elections Comm’n*, 983
19 F.3d 919, 924–25 (7th Cir. 2020). Three Justices of the Wisconsin Supreme Court
20 subsequently acknowledged a related point: “If elections are conducted outside of the law,
21 the people have not conferred their consent on the government. Such elections are unlawful
22 and their results are illegitimate.” *Teigen v. Wisconsin Elections Comm’n*, 2022 WI 64, ¶
23 23, 403 Wis. 2d 607, 627, 976 N.W.2d 519, 530 (Bradley, J., joined by Ziegler, C.J., and
24 Roggensack, J.).

25
26 17. The two-page and six-page memos proposed that Pence exercise unilateral authority to
27 resolve purported disputes regarding electoral votes or delay the counting of electoral votes.
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1 Respondent proposed that Pence exercise this unilateral authority in the context of proposing a
2 detailed plan for Pence to take actions to reverse the legitimate results of the 2020 election to
3 secure Trump’s re-election in the context of a legal proceeding—the counting of electoral votes at
4 the Joint Session of Congress—that was not a judicial proceeding before a court. Respondent
5 advised Trump and Pence to “[l]et the other side challenge [Pence’s] actions in court” and
6 suggested that the plaintiffs “who would press a lawsuit would have their past position – that these
7 are non-justiciable political questions – thrown back at them, to get the lawsuit dismissed.”
8 Respondent’s proposed plan thus presupposed that Pence would take unilateral action without
9 subsequent judicial review of its legality.

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Respondent objects to the allegations in Paragraph 17 of the NDC on the grounds that they are conclusory, compound, ambiguous, vague, imprecise, overbroad, and intertwined with legal conclusions/argument. Notwithstanding these objections, Respondent **DENIES** that the six-page memo (of which the two-page memo was but a preliminary draft component) proposes any particular course of action. It was, rather, a description of 9 different scenarios, none of which were “proposed.” Respondent **DENIES** that the memo proposes a detailed plan for any particular action. Respondent **DENIES** that the memo proposed “to reverse the legitimate results of the 2020 election.” Whether or not the results of the 2020 election were “legitimate” was hotly disputed at the time and remains so. Moreover, none of the scenarios described in the memo would “reverse” “legitimate” election results. In five of the nine scenarios, “Biden Wins.” The temporary adjournment scenario invited further investigation into the illegality and fraud of the election, and expressly noted that “If, after investigation, proven fraud and illegality is insufficient to alter the results of the election, the original slate of electors would remain valid. **BIDEN WINS.**” Memo ¶ III.d.i (emphasis in original). “If, on the other hand,” that scenario explained, “the investigation proves to the satisfaction of the legislature that there was sufficient fraud and illegality to affect the results of the election, the Legislature certifies

1 the Trump electors. Upon reconvening the Joint Session of Congress, those votes are counted
2 and **TRUMP WINS.**” Memo ¶ III.d.ii. That result is similar to the one described in
3 Scenario III.c.i, in which the State Legislatures in the contested states had certified the
4 Trump electors to have been the legitimate winners of the election, in which case “Trump
5 Wins.” The remaining two scenarios described the situation where, “based on all the
6 evidence and the letters from state legislators calling into question the executive
7 certifications” of Biden electors, the legitimate outcome of the state’s election could not be
8 determined and neither slate of electors would be counted. None of the scenarios therefore
9 involved “revers[ing] legitimate” election results, but rather discussed options for confirming
10 what were in fact that actual election results. Respondent **ADMITS** that the Joint Session of
11 Congress is “not a judicial proceeding before a court.” Respondent **ADMITS** that if, as
12 several scholars have contended, the counting of electoral votes in the Joint Session of
13 Congress is a non-justiciable political question because the Twelfth Amendment is a
14 “textual commitment” of that authority elsewhere than the courts, then subsequent judicial
15 review would not be permissible. That’s what it means for an issue to be a non-justiciable
16 political question. *See, e.g., Baker v. Carr*, 369 U.S. 186, 217 (1962) (“Prominent on the
17 surface of any case held to involve a political question is found a textually demonstrable
18 constitutional commitment of the issue to a coordinate political department”); *see also*,
19 *e.g., Laurence H. Tribe, Erog .v Hsub and Its Disguises: Freeing Bush v. Gore from Its*
20 *Hall of Mirrors*, 115 Harv. L. Rev. 170, 277 (2001) (“There is a powerful case indeed for
21 the Court playing no role other than to protect Congress’s decision-making function--that
22 is, for treating the matter as a political question textually committed to Congress under the
23 Twelfth Amendment, rather than a legal question properly resolved by a court.”); Erwin
24 Chemerinsky, *Bush v. Gore Was Not Justiciable*, 76 Notre Dame L. Rev. 1093, 1107
25 (2001) (contending that the Supreme Court erred in deciding *Bush v. Gore* because the
26 Twelfth Amendment is a “textual commitment” of the counting of electoral votes to a
27 branch of government other than the courts); Beverly J. Ross & William Josephson, *The*
28

1 *Electoral College and the Popular Vote*, 12 J.L. & Pol. 665, 716 (1996) (“It is possible the
2 Supreme Court would decline to review any challenge to Congress's counting of the elector
3 votes on the basis of either the separation of powers or the political question doctrine.”);
4 Jack Beermann & Gary Lawson, *The Electoral Count Mess: The Electoral Count Act of*
5 *1887 is Unconstitutional, and Other Fun Facts (Plus a Few Random Academic*
6 *Speculations) about Counting Electoral Votes* 5 (Boston Univ. Sch. L. Pub. L. Rsch.
7 Paper, Paper No. 21-07, 2021) (“It is even conceivable that the Supreme Court would
8 decide, contrary to our view, that the Vice President’s actions are not subject to judicial
9 review, perhaps based on the political question doctrine,...”); *cf.* 115 Cong. Rec. 203
10 (1969) (statement of Sen. Muskie) (stating that although the issue of whether there was a
11 remedy for faithless electors had not yet been “settled in the courts,” the validity of an
12 elector's vote could be “a political question, to which the courts will not address
13 themselves”).

14
15 18. Respondent knew, or was grossly negligent in not knowing, that the courses of action
16 he proposed to Pence in the two and six page memos were contrary to and unsupported by the
17 historical record, and contrary to and unsupported by established legal authority and precedent,
18 including the Electoral Count Act and the Twelfth Amendment. Respondent’s legal theory to
19 support his proposed courses of action was based on misinterpreted historical sources,
20 misinterpreted law review articles, and law review articles which he knew, or was grossly
21 negligent in not knowing, were themselves fundamentally flawed, such that no reasonable attorney
22 with expertise in constitutional or election law would conclude that Pence was legally authorized
23 to take the actions that respondent proposed. Moreover, in the course of an email exchange with
24 another individual in early October 2020, respondent himself had recognized that these courses of
25 action were improper. In that earlier email exchange, respondent stated that he he (sic) did not
26 agree that Pence, who serves as President of the Senate, could determine which votes to count on
27 January 6, 2021, because “3 U.S.C. § 12 says merely that [the President of the Senate] is the
28

1 presiding officer, and then it spells out specific procedures, presumptions, and default rules for
2 which slates will be counted. Nowhere does it suggest that the President of the Senate gets to make
3 the determination on his own. § 15 doesn't, either." In that earlier email exchange, respondent
4 further stated that he did not agree that, in the event of a dispute between a state legislature and the
5 state's governor or popular vote regarding the appointment of electors, the legislature determines
6 the appointment of electors, stating "I don't think [Article II] entitles the Legislature to change the
7 rules after the election and appoint a different slate of electors in a manner different than what was
8 in place on election day. And 3 U.S.C. § 15 gives dispositive weight to the slate of electors that
9 was certified by the Governor in accord with 3 U.S.C. § 5."

10
11 Respondent objects to the allegations in Paragraph 18 of the NDC on the grounds
12 that they are conclusory, compound, ambiguous, vague, imprecise, overbroad, and
13 intertwined with legal conclusions/argument. Notwithstanding these objections, Respondent
14 **DENIES** that he proposed a course of action to Vice President Pence in the six-page memo
15 (of which the two-page memo was but a preliminary draft component). Respondent
16 **DENIES** that the scenarios described in the six-page memo that were grounded on an
17 assertion that the Constitution assigns judgment authority to the President of the Senate over
18 the counting of disputed electoral votes "were contrary to and unsupported by the historical
19 record, and contrary to and unsupported by established legal authority and precedent," or
20 that he knew, or was grossly negligent in not knowing, that the scenarios were so
21 unsupported. To the contrary, numerous scholarly sources have either advocated for or
22 acknowledged the plausibility of just such an interpretation of the text of the Twelfth
23 Amendment and its predecessor language in Article II, including John Yoo and Robert
24 Delahunty, *What Happens if No One Wins?*, American Mind (Oct. 19, 2020) ("Though the
25 12th Amendment describes the counting in the passive voice, the language seems to envisage
26 a single, continuous process in which the Vice President both opens *and* counts the votes. ...
27 And if 'counting' the electors' votes is the Vice President's responsibility, then the
28

1 inextricably intertwined responsibility for judging the validity of those votes must also be
2 his. ... [W]e think the better reading is that Vice President Pence would decide between
3 competing slates of electors chosen by state legislators and governors, or decide whether to
4 count votes that remain in litigation.”¹⁷; Bruce Ackerman and David Fontana, *Thomas*
5 *Jefferson Counts Himself Into the Presidency*, 90 Va. L. Rev. 551, 608 (2004) (“After all, the
6 Constitution delegated to Jefferson [as President of the Senate], and only Jefferson, an
7 affirmative role in the vote-counting ritual. While it is debatable whether the text gave him
8 the authority to make a decisive ruling [to count facially defective certificates from Georgia],
9 it is abundantly clear that the tellers [appointed by the House and Senate] had absolutely no
10 authority to resolve the matter”)¹⁸; Vasan Kesavan, *Is the Electoral Count Act*
11 *Unconstitutional*. 80 N.C. L. Rev. 1653 (2002) (“The Framers clearly thought that the
12 counting function was vested in the President of the Senate alone.”)¹⁹; Edward B. Foley,
13 *Preparing for A Disputed Presidential Election: An Exercise in Election Risk Assessment*
14 *and Management*, 51 Loyola Chi. L. J. 309, 322, 325 (2019) (noting “that at least some
15 recent law journal scholarship has supported this position” and that the Twelfth
16 Amendment’s textual ambiguity “opens up the possibility of interpreting it to provide that
17 the ‘President of the Senate’ has the exclusive constitutional authority to determine which
18 ‘certificates’ to ‘open’ and thus which electoral votes ‘to be counted.’”)²⁰; Nathan L.
19 Colvin and Edward B. Foley, *The Twelfth Amendment: A Constitutional Ticking Time Bomb*,
20 64 U. Miami L. Rev. 475, 480 (2010) (“from 1789 to 1821, the power [to count and/or
21 determine the validity of votes] was generally thought vested in the states or the President of

22
23 ¹⁷ <https://americanmind.org/salvo/what-happens-if-no-one-wins/>.

24 ¹⁸ <https://openyls.law.yale.edu/bitstream/handle/20.500.13051/399/ThomasJeffersonCountsHimselfItothePresidency.pdf?sequence=2&isAllowed=y>

25 ¹⁹ <https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=4003&context=nclr>.

26 ²⁰ [https://www.luc.edu/media/lucedu/law/students/publications/lj/pdfs/vol-51/issue-2/7_Foley%20\(309-362\).pdf](https://www.luc.edu/media/lucedu/law/students/publications/lj/pdfs/vol-51/issue-2/7_Foley%20(309-362).pdf)

1 the Senate”).²¹ The Bar investigators appear to concede that the scholarship on which
2 Respondent relied supported his position, but they disregard it as, in their view, “fundamentally
3 flawed.” Respondent **DENIES** that he misinterpreted these scholarly articles or the historical
4 sources analyzed therein. Respondent **DENIES** that these scholarly articles were
5 “fundamentally flawed,” yet even if they were, legal positions that are “debatable” on issues for
6 which the law is “unsettled,” and based on the exercise of informed judgment, are protected
7 under California’s judgment immunity rule. *Mutuelles Unies v. Kroll & Linstrom*, 957 F.2d
8 707 (9th Cir. 1992) (citing *Davis v. Damrell*, 119 Cal.App.3d 883, 174 Cal.Rptr. 257, 259
9 (1981)). Respondent also **DENIES** that the legal position regarding the Vice President’s
10 preeminent role under the Constitution in the counting of electoral votes was “improper,” or that
11 he ever made such a claim in the referenced email exchange in early October or otherwise.
12 Rather, in that email exchange, he disagreed with the claim that the Electoral Count Act
13 assigned such authority to the Vice President, but the constitutionality of the Electoral Count
14 Act was not discussed. Respondent **ADMITS** that in the comments to a draft letter prepared by
15 a correspondent of Respondent’s (which was never sent and to which Respondent never
16 assented), he wrote: “I don’t think [Article II] entitles the Legislature to change the rules
17 after the election and appoint a different slate of electors in a manner different than what
18 was in place on election day. And 3 U.S.C. § 15 gives dispositive weight to the slate of
19 electors that was certified by the Governor in accord with 3 U.S.C. § 5.” Respondent
20 **DENIES** that the statement indicates a belief by Respondent that a state legislature could not
21 appoint electors after an election that was conducted unconstitutionally, in violation of the
22 “manner” for choosing electors established by the legislature pursuant to its plenary power
23 under Article II. Respondent **ADMITS** that 3 U.S.C. § 15 purports to give dispositive weight to
24 electors certified by a state’s Governor, but **DENIES** that § 15 could constitutionally do so in
25 the event that the Legislature of a State, acting pursuant to its plenary power under Article II,
26

27 ²¹ <https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1204&context=umlr>
28

1 selected a different slate of electors following an election that was unconstitutionally conducted
2 in violation of the legislature’s election code.

3
4 19. On January 4, 2021, respondent and Trump invited Pence, Pence’s White House
5 Counsel Greg Jacob (“Jacob”), and Pence’s Chief of Staff Marc Short (“Short”) to the Oval Office
6 to discuss respondent’s memos and the plan for Pence to take unilateral action that would result in
7 Trump’s re-election. During the meeting, respondent presented only two courses of action for
8 Pence to take on January 6: to reject the electors from seven states that respondent falsely and
9 misleadingly asserted had submitted “dual slates of electors,” or delay the count to give those
10 states’ legislatures time to certify Trump’s electors using a purported authority that respondent
11 knew, or was grossly negligent in not knowing, they did not possess. During the meeting on
12 January 4, Pence stated to respondent that he did not possess the legal authority to carry out either
13 of respondent’s proposals.

14
15 Respondent objects to the allegations in Paragraph 19 of the NDC on the grounds
16 that they are conclusory, compound, ambiguous, vague, imprecise, overbroad, and
17 intertwined with legal conclusions/argument. Notwithstanding these objections, Respondent
18 **DENIES** that he invited anyone to the Oval Office meeting on January 4, 2021. Respondent
19 **DENIES** that he discussed his memos at that meeting. Indeed, as Pence’s General Counsel
20 Greg Jacob stated in his deposition before the House Select Committee, the memos were not
21 presented at the meeting, *see* Jacob Tr. at 85:20-21, and had never been provided to Pence’s
22 General Counsel, Jacob Tr. at 87:5-8, or, to Respondent’s knowledge, Pence himself or
23 anyone else on Pence’s staff. Respondent **ADMITS** that the role of the Vice President under
24 the Twelfth Amendment was discussed at the meeting. Respondent **DENIES** that “only two
25 courses of action” were presented to the Vice President. Respondent **DENIES** that the claim
26 regarding “dual slates of electors” was false and misleading, or that he knew or was grossly
27 negligent in not knowing that it was false and misleading. The statement was in fact true,
28

1 just as there were “dual slates of electors” from Hawaii in 1960 – the Vice President Nixon
2 electors who had been certified as victors, and the Senator Kennedy electors, both sets of
3 which met on the designated day in December 1960, cast their electoral votes, and
4 transmitted those votes to the President of the Senate. Respondent **DENIES** that Vice
5 President Pence stated at the meeting that he did not have authority either to reject
6 contested electoral votes or to delay proceeding for further investigation. Rather, as Mr.
7 Jacob noted in his deposition before the Select Committee, “the Vice President mostly
8 asked a series of questions in that meeting.” Jacob Tr. at 95:11-12. He departed the
9 meeting after telling the President that he would give the matter further consideration and
10 that his staff would have further discussions with Respondent.

11
12 20. On January 5, 2021, respondent met again with Jacob and Short. At the meeting,
13 respondent stated “I’m here asking you to reject the electors.” Jacob and respondent debated the
14 merits of respondent’s legal arguments. Over the course of their discussion, respondent retreated
15 from his initial request “to reject the electors,” shifting focus to asking Pence to delay the count
16 because delaying the count would be more “palatable.” During the discussion, respondent
17 conceded that the positions he was urging Pence to take were contrary to historical practice,
18 violated several provisions of statutory law, and would likely be unanimously rejected by the
19 Supreme Court.

20
21 Respondent objects to the allegations in Paragraph 20 of the NDC on the grounds
22 that they are conclusory, compound, ambiguous, vague, imprecise, overbroad, and
23 intertwined with legal conclusions/argument. Notwithstanding these objections,
24 Respondent **DENIES** that he asked during the meeting on January 5, 2021, that Pence
25 simply reject the electors. He is aware of testimony by Messers. Jacob and Short to that
26 effect, but has no recollection of making such a statement and, given his explicit statement in
27 the oval office the evening before that it would be foolish to do so absent certification of
28

1 alternate electors by state legislatures, finds it implausible that he would have made such a
2 statement. Respondent **ADMITS** that during the discussion about whether the Vice
3 President could accede to requests from more than a hundred state legislators to delay the
4 electoral vote count for a brief period to allow for further investigation of illegal and fraud in
5 the election, he and Mr. Jacob discussed the doctrine of non-justiciable political questions
6 and he agreed that, if Pence were to simply reject electors without certification by
7 legislatures of alternate electors as others had previously suggested, the Supreme Court
8 would likely find a way around the non-justiciability problem and rule 9-0 against such an
9 action. But Respondent **DENIES** that he ever agreed that a decision to delay the
10 proceedings would likely be rejected by the Supreme Court, unanimously or otherwise. In
11 fact, he expressly wrote to Mr. Jacob that he believed such an action “had a fair chance of
12 being approved (or at least not enjoined) by the Courts.” Respondent **DENIES** that the
13 scenario of a brief delay to allow for investigation of the impact of illegality and fraud on
14 the election was without historical precedent, or that he conceded as much. In fact, a
15 lengthy delay in the counting of electoral votes occurred in 1877 following the contested
16 Hayes-Tilden election of 1876. Respondent **DENIES** that the contention that the Vice
17 President had authority to assess the validity of contested electoral votes was without
18 historical precedent, or that he conceded as much. In fact, Respondent expressly noted that
19 Vice President Adams in 1797, Vice President Jefferson in 1801, and Vice President Nixon
20 in 1961 had all exercised such authority. The President Pro Tem of the Senate (the office
21 of Vice President being vacant at the time) also exercised such authority in 1857 in
22 determining to count votes from Wisconsin that had not been cast on the “uniform” date
23 specified by Congress. Respondent **DENIES** that he conceded that a brief delay in the
24 electoral count proceedings would violate “several provisions” of the Electoral Count Act.
25 Respondent **ADMITS** that he acknowledged that acceding to requests from numerous state
26 legislators for a brief delay might be contrary to the provision in 3 U.S.C. § 16 against
27 dissolving the Joint Session of Congress prior to the completion of the count of electoral
28

1 votes or against recess of the session, but he expressly asserted that to the extent the Act
2 interfered with authority provided directly by the Constitution, the Act itself was
3 unconstitutional. He also notes that that the requests from state legislators was not to
4 “dissolve” the Joint Session but merely to adjourn it for a brief period of a week or ten
5 days and he further notes that § 16 expressly provides that “no recess shall be taken *unless*
6 *a question shall have arisen in regard to counting any such votes,*” which was surely the
7 case at the time.

8 21. The actions respondent proposed in his two-page and six-page memos, and that he
9 urged Pence to take in their meetings on January 4 and 5, 2021, provided support for messages
10 Trump sent to his followers on Twitter on the morning of January 6, 2021. On January 6, 2021, at
11 approximately 1:00 a.m., Trump sent a message to his followers on Twitter stating, “If Vice
12 President @Mike_Pence comes through for us, we will win the Presidency . . . Mike can send it
13 back!” At approximately 8:17 a.m., Trump sent another message on Twitter stating, “States want
14 to correct their votes . . . All Mike Pence has to do is send them back to the States, AND WE WIN.
15 Do it Mike, this is a time for extreme courage!”

16
17 Respondent objects to the allegations in Paragraph 21 of the NDC on the grounds
18 that they are conclusory, compound, ambiguous, vague, imprecise, overbroad, and
19 intertwined with legal conclusions/argument. Notwithstanding these objections, Respondent
20 **DENIES** that he proposed any particular “actions” in the six-page memo (of which the two-
21 page memo was a draft component). Rather, that memo outlined nine different scenarios for
22 discussion without proposing any one of them. Respondent **DENIES** that he proposed
23 “actions” (plural) in the meetings of January 4 and 5, 2021. Respondent **ADMITS** that he
24 proposed that the Vice President accede to requests from more than a hundred state
25 legislators for a brief delay to allow the state legislatures in the contested states to consider
26 the impact, if any, of acknowledged illegality and fraud on the results of the election.
27 Respondent has no knowledge, and therefore **DENIES**, whether President Trump’s tweets
28

1 on the morning of January 6 were based on the advice he gave, but **ADMITS** that the tweets
2 were consistent with that advice and demonstrate that the advice was to delay proceedings,
3 not to reject electoral votes outright.

4
5 22. On or about January 6, 2021, respondent spoke to a crowd of tens of thousands of
6 people who attended a rally, promoted as a “Save America” march, at the Ellipse of the National
7 Mall in Washington, D.C. Respondent’s speech was broadcast live on television. Respondent was
8 introduced by Rudy Giuliani as “Professor Eastman,” and described as “one of the preeminent
9 constitutional scholars in the United States.” In his speech, with the intent of promoting doubt in
10 the results of the election, respondent stated to the audience, “We know there was fraud, traditional
11 fraud that occurred. We know that dead people voted.” Respondent knew, or was grossly negligent
12 in not knowing, that, as an attempt to cast doubt on the results of the election, this statement was
13 false and misleading, in that, as respondent knew at the time, there was no evidence upon which a
14 reasonable attorney would rely of fraud in any state election, involving deceased voters or
15 otherwise, which could have affected the outcome of the election. In fact, while Trump claimed
16 that some 5,000 ballots in Georgia were cast by deceased voters, the Georgia State Election Board
17 found just four such votes, all of which had been returned by relatives. Similarly, Michigan’s
18 Office of the Auditor General determined that only 1,616 votes in Michigan, or 0.03% of the total
19 ballots, were cast by voters who were deceased on Election Day and primarily involved people
20 who were alive when they voted prior to Election Day. And, the Nevada Secretary of State
21 determined that only 10 dead voters had ballots cast in their names.

22
23 Respondent objects to the allegations in Paragraph 22 of the NDC on the grounds
24 that they are conclusory, compound, ambiguous, vague, imprecise, overbroad, and
25 intertwined with legal conclusions/argument. Notwithstanding these objections, Respondent
26 **ADMITS** that he spoke to the “Save America” rally at the Ellipse of the National Mall in
27 Washington, D.C., on January 6, 2021. He **ADMITS** that there were at least “tens of
28

1 thousands of people” in attendance, and has estimated, based on aerial photographs of
2 crowds at similar events on the National Mall, that the crowd was likely somewhere between
3 250,000 and 500,000 people. Respondent **ADMITS** that Rudy Giuliani introduced him as
4 “one of the preeminent constitutional scholars in the United States.” Respondent **ADMITS**
5 that he made the statements quoted and attributed to him in Paragraph 22 of the NDC.
6 Respondent **DENIES** that his intent was to “promote doubt” rather than to highlight the
7 acknowledged illegality and serious allegations of fraud in the conduct of the election.
8 Respondent **DENIES** that he ever alleged that enough votes were fraudulently cast on
9 behalf of deceased persons to have affected the outcome of the election. Respondent
10 **DENIES** that his statement that “dead people voted” (or rather, that votes were cast of
11 behalf of deceased people) was false and misleading, or that he knew or was grossly
12 negligent in not knowing that it was false and misleading. Indeed, it is a true statement of
13 fact, as the Bar investigators acknowledge later in the same paragraph when recounting
14 that election officials in Georgia, Michigan, and Nevada had acknowledged that votes were
15 cast by deceased persons and counted. It was also supported by expert analysis submitted
16 as Exhibit 3 to the Verified Complaint in *Trump v. Raffensperger*, ¶ 101.²² It was also
17 supported by the unrebutted expert analysis submitted in the Nevada case of *Law v.*
18 *Whitmer*, No. 10 OC 00163 1B (Nev. Dist. Ct., Carson City). *See id.*, Report of Jesse
19 Kamzol,²³ Contestant’s Designation of Expert Witness – Jesse Kamzol (submitted Nov.
20 30, 2020). The allegation in Paragraph 22 of the NDC that the “dead people voted” claim
21 was false is itself demonstrably and knowingly false, therefore, a violation of the ethical
22 duty not to make a false statement of fact to the court, Bus. & Prof. Code § 6068(d), and a
23 sanctionable “act involving moral turpitude, dishonesty or corruption” in violation of Bus. &
24 Prof. Code § 6106.

25
26 _____
27 ²² Available at <https://tinyurl.com/37zhct2e>.

28 ²³ Available at <https://nevadagop.org/wp-content/uploads/2020/12/kamzol-data-report.pdf>.

1 Respondent has no specific knowledge, and therefore **DENIES**, whether President
2 Trump claimed “that some 5,000 ballots in Georgia were cast by deceased voters,” but even
3 if such a statement was made, the NDC does not allege that the statement was made based on
4 any advice given by Respondent; it is therefore irrelevant to the charges made *against*
5 *Respondent*.

6
7 23. During his January 6 speech at the Ellipse, respondent also stated that Dominion
8 electronic voting machines had fraudulently manipulated the election results during the November
9 3, 2020, presidential election and during the January 5, 2021, run-off election in Georgia for its
10 two Senate seats. Respondent stated that “[t]hey” put ballots “in a secret folder in the machines,
11 sitting there waiting until they know how many they need,” and that after the polls closed,
12 “unvoted ballots” were matched with “an unvoted voter” to fraudulently change the election totals
13 in favor of Joe Biden and the Democratic candidates in the Georgia runoff election. Respondent
14 further stated that analysis of the vote percentages showed that “they were unloading the ballots
15 from that secret folder, matching them—matching them to the unvoted voter and voila we have
16 enough votes to barely get over the finish line.” Respondent knew, or was grossly negligent in not
17 knowing, that these statements were false and misleading in that, as respondent knew at the time:

18 a) There was no evidence upon which a reasonable attorney would rely of fraud through
19 electronic manipulation of Dominion voting tabulation machines. In fact, respondent knew
20 that on or about November 12, 2020, the Elections Infrastructure Government Coordinating
21 Council and the Election Infrastructure Sector Coordinating Executive Committees issued a
22 joint statement which stated that the “2020 presidential election was the most secure in
23 American history” and “there was no evidence that any voting system deleted or lost votes,
24 changed votes, or was in any way compromised.” Furthermore, no reliable evidence
25 emerged after November 12, 2020, that there was any electronic manipulation of voting
26 tabulation.

1 b) No reasonable expert in statistical analysis of election results would conclude that the
2 vote percentages related to the Dominion voting machines indicated that the machines had
3 been used to fraudulently manipulate the election results.
4

5 Respondent objects to the allegations in Paragraph 23 of the NDC on the grounds
6 that they are conclusory, compound, ambiguous, vague, imprecise, overbroad, and
7 intertwined with legal conclusions/argument. Notwithstanding these objections, Respondent
8 **ADMITS** that he made the statements attributed to him in Paragraph 23 of the NDC.
9 Respondent **DENIES** that the statements were false and misleading, or that he knew or was
10 grossly negligent in not knowing that they were false and misleading. Dr. Eastman was
11 personally advised on the evening of January 5, 2021, of the existence of suspense folders in
12 the electronic voting machines by forensic experts who had been involved in the forensic
13 audit conducted in Antrim County, Michigan. That information is also contained in an
14 affidavit submitted by one of those experts, Russell Ramsland, in the case of *Wood v.*
15 *Raffensperger*, No. 20-cv-04651, Dkt. #70-1, ¶ 14 (N.D. Ga. Nov. 25, 2020) (noting that
16 “Dominion also has a ‘Blank Ballot Override’ function that is essentially a ‘save for later’
17 bucket that can be manually populated by the operator later”).²⁴ Those same experts advised
18 Eastman that an increase in the total number of ballots cast (the “denominator” in the
19 calculation for percentage of votes reported), plus a suspension of counting, late in the
20 evening on election day, would strongly indicate that pre-scanned ballots were being loaded
21 from the suspense folder and then matched to voters on the voter rolls who had not voted.
22 Those experts observed that phenomenon during the U.S. Senate runoff election in Georgia
23 on January 5 and reported their conclusions to Dr. Eastman. Subsequent to his speech, Dr.
24 Eastman also confirmed the “increase in the denominator” phenomenon with a separate set
25 of experts and provided evidence of that expert analysis to the Bar investigators. See
26 Chapman062955. That such a manipulation was possible was subsequently confirmed

27 ²⁴ Available at <https://tinyurl.com/2p9743bb>.
28

1 when, in the June 2021 New York City Mayoral election, 135,000 ballots that had been pre-
2 loaded into the voting machines during a “test” were counted in the initial election results.
3 See Ryan W. Miller, *135,000 ‘test’ ballots mistakenly added: How NYC’s election board got*
4 *the results so wrong*, USA Today (June 30, 2021).²⁵

5 Respondent **ADMITS** the assertion in subparagraph (a) that he was aware that the
6 Elections Infrastructure Government Coordinating Council and the Election Infrastructure
7 Sector Coordinating Executive Committees had issued a joint statement which stated that
8 the “2020 presidential election was the most secure in American history” and “there was no
9 evidence that any voting system deleted or lost votes, changed votes, or was in any way
10 compromised.” Respondent **DENIES** that the statement was credible, however, as he was
11 also aware that a forensic audit conducted by Allied Security Operations Group in Antrim
12 County, Michigan had confirmed a “the vote ‘flip’ from Trump to Biden.”²⁶ That votes
13 were flipped from Trump to Biden was confirmed by the State of Michigan’s own expert,
14 Alex Halderman, in a report issued in March 2021. J. Alex Halderman, *Analysis of the*
15 *Antrim County, Michigan November 2020 Election Incident* (March 26, 2021).²⁷ Expert
16 statistical analysis of absentee ballot patterns conducted by Thomas Davis and Dr.
17 William M. Briggs, *Irrational MI Absentee Ballots Findings* (Nov. 28, 2020), in
18 Michigan 2020 Voting Analysis Report, pp. 18-22,²⁸ contrasting 2016 and 2020
19 absentee ballot results also provided “very strong evidence that the absentee voting
20 counts in some counties in Michigan have likely been manipulated by a computer
21 algorithm.” The anomalous “parallel snakes” phenomenon was observed in several
22 Michigan counties, including Ingham County, depicted below.

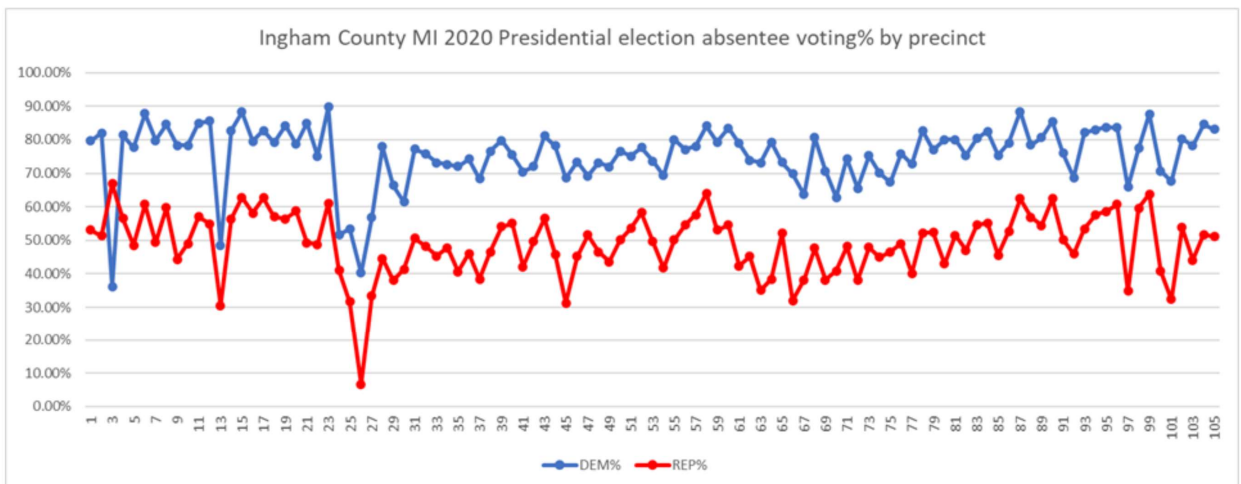
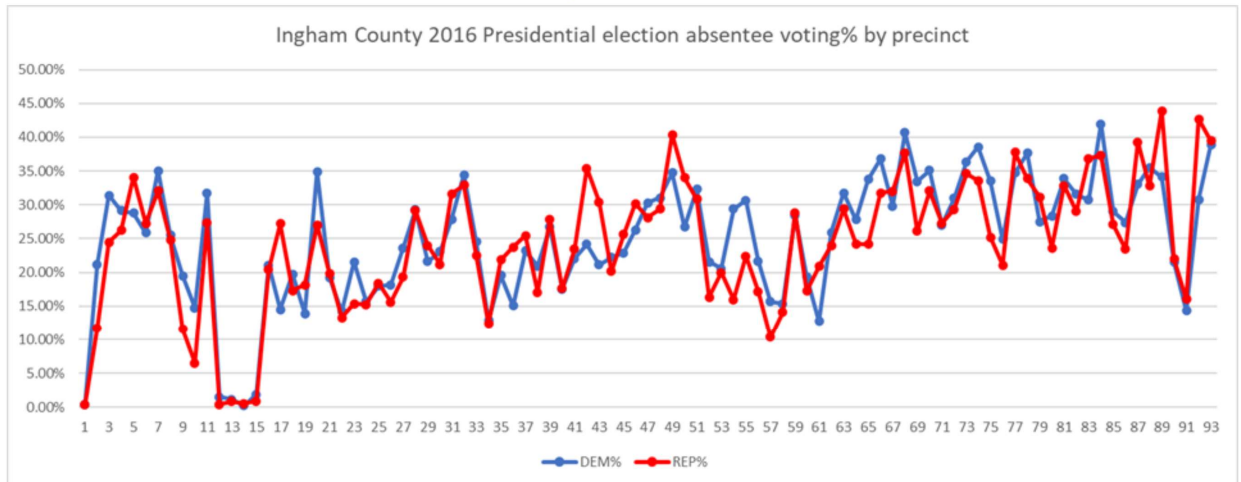
23
24 ²⁵ Available at [https://www.usatoday.com/story/news/nation/2021/06/30/nyc-mayoral-
25 race-test-ballots-mistake-explained/7809359002/](https://www.usatoday.com/story/news/nation/2021/06/30/nyc-mayoral-race-test-ballots-mistake-explained/7809359002/).

26 ²⁶ Available at <https://tinyurl.com/ytk9hv43>, p. 2.

27 ²⁷ Available at <https://tinyurl.com/bdfbkh22>.

28 ²⁸ Available at https://election-integrity.info/MI_2020_Voter_Analysis_Report.pdf.

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This same group of experts, with whom Dr. Eastman was working, identified the same “parallel snakes” phenomenon in the January 5, 2021 Georgia Senate Runoff Election, noting that it “reeks of a computer algorithm.” See Chapman063479.²⁹ Based on these expert analyses and other evidence, Respondent likewise **DENIES** the assertion in subparagraph (b) that “No reasonable expert in statistical analysis of election results would conclude that the vote percentages related to the Dominion voting machines indicated that the machines had been used to fraudulently manipulate the election results.”

²⁹ This reference is the Bates number, and the document (as well as those below bearing similar Chapman0xxxx bates numbers) is part of the document production made to the House of Representatives January 6 Committee, and which has also been provided to the State Bar of California pursuant to this investigation.

1 24. On January 6, 2021, before the Joint Session of Congress began, Pence publicly
2 rejected respondent’s proposed plan in a written statement that concluded: “It is my considered
3 judgment that my oath to support and defend the Constitution constrains me from claiming
4 unilateral authority to determine which electoral votes should be counted and which should not.”
5 Respondent, however, concluded his January 6 speech at the Ellipse by stating: “And all we are
6 demanding of Vice President Pence is this afternoon at 1:00 he let the legislators of the state look
7 into this so we get to the bottom of it, and the American people know whether we have control of
8 the direction of our government, or not. We no longer live in a self-governing republic if we can’t
9 get the answer to this question. This is bigger than President Trump. It is a very essence of our
10 republican form of government, and it has to be done. And anybody that is not willing to stand up
11 to do it, does not deserve to be in the office. It is that simple.” Respondent knew, or was grossly
12 negligent in not knowing, that this assertion that Pence had the authority to delay the counting of
13 electoral votes at the Joint Session of Congress for any reason, including to give states time to
14 investigate purported voting irregularities, was contrary to and unsupported by the historical
15 record; that it was contrary to and unsupported by established legal authority and precedent,
16 including the Electoral Count Act and the Twelfth Amendment; and that no reasonable attorney
17 with expertise in constitutional or election law would conclude that Pence was legally authorized
18 to delay the counting of electoral votes at the Joint Session of Congress to give states time to
19 investigate purported voting irregularities.

20
21 Respondent objects to the allegations in Paragraph 24 of the NDC on the grounds
22 that they are conclusory, compound, ambiguous, vague, imprecise, overbroad, and
23 intertwined with legal conclusions/argument. Notwithstanding these objections, Respondent
24 **ADMITS** that Vice President Pence asserted in his “Dear Colleague” letter of January 6,
25 2021, that “Some believe that as Vice President, I should be able to accept or reject electoral
26 votes unilaterally.” Respondent **DENIES** that he advised Vice President Pence to exercise
27 such unilateral authority to reject electoral votes. Indeed, in the very next sentence of this
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1 paragraph, the Bar investigators acknowledge that Respondent’s recommendation, in a
2 speech that is protected by the First Amendment, was not to “reject” electoral votes himself,
3 but to delay the proceedings in order to “let the legislators of the state look into” what Pence
4 himself, earlier in the “Dear Colleague” letter, admitted were “significant allegations of
5 voting irregularities and numerous instances of officials setting aside state election law,”
6 which is to say, conducting the election unconstitutionally, in violation of the plenary
7 power Article II assigns to the state *legislatures* to direct the manner of choosing
8 presidential electors. As Wisconsin Supreme Court Justice Bradley noted in the *Teigen*
9 case, “Such elections are unlawful and their results are illegitimate.” *Teigen v. Wisconsin*
10 *Elections Comm’n*, 2022 WI 64, ¶ 23, 403 Wis. 2d 607, 627, 976 N.W.2d 519, 530 (Bradley,
11 J., joined by Ziegler, C.J., and Roggensack, J.).

12
13 Respondent **DENIES** that he knew, or was grossly negligent in not knowing, that the
14 “assertion that Pence had the authority to delay the counting of electoral votes at the Joint
15 Session of Congress for any reason, including to give states time to investigate purported
16 voting irregularities, was contrary to and unsupported by the historical record; that it was
17 contrary to and unsupported by established legal authority and precedent, including the
18 Electoral Count Act and the Twelfth Amendment.” Congress itself, in 1877, delayed the
19 electoral vote count for months in order to allow a special commission that it created time
20 to investigate election irregularities and competing slates of electors. Moreover,
21 remanding an illegal election to the state legislature, consistent with the authority conferred
22 upon it by Article II, is the remedy that the Seventh Circuit recognized in *Trump v.*
23 *Wisconsin Elections Comm’n*, 983 F.3d 919, 924–25 (7th Cir. 2020): “A favorable ruling [to
24 Trump’s claims that state election officials had violated the “manner” for conducting the
25 election set out by the Legislature] would provide the opportunity for the appointment of a
26 new slate of electors. From there, it would be for the Wisconsin Legislature to decide the
27 next steps in advance of Congress’s count of the Electoral College’s votes on January 6,
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1 2021.” That a decision to delay in order to allow state legislatures to assess the impact of the
2 illegality that Pence himself acknowledged had not been taken by prior Vice Presidents is
3 not dispositive, as nothing quite like the illegality of the 2020 election had ever been
4 presented, but scholarly assessment of the meaning of the original Article II and the 12th
5 Amendment’s conferral of a non-ministerial power upon the Vice President to make a
6 judgment as to the counting of electoral votes, certainly provides at least a colorable
7 argument to support a delay to allow the legislatures time to address the unconstitutional
8 usurpation of their plenary power to direct the manner of choosing presidential electors. That
9 scholarship is set out at length in the response to NDC ¶ 6 above.

10
11 25. After respondent completed his speech, Trump took the podium and stated to the crowd
12 and television audience: “Thank you very much, John. John is one of the most brilliant lawyers in
13 the country, and he looked at this and he said, ‘What an absolute disgrace that this can be
14 happening to our Constitution.’ Because if Mike Pence does the right thing, we win the election.
15 All he has to do, all this is, this is from the number one, or certainly one of the top, Constitutional
16 lawyers in our country. He has the absolute right to do it.” Trump concluded his speech by urging
17 his supporters to walk with him to the Capitol: “Now, it is up to Congress to confront this
18 egregious assault on our democracy. And after this, we’re going to walk down, and I’ll be there
19 with you, we’re going to walk down, we’re going to walk down. We’re going to try and give our
20 Republicans, the weak ones because the strong ones don’t need any of our help. We’re going to try
21 and give them the kind of pride and boldness that they need to take back our country. So let’s walk
22 down Pennsylvania Avenue.”

23
24 Respondent objects to the allegations in Paragraph 25 of the NDC on the grounds
25 that they are conclusory, compound, ambiguous, vague, imprecise, overbroad, and
26 intertwined with legal conclusions/argument. Notwithstanding these objections, Respondent
27 **ADMITS**, based on first-hand knowledge from his presence during the beginning of
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1 President Trump’s speech, that President Trump described him as “one of the most brilliant
2 lawyers in the country” and “the number one, or certainly one of the top, Constitutional
3 lawyers in our country.” Respondent **ADMITS**, based on news reports and video
4 transcripts, that President Trump concluded his speech with the words quoted in Paragraph
5 25 of the NDC, but **DENIES** that President Trump’s speech, protected by both the First
6 Amendment’s Speech and Petition Clauses, has any relevance to the charges levelled against
7 Respondent.

8
9 26. After Trump’s speech, hundreds of protesters left the rally and stormed the Capitol
10 Building. Some of the protestors were armed with weapons, and the mob overwhelmed law
11 enforcement and violently broke into the Capitol in an attempt to prevent the Joint Session of
12 Congress from counting the electoral votes that would result in Biden’s victory. While the violent
13 protestors were attacking the Capitol Building, respondent and Trump continued to urge Pence to
14 delay the electoral vote count.

15
16 Respondent objects to the allegations in Paragraph 26 of the NDC on the grounds
17 that they are conclusory, compound, ambiguous, vague, imprecise, overbroad, and
18 intertwined with legal conclusions/argument. Notwithstanding these objections, Respondent
19 has no first-hand knowledge of, and therefore **DENIES**, the assertion that “hundreds of
20 protestors left the rally and stormed the Capitol,” or that “[s]ome of the protestors were
21 armed with weapons.” He is unaware than anyone in the crowd assembled at the Ellipse was
22 “armed with weapons” and because entrance to the rally area reportedly required screening
23 through metal detectors, finds such a claim to be implausible. Respondent is aware, from
24 news accounts, that some protestors at the Capitol nearly two miles away from the Ellipse
25 entered Capitol grounds and the Capitol itself while President Trump was still speaking, and
26 based on that **DENIES** that the initial breach of the Capitol was made by “hundreds of
27 protestors who left the rally” “[a]fter Trump’s speech.” Respondent has no first-hand
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1 knowledge of, and therefore **DENIES**, that the purpose of those who entered the Capitol was
2 “to prevent the Joint Session of Congress from counting the electoral votes that would result
3 in Biden’s victory. Respondent **DENIES** that he had any communication with Vice
4 President Pence on January 6, 2021, either before the Capitol breach, during the Capitol
5 breach when the Joint Session of Congress was suspended, or after the Joint Session of
6 Congress resumed.

7
8 27. Shortly after 2:00 p.m., protestors broke windows and climbed into the Capitol
9 Building, opening doors for other protestors to enter the building. At approximately 2:20 p.m.,
10 Secret Service agents removed Pence from the Senate floor, and the Senate and House were
11 abruptly called to recess as the mob of protestors moved further into the building. At
12 approximately 2:24 p.m., Trump posted a message on Twitter stating "Mike Pence didn't have the
13 courage to do what should have been done to protect our Country and our Constitution."

14
15 Respondent objects to the allegations in Paragraph 27 of the NDC on the grounds
16 that they are conclusory, compound, ambiguous, vague, imprecise, overbroad, and
17 intertwined with legal conclusions/argument. Notwithstanding these objections, Respondent
18 has no direct knowledge of, and therefore **DENIES**, the assertions made in Paragraph 27 of
19 the NDC.

20
21 28. At approximately 12:14 p.m. on January 6, 2021, Jacob had sent to respondent an email
22 that stated, “I just don’t in the end believe that there is a single Justice on the United States
23 Supreme Court, or a single judge on any of our Courts of Appeals, who is as ‘broad minded’ as
24 you when it comes to the irrelevance of statutes enacted by the United States Congress, and
25 followed without exception for more than 130 years.” The email closed by stating that Jacob
26 “ha[d] run down every legal trail placed before me to its conclusion, and I respectfully conclude
27 that as a legal framework, it is a results oriented position that you would never support if attempted
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1 by the opposition, and essentially entirely made up.” At approximately 2:25 p.m., respondent
2 replied to Jacob’s email, stating, “You think you can’t adjourn the session because the [Electoral
3 Count Act] says no adjournment, while the compelling evidence that the election was stolen
4 continues to build and is already overwhelming? The ‘siege’ is because YOU and your boss did not
5 do what was necessary to allow this to be aired in a public way so the American people can see for
6 themselves what happened.” Respondent knew that his statement that there was “compelling” and
7 “overwhelming” evidence that the election was “stolen” was false and misleading, in that, as
8 respondent knew at the time:

9 a) There was no evidence upon which a reasonable attorney would rely that the election was
10 “stolen” by the Democratic Party or any other actors. In fact, respondent had been informed
11 by numerous credible sources, including the Attorney General of the United States, and
12 knew, or was grossly negligent in not knowing, that numerous courts had held, that there was
13 no evidence of widespread election fraud or illegality that could have affected the outcome
14 of the election.

15 b) There was no evidence upon which a reasonable attorney would rely of fraud through
16 electronic manipulation of voting tabulation machines. In fact, respondent knew that on or
17 about November 12, 2020, the Elections Infrastructure Government Coordinating Council
18 and the Election Infrastructure Sector Coordinating Executive Committees issued a joint
19 statement which stated that the “2020 presidential election was the most secure in American
20 history” and “there was no evidence that any voting system deleted or lost votes, changed
21 votes, or was in any way compromised.” Furthermore, no reliable evidence emerged after
22 November 12, 2020, that there was any electronic manipulation of voting tabulation.

23
24 Respondent objects to the allegations in Paragraph 28 of the NDC on the grounds
25 that they are conclusory, compound, ambiguous, vague, imprecise, overbroad, and
26 intertwined with legal conclusions/argument. Notwithstanding these objections, Respondent
27 **ADMITS** that the passages quoted in Paragraph 28 are contained in an intemperate, heat-of-

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1 the-moment email exchange initiated by Greg Jacob. Respondent **DENIES** that his assertion
2 of “compelling” and “overwhelming” evidence of illegality and fraud in the election was
3 false and misleading, or that he knew or was grossly negligent in not knowing that it was
4 false and misleading. Respondent **OBJECTS** to the allegations contained in subparagraph
5 (a) as duplicative of those contained in Paragraphs 3, 4, 5, and 11, and **DENIES** those
6 allegations for the reasons set forth in his response to those paragraphs. Respondent
7 **OBJECTS** to the allegations contained in subparagraph (b) as duplicative of those contained
8 in Paragraph 23(a), and **DENIES** those allegations for the reasons set forth in his response to
9 that paragraph.

10
11 29. At approximately 5:40 p.m., Capitol Police cleared and secured the Capitol building, and
12 Congressional leaders announced that they would proceed with counting the electoral votes. At
13 approximately 6:09 p.m., respondent sent Jacob another email which stated that “adjourn[ing] to
14 allow the state legislatures to continue their work” was the “most prudent course.”

15
16 Respondent objects to the allegations in Paragraph 29 of the NDC on the ground that
17 they are compound. Notwithstanding that objection, Respondent has no direct knowledge
18 of, and therefore **DENIES**, the allegation contained in the first sentence of Paragraph 29.
19 Respondent **ADMITS** that the language quoted in the second sentence of Paragraph 29 is
20 contained in an email he sent to Mr. Jacob.

21
22 30. At approximately 11:32 p.m., after a nearly nine-hour delay, the House and Senate
23 resumed the Joint Session. In an email to Jacob sent at approximately 11:44 p.m. on January 6,
24 2021, respondent stated, “The Senate and House have both violated the Electoral Count Act this
25 evening – they debated the Arizona objections for more than 2 hours. Violation of 3 USC 17. And
26 the VP allowed further debate or statements by leadership after the question had been voted upon.
27 Violation of 3 USC 17. And they had that debate upon motion approved by the VP, in violation of
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1 the requirement in 3 USC 15 that after the vote in the separate houses, ‘they shall immediately again
2 meet.’ So now that the precedent has been set that the Electoral Count Act is not quite so sacrosanct
3 as was previously claimed, I implore you to consider one more relatively minor violation [of the
4 law] and adjourn for 10 days to allow the legislatures to finish their investigations, as well as to
5 allow a full forensic audit of the massive amount of illegal activity that has occurred here.” At
6 approximately 3:42 a.m. on January 7, 2021, Pence announced that a majority of votes in the
7 Electoral College votes had been cast for Biden and that Biden had thus been elected to the
8 presidency.

9
10 Respondent objects to the allegations in Paragraph 30 of the NDC on the ground that
11 they are compound. Notwithstanding that objection, Respondent has no direct knowledge
12 of, and therefore **DENIES**, the allegations contained in the first and third sentences of
13 Paragraph 30. Respondent **ADMITS** that the language quoted in the second sentence of
14 Paragraph 30, except for the phrase set out in brackets, is contained in an email he sent to
15 Mr. Jacob. Respondent **ADMITS** that the House and Senate both violated provisions of the
16 Electoral Count Act by allowing debate in excess of the maximum time permitted by 3
17 U.S.C. § 17 (exclusive of the time the Joint Session was in recess due to the breach of the
18 Capitol). Respondent **ADMITS** that Vice President Pence violated Sections 15 and 17 of
19 the Electoral Count Act, 3 U.S.C. §§ 15, 17, by allowing further debate on the floor of the
20 Senate after a vote on objections had been taken, and by failing to return “immediately” to
21 the House to continue with the Joint Session of Congress following the vote on objections.
22 Respondent **ADMITS** that in his email to Mr. Jacob, he accepted Mr. Jacob’s prior
23 contention that an adjournment would violate the Electoral Count Act, but he **DENIES** that a
24 brief adjournment would indisputably violate the Electoral Count Act. Section 16 of the
25 Electoral Count Act, 3 U.S.C. § 16, expressly distinguishes between the Joint Session of
26 Congress being “dissolved” and “recess[ed].” The former is prohibited by the Act “until
27 the count of electoral votes shall be completed and the result declared,” and Respondent
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1 never advised that the Joint Session should be dissolved. A “recess” is likewise prohibited
2 “unless a question shall have arisen in regard to counting any such votes,” which was
3 precisely the situation that presented itself, serious questions having been raised regarding
4 the counting of electoral votes from several states. Moreover, even if the Electoral Count
5 Act prohibited the Vice President from acceding to requests from more than a hundred
6 state legislators for a brief delay in the proceedings to allow time for further investigation
7 of the impact that illegality and fraud had on the election results, Respondent **DENIES** that
8 a statute can interfere with powers given directly by the Constitution to the Vice President
9 to “open” electoral certificates and, implicitly, to make a judgement about whether further
10 investigation was warranted to assess the validity of electoral certificates in the face of what
11 the Vice President himself acknowledged was “significant allegations of voting
12 irregularities and numerous instances of officials setting aside state election law.” *See,*
13 *e.g., Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 177 (1803) (“an act of the legislature,
14 repugnant to the constitution, is void.”).

15
16 31. In engaging in the course of conduct that included the acts set forth in paragraphs 8
17 through 30 above, by which respondent proposed and attempted to convince Pence to execute a plan
18 unilaterally to reject the electoral votes of certain states or delay the count of electoral votes,
19 respondent did not act with intent either to reach an accurate and reasonable legal conclusion
20 regarding the scope of Pence’s authority under the Twelfth Amendment and the Electoral Count Act
21 or to take adequate steps to form an accurate and reasonable determination of whether the election
22 was affected by fraud or illegality involving enough votes to have affected the outcome of the
23 election.

24
25 Respondent objects to the allegations in Paragraph 31 of the NDC on the grounds
26 that they are conclusory, compound, ambiguous, vague, imprecise, overbroad, and
27 intertwined with legal conclusions/argument. Notwithstanding these objections, Respondent
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1 DENIES that he “proposed and attempted to convince Pence to execute a plan unilaterally to
2 reject the electoral votes of certain states.” Respondent DENIES that his advice merely to
3 accede to requests from more than a hundred state legislators to delay proceedings in order to
4 allow a brief period of time for state legislators to assess the impact, if any, of what Pence
5 himself acknowledged was “significant allegations of voting irregularities and numerous
6 instances of officials [unconstitutionally] setting aside state election law” was made
7 without “intent either to reach an accurate and reasonable legal conclusion regarding the
8 scope of Pence’s authority under the Twelfth Amendment and the Electoral Count Act or to
9 take adequate steps to form an accurate and reasonable determination of whether the election
10 was affected by fraud or illegality involving enough votes to have affected the outcome of
11 the election.”

12
13 32. By engaging in the course of conduct that included the acts set forth in paragraphs 8
14 through 30 above, respondent willfully failed to support the Constitution and the laws of the United
15 States, in violation of Business and Professions Code section 6068(a), in that:

- 16 a) Without legal or factual support, respondent sought to have Vice President Pence
17 unilaterally disregard the electoral votes of certain states or delay the counting of electoral
18 votes at the Joint Session of Congress, in violation of Article II, Section 1, and the Twelfth
19 Amendment of the United States Constitution and the Electoral Count Act (3 U.S.C. § 15);
20 b) Without legal or factual support, respondent sought to reverse the outcome of the
21 presidential election by depriving the voters of certain states of their right to have their votes
22 in the 2020 election determine their states’ electoral votes, in violation of those states’ laws,
23 federal statutes, and the United States Constitution; and
24 c) Respondent participated in numerous overt acts in furtherance of a shared plan with
25 Trump and others to pressure Pence to, without legal or factual support, reject the electoral
26 votes of certain states or delay the electoral count, and thereby dishonestly conspired to
27 obstruct the Joint Session of Congress on January 6, 2021, in violation of 18 U.S.C. § 371.
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Respondent objects to the allegations in Paragraph 32 of the NDC on the grounds that they are conclusory, compound, ambiguous, vague, imprecise, overbroad, duplicative, and intertwined with legal conclusions/argument. Notwithstanding these objections, Respondent **DENIES** that he “willfully failed to support the Constitution and the laws of the United States, in violation of Business and Professions Code section 6068(a)” or otherwise. On the contrary, Respondent sought further investigation and remedy for what Vice President Pence himself acknowledged to be “numerous instances of [state and local election] officials setting aside state election law” in clear violation of Article II of the Constitution’s assignment to the state *legislatures* of plenary authority to direct the manner of choosing presidential electors. Respondent **DENIES** the allegations in subparagraphs (a) and (c) that he “sought to have Vice President Pence unilaterally disregard the electoral votes of certain states” or “to pressure Pence to, without legal or factual support, reject the electoral votes of certain states.” Respondent **ADMITS** that he recommended that Vice President Pence accede to requests from more than a hundred state legislators for a brief delay in the electoral count proceedings to afford the state legislatures time to assess the impact of illegality and fraud on the election results, but he **DENIES**, for the reasons set out in further detail in responses above, including his responses to paragraphs 5 and 6, that the recommendation was “without legal or factual support,” as alleged in subparagraphs (a), (b), and (c). Respondent **DENIES** the allegation in subparagraph (b) that he “sought to reverse the outcome of the presidential election by depriving the voters of certain states of their right to have their votes in the 2020 election determine their states’ electoral votes, in violation of those states’ laws, federal statutes, and the United States Constitution.” As the “delay” scenario described in Part III.d of his six-page memo made clear, he recommended delay in order to permit further investigation of the acknowledged illegality in the conduct of the election, and expressly noted that “If, after investigation, proven fraud and illegality is insufficient to alter the results of the election, the original slate of electors would remain

1 valid. **BIDEN WINS.**” Memo ¶ III.d.i (emphasis in original). “If, on the other hand, the
2 investigation proves to the satisfaction of the legislature that there was sufficient fraud and
3 illegality to affect the results of the election, the Legislature certifies the Trump electors.
4 Upon reconvening the Joint Session of Congress, those votes are counted and **TRUMP**
5 **WINS.**” Memo ¶ III.d.ii. In other words, the purpose of the delay recommendation was to
6 ensure that, after accounting for illegal or fraudulent votes, the rightful winner of the election
7 was properly certified, therefore *upholding* rather than *depriving* the voters of those states of
8 their right to have their legal votes in the 2020 election determine the states’ electoral votes.
9 The purpose was to *uphold* the states’ election laws and the Constitution’s assignment of
10 authority to the state legislatures to adopt them in the face of admitted violations of those
11 laws by state and local election officials. Respondent **DENIES** that he “dishonestly
12 conspired to obstruct the Joint Session of Congress on January 6, 2021, in violation 18
13 U.S.C. § 371.” As Section 16 of the Electoral Count Act expressly acknowledges, “no
14 recess is permitted *unless a question shall have arisen in regard to counting any such*
15 *votes....*” 3 U.S.C. § 16 (emphasis added). In light of reports of illegality and fraud in the
16 conduct of the election that had been transmitted to Vice President Pence from more than a
17 hundred state legislators, it was certainly the case that “a question [had] arisen in regard to
18 the counting” of electoral votes. *See, e.g.*, Letter to Vice President Pence of January 5,
19 2021 (signed by 91 legislators from the contested states of Arizona, Georgia, Michigan,
20 Pennsylvania, and Wisconsin) (“The 2020 election witnessed an unprecedented and
21 admitted defiance of state law and procedural irregularities raising questions about the
22 validity of hundreds of thousands of ballots in our respective states.”); *id.* (“There are
23 extensive and well-founded accusations of electoral administration mismanagement and
24 deliberate and admitted violations of explicit election laws enacted by state legislatures in
25 Arizona, Georgia, Michigan, Pennsylvania, and Wisconsin.”); *id.* (“we write to ask you to
26 comply with our reasonable request to afford our nation more time to properly review the
27 2020 election by postponing the January 6th opening and counting of the electoral votes
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1 for at least 10 days, affording our respective bodies to meet, investigate, and as a body vote
2 on certification or decertification of the election.”); Letter to Rep. Scott Perry, cc: to all
3 members of Congress, of December 4, 2020 (signed by 15 members of the Pennsylvania
4 Legislature) (“The general election of 2020 in Pennsylvania was fraught with
5 inconsistencies, documented irregularities and improprieties associated with mail-in
6 balloting, pre-canvassing, and canvassing that the reliability of the mail-in votes in the
7 Commonwealth of Pennsylvania is impossible to rely upon.”); *id.* (“the mail-in ballot
8 process in the Commonwealth of Pennsylvania in the 2020 General Election was so
9 defective that it is essential to declare the selection of presidential electors for the
10 Commonwealth to be in dispute.”); Letter to Senate Majority Leader Mitch McConnell and
11 House Republican Leader Kevin McCarthy of January 4, 2021 (signed by 21 members of
12 the Pennsylvania Senate, including President Pro Tem Jake Corman and Majority Leader
13 Kim Ward) (identifying “numerous unlawful violations [of state election law] taken by
14 Pennsylvania Governor, Tom Wolf; Secretary of State, Kathy Boockvar; and the rogue
15 State Supreme Court,” by which “the balance of power was taken from the State
16 Legislature,” asserting that, “Due to these inconsistent and questionable activities, we
17 believe that PA election results should not have been certified by our Secretary of State,”
18 and requesting a “delay” in the “certification of the Electoral College to allow due process
19 as we pursue election integrity in our Commonwealth”); Hon. Wm. Ligon, *The*
20 *Chairman’s Report of the Election Law Study Subcommittee of the Standing [Georgia]*
21 *Senate Judiciary Committee*, at 12 (Dec. 17, 2020) (describing the “ample evidence”
22 received by his subcommittee “that the 2020 Georgia General Election was so
23 compromised by systemic irregularities and voter fraud that it should not be certified.”)³⁰;
24 Letter to Members of Congress, cc: The Vice President, of January 4, 2021 from Michigan
25 State Senator John Bizon (co-signed by 10 other members of the Michigan Senate (noting
26 that “[n]umerous allegations surrounding the 2020 election have made a considerable

27 ³⁰ http://www.senatorligon.com/THE_FINAL%20REPORT.PDF.
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1 portion of the American public call into question the legitimacy of the electoral process in
2 Michigan and several other states,” that a request by “40 State Representatives and
3 Senators” for “an independent audit of the November 2020 election before certification ...
4 was not respected,” and “calling upon the imminent joint session of Congress to pursue
5 every available option and procedure to examine the credible allegations of election related
6 concerns surrounding fraud and irregularities.”);

7
8 **COUNT TWO**

9 Case No. 21-O-11801
10 Business and Professions Code section 6068(d)
11 [Seeking to Mislead a Court]

12 33. On or about December 7, 2020, the State of Texas filed a Motion for Leave to File Bill of
13 Complaint in the United States Supreme Court, initiating the lawsuit Texas v. Pennsylvania, 141 S.
14 Ct. 1230 (2020), against Pennsylvania, Georgia, Michigan, and Wisconsin (“Defendant States”),
15 whose electors were pledged to vote for Joe Biden in the 2020 presidential election. The lawsuit
16 “challeng[ed]” the Defendant States’ “administration of the 2020 presidential election.” It claimed
17 that “government officials in the defendant states of Georgia, Michigan, and Wisconsin, and the
18 Commonwealth of Pennsylvania” had “[u]s[ed] the COVID- 19 pandemic as a justification” to
19 “usurp their legislatures’ authority and unconstitutionally revised their state’s election statutes.”

20
21 Respondent **ADMITS** the allegations in Paragraph 33 of the NDC.

22
23 34. The lawsuit made three primary allegations:

24 a) First, it alleged “[n]on-legislative actors’ purported amendments to States’ duly enacted
25 election laws, in violation of the Electors Clause’s vesting State legislatures with plenary
26 authority regarding the appointment of presidential electors.”

27 b) Second, it alleged “[i]ntrastate differences in the treatment of voters, with more favorable
28 [treatment] allotted to voters – whether lawful or unlawful – in areas administered by local

1 government under Democrat control and with populations with higher ratios of Democrat
2 voters than other areas of Defendant States.”

3 c) Third, it alleged “[t]he appearance of voting irregularities in the Defendant States that
4 would be consistent with the unconstitutional relaxation of ballot-integrity protections in
5 those States’ election laws.”

6
7 Respondent **ADMITS** the allegations in Paragraph 34 of the NDC.

8
9 35. The lawsuit sought an order from the Supreme Court to “enjoin the use of unlawful
10 election results without review and ratification by the Defendant States’ legislatures and remand to
11 the Defendant States’ respective legislatures to appoint Presidential Electors in a manner consistent
12 with the Electors Clause and pursuant to 3 U.S.C. § 2.”

13
14 Respondent **ADMITS** the allegations in Paragraph 35 of the NDC.

15
16 36. Texas’ Motion for Leave to File Bill of Complaint made numerous specific factual
17 allegations, including the following:

18 a) Citing “rampant lawlessness arising out of Defendant States’ unconstitutional acts,” the
19 lawsuit asserted that “[t]aken together, these flaws affect an outcome- determinative numbers
20 of popular votes in a group of States that cast outcome- determinative numbers of electoral
21 votes.”

22 b) “Statewide election officials and local election officials in Philadelphia and Allegheny
23 Counties, aware of the historical Democrat advantage in those counties, violated
24 Pennsylvania’s election code and adopted the differential standards favoring voters in
25 Philadelphia and Allegheny Counties with the intent to favor former Vice President Biden.”

26 c) “The probability of former Vice President Biden winning the popular vote in the four
27 Defendant States—Georgia, Michigan, Pennsylvania, and Wisconsin— independently given
28

1 President Trump’s early lead in those States as of 3 a.m. on November 4, 2020, is less than
2 one in a quadrillion, or 1 in 271,000,000,000,000,000. For former Vice President Biden to
3 win these four States collectively, the odds of that event happening decrease to less than one
4 in a quadrillion to the fourth power (i.e., 1 in 1,000,000,000,000,0004).”

5 d) “The same less than one in a quadrillion statistical improbability of Mr. Biden winning the
6 popular vote in the four Defendant States—Georgia, Michigan, Pennsylvania, and
7 Wisconsin— independently exists when Mr. Biden’s performance in each of those
8 Defendant States is compared to former Secretary of State Hilary Clinton’s performance in
9 the 2016 general election and President Trump’s performance in the 2016 and 2020 general
10 elections. Again, the statistical improbability of Mr. Biden winning the popular vote in these
11 four States collectively is 1 in 1,000,000,000,000,0004.”

12
13 Respondent **ADMITS** that the Original Action filed by Texas made the factual
14 allegations described in Paragraph 36 of the NDC.

15
16 37. On or about December 9, 2020, respondent filed in the Supreme Court a motion on
17 behalf of President Donald Trump to intervene in Texas v. Pennsylvania in his capacity as a
18 candidate for re-election and a proposed Bill of Complaint, thereby attempting to join the case as a
19 plaintiff. In his motion, respondent expressly adopted the allegations contained in the Motion for
20 Leave to File Bill of Complaint filed by Texas on December 7, 2020.

21
22 Respondent **ADMITS** that the Motion to Intervene incorporated by reference many
23 of the allegations contained in Texas’s Bill of Complaint.

24
25 38. Respondent knew that the factual allegations in the motion filed by Texas were false and
26 misleading, in that, as respondent knew at the time:

1 a) There was no evidence upon which a reasonable attorney would rely of fraud in any state
2 election in sufficient numbers that could have affected the outcome of the election.

3 b) There was no evidence upon which a reasonable attorney would rely that election officials
4 in Philadelphia and Allegheny Counties had acted with the intent to favor Biden in the
5 election through the alleged violations of election codes or adoptions of differential
6 standards, or that the alleged violations of election codes or adoptions of differential
7 standards “affect[ed] an outcome-determinative numbers of popular votes.”

8 c) Texas’ claims that the odds of Biden winning the popular vote in the Defendant States
9 were less than one in a quadrillion were based on statistical analysis that no reasonable
10 expert on statistical analysis would agree with. The claim was supported by a declaration
11 from Charles Cicchetti, who has a Ph.D. in economics. Experts in statistics were highly
12 critical of Cicchetti's statistical analysis and found that he based his analysis on erroneous
13 assumptions about the ways that votes are distributed among geographic regions,
14 demographics, and voting methods.

15
16 Respondent objects to the allegations in Paragraph 38 of the NDC on the grounds
17 that they are conclusory, compound, ambiguous, vague, imprecise, overbroad, duplicative,
18 and intertwined with legal conclusions/argument. Notwithstanding these objections,
19 Respondent **DENIES** that the factual allegations in the motion filed by Texas were false, or
20 that he knew that the factual allegations made in that motion were false. Respondent
21 **DENIES** the allegation in subparagraph (a) that there was “no evidence upon which a
22 reasonable attorney would rely of fraud in any state election in sufficient numbers that could
23 have affected the outcome of the election.” As set out in the response to Paragraph 11
24 above, there was ample evidence of fraud and illegality in sufficient quantity to have affected
25 the outcome of the election. There was, in addition, statistical evidence of significant vote
26 spikes in Georgia, Pennsylvania, and Michigan suggesting likely ballot stuffing. *See,*
27
28

1 e.g., Pennsylvania 2020 Voting Analysis Report³¹; Michigan 2020 Voting Analysis
2 Report.³² There was sworn testimony of Jesse Morgan, a postal subcontractor truck
3 driver in Pennsylvania, regarding the transport of 24 bins (two hundred thousand or
4 more) of ballots from Long Island, New York to Lancaster, Pennsylvania. Affidavit of
5 Jesse Morgan, *Metcalfe v. Wolf*, No. 636 MD 2020 (Commonwealth Ct. of PA, filed
6 Dec. 4, 2020).³³ There was video evidence of ballots being scanned multiple times at
7 the State Farm Arena in Atlanta, Georgia, after election observers were advised to go
8 home because counting had been halted for the evening. Jack Phillips, *Georgia State*
9 *Farm Arena Footage Shows Poll Workers Staying Behind, Pulling Out Suitcases With*
10 *Ballots*, Epoch Times (Dec. 3, 2020).³⁴ Portions of the original video³⁵ were played at
11 a “Hearing to Assess Election Improprieties and to Evaluate the Election Process to
12 Ensure the Integrity of Georgia’s Voting System” held by the Georgia Senate
13 Judiciary Committee, Subcommittee on State Election Processes, on December 3,
14 2020. There was sworn testimony by Grace Lennon, a Georgia Tech college student,
15 in the Georgia Senate subcommittee hearing, indicating that someone had applied for
16 and voted an absentee ballot in her name, after having the ballot redirected to an
17 address unknown to her without her knowledge or consent. The Chairman’s Report of
18 the Election Law Study Committee of the Standing Senate Judiciary Committee,

19
20
21 ³¹ Available at https://election-integrity.info/PA_2020_Voter_Analysis_Report.pdf.

22 ³² Available at https://election-integrity.info/MI_2020_Voter_Analysis_Report.pdf.

23 ³³ <https://www.pacourts.us/Storage/media/pdfs/20210603/212420-file-10836.pdf>; *see also*
24 [https://cleverjourneys.com/2021/07/12/testimony-of-truck-driver-who-delivered-ballots-from-](https://cleverjourneys.com/2021/07/12/testimony-of-truck-driver-who-delivered-ballots-from-new-york-to-pennsylvania-wont-go-away/)
25 [https://www.thegatewaypundit.com/2020/12/driving-](https://www.thegatewaypundit.com/2020/12/driving-completed-ballots-ny-pennsylvania-decided-speak-update-usps-contract-truck-driver-transferred-288000-fraudulent-ballots-ny-pa-speaks-presser/)
26 [288000-fraudulent-ballots-ny-pa-speaks-presser/](https://www.breitbart.com/politics/2020/12/02/usps-driver-says-trailer-thousands-ballots-disappeared/);
27 [https://www.breitbart.com/politics/2020/12/02/usps-driver-says-trailer-thousands-ballots-](https://www.breitbart.com/politics/2020/12/02/usps-driver-says-trailer-thousands-ballots-disappeared/)
28 [disappeared/](https://www.breitbart.com/politics/2020/12/02/usps-driver-says-trailer-thousands-ballots-disappeared/).

29 ³⁴ [https://www.theepochtimes.com/state-farm-arena-footage-shows-poll-workers-staying-](https://www.theepochtimes.com/state-farm-arena-footage-shows-poll-workers-staying-behind-pulling-out-suitcases-with-ballots_3603293.html)
30 [behind-pulling-out-suitcases-with-ballots_3603293.html](https://www.theepochtimes.com/state-farm-arena-footage-shows-poll-workers-staying-behind-pulling-out-suitcases-with-ballots_3603293.html)

31 ³⁵ The video was initially available at
32 <https://www.youtube.com/watch?v=keANzinHWUA>, but that link is no longer available.

1 *Summary of Testimony from December 3, 2020 Hearing*, p. 12.³⁶ Subsequent
2 investigations, such as that conducted by former Wisconsin Supreme Court Justice
3 Gableman at the behest of the Wisconsin Legislature, have confirmed that illegality and
4 fraud in the conduct of the election affected more ballots than the reported margin of victory.
5 *See* Office of the Special Counsel, *Second Interim Investigative Report On the Apparatus*
6 *and Procedures of the Wisconsin Elections System* (March 1, 2022), at 2 (“it is clear that
7 Wisconsin election officials’ unlawful conduct in the 2020 Presidential election casts grave
8 doubt on Wisconsin’s 2020 Presidential election certification.”); *id.* at 81-95 (describing
9 illegality and extensive fraud in harvesting ballots from nursing homes and concluding: “the
10 fact that tens of thousands of illegal ballots from these facilities were counted casts doubt on
11 the 2020 Presidential election result.”) An audit conducted in Arizona under the authority of

12 that State’s Legislature likewise found tens of thousands of ballots of dubious
13 legality—well

14 more than the 10,457-vote margin in that state.

15 Respondent **DENIES** the allegation in subparagraph (b) that “There was no evidence
16 upon which a reasonable attorney would rely that election officials in Philadelphia and
17 Allegheny Counties had acted with the intent to favor Biden in the election through the
18 alleged violations of election codes or adoptions of differential standards.” There is
19 documented evidence that election officials in Philadelphia and Allegheny Counties
20 provided advance notice of defective mail-in and absentee ballots to Democrat party
21 officials, in violation of Pennsylvania law, 25 P.S. § 3146.8. Those allegations were raised
22 in the complaint filed in *Donald J. Trump for President, Inc. v. Boockvar*, No. 4:20-cv-
23 02078, Complaint ¶¶ 128-137 (M.D. Pa. 2020); the case was ultimately dismissed for lack of
24 standing without addressing the merits of the allegations. *Id.*, Memorandum Opinion (Dkt.
25 #202) and Order (Dkt. #203) (M.D. Pa. Nov. 21, 2020).³⁷

26 ³⁶ http://www.senatorligon.com/THE_FINAL%20REPORT.PDF

27 ³⁷ Available at [https://www.courtlistener.com/docket/18618673/donald-j-trump-for-](https://www.courtlistener.com/docket/18618673/donald-j-trump-for-president-inc-v-boockvar/?page=2)
28 [president-inc-v-boockvar/?page=2](https://www.courtlistener.com/docket/18618673/donald-j-trump-for-president-inc-v-boockvar/?page=2).

1 Respondent **DENIES** the allegation in subparagraph (b) that there was no evidence
2 to support the claim made in the Texas Bill of Complaint “that the alleged violations of
3 election codes or adoptions of differential standards ‘affect[ed] an outcome-determinative
4 numbers of popular votes.’” There were numerous violations of state law that, cumulatively,
5 affected well more than the 81,660 vote margin in Pennsylvania. In his report on election
6 irregularities, for example, Representative Ryan identified 58,221 absentee or mail-in ballots
7 that were *received back* on or before the day state records indicated they were mailed out,
8 and another 51,200 ballots received back the day after they were mailed out. The 109,421
9 total alone exceeds the 81,660 vote margin. The Secretary of State’s elimination of signature
10 verification contrary to Pennsylvania law, *e.g.*, 25 P.S. § 3146.8(g), which caused or at least
11 contributed to a dramatic decline (from 4.45% in 2018 to .28% in 2020) in the number of
12 ballots that were disqualified because the signatures did not match the signatures on file (or,
13 in other words, were illegally signed by someone other than the registered voter), affected
14 more than 2.6 million ballots, of which nearly 60,000 would likely have been disqualified
15 using historic disqualification rates when signature verification was conducted. 2,175
16 absentee and mail-in ballots in Bucks County, 8,329 in Philadelphia County, and 2,349 in
17 Allegheny County that were not “filled in, signed, and dated,” as required by Pennsylvania
18 law, 25 P.S. §§ 3146.6(a), were nonetheless counted.³⁸ In addition, the Pennsylvania
19 Supreme Court, at the request of the Secretary of State, extended the statutory deadline for
20 the receipt of absentee and mail-in ballots, thereby allowing somewhere between 10,000 (as
21 acknowledged by the Secretary) and 71,893 (as alleged by Trump campaign officials) late-
22 received ballots to be counted in violation of Pennsylvania law, 25 P.S. §§ 3146.6(c),
23
24

25 ³⁸ Despite the clear statutory text, the Supreme Court of Pennsylvania held that the statute
26 did not require that a voter actually “fill in, sign, and date” the ballot certification envelope. *In re:*
27 *Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election*, 241 A.3d 1058
28 (Pa. 2020). A petition for writ of certiorari, filed in the Supreme Court of the United States,
remained pending until it was denied on Feb. 22, 2021. *Donald J. Trump for President, Inc. v.*
Degraffenreid, No. 20-845.

1 3150.16(c).³⁹ While a petition for writ of certiorari challenging that decision was pending,
2 three Justices of the Supreme Court noted that the Pennsylvania Court’s decree “squarely
3 alters an important statutory provision enacted by the Pennsylvania Legislature pursuant to
4 its authority under the Constitution of the United States to make rules governing the conduct
5 of elections for federal office,” and that “there is a strong likelihood that the State Supreme
6 Court decision violates the Federal Constitution.” *Republican Party of Pennsylvania v.*
7 *Degraffenreid*, No. 20-542, Order Denying Motion to Expedite, Statement of Justice Alito
8 (joined by Justices Thomas and Gorsuch) (Oct. 28, 2020). Violations of law in other swing
9 states similarly impacted more votes than the margins in those states. In Georgia, for
10 example, the loosening of that state’s statutory signature verification process caused or at
11 least contributed to a dramatic decline in the disqualification rate of absentee ballots, from
12 6.42% in 2016 to .36% in 2020. Because Biden received a much greater proportion of
13 absentee ballots than Trump, Dr. Charles Cicchetti, the expert on whose statistical analysis
14 Texas relied, opined that that issue alone would have produced a net gain for Trump of
15 25,587 votes – or more than double the 11,799 vote margin in the state. Decl. of Charles J.

17 ³⁹ The U.S. Supreme Court denied, by an equally-divided 4-4 vote, a request for an
18 emergency stay of the Pennsylvania Supreme Court’s order extending the statutory deadline for
19 receipt of absentee and mail-in ballots, and then subsequently denied a motion for expedited
20 consideration of a cert. petition in large part because Secretary Bookvar notified the Court that
21 such ballots would be segregated and not canvassed pending further decision by the court.
22 *Republican Party of Pennsylvania v. Degraffenreid*, No. 20-542, Order Denying Motion to
23 Expedite, Statement of Justice Alito (joined by Justices Thomas and Gorsuch) (“we have been
24 informed by the Pennsylvania Attorney General that the Secretary of the Commonwealth issued
25 guidance today directing county boards of elections to segregate ballots received” after the
26 statutory deadline. The Guidance issued by Secretary Boockvar on October 28, 2020, directed
27 county clerks to keep such ballots “separate and segregated from all other voted ballots” and
28 further directed that “the county boards of elections shall not pre-canvass or canvass” such ballots.
<https://www.dos.pa.gov/VotingElections/OtherServicesEvents/VotingElectionStatistics/Documents/2020-10-28-Segregation-Guidance.pdf>. Then, without advising the Supreme Court, Secretary
Boockvar modified that guidance on November 1, 2020, directing county clerks to “canvass” the
segregated ballots “as soon as possible upon receipt...” That, and the fact that it could not be
verified whether all counties were complying with the segregation Guidance, prompted Justice
Alito to order that late-received ballots be “segregated and kept ‘in a secure, safe and sealed
container separate from other voted ballots” and “that all such ballots, if counted [as some may
have been] be counted separately.” *Republican Party of Pennsylvania v. Degraffenreid*, No. 20-
542, Order issued by Justice Alito (Nov. 6, 2020).

1 Cicchetti, Ph.D., ¶¶ 22-28, Appendix, Motion for Expedited Consideration, *Texas v.*
2 *Pennsylvania*, No. 22O155 (S.Ct., filed Dec. 7, 2020).

3 Respondent **DENIES** the allegation in subparagraph (c) that “no reasonable expert
4 on statistical analysis would agree with” the expert opinion offered by Dr. Charles Cicchetti.
5 Disputes among experts are commonplace in litigation, and Respondent **DENIES** that he
6 had any basis for knowing whether Dr. Cicchetti’s expert opinion was incorrect. “Although
7 attorneys may not present evidence they know to be false or assist in perpetrating known
8 frauds on the court, they may ethically present evidence that they suspect, but do not
9 personally know, is false. ... [A]s long as counsel has no specific undisclosed factual
10 knowledge of its falsity, it does not raise an ethical problem.” *People v. Riel*, 22 Cal. 4th
11 1153, 1217 (2000) (citing *People v. Gordon*, supra, 10 Cal.3d 460, 472-474 (1973)); *see also*
12 *Marijanovic v. Gray York*, 137 Cal.App.4th 1262, 1273 (2006) (“A litigant or attorney who
13 possesses competent evidence to substantiate a legally cognizable claim for relief does not
14 act tortiously by bringing the claim, even if also aware of evidence that will weigh against
15 the claim.”).

16
17 39. By expressly adopting these false and misleading statements and presenting them to the
18 Supreme Court as a basis of relief for Trump, respondent sought to mislead the Supreme Court by an
19 artifice or false statement of fact or law, in willful violation of Business and Professions Code,
20 section 6068(d).

21
22 Respondent **DENIES** that the statements contained in the Texas Bill of Complaint
23 were false and misleading, or that he knew they were false and misleading.

24
25 **COUNT THREE**

26 Case No. 21-O-11801
27 Business and Professions Code section 6106
[Moral Turpitude - Misrepresentation]

28 40. The allegations in paragraphs 8 through 10 above are incorporated here by reference.

1
2 Respondent **ADMITS** or **DENIES** the allegations in paragraphs 8 through 10 as set
3 out above.
4

5 41. On or about December 23, 2020, in the two-page memo that respondent wrote and sent
6 to an attorney and strategic advisor to Trump’s 2020 presidential campaign, with the intent of
7 providing legal advice to Trump and Pence, respondent asserted that seven states that had voted for
8 Biden (Arizona, Georgia, Michigan, Pennsylvania Nevada, New Mexico, and Wisconsin) “have
9 transmitted dual slates of electors to the President of the Senate.” Respondent knew that this
10 assertion was false and misleading in that, as respondent knew at the time:

- 11 a) Pursuant to 3 U.S.C. § 6, the governor of each of those states had submitted a certificate
12 of ascertainment naming the Biden electors, not Trump electors;
13 b) No other state official of any of those states had submitted a purported certificate of
14 ascertainment naming Trump electors; and
15 c) As a result, no legal authority on behalf of any state had taken any action to support the
16 contention that Trump electors were the legitimate electors for any of the seven states.
17

18 Respondent objects to the allegations in Paragraph 41 of the NDC on the grounds
19 that they are conclusory, compound, ambiguous, vague, imprecise, overbroad, and
20 intertwined with legal conclusions/argument. Notwithstanding these objections, Respondent
21 **DENIES** that he prepared the 2-page memo with the “intent of providing legal advice to
22 Trump and Vice-President Michael Pence.” As he has noted to the Bar investigators and
23 elsewhere, the 2-page memo was but a preliminary draft of a portion of larger memo
24 outlining all the various scenarios that were being discussed in public discourse.
25 Respondent **ADMITS** that Biden had been declared the winner in the seven listed states,
26 but **DENIES** that those declarations, like the similar declarations that had been made
27
28

1 certifying Nixon's electors in Hawaii in 1960, were conclusive, as litigation was still
2 pending at the time in several of the contested states.

3
4 42. By including this false and misleading assertion as a basis for the alternative legal
5 strategies provided in the two-page memo, respondent committed an act involving moral turpitude,
6 dishonesty, and corruption in willful violation of Business and Professions Code section 6106.

7
8 Respondent **DENIES** that the assertion was false and misleading. The Trump
9 electors from the seven contested had in fact met and cast contingent electoral votes, just as
10 the electors for Senator Kennedy had done in Hawaii in 1960. Respondent did not assert that
11 the Trump electoral votes had been certified by the respective state governors or any other
12 state official.

13
14 43. A violation of section 6106 may result from intentional conduct or grossly negligent
15 conduct. Respondent is charged with committing intentional misrepresentation. However, should the
16 evidence at trial demonstrate that respondent committed misrepresentation as a result of gross
17 negligence, respondent must still be found culpable of violating section 6106 because
18 misrepresentation through gross negligence is a lesser included offense of intentional
19 misrepresentation.

20
21 Respondent **DENIES** that the assertion was false and misleading, or that he knew or
22 was grossly negligent in not knowing that it was false and misleading.

23
24 ///

25 ///

26 ///

27

28

COUNT FOUR

Case No. 21-O-11801
Business and Professions Code section 6068(d)
[Seeking to Mislead a Court]

44. On or about December 31, 2020, respondent, as co-counsel, filed in the Northern District of Georgia a Verified Complaint for Emergency Injunctive and Declaratory Relief on behalf of President Donald Trump in *Trump v. Kemp*, No. 20-CV-5310 (motion for expedited declaratory and injunctive relief denied, 511 F. Supp. 3d 1325 (NDGA, Jan. 5, 2021)). The complaint requested an emergency injunction to de-certify Georgia's election results, alleging that Georgia's manner of conducting the election violated the Electors Clause.

Respondent **ADMITS** the allegations in paragraph 44 of the NDC.

45. The Complaint alleged that various aspects of the administration of Georgia's election were fraudulent or unlawful. The alleged fraudulent or unlawful actions included:

- a) Georgia election officials allowed unqualified individuals to register and vote, allowed convicted felons still serving their sentence to vote, allowed underaged individuals to register and then vote, allowed unregistered or late registered individuals to vote, allowed individuals to vote who had moved across county lines, allowed individuals to vote who had registered at a P.O. Box, church, or courthouse rather than their residence, and accepted votes cast by deceased individuals.
- b) Fulton County election officials "remove[d] suitcases of ballots from under a table where they had been hidden, and processed those ballots without open viewing by the public in violation of [state law]."

Respondent **ADMITS** that the allegations identified in paragraph 45 of the NDC were included in the *Trump v. Kemp* Complaint.

///

1 46. Respondent knew that these allegations regarding the administration of Georgia’s
2 election were false and misleading, in that, as respondent knew at the time:

3 a) There was no evidence upon which a reasonable attorney would rely that the alleged
4 irregularities in Georgia, even collectively, occurred in sufficient number as to affect the
5 outcome of the election in Georgia, as the margin of votes for Biden in Georgia was over
6 11,000 votes, and there was no evidence upon which a reasonable attorney would rely
7 that the allegedly fraudulent or unlawful actions in the administration of Georgia’s
8 election approached that margin.

9 b) Fulton County election officials did not remove a suitcase of hidden ballots from under a
10 table out of view of election observers and fraudulently process the ballots. In fact, video
11 evidence established that the ballots at issue were in a room filled with people including
12 election monitors, until the boxes—not suitcases— containing the ballots were placed
13 under a table in preparation for the poll watchers to leave for the evening. Those boxes
14 were reopened and their contents retrieved and scanned before poll watchers left when
15 the state official monitor intervened, instructing the workers that they should remain to
16 tabulate the votes. Furthermore, based upon the claim of fraudulent conduct, the Georgia
17 Secretary of State conducted an investigation and determined that the video evidence did
18 not show secreting and counting of illegal ballots, and there was no evidence of improper
19 activity.

20
21 Respondent objects to the allegations in Paragraph 46 of the NDC on the grounds
22 that they are conclusory, compound, ambiguous, vague, imprecise, overbroad, and
23 intertwined with legal conclusions/argument. Notwithstanding these objections, Respondent
24 **DENIES** that the allegations identified in paragraph 45 of the NDC were false and
25 misleading, or that he knew them to be false and misleading at the time. On the contrary, the
26 allegations were supported by sworn affidavits and expert analysis submitted in conjunction
27 with the complaint filed in *Trump v. Raffensperger*, No. 2020CV343255 (Fulton Cnty.
28

1 Super. Ct., filed Dec. 4, 2020), which was attached to the *Trump v. Kemp* complaint and
2 incorporated by reference. That complaint and its accompanying affidavits and expert
3 analyses provided evidence of more than 100,000 ballots that were cast and counted in the
4 Georgia election, well over the 11,779 vote margin. Respondent therefore **DENIES** the
5 allegation in subparagraph (a) that there was “no evidence ... that the alleged irregularities in
6 Georgia, even collectively, occurred in sufficient number as to affect the outcome of the
7 election in Georgia.” That claim is demonstrably false, and because Respondent had
8 identified that evidence to the bar examiners during the investigative phase, the false
9 statement was made knowingly, in violation of Business and Professions Code, section
10 6068(d).

11 Respondent **DENIES** that the allegations in subparagraph (b) were false and
12 misleading, or that he knew or was grossly negligent in not knowing at the time that they
13 were false and misleading. There was video evidence of ballots being scanned multiple
14 times at the State Farm Arena in Atlanta, Georgia, after election observers were
15 advised to go home because counting had been halted for the evening. Jack Phillips,
16 *Georgia State Farm Arena Footage Shows Poll Workers Staying Behind, Pulling Out*
17 *Suitcases With Ballots*, Epoch Times (Dec. 3, 2020).⁴⁰ Portions of the original video⁴¹
18 were played at a “Hearing to Assess Election Improprieties and to Evaluate the
19 Election Process to Ensure the Integrity of Georgia’s Voting System” held by the
20 Georgia Senate Judiciary Committee, Subcommittee on State Election Processes, on
21 December 3, 2020.

22
23 47. By including these false and misleading statements in the Verified Complaint for
24 Emergency Injunctive and Declaratory Relief, respondent sought to mislead the court by an artifice

25
26 ⁴⁰ https://www.theepochtimes.com/state-farm-arena-footage-shows-poll-workers-staying-behind-pulling-out-suitcases-with-ballots_3603293.html

27 ⁴¹ The video was initially available at
28 <https://www.youtube.com/watch?v=keANzinHWUA>, but that link is no longer available.

1 or false statement of fact or law, in willful violation of Business and Professions Code, section
2 6068(d).

3
4 Respondent **DENIES** that the statements in the Verified Complaint were false and
5 misleading, or that he knew them to be false and misleading at the time they were made.

6
7 **COUNT FIVE**

8 Case No. 21-O-11801
9 Business and Professions Code section 6106
[Moral Turpitude - Misrepresentation]

10 48. The allegations in paragraph 11 above are incorporated here by reference.

11 Respondent incorporates his response to paragraph 11 of the NDC here by reference.

12
13 49. On or about January 2, 2021, respondent appeared on the “Bannon’s War Room” radio
14 program, during which he was interviewed by program host Steve Bannon. According to Bannon,
15 the radio program had tens of millions of listeners. Respondent stated that there was “massive
16 evidence” of fraud involving absentee ballots in the November 3, 2020 presidential election, “most
17 egregiously in Georgia and Pennsylvania and Wisconsin.” Respondent further stated that there had
18 been “more than enough” absentee ballot fraud “to have affected the outcome of the election.”
19 Respondent made these statements with the intent to encourage the audience listening to the radio
20 program and the general public to question the legitimacy of the election results.

21
22 Respondent objects to the allegations in Paragraph 49 of the NDC on the grounds
23 that they are conclusory, compound, ambiguous, vague, imprecise, overbroad, repetitive, and
24 intertwined with legal conclusions/argument. Notwithstanding these objections, Respondent
25 has no knowledge about, and therefore **DENIES**, the claim regarding the number of listeners
26 to Steve Bannon’s radio program. Respondent **ADMITS** that he made the statements
27 attributed to him. Respondent **ADMITS** that American Citizens have the right to question
28

1 illegality and fraud in the conduct of their elections, and that his intent in making those
2 statements was to expose such illegality and fraud, as was his constitutional right under the
3 First Amendment.

4
5 50. Respondent knew, or was grossly negligent in not knowing, that these allegations
6 regarding absentee ballot fraud were false and misleading, as respondent knew at that time that there
7 was no evidence upon which a reasonable attorney would rely of absentee ballot fraud in any state in
8 sufficient numbers that could have affected the outcome of the election.

9
10 Respondent objects to the allegations in Paragraph 50 of the NDC on the grounds
11 that they are conclusory, compound, ambiguous, vague, imprecise, overbroad, repetitive, and
12 intertwined with legal conclusions/argument. Notwithstanding these objections, Respondent
13 **DENIES** that his statements were false or misleading, or that he knew or was grossly
14 negligent in not knowing that they were false or misleading.

15
16 51. By making these false and misleading statements, with the intent to encourage the
17 general public to question the legitimacy of the election results, respondent committed an act
18 involving moral turpitude, dishonesty, and corruption in willful violation of Business and
19 Professions Code section 6106.

20
21 Respondent objects to the allegations in Paragraph 51 of the NDC on the grounds
22 that they are conclusory, compound, ambiguous, vague, imprecise, overbroad, repetitive, and
23 intertwined with legal conclusions/argument. Notwithstanding these objections, Respondent
24 **DENIES** that his statements were false and misleading, or that he knew, or was grossly
25 negligent in not knowing, that they were false and misleading. Respondent **ADMITS** that
26 American Citizens have the right to question illegality and fraud in the conduct of their
27 elections, and that his intent in making those statements was to expose such illegality and
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1 fraud, as was his constitutional right under the First Amendment. Respondent **DENIES** that
2 highlighting illegality and fraud in the conduct of an election constitutes an act involving
3 moral turpitude, dishonesty, and corruption in violation of Business and Professions Code
4 section 6106, willful or otherwise.

5
6 52. A violation of section 6106 may result from intentional conduct or grossly negligent
7 conduct. Respondent is charged with committing intentional misrepresentation. However, should the
8 evidence at trial demonstrate that respondent committed misrepresentation as a result of gross
9 negligence, respondent must still be found culpable of violating section 6106 because
10 misrepresentation through gross negligence is a lesser included offense of intentional
11 misrepresentation.

12
13 Respondent **DENIES** that his statements on the Steve Bannon show were false and
14 misleading, or that he knew or was grossly negligent in not knowing them to be false and
15 misleading at the time they were made.

16 **COUNT SIX**

17 Case No. 21-O-11801
18 Business and Professions Code section 6106
19 [Moral Turpitude – Misrepresentation]

20 53. The allegations in paragraphs 12 through 16 above are incorporated here by reference.

21
22 Respondent incorporates by reference his responses to paragraphs 12 through 16.

23
24 54. On or about January 3, 2021, in the six-page memo that respondent wrote and sent to an
25 attorney and strategic advisor to Trump's 2020 presidential campaign, with the intent of providing
26 legal advice to Trump and Pence, respondent stated the following regarding the 2020 presidential
27 election:
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- 1 a) There had been “outright fraud” through “electronic manipulation of voting tabulation
2 machines.”
- 3 b) There were “dual slates of electors from 7 states,” because the Trump electors in Arizona,
4 Georgia, Michigan, Nevada, New Mexico, Pennsylvania, and Wisconsin had met on
5 December 14, 2020, cast their electoral votes for Trump, and transmitted those votes to
6 Pence.
- 7 c) The State of Michigan “[m]ailed out absentee ballots to every registered voter, contrary to
8 statutory requirement that voter apply for absentee ballots.”
- 9 d) “[T]his Election was Stolen by a strategic Democrat plan to systematically flout existing
10 election laws for partisan advantage.”

11
12 Respondent **ADMITS** that he sent a six-page memo to an attorney/strategic advisor
13 outlining numerous scenarios for the counting of electoral votes during the joint session of
14 Congress on January 6, 2021. Respondent **DENIES** that the memo advised the adoption of
15 any particular scenario. Respondent **ADMITS** that the statements quoted in paragraph 54
16 of the NDC are contained in the six-page memo.

17
18 55. Respondent knew that these statements were false and misleading, in that, as respondent
19 knew at the time:

- 20 a) There was no evidence upon which a reasonable attorney would rely of fraud through
21 electronic manipulation of voting tabulation machines. Respondent knew that on or about
22 November 12, 2020, the Elections Infrastructure Government Coordinating Council and
23 the Election Infrastructure Sector Coordinating Executive Committees issued a joint
24 statement which stated that “The 2020 presidential election was the most secure in
25 American history” and “there was no evidence that any voting system deleted or lost
26 votes, changed votes, or was in any way compromised.” Furthermore, no reliable
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1 evidence emerged after November 12, 2020, that there was any electronic manipulation
2 of voting tabulation.

3 b) No states had submitted legitimate, competing slates of electors. The governors of
4 Arizona, Georgia, Michigan, Pennsylvania Nevada, New Mexico, and Wisconsin had
5 each submitted a certificate of ascertainment pursuant to 3 U.S.C. § 6 naming the Biden
6 electors, not Trump electors. No other state official of any of those states had submitted a
7 purported certificate of ascertainment naming the Trump electors, and no legal authority
8 on behalf of any state had taken any action to support the contention that the Trump
9 electors were the legitimate electors for any of the seven states.

10 c) The State of Michigan mailed to every registered voter applications to vote by mail, not
11 absentee ballots. That action did not violate the state’s prohibition on sending absentee
12 ballots without a prior request. Moreover, there was no evidence upon which a
13 reasonable attorney would rely that illegal votes by absentee ballots in Michigan had
14 affected the outcome of the election.

15 d) There was no evidence upon which a reasonable attorney would rely that the election was
16 “stolen” or that the Democratic Party planned to “systematically flout existing election
17 laws for partisan advantage.”

18
19 Respondent objects to the allegations in Paragraph 55 of the NDC on the grounds
20 that they are conclusory, compound, ambiguous, vague, imprecise, overbroad, repetitive, and
21 intertwined with legal conclusions/argument. Notwithstanding these objections, Respondent
22 **DENIES** that his statements were false and misleading, or that he knew, or was grossly
23 negligent in not knowing, that they were false and misleading.

24 Respondent **DENIES** the allegations in subparagraph (a) for the reasons set out in his
25 response to paragraph 23 above, which he incorporates here by reference.

26 Respondent **DENIES** the allegation in subparagraph (b) that he claimed that “six
27 states had submitted legitimate, completing slates of electors.” The claim in the memo, as
28

1 the NDC acknowledges in paragraph 54(b), was that there were “dual slates of electors
2 from 7 states.” Respondent **DENIES** that the claim in the memo regarding dual slates of
3 electors from 7 states was false and misleading, or that Respondent knew or was grossly
4 negligent in not knowing it to be false and misleading. The statement was in fact true, just
5 as there were “dual slates of electors” from Hawaii in 1960 – the Vice President Nixon
6 electors who had been certified as victors, and the Senator Kennedy electors, both sets of
7 which met on the designated day in December 1960, cast their electoral votes, and
8 transmitted those votes to the President of the Senate. Respondent **ADMITS** that the
9 Biden electors had been certified by the respective Governors, just as the Nixon electors
10 had been certified by Hawaii’s Governor in 1960. Respondent **ADMITS** that, at the time
11 the memo was drafted, no other state authority had certified the Trump electors, just as no
12 other state authority had certified the Kennedy electors at the time those electors met in
13 December and cast their electoral votes.

14 Respondent **ADMITS** the allegation in subparagraph (c) that the Michigan
15 Secretary of State mailed absentee ballot *applications* rather than absentee *ballots* to every
16 voter in the state, and that the allegation was incorrectly stated in the six-page memo.
17 Respondent **DENIES** that the mistake was willful. Respondent **DENIES** that, at the time
18 he began preparing his memo, the Secretary’s action did not violate the state’s prohibition
19 on sending absentee ballots without a prior request. Michigan law provides that
20 applications for absentee ballots may be made (a) by a written request signed by the
21 voter; (b) On an absent voter application form provided for that purpose *by the clerk of*
22 *the city or township*; or (c) On a federal postcard application. Mich. Comp. Laws Ann.
23 § 168.759. There is no explicit provision in the law for the Secretary of State to
24 provide the application forms or mail them to every voter in the State, and the
25 Michigan Courts had held that even county clerks had no authority to send absentee
26 ballot applications unsolicited. *Taylor v. Currie*, 277 Mich. App. 85, 97, 743 N.W.2d
27 571, 578 (2007). The Secretary’s action was challenged in a Senate Elections
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1 Committee hearing by state Senator (and former Secretary of State) Ruth Johnson,
2 who described as “truly alarming” the Secretary’s “changes and attempts to centralize
3 certain election functions.” See Riley Beggin, *Michigan GOP lawmakers claim*
4 *Jocelyn Benson’s absentee ballot mailings illegal*, Bridge Michigan (June 24, 2020).⁴²
5 The action was also challenged in litigation. An intermediate court of appeals had
6 held that the holding in *Taylor* dealt with the authority of county clerks and therefore
7 did not control the issue of the Secretary of State’s authority. *Davis v. Sec’y of State*,
8 333 Mich. App. 588, 601, 963 N.W.2d 653, 660 (Sept. 16, 2020). Over a strong
9 dissent, which found that the statutory language unambiguously does not support that
10 the Secretary had the authority to distribute unsolicited applications for absentee
11 ballots, *id.* 963 N.W.2d at 664 (Meter, J., dissenting in part), the Court held that the
12 Secretary had “inherent authority” to send unsolicited applications to all registered
13 voters. *Id.* at 660 (majority opinion). An appeal of that decision to the Michigan
14 Supreme Court was pending when Respondent began preparing his memo, and
15 although the appeal was denied six days before Eastman’s memo was finalized (a
16 decision of which Dr. Eastman was unaware at the time), Justice Viviano dissented
17 from that denial, contending that the Court should have agreed to hear the case
18 because Judge Meter’s partial dissent concluding that the Secretary had “exceeded her
19 authority” “raise[d] a number of issues that this Court should address.” *Davis v. Sec’y*
20 *of State*, 506 Mich. 1040, 951 N.W.2d 911 (2020). Respondent **DENIES** that he ever
21 claimed, in the memo or otherwise, that the Secretary’s unsolicited mailing of absentee
22 ballot applications to every registered voter in the state had, standing alone, affected
23 the outcome of the election.

24 Respondent **DENIES** the allegation in subparagraph (d) that there was “no
25 evidence ... that the election was ‘stolen’ or that the Democratic Party planned to

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27 ⁴² <https://www.bridgemi.com/michigan-government/michigan-gop-lawmakers-claim-jocelyn-bensons-absentee-ballot-mailings-illegal>.

1 ‘systematically flout existing election laws for partisan advantage.’ In fact, there was
2 significant evidence of that claim at the time, including evidence in Pennsylvania of election
3 officials providing advance notice of defective mail-in ballots to Democrat operatives before
4 the law allowed; an apparently collusive suit between a Democrat-leaning NGO and the
5 Democrat Secretary of State in Pennsylvania to eliminate signature verification; coordination
6 between the Biden campaign and Democrat county election officials of an illegal “human
7 drop box” ballot harvesting effort in Wisconsin dubbed “Democracy in the Park,” *see Trump*
8 *v. Biden*, 951 N.W.2d 568, 590 (Dec. 14, 2020) (Roggensack, J., dissenting,⁴³ joined by)
9 (noting that “the 17,271 ballots that were collected in Madison parks did not comply with
10 the statutes”); M. D. Kittle, *Is Biden sponsoring Madison city voter event?*, Empower
11 Wisconsin (Sept. 25, 2020).⁴⁴ These and other efforts were subsequently described in an
12 important, eye-opening Time Magazine article by Molly Ball as a “conspiracy” by leftist
13 groups and anti-Trump Republicans. Headed by Mike Podhorzer, long-time Democrat
14 activist and senior advisor to the President of the AFL-CIO, one of the Democrat parties
15 strongest allies, Ball described the “conspiracy” as “a well-funded cabal of powerful people,
16 ranging across industries and ideologies, working together behind the scenes to influence
17 perceptions, change rules and laws, steer media coverage and control the flow of
18 information,” not to “rig” the election, they claimed, but to “fortify” it against Trump and his
19 supposed “assault on democracy.” Molly Ball, *The Secret History of the Shadow Campaign*
20 *that Saved the 2020 Election*, Time (Feb. 4, 2021).

21
22 56. By including these false and misleading statements as a basis for the alternative legal
23 strategies proposed in the six-page memo, respondent committed an act involving moral turpitude,
24 dishonesty, and corruption in willful violation of Business and Professions Code section 6106.

25 _____
26 ⁴³ The four justices in the majority found the challenge barred by laches and did not
address the legality of the program.

27 ⁴⁴ Available at [https://empowerwisconsin.org/is-bidensponsoring-madison-city-voter-](https://empowerwisconsin.org/is-bidensponsoring-madison-city-voter-event/)
28 [event/](https://empowerwisconsin.org/is-bidensponsoring-madison-city-voter-event/)

1 Respondent **DENIES** that any legal strategies were “proposed” in the six-page
2 memo. Respondent **DENIES** that his statements were false and misleading, or that he knew,
3 or was grossly negligent in not knowing, that they were false and misleading. Respondent
4 **DENIES** that highlighting illegality and fraud in the conduct of an election constitutes an act
5 involving moral turpitude, dishonesty, and corruption in violation of Business and
6 Professions Code section 6106, willful or otherwise.

7
8 57. A violation of section 6106 may result from intentional conduct or grossly negligent
9 conduct. Respondent is charged with committing intentional misrepresentation. However, should the
10 evidence at trial demonstrate that respondent committed misrepresentation as a result of gross
11 negligence, respondent must still be found culpable of violating section 6106 because
12 misrepresentation through gross negligence is a lesser included offense of intentional
13 misrepresentation.

14
15 Respondent **DENIES** that his assertions in the six-page memo were false and
16 misleading, or that he knew or was grossly negligent in not knowing them to be false and
17 misleading at the time they were made.

18
19 **COUNT SEVEN**

20 Case No. 21-O-11801
21 Business and Professions Code section 6106
22 [Moral Turpitude - Misrepresentation]

23 58. The allegations in paragraphs 22 through 25 are incorporated here by reference.

24 Respondent incorporates by reference his responses to paragraphs 22 through 25.

25
26 59. On or about January 6, 2021, during his speech to a crowd of tens of thousands of people
27 who attended a rally, promoted as a “Save America” march, held at the Ellipse of the National Mall
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1 in Washington, D.C., respondent stated that Dominion electronic voting machines had fraudulently
2 manipulated the election results during the November 3, 2020, presidential election and during the
3 January 5, 2021, run-off election in Georgia for its two Senate seats. Respondent stated that “[t]hey”
4 put ballots “in a secret folder in the machines, sitting there waiting until they know how many they
5 need,” and that after the polls closed, “unvoted ballots” were matched with “an unvoted voter” to
6 fraudulently change the election totals in favor of Joe Biden and the Democratic candidates in the
7 Georgia runoff election. Respondent further stated that analysis of the vote percentages showed that
8 “they were unloading the ballots from that secret folder, matching them—matching them to the
9 unvoted voter and voila we have enough votes to barely get over the finish line.”

10 Respondent objects to the allegations in Paragraph 59 of the NDC on the grounds
11 that they are conclusory, compound, ambiguous, vague, imprecise, overbroad, repetitive, and
12 intertwined with legal conclusions/argument. Notwithstanding these objections, Respondent
13 **ADMITS** that he spoke at a rally on the Ellipse of the National Mall on January 6, 2021, in
14 the exercise of his constitutionally-protected First Amendment rights to Freedom of Speech,
15 Freedom of Association, and Right to Petition the Government for Redress of Grievances.
16 Respondent has no direct knowledge of how the rally was promoted, and on that basis
17 **DENIES**, the allegation that it was “promoted as a “Save America’ march.” Respondent
18 **DENIES** that he ever mentioned “Dominion” during his speech, or that he “stated that
19 Dominion electronic voting machines had fraudulently manipulated the election results.”
20 Respondent **ADMITS** that he made the remaining statements attributed to him in Paragraph
21 59.

22
23 60. Respondent knew that these statements were false and misleading in that, as respondent
24 knew at the time:

- 25 a) There was no evidence upon which a reasonable attorney would rely of fraud through
26 electronic manipulation of Dominion voting tabulation machines. Respondent knew that
27 on or about November 12, 2020, the Elections Infrastructure Government Coordinating
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Council and the Election Infrastructure Sector Coordinating Executive Committees issued a joint statement which stated that “The 2020 presidential election was the most secure in American history” and “there was no evidence that any voting system deleted or lost votes, changed votes, or was in any way compromised.” Furthermore, no reliable evidence emerged after November 12, 2020, that there was any electronic manipulation of voting tabulation.

b) No reasonable expert in statistical analysis of election results would conclude that the vote percentages related to the Dominion voting machines indicated that the machines had been used to fraudulently manipulate the election results.

Respondent objects to the allegations in Paragraph 59 of the NDC on the grounds that they are conclusory, compound, ambiguous, vague, imprecise, overbroad, repetitive, and intertwined with legal conclusions/argument. Notwithstanding these objections, Respondent **DENIES** that his statements were false and misleading, or that he knew or was grossly negligent in not knowing that they were false and misleading at the time. Respondent **DENIES** the allegations in subparagraph (a) for the reasons set out in his response to Paragraph 23(a) above, which he incorporates here by reference. Based on that response and the expert analyses described therein, Respondent likewise **DENIES** the assertion in subparagraph (b) that “No reasonable expert in statistical analysis of election results would conclude that the vote percentages related to the Dominion voting machines indicated that the machines had been used to fraudulently manipulate the election results.”

61. By making these false and misleading statements in his speech to protestors on January 6, 2021, respondent committed an act involving moral turpitude, dishonesty, and corruption in willful violation of Business and Professions Code section 6106.

1 to adjourn the Joint Session of Congress, respondent wrote: “You think you can’t adjourn the
2 session because the [Electoral Count Act] says no adjournment, while the compelling evidence that
3 the election was stolen continues to build and is already overwhelming? The ‘siege’ is because YOU
4 and your boss did not do what was necessary to allow this to be aired in a public way so that
5 American people can see for themselves what happened.”

6
7 Respondent **ADMITS** that he sent an email to Greg Jacob at approximately 2:25 pm
8 EST in response to Mr. Jacob’s intemperate email of approximately 2:14 pm EST falsely
9 claiming: “thanks to your bullshit, we are now under siege,” language for which Mr. Jacob
10 later apologized.

11 65. Respondent knew that his statement that there was “compelling” and “overwhelming”
12 evidence that the election was “stolen” was false and misleading, in that, as respondent knew at the
13 time, there was no evidence upon which a reasonable attorney would rely that the election was
14 “stolen” by the Democratic Party or any other actors. In fact, respondent had been informed by
15 numerous credible sources, including the Attorney General of the United States, and knew that
16 numerous courts had held, that there was no evidence of widespread election fraud or illegality that
17 could have affected the outcome of the election.

18
19 Respondent objects to the allegations in Paragraph 65 of the NDC on the grounds
20 that they are conclusory, compound, ambiguous, vague, imprecise, overbroad, and
21 intertwined with legal conclusions/argument. Notwithstanding these objections, Respondent
22 **DENIES** that his assertion of “compelling” and “overwhelming” evidence of illegality and
23 fraud in the election—an assertion that is protected by the First Amendment’s Speech and
24 Petition Clauses—was false and misleading, or that he knew or was grossly negligent in not
25 knowing that it was false and misleading. Respondent **DENIES** the allegations in Paragraph
26 65 for the reasons set out in his responses to Paragraphs 3, 4, 5, and 11 above, which he
27 incorporates here by reference.

28

1 66. By stating to Jacob, with the intent of pressuring Pence to adjourn the Joint Session of
2 Congress, that there was “compelling” and “overwhelming” evidence that the election was “stolen,”
3 when respondent knew the statement was false and misleading, respondent committed an act
4 involving moral turpitude, dishonesty, and corruption in willful violation of Business and
5 Professions Code section 6106.

6
7 Respondent **DENIES** that his statements were false and misleading, or that he knew,
8 or was grossly negligent in not knowing, that they were false and misleading. Respondent
9 **DENIES** that highlighting illegality and fraud in the conduct of an election, particularly in a
10 speech protected by the First Amendment, constitutes an act involving moral turpitude,
11 dishonesty, and corruption in violation of Business and Professions Code section 6106,
12 willful or otherwise.

13
14 67. A violation of section 6106 may result from intentional conduct or grossly negligent
15 conduct. Respondent is charged with committing intentional misrepresentation. However, should the
16 evidence at trial demonstrate that respondent committed misrepresentation as a result of gross
17 negligence, respondent must still be found culpable of violating section 6106 because
18 misrepresentation through gross negligence is a lesser included offense of intentional
19 misrepresentation.

20
21 Respondent **DENIES** that his statements to Mr. Jacob were false and misleading, or
22 that he knew or was grossly negligent in not knowing them to be false and misleading at the
23 time they were made.

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COUNT NINE

Case No. 21-O-11801
Business and Professions Code section 6106
[Moral Turpitude – Misrepresentation]

68. On or about January 18, 2021, the American Mind, a publication of the Claremont Institute, published an article written by respondent regarding the November 3, 2020, presidential election entitled “Setting the Record Straight on the POTUS ‘Ask’.” In the article, respondent stated that illegal or fraudulent conduct had occurred during the election, including:

- a) “in Fulton County, Georgia, where suitcases of ballots were pulled from under the table after election observers had been sent home for the night;”
- b) “in parts of Wayne County (Detroit), Michigan, where there are more absentee votes cast than had been requested;” and
- c) “in Antrim County, Michigan, where votes were electronically flipped from Trump to Biden.”

Respondent **ADMITS** that, in his American Mind article (which is a publication protected by the First Amendment’s Speech and Press Clauses), he wrote that “A large portion of the American citizenry believes the illegal actions by partisan election officials in a few states have thrown the election. They saw it with their own eyes,” and that he then gave a litany of examples of fraud or illegality, including the three cited in Paragraph 68—examples that he wrote are “what the American people know, or strongly suspect.”

69. Respondent knew that these statements were false and misleading in that, as respondent knew at the time:

- a) Fulton County election officials did not remove a suitcase of hidden ballots from under a table out of view of election observers and fraudulently process the ballots. In fact, video evidence established that the ballots at issue were in a room filled with people including election monitors, until the boxes—not suitcases— containing the ballots were placed

1 under a table in preparation for the poll watchers to leave for the evening. Those boxes
2 were reopened and their contents retrieved and scanned before poll watchers left when
3 the state official monitor intervened, instructing the workers that they should remain to
4 tabulate the votes. Furthermore, based upon the claim of fraudulent conduct, the Georgia
5 Secretary of State conducted an investigation and determined that the video evidence did
6 not show secreting and counting of illegal ballots, and there was no evidence of improper
7 activity.

- 8 b) The State of Michigan mailed to every registered voter applications to vote by mail, not
9 absentee ballots. That action did not violate the state’s prohibition on sending absentee
10 ballots without a prior request. Furthermore, while Trump supporters made public claims
11 that hundreds of thousands of absentee ballots were sent to voters without a prior request,
12 the Michigan Senate Oversight Committee found that that “no evidence [was] presented
13 to the Committee” supporting that claim, and it appeared that many who claimed to have
14 received an unsolicited ballot actually received an absentee-ballot application, which is
15 legal under Michigan law. There was also no evidence that election workers in Wayne
16 County ran the same ballots through a tabulator multiple times. Moreover, there was no
17 evidence upon which a reasonable attorney would rely that illegal votes by absentee
18 ballots in Michigan had affected the outcome of the election.
- 19 c) There was no evidence upon which a reasonable attorney would rely that votes were
20 “electronically flipped from Trump to Biden” in Antrim County, Michigan.

21
22 Respondent objects to the allegations in Paragraph 69 of the NDC on the grounds
23 that they are conclusory, compound, ambiguous, vague, imprecise, overbroad, and
24 intertwined with legal conclusions/argument. Notwithstanding these objections, Respondent
25 **DENIES** that the statements contained in his American Mind article were false and
26 misleading, or that he knew, or was grossly negligent in not knowing, them to be false and
27 misleading at the time.

1 Respondent **OBJECTS** to the allegations in subparagraph (a) as duplicative of those
2 contained in Paragraph 46(b), and incorporates his response to Paragraph 46(b) here by
3 reference.

4
5 70. By making these statements, when respondent knew they were false and misleading, and
6 with the intent to encourage the general public to question the legitimacy of the election results,
7 respondent committed an act involving moral turpitude, dishonesty, and corruption in willful
8 violation of Business and Professions Code section 6106.

9
10 Respondent **DENIES** that his statements were false and misleading, or that he knew,
11 or was grossly negligent in not knowing, that they were false and misleading. Respondent
12 **ADMITS** that American Citizens have the right to question illegality and fraud in the
13 conduct of their elections, and that his intent in making those statements was to expose such
14 illegality and fraud, as was his constitutional right under the First Amendment. Respondent
15 **DENIES** that highlighting illegality and fraud in the conduct of an election, particularly in a
16 speech protected by the First Amendment, constitutes an act involving moral turpitude,
17 dishonesty, and corruption in violation of Business and Professions Code section 6106,
18 willful or otherwise.

19
20 71. A violation of section 6106 may result from intentional conduct or grossly negligent
21 conduct. Respondent is charged with committing intentional misrepresentation. However, should the
22 evidence at trial demonstrate that respondent committed misrepresentation as a result of gross
23 negligence, respondent must still be found culpable of violating section 6106 because
24 misrepresentation through gross negligence is a lesser included offense of intentional
25 misrepresentation.

26 ///

1 unilaterally adjourn the Joint Session without counting the electoral votes in the hope
2 that Republican legislatures in the seven state would later appoint or certify a slate of
3 Trump electors;

- 4 c) In an email to Jacob sent at approximately 6:09 pm on January 6, 2021, approximately
5 one-half hour after Capitol Police had cleared and secured the Capital building of
6 protestors and Congressional leaders had announced that they would proceed with
7 counting the electoral votes, respondent stated that “adjourn[ing] to allow the state
8 legislatures to continue their work” was the “most prudent course”; and
9 d) In an email to Jacob sent at approximately 11:44 p.m. on January 6, 2021, shortly after
10 the House and Senate resumed the Joint Session to count electoral votes, respondent
11 stated, “I implore you to consider one more relatively minor violation [of the law] and
12 adjourn for 10 days.”

13 Respondent objects to the allegations in Paragraph 73 of the NDC on the grounds
14 that they are conclusory, compound, ambiguous, vague, imprecise, overbroad, and
15 intertwined with legal conclusions/argument. Notwithstanding these objections, Respondent
16 **DENIES** that he “repeatedly proposed and sought to encourage that Pence exercise
17 unilateral authority to disregard the electoral votes of certain states.”

18 Respondent **ADMITS** that the language quoted in subparagraph (a) is contained in
19 the draft two-page memo, which was a draft component of the more complete, six-page
20 memo, but he **DENIES** that the memo was provided to Vice President Pence or members
21 of Pence’s staff.

22 Respondent **ADMITS** that the phrases quoted in subparagraph (b) are among the
23 nine scenarios discussed in the six-page memo, but he **DENIES** that the memo advocates
24 for (rather than merely describes) any particular scenario.

25 Respondent **ADMITS** that the language quoted in subparagraph (c) is contained in
26 the email he sent to Mr. Jacob at approximately 6:09 pm EST on January 6, 2021.
27 Respondent has no direct knowledge regarding the timing of when Capitol Police had
28

1 cleared and secured the Capitol building and therefore **DENIES** that allegation in
2 subparagraph (c).

3 Respondent **ADMITS** that the quoted language in subparagraph (d), except for the
4 bracketed portion, is contained in his email to Mr. Jacob of approximately 11:44 pm EST
5 on January 6, 2021. Respondent **ADMITS** that Mr. Jacob was of the view that an
6 adjournment would violate the Electoral Count Act. Respondent **DENIES** that he agrees
7 with that assessment. Section 16 of the Electoral Count Act, 3 U.S.C. § 16, expressly
8 distinguishes between the Joint Session of Congress being “dissolved” and “recess[ed].”
9 The former is prohibited by the Act “until the count of electoral votes shall be completed
10 and the result declared,” and Respondent never advised that the Joint Session should be
11 “dissolved.” A “recess” is likewise prohibited “unless a question shall have arisen in
12 regard to counting any such votes,” which was precisely the situation that presented itself,
13 serious questions having been raised regarding the counting of electoral votes from several
14 states. Moreover, even if the Electoral Count Act prohibited the Vice President from
15 acceding to requests from more than a hundred state legislators for a brief delay in the
16 proceedings to allow time for further investigation of the impact that illegality and fraud
17 had on the election results, Respondent **DENIES** that a statute can interfere with powers
18 given directly by the Constitution to the Vice President to “open” electoral certificates and,
19 implicitly, to make a judgement about whether further investigation was warranted to assess
20 the validity of electoral certificates in the face of what the Vice President himself
21 acknowledged was “significant allegations of voting irregularities and numerous instances
22 of officials setting aside state election law.” *See, e.g., Marbury v. Madison*, 1 Cranch (5
23 U.S.) 137, 177 (1803) (“an act of the legislature, repugnant to the constitution, is void.”).

24
25 74. Respondent knew that the courses of action he proposed to Pence were contrary to and
26 unsupported by the historical record, contrary to and unsupported by established legal authority
27 and precedent, including the Electoral Count Act and the Twelfth Amendment, and based on the
28

1 false premise that the seven states at issue had transmitted alternate slates of electors.
2 Respondent’s legal theory to support his proposed courses of action was based on misinterpreted
3 historical sources, misinterpreted law review articles, and law review articles which he knew, or
4 was grossly negligent in not knowing, were themselves fundamentally flawed, such that no
5 reasonable attorney with expertise in constitutional or election law would conclude that Pence was
6 legally authorized to take the actions that respondent proposed. Moreover, in the course of an
7 email exchange with another individual in early October 2020, respondent himself had recognized
8 that these courses of action were improper. In that earlier email exchange, respondent stated that
9 he he did not agree that Pence, who serves as President of the Senate, could determine which votes
10 to count on January 6, 2021, because “3 U.S.C. § 12 says merely that [the President of the Senate]
11 is the presiding officer, and then it spells out specific procedures, presumptions, and default rules
12 for which slates will be counted. Nowhere does it suggest that the President of the Senate gets to
13 make the determination on his own. § 15 doesn’t, either.” In that earlier email exchange,
14 respondent further stated that he did not agree that, in the event of a dispute between a state
15 legislature and the state’s governor or popular vote regarding the appointment of electors, the
16 legislature determines the appointment of electors, stating “I don’t think [Article II] entitles the
17 Legislature to change the rules after the election and appoint a different slate of electors in a
18 manner different than what was in place on election day. And 3 U.S.C. § 15 gives dispositive
19 weight to the slate of electors that was certified by the Governor in accord with 3 U.S.C. § 5.”

20
21 Respondent objects to the allegations in Paragraph 74 of the NDC on the grounds
22 that they are conclusory, compound, ambiguous, vague, imprecise, overbroad, and
23 intertwined with legal conclusions/argument. Notwithstanding these objections, Respondent
24 **OBJECTS** to the allegations of Paragraph 74 as duplicative of those contained in Paragraph
25 18, and **DENIES** the allegations for the reasons set out in his response to Paragraph 18,
26 which he incorporates here by reference.

1 75. Respondent failed to state in either the two-page or six-page memo that the courses of
2 action he proposed to Pence were contrary to and unsupported by the historical record, and that his
3 legal theory was primarily based on law review articles and contrary to and unsupported by
4 established legal authority and precedent.

5
6 Respondent objects to the allegations in Paragraph 75 of the NDC on the grounds
7 that they are conclusory, compound, ambiguous, vague, imprecise, overbroad, and
8 intertwined with legal conclusions/argument. Notwithstanding these objections, Respondent
9 **DENIES** that he proposed any particular course of action in the six-page memo (of which
10 the two-page memo was a draft component). Respondent **DENIES** that his legal analysis
11 was “primarily based on law review articles.” It was instead based both on numerous law
12 review articles and the historical examples and extensive legislative debates references in
13 those articles, which Respondent independently reviewed. Respondent **DENIES** that the
14 scenario of a brief delay to allow for investigation of the impact of illegality and fraud on
15 the election was without historical precedent. In fact, a lengthy delay in the counting of
16 electoral votes occurred in 1877 following the contested Hayes-Tilden election of 1876.
17 Respondent **DENIES** that the contention that the Vice President had authority to assess the
18 validity of contested electoral votes was without historical precedent. In fact, Vice
19 President Adams in 1797, Vice President Jefferson in 1801, and Vice President Nixon in
20 1961 had all exercised such authority. The President Pro Tem of the Senate (the office of
21 Vice President being vacant at the time) also exercised such authority in 1857 in
22 determining to count votes from Wisconsin that had not been cast on the “uniform” date
23 specified by Congress.

24
25 76. In discussions with Pence and Jacob on January 4 and 5, 2021, respondent conceded
26 that the positions he was urging Pence to take were contrary to historical practice, violated several
27 provisions of statutory law, and would likely be unanimously rejected by the Supreme Court.

28

1 Moreover, at approximately 12:14 p.m. on January 6, 2021, Jacob sent an email to respondent
2 which stated, “I just don’t in the end believe that there is a single Justice on the United States
3 Supreme Court, or a single judge on any of our Courts of Appeals, who is as ‘broad minded’ as
4 you when it comes to the irrelevance of statutes enacted by the United States Congress, and
5 followed without exception for more than 130 years.” The email closed by stating that Jacob
6 “ha[d] run down every legal trail placed before me to its conclusion, and I respectfully conclude
7 that as a legal framework, it is a results oriented position that you would never support if
8 attempted by the opposition, and essentially entirely made up.” Nevertheless, in subsequent emails
9 sent to Jacob on January 6, 2021, at approximately 6:09 pm and 11:44 pm, respondent continued
10 to urge Pence to take unilateral action to adjourn the Joint Session and so delay the counting of
11 electoral votes.

12
13 Respondent objects to the allegations in Paragraph 76 of the NDC on the grounds
14 that they are conclusory, compound, ambiguous, vague, imprecise, overbroad, and
15 intertwined with legal conclusions/argument. Notwithstanding these objections, Respondent
16 **DENIES** that he urged Pence to unilaterally reject electoral votes.

17 Respondent **ADMITS** that he urged Pence to accede to requests from more than a
18 hundred state legislators to delay the electoral count proceedings for a brief period in order
19 to allow the state legislatures in the contested states time to assess the impact, if any, that
20 acknowledged illegality and fraud had on the results of the election.

21 Respondent **DENIES** that he conceded such a brief delay was contrary to historical
22 practice, as Congress itself had provided for a multi-month delay following the contested
23 election of 1876.

24 Respondent **DENIES** that he conceded that a delay would violate several
25 provisions of statutory law, although he **ADMITS** that he acknowledged that was Mr.
26 Jacob’s position. Section 16 of the Electoral Count Act, 3 U.S.C. § 16, expressly
27 distinguishes between the Joint Session of Congress being “dissolved” and “recess[ed].”
28

1 The former is prohibited by the Act “until the count of electoral votes shall be completed
2 and the result declared,” and Respondent never advised that the Joint Session should be
3 “dissolved.” A “recess” is likewise prohibited “unless a question shall have arisen in
4 regard to counting any such votes,” which was precisely the situation that presented itself,
5 serious questions having been raised regarding the counting of electoral votes from several
6 states. Moreover, even if the Electoral Count Act prohibited the Vice President from
7 acceding to requests from more than a hundred state legislators for a brief delay in the
8 proceedings to allow time for further investigation of the impact that illegality and fraud
9 had on the election results, Respondent expressly noted during the discussions with Mr.
10 Jacob on January 5, 2021, that the Act itself would therefore be unconstitutional.

11 Respondent **DENIES** that he conceded that his recommendation for a brief delay
12 “would likely be unanimously rejected by the Supreme Court.” In fact, he expressly wrote
13 to Mr. Jacob that such an action “had a fair chance of being approved (or at least not
14 enjoined) by the Courts.”

15 Respondent **ADMITS** that the language quoted in Paragraph 76 from Mr. Jacob’s
16 email of approximately 12:14 pm EST is contained in that email, but **DENIES** that he
17 agreed with Mr. Jacob’s assessment.

18
19 77. By proposing to Pence that he had the legal authority to and should act unilaterally to
20 resolve purported disputes regarding electoral votes on January 6, 2021, or that he had the legal
21 authority unilaterally to delay certification of the votes, respondent advanced a radical and
22 incorrect theory of constitutional law and election law, based on misinterpreted historical sources,
23 misinterpreted law review articles, and law review articles which he knew, or was grossly
24 negligent in not knowing, were themselves fundamentally flawed, and on the false premise that the
25 seven states at issue had transmitted alternate slates of electors, such that no reasonable attorney
26 with expertise in constitutional law or election law would conclude that Pence was legally
27 authorized to take the actions that respondent proposed. Respondent advanced this theory and
28

1 proposed that Pence take these actions where the outcome of a presidential election was at stake,
2 courts were unlikely to be in a position to intervene, and the intended result of the proposed
3 actions, the reversal of the outcome of the 2020 presidential election, risked significant foreseeable
4 harm. By advancing this theory and proposing that Pence take these actions under the
5 circumstances set forth above, respondent committed acts of moral turpitude, dishonesty, and
6 corruption in willful violation of Business and Professions Code section 6106.

7
8 Respondent objects to the allegations in Paragraph 77 of the NDC on the grounds
9 that they are conclusory, compound, ambiguous, vague, imprecise, overbroad, and
10 intertwined with legal conclusions/argument. Notwithstanding these objections, Respondent
11 **DENIES** that he “propos[ed] to Pence that he had the legal authority to and should act
12 unilaterally to resolve purported disputes regarding electoral votes on January 6, 2021, he
13 urged Pence to unilaterally reject electoral votes.” Rather, he expressly stated to Pence
14 during the Oval Office meeting on January 4, 2021 that whether he had such authority was
15 an “open question,” but that even if he had such authority, it would be foolish to exercise it
16 absent certification of alternate electors by the legislatures of the states. That account of
17 the discussion was confirmed in a New York Times article by a “person close to Mr.
18 Pence,” who said that “Mr. Eastman acknowledged that the Vice President most likely did
19 not have that power.” Michael S. Schmidt and Maggie Haberman, *The Lawyer Behind the*
20 *Memo on How Trump Court Stay in Office*, New York Times (Oct. 2, 2021).⁴⁵

21 Respondent **DENIES** that his advice to accede to requests from over a hundred state
22 legislators for a brief delay was either “radical” or “incorrect,” or that he knew or was
23 grossly negligent in not knowing at the time that it was “radical” or incorrect.” On the
24 contrary, Congress itself had authorized a multi-month delay in the elector count proceedings
25 following the disputed election of 1876. Respondent **DENIES** that he “misinterpreted

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27 ⁴⁵ Available at [https://www.nytimes.com/2021/10/02/us/politics/john-eastman-trump-](https://www.nytimes.com/2021/10/02/us/politics/john-eastman-trump-memo.html)
28 [memo.html](https://www.nytimes.com/2021/10/02/us/politics/john-eastman-trump-memo.html).

1 historical sources” or “law review articles. Respondent **DENIES** that he knew, or was
2 grossly negligent in not knowing, that the law review were “fundamentally flawed.”
3 Respondent **DENIES** that his assertion that alternative slates of electors had been
4 submitted from seven states was a “false premise,” given that they were identically situated
5 to the Senator Kennedy electors in Hawaii in 1960 following initial certification of that
6 election for Vice President Nixon. Respondent **DENIES** that “no reasonable attorney with
7 expertise in constitutional law or election law would conclude that Pence was legally
8 authorized to” accede to requests from numerous state legislators for a brief delay in the
9 electoral count proceedings. Several constitutional scholars have advocated for or at least
10 acknowledged the tenability of position that the Vice President has the preeminent
11 authority to make judgements about the legality of disputed electoral votes, as noted in
12 Respondent’s response to Paragraph 6 above. Moreover, Vice President Pence’s own
13 General Counsel, Greg Jacob, had acknowledged in a memo to the Vice President dated
14 December 8, 2020, that “[s]ome scholars argue that under the text of the Twelfth
15 Amendment, it is the sole responsibility of the Vice President to count electoral votes, and
16 that it is accordingly also the Vice President’s sole responsibility to determine whether or
17 not disputed electoral votes should be counted,” and that the Electoral Count Act, which
18 relegates the Vice President to a merely ministerial role, is therefore unconstitutional.
19 Information Memorandum, Gregory Jacob to Vice President Pence (Dec. 8, 2020).⁴⁶ Mr.
20 Jacob further noted that, “[b]ecause there are only a few instances of historical practice
21 under the Electoral Count Act, however, the question of its constitutionality remains
22 muddy, and scholars continue to this day to debate the constitutionally appropriate role of
23 the Vice President in resolving objections to electoral votes.” *Id.* Respondent **DENIES**
24 that advancing a legal position on behalf of his client, where the legal issues remain
25 “muddy” and are the subject of continuing scholarly debate, is a valid ground for
26 discipline. Indeed, Under California’s “judgment immunity rule,” an attorney is immune

27 ⁴⁶ Available at <https://www.politico.com/f/?id=0000017f-daf9-d522-ab7f-def9bf4d0000>.

1 from liability for legal advice if the law was unsettled at the time attorney gave the
2 professional advice and his advice was based on the exercise of informed judgment.
3 *Mutuelles Unies v. Kroll & Linstrom*, 957 F.2d 707, 712 (9th Cir. 1992) (citing *Davis v.*
4 *Damrell*, 119 Cal.App.3d 883, 174 Cal.Rptr. 257, 259 (1981)).

5 Respondent **ADMITS** that, given what Vice President Pence himself
6 acknowledged were “significant allegations of voting irregularities and numerous instances
7 of officials setting aside state election law”—that is, acting unconstitutionally—and given
8 the serious allegations of illegality and fraud that had been identified by more than a
9 hundred state legislatures and that, in their view, called into question the validity of the
10 existing election certifications, the “outcome of a presidential election was at stake.”
11 Respondent **DENIES** that the “intended result” of his advice to delay the proceedings was
12 the “reversal of the outcome of the 2020 presidential election.” On the contrary, as
13 outlined in his six-page memo, the “delay” scenario sought to provide additional time for
14 investigation, and that, “If, after investigation, proven fraud and illegality is insufficient to
15 alter the results of the election, the original slate of electors would remain valid. **BIDEN**
16 **WINS.**” (emphasis in original)). Respondent **ADMITS** that that “courts were unlikely to be
17 in a position to intervene” because, as Harvard Law Professor Lawrence Tribe has
18 previously argued, questions arising out of the electoral count process are likely non-
19 justiciable political questions. Respondent **DENIES** that a delay to assess the impact of
20 acknowledged illegality and fraud in the election, rather than the illegality and fraud itself,
21 “risked significant foreseeable harm.”

22 Respondent **DENIES** that highlighting illegality and fraud in the conduct of an
23 election and proposing to the government official with primary responsibility over the
24 electoral counting process to merely accede to requests from more than a hundred state
25 legislators to “delay” the proceedings for further investigation to determine whether the
26 acknowledged illegality and fraud in the conduct of the election altered the results of the
27 election constitutes an act involving moral turpitude, dishonesty, and corruption in violation
28

1 of Business and Professions Code section 6106, willful or otherwise. On the contrary, the
2 right to petition the government for redress of grievances is explicitly protected by the First
3 Amendment.

4
5 78. A violation of section 6106 may result from intentional conduct or grossly negligent
6 conduct. Respondent is charged with committing intentional acts of moral turpitude, dishonesty, or
7 corruption. However, should the evidence at trial demonstrate that respondent committed the acts
8 as a result of gross negligence, respondent must still be found culpable of violating section 6106
9 because acts of moral turpitude, dishonesty, or corruption through gross negligence are a lesser
10 included offense of intentional acts of moral turpitude, dishonesty, or corruption.

11
12 Respondent **DENIES** that his recommendation to Vice President Pence—a petition
13 to the responsible official in Government for redress of grievances that is protected by the
14 First Amendment—was conduct that was contrary to law or historical or judicial precedent,
15 or that he knew of was grossly negligent in not knowing, that such conduct was contrary to
16 law or historical or judicial precedent.

17
18 **COUNT ELEVEN**

19 Case No. 21-O-11801
20 Business and Professions Code section 6106
21 [Moral Turpitude]

22 79. The allegations in paragraphs 8 through 31 above are incorporated here by reference.

23 Respondent incorporates by reference his responses to paragraphs 8 through 31.

24
25 80. On or about January 6, 2021, respondent spoke to a crowd of tens of thousands of
26 people who attended a rally, promoted as a “Save America” march, at the Ellipse of the National
27 Mall in Washington, D.C. During his speech, respondent stated to the crowd that fraud had
28 occurred in the November 3, 2020, presidential election, including a claim that “dead people had

1 voted” and that Dominion electronic voting machines had fraudulently manipulated the election
2 results. Respondent made these statements with the intent to convince the listener that the outcome
3 of the presidential election had been affected by fraud. Respondent further stated, “[A]ll we are
4 demanding of Vice President Pence is this afternoon at 1:00 he let the legislators of the state look
5 into this so we get to the bottom of it . . .” Respondent made these statements with the intent to
6 encourage the crowd of protestors to doubt the results of the election and to believe that Pence had
7 the legal authority to delay the counting of electoral votes.

8
9 Respondent objects to the allegations in Paragraph 80 of the NDC on the grounds
10 that they are conclusory, compound, ambiguous, vague, imprecise, overbroad, and
11 intertwined with legal conclusions/argument. Notwithstanding these objections, Respondent
12 **ADMITS** that he spoke to the “Save America” rally at the Ellipse of the National Mall in
13 Washington, D.C., on January 6, 2021. He **ADMITS** that there were at least “tens of
14 thousands of people” in attendance, and has estimated, based on aerial photographs of
15 crowds at similar events on the National Mall, that the crowd was likely somewhere between
16 250,000 and 500,000 people. Respondent **ADMITS** that he made the statements quoted
17 and attributed to him in Paragraph 80 of the NDC. Respondent **DENIES** that the crowd at
18 the rally were “protestors” rather than rally attendees. Respondent **DENIES** that his intent
19 was to “encourage the crowd of protestors to doubt the results of the election” rather than
20 to highlight the acknowledged illegality and serious allegations of fraud in the conduct of
21 the election. Respondent **DENIES** that his intent was to encourage the crowd to believe
22 anything about the Vice President’s authority under the Twelfth Amendment; he merely
23 stated that “we”—which is to say, Respondent, the President, and more than a hundred
24 state legislators—had asked the Vice President to delay the counting of electoral votes for
25 a brief period of time to allow state legislatures the opportunity to assess whether
26 acknowledged illegality and fraud in the conduct of the election had affected the election
27 results.

28

1 81. By telling the crowd of protestors, from a position of authority as a professor and
2 purported “preeminent constitutional scholar,” that fraud had occurred in the election, that dead
3 people had voted, that electronic voting machines had been used to fraudulently alter the election
4 results, that Pence had authority to delay the counting of votes, and that Pence did not deserve to
5 be in office if he did not delay the counting of votes, respondent made false and misleading
6 statements that contributed to provoking the crowd to assault and breach the Capitol in an effort to
7 intimidate Pence and prevent the electoral count from proceeding, when such harm was
8 foreseeable, and thereby committed an act of moral turpitude, dishonesty, and corruption in willful
9 violation of Business and Professions Code section 6106.

10
11 Respondent objects to the allegations in Paragraph 81 of the NDC on the grounds
12 that they are conclusory, compound, ambiguous, vague, imprecise, overbroad, and
13 intertwined with legal conclusions/argument. Notwithstanding these objections, Respondent
14 **ADMITS** that at the time of his speech he was a professor. Respondent **ADMITS** that Rudy
15 Giuliani introduced him as “one of the preeminent constitutional scholars in the United
16 States.” Respondent **ADMITS** that fraud and illegality had occurred in the election, that
17 votes had been cast on behalf of dead people, and that he made those truthful statements to
18 the crowd of people at the rally. Respondent **ADMITS** that he had been advised by
19 statistical and forensic experts that voting machines had suspense folders into which
20 ballots could be pre-loaded and then fraudulently including in vote tallies, as was proved to
21 have actually happened in the New York mayoral race in June 2021. Respondent
22 **ADMITS** that those same experts conveyed to him on the early evening of January 5,
23 2021, that if such a fraud were to occur in the Georgia run-off election for U.S. Senate, a
24 dramatic increase in the number of total votes reported would occur late in the counting
25 process, and that the counting process itself would be shut down for a period of time.
26 Respondent **ADMITS** that just such an increase in total votes was reported late in the
27 evening on January 5, 2021, following the close of polls in Georgia, and that just such a
28

1 shut-down occurred. Respondent **ADMITS** that he conveyed that expert analysis to the
2 crowd assembled at the Ellipse on the morning of January 6, 2021. Respondent **DENIES**
3 that he made any statement to the crowd about Vice President Pence’s authority.
4 Respondent **DENIES** that he told the assembled crowd that “*Pence* did not deserve to be in
5 office if he did not delay the counting of votes.” Rather, as the transcript of his remarks
6 demonstrates, he stated that “*anybody* that is not willing to stand up to” get to the bottom
7 of whether acknowledged illegality and fraud in the conduct of the election had affected
8 the election results “does not deserve to be in the office.” “Anybody” would include not
9 just Vice President Pence, but other members of Congress as well as the members of the
10 several state legislatures who were being asked to investigate the acknowledged illegality
11 and fraud and to assess whether that affected the election results.

12 Respondent **DENIES** that his statements were false and misleading, or that he
13 knew or was grossly negligent in not knowing at the time that they were false and
14 misleading. Respondent **DENIES** that his statements provoked or “contributed to
15 provoking the crowd to assault and breach the Capitol in an effort to intimidate Pence and
16 prevent the electoral count from proceeding.” On the contrary, Respondent made no
17 statement provoking or inciting the crowd to violence of any kind, much less inciting it to
18 “imminent” violence as the Supreme Court has held to be required for speech to be
19 unprotected under the First Amendment. *See, e.g., Brandenburg v. Ohio*, 395 U.S. 444
20 (1969). The bar investigators have offered no evidence to support the allegation that
21 attendees at the Ellipse rally who heard Respondent’s short speech at about 10:45 a.m.
22 were among those who “assault[ed] and breach[ed] the Capitol” more than three hours
23 later. Respondent is unaware of any such evidence, and to his knowledge, no allegation to
24 that effect was made in the criminal indictments brought against any of the more than 900
25 individuals who were charged with crimes arising out of the breach of the Capitol.
26 Respondent **DENIES** that the assault and breach of the Capitol was a foreseeable response
27 to his brief speech, particularly since the President himself, who spoke after Respondent,
28

1 expressly acknowledged that “everyone here will soon be marching over to the Capitol
2 building to peacefully and patriotically make your voices heard,” a quintessential
3 invocation of the Freedom of Speech and the right to Petition the Government for Redress
4 of Grievances protected by the First Amendment. Respondent **DENIES** that his brief
5 speech, protected by the First Amendment, was “an act of moral turpitude, dishonesty, and
6 corruption in willful violation of Business and Professions Code section 6106.”
7

8 82. A violation of section 6106 may result from intentional conduct or grossly negligent
9 conduct. Respondent is charged with committing intentional acts of moral turpitude, dishonesty, or
10 corruption. However, should the evidence at trial demonstrate that respondent committed the acts
11 as a result of gross negligence, respondent must still be found culpable of violating section 6106
12 because acts of moral turpitude, dishonesty, or corruption through gross negligence are a lesser
13 included offense of intentional acts of moral turpitude, dishonesty, or corruption.
14

15 Respondent **DENIES** that his brief speech—a speech protected by the First
16 Amendment—was false and misleading or otherwise constituted “acts of moral turpitude,
17 dishonesty, or corruption,” or that he knew or was grossly negligent in not knowing that
18 the speech was false and misleading or otherwise constituted “acts of moral turpitude,
19 dishonesty, or corruption.”
20

21 AFFIRMATIVE DEFENSES

22 FIRST AFFIRMATIVE DEFENSE

23 (Failure to State Sufficient Facts)

24 The NDC, and each of its purported counts, fails to state, by clear and convincing
25 evidence, that there are sufficient facts to provide a basis for discipline.

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SECOND AFFIRMATIVE DEFENSE

(Duplicative Charges)

The NDC contains inappropriate, unnecessary, and immaterial duplicative charges. *Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060; *In the Matter of Lilley* (Rev. Dept. 1991) 1 Cal. State Bar Ct.Rptr. 476, 585.

THIRD AFFIRMATIVE DEFENSE

(Lack of Materiality)

The facts on which some or all of the Notice of Disciplinary Charges are based allege immaterial or irrelevant omissions or statements.

FOURTH AFFIRMATIVE DEFENSE

(No Willful Misconduct)

The facts on which some or all of the counts in the NDC are based, to the extent Respondent’s assertions were incorrect at all, constitute mistake, inadvertence, neglect, or error, and do not rise to the level of willful misconduct nor gross negligence.

FIFTH AFFIRMATIVE DEFENSE

(No Prior Discipline)

Prior to the conduct alleged in the NDC, Respondent practiced law for more than 20 years with no record of discipline. If and to the extent Respondent receives discipline for the conduct alleged in the NDC, mitigation credit should be applied under Rule 1.6(a) of the State Bar Rules of Procedure.

SIXTH AFFIRMATIVE DEFENSE

(Good Character)

Respondent exhibits exemplary good character, as will be attested to in the course of this proceeding by a wide range of references in the legal and general communities. If and to the

1 extent Respondent is disciplined for the conduct alleged in the NDC, mitigation credit should be
2 applied under Rule 1.6(f) of the State Bar Rules of Procedure.

3
4 **SEVENTH AFFIRMATIVE DEFENSE**

5 (Remoteness in Time/Subsequent Rehabilitation)

6 In the two years that have elapsed since the time of the conduct alleged in the NDC,
7 Respondent has practiced law without incident. If and to the extent Respondent is disciplined for
8 the conduct alleged in the NDC, mitigation credit should be applied under Rule 1.6(h) of the State
9 Bar Rules of Procedure.

10
11 **EIGHTH AFFIRMATIVE DEFENSE**

12 (Violation of U.S. and California Constitutions’

13 Freedoms of Speech, Association, and Political Affiliation)

14 The California Bar lacks jurisdiction over the conduct of the Respondent referred to in the
15 Charges because the First Amendment and its California counterpart provide absolute protection
16 for political speech and legal opinion given in good faith on a matter of public importance.
17 Respondent also cannot be penalized for his political affiliations, associations, or speech. *See*,
18 *e.g.*, *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1054 (1991) (Kennedy, J., joined by Justices
19 Marshall, Blackmun, and Stevens) (“disciplinary rules governing the legal profession cannot
20 punish activity protected by the First Amendment, and [the] First Amendment protection survives
21 even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice
22 of law.”); *In re Kaiser*, 759 P.2d 392,397 (Wash. S.Ct. 1988) (“Where political speech is at issue,
23 disciplinary rules are subject to exacting scrutiny under the First Amendment”) (citing *In re*
24 *Primus*, 436 U.S. 412 (1978); *NAACP v. Button*, 371 U.S. 415, 438 (1963)). As was the case in
25 *Gentile*, “this case involves punishment of pure speech in the political forum. Petitioner engaged
26 not in solicitation of clients or advertising for his practice, as in our precedents from which some
27 of our colleagues would discern a standard of diminished First Amendment protection. His words
28

1 were directed at public officials and their conduct in office.” *Gentile*, 501 U.S. at 1034. Like
2 Nevada in *Gentile*, California here “seeks to punish the dissemination of information relating to
3 alleged governmental misconduct, which only last Term we described as ‘speech which has
4 traditionally been recognized as lying at the core of the First Amendment.’” *Id.* at 1034-35
5 (quoting *Butterworth v. Smith*, 494 U.S. 624, 632 (1990)). The Notice of Disciplinary Charges is
6 therefore a violation of Respondent’s Freedom of Speech protected by the First Amendment (as
7 made applicable to the States via the Fourteenth Amendment).

8 9 NINTH AFFIRMATIVE DEFENSE

10 (Violation of U.S. Constitution, Right to Petition Government for Redress of Grievances)

11 The First Amendment to the U.S. Constitution guarantees the right to petition the
12 government for redress of grievances. As the Ninth Circuit has recognized, the “right to petition
13 ‘protects the right of individuals to appeal to courts and other forums established by the
14 government for resolution of legal disputes’” and, “[m]ore generally, it ‘allows citizens to express
15 their ideas, hopes, and concerns to their government and their elected representatives.’” *Rodriguez*
16 *v. Newsom*, 974 F.3d 998, 1010 (9th Cir. 2020) (quoting *Borough of Duryea, Pa. v. Guarnieri*, 564
17 U.S. 379, 387-88 (2011)). Respondents actions in litigating election disputes on behalf of his
18 client, in speaking about illegality and fraud in the conduct of the election, and in petitioning Vice
19 President Pence to accede to requests from more than a hundred state legislators for a brief delay
20 in the elector vote counting process to assess the impact of such illegality and fraud on the election
21 results, fall squarely within the right to petition protected by the First Amendment.

22 23 TENTH AFFIRMATIVE DEFENSE

24 (Violation of U.S. Constitution, Due Process)

25 Due process rights are violated if an attorney’s presentation of a defense would require that
26 attorney to disclose confidential information subject to attorney-client privilege. *Reilly v.*
27 *Greenwald & Hoffman, LLP* (App. 4 Dist. 2011) 127 Cal.Rptr.3d 317, 196 Cal.App.4th 891,
28

1 *rehearing denied.*

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ELEVENTH AFFIRMATIVE DEFENSE

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(Attorney-Client Privileges)

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TWELTH AFFIRMATIVE DEFENSE

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(Sixth Amendment Confrontation Clause)

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Receiving the testimony against Respondent into evidence in this proceeding that violates the attorney-client privilege would violate the Confrontation Clause (U.S. Const. amend. VI)

1 because Respondent, observing one or more of the applicable privileges, cannot counter and thus
2 confront the testimony given against him without violating the privilege, creating a second
3 procedural Catch-22.

4
5 **THIRTEENTH AFFIRMATIVE DEFENSE**

6 (Violation of U.S. Constitution, Equal Protection)

7 The Office of Disciplinary Counsel wields its disciplinary authority here in a politically
8 biased manner, prosecuting a prominent Republican lawyer and supporter of former President
9 Trump with excessive and improper zeal, while turning a blind eye to the blatant falsehoods that
10 were perpetrated by Democrat members of the California Bar, such as Adam Schiff (SBN 122595,
11 Inactive) and Eric Swalwell (SBN 244361, Active),⁴⁷ in the wake of the 2016 election. This
12 selective prosecution/disparate treatment of alleged violations of the Rules of Professional
13 Conduct violates the Equal Protection clause of the Fourteenth Amendment. *See, e.g., Adamson v.*
14 *City & Cnty. San Francisco*, No. 16-CV-04370-YGR, 2018 WL 1456761, at *3 (N.D. Cal. Mar.
15 23, 2018) (“A claim of selective prosecution is sufficiently alleged where the plaintiff sets forth
16 facts to establish that the prosecutor decided to enforce the law “on the basis of an impermissible
17 ground such as ... exercise of ... constitutional rights.”); *see also Gayer v. State Bar of California*,
18 No. C 93-2085 BAC, 1994 WL 163920, at *4 (N.D. Cal. Apr. 14, 1994), *aff’d*, 73 F.3d 368 (9th
19 Cir. 1995) (recognizing a selective prosecution claim in the context of bar discipline proceeding).

20 The equal protection violation is exacerbated by the Bar’s focus on Respondents’ speech
21 and the vagueness of the regulations it seeks to enforce against Respondent. “The prohibition
22 against vague regulations of speech is based in part on the need to eliminate the impermissible risk

23
24 ⁴⁷ Although Schiff and Swalwell are, as members of Congress, protected by the
25 Constitution’s Speech and Debate Clause, U.S. Const. Art. I, § 6, cl. 1, for “things generally said
26 or done in the House or Senate in the performance of official duties,” *Cleveland v. Trump*, No.
27 120CV01140NONEJLTPS, 2021 WL 3124603, at *2 (E.D. Cal. July 23, 2021) (quoting *United*
28 *States v. Helstoski*, 442 U.S. 477, 488 (1979)), “[a]ctivities such as public speaking” of the sort
that Schiff and Swalwell both extensively engaged in “are political rather than legislative” and
therefore not protected by the Speech and Debate Clause. *Miller v. Transamerican Press, Inc.*,
709 F.2d 524, 531 (9th Cir. 1983) (quoting *Brewster*, 408 U.S. 501, 512-14 (1972)).

1 of discriminatory enforcement, *Kolender v. Lawson*, 461 U.S. 352, 357–358, 361 (1983); *Smith v.*
2 *Goguen*, 415 U.S. 566, 572–573, 94 S.Ct. 1242, 1246–1247, 39 L.Ed.2d 605 (1974), for history
3 shows that speech is suppressed when either the speaker or the message is critical of those who
4 enforce the law. The question is not whether discriminatory enforcement occurred here, and we
5 assume it did not, but whether the Rule is so imprecise that discriminatory enforcement is a real
6 possibility.” *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1051 (1991).

7 8 **FOURTEENTH AFFIRMATIVE DEFENSE**

9 (Lack of Due Process - Fair Notice)

10 Respondent lacks fair notice that the conduct alleged in the Charges constituted a violation
11 of the California Bar Rules. Until the spate of complaints filed against lawyers involved in the
12 2020 election challenges, there was no case like these in the annals of ethical decisions in
13 California or in any State in the Nation. No licensed lawyer in December 2020 to January 2021
14 could possibly have rationally expected that the local ethics rules would be deemed to be violated
15 for bringing challenges to election irregularities of the sort that are commonplace in the wake of
16 contested elections. As such, the Charges violate the Due Process Clause’s requirement of fair
17 notice.

18 19 **FIFTEENTH AFFIRMATIVE DEFENSE**

20 (Abatement Pursuant to SB 5.50(B))

21 SB Rule of Procedure 5.50 permits consideration of any relevant factor in determining
22 whether to grant a motion for abatement, including:

- 23
- 24 • the extent to which issues in a related proceeding are the same or substantially the same as
25 those in the State Bar Court proceeding;
 - 26 • the delay of the State Bar proceeding necessary by awaiting trial or appeal in a related
27 proceeding;
 - 28 • the potential expedition of the State Bar proceeding by awaiting disposition in a related

- 1 proceeding;
- 2 • the extent to which evidence may be adduced in a related proceeding that would aid
- 3 determination of the State Bar Court proceeding;
- 4 • the extent to which evidence would become unavailable in the State Bar Court proceeding
- 5 because of delay resulting from abatement;
- 6 • the extent to which parties, witnesses or documents are currently unavailable to participate
- 7 in the State Bar Court proceeding for reasons beyond the parties' control;
- 8 • the extent to which a party or witness may be prejudiced in a related proceeding by
- 9 delaying or proceeding with further action;
- 10 • the extent to which a Client Security Fund claim would be unnecessarily delayed.

11 SB Rule 5.50(B)

12 A fundamental principle of both California and federal law is the right against self-

13 incrimination. That right is recognized in the Fifth Amendment to the United States Constitution,

14 Article 1 Section 15 of the California Constitution, and Evidence Code section 940, which

15 provides that “[t]o the extent that such privilege exists under the Constitution of the United States

16 or the State of California, a person has a privilege to refuse to disclose any matter that may tend to

17 incriminate him.” The fact that Respondent is likely to be placed in a position in which he must

18 choose whether to assert or waive their Fifth Amendment rights presents a profoundly significant

19 constitutional issue.

20 The rule is clear in California that “[a] party asserting the Fifth Amendment privilege

21 should suffer no penalty for his silence.” (*Pacers, Inc. v. Sup. Ct.*, 162 Cal.App.3d 686, 689

22 (1984).) “In this context ‘penalty’ is not restricted to fine or imprisonment,” but includes “the

23 imposition of any sanction which makes assertion of the Fifth Amendment privilege ‘costly.’” *Id.*

24 (Citation omitted). Indeed, this principle is explicitly codified in California at Evidence Code §

25 913, which provides that upon the assertion of a privilege “neither the presiding officer nor

26 counsel may comment thereon, no presumption shall arise because of the exercise of the privilege,

27 and the trier of fact may not draw any inference therefrom.”

28

1 To the extent Respondent is under threat of criminal prosecution, implicating his Fifth
2 Amendment rights, abatement of the disciplinary proceeding is arguably necessary to protect his
3 rights and is within the Bar Court's discretion to order.

4 In view of the importance of the privilege against self-incrimination, courts in civil cases
5 have the inherent authority and discretion to stay a pending civil action, or to stay discovery, until
6 such time as the need to invoke the privilege is eliminated. (*Fuller v. Superior Court*, 87
7 Cal.App.4th 299, 307 (2001) [“[o]ne accommodation is to stay the civil proceeding until
8 disposition of the related criminal prosecution.”]) It is, of course, well-settled that “[j]udges also
9 have broad discretion in controlling the course of discovery and in making the various decisions
10 necessitated by discovery proceedings.” (*Obregon v. Sup. Ct.* (1998) 67 Cal.App.4th 424, 431.)
11 The Court's wide discretion in controlling discovery extends to ordering a partial or complete stay
12 of discovery under circumstances such as those present here, where a civil action coexists with an
13 actual or potential criminal action based on related facts. (*Pacers, Inc.*, *supra*, 162 Cal.App.3d at
14 690):

15 Where, as here, a defendant's silence is constitutionally guaranteed, the court should weigh
16 the parties' competing interests with a view toward accommodating the interests of both parties, if
17 possible. An order staying discovery until expiration of the criminal statute of limitations would
18 allow real parties to prepare their lawsuit while alleviating petitioners' difficult choice between
19 defending either the civil or criminal case.

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SIXTEENTH AFFIRMATIVE DEFENSE

(Violation of 5th Amendment of the U.S. Constitution)

The 5th Amendment affords Respondent the right not to testify against himself. The NDC places Respondent is at risk that his testimony in this proceeding will be used against him in other proceedings; that risk is prohibited by the 5th Amendment. The text of Respondent's Thirteenth Affirmative Defense is incorporated by reference herein.

Dated: February 15, 2023

MILLER LAW ASSOCIATES, APC

By: 

Randall A. Miller, Esq.

Zachary Mayer, Esq.

Attorneys for Respondent JOHN CHARLES EASTMAN

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is MILLER LAW ASSOCIATES, APC, 411 South Hewitt Street, Los Angeles, CA 90013. On February 15, 2023, I e-served the document(s) described as **RESPONDENT JOHN CHARLES EASTMAN'S ANSWER TO NOTICE OF DISCIPLINARY CHARGES** on the interested parties by serving them in the manner and/or manners listed below:

Sr. Trial Counsels:
Duncan Carling, Esq.
Angie Esquivel, Esq.
duncan.carling@calbar.ca.gov
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Sandra.Jones@calbar.ca.gov

by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date.

by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.

by causing such document to be transmitted by electronic mail to the office of the addressees as set forth below on this date.

by causing such document(s) to be sent overnight via Federal Express; I enclosed such document(s) in an envelope/package provided by Federal Express addressed to the person(s) at the address (es) set forth below and I placed the envelope/package for collection at a drop box provided by Federal Express.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on February 15, 2023, at Los Angeles, California.

OLGA GORBUNKOVA