APPENDIX TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN C. EASTMAN,

Plaintiff-Appellant,

v.

BENNIE G. THOMPSON, in his official capacity as Chairman of the House Select Committee to Investigate the January 6 Attack on the United States Capitol; et al.,

Defendants-Appellees.

No. 22-56013

D.C. No. 8:22-cv-00099-DOC-DFM
Central District of California,
Santa Ana

ORDER

(Filed Nov. 7, 2022)

Before: McKEOWN, WARDLAW, and W. FLETCHER, Circuit Judges.

Appellant's request to withdraw the emergency request for injunctive relief (Docket Entry No. 9) is granted. The emergency motions (Docket Entry Nos. 2 and 5) are deemed withdrawn.

The motion to file exhibits under seal and *in camera* (Docket Entry No. 6-1) is denied. *See* 9th Cir. R. 27-13(a).

Within 21 days after the date of this order, appellant may file a motion to withdraw the exhibits at Docket Entry No. 6-2. The Clerk shall maintain Docket Entry No. 6-2 under seal and *in camera* until the expiration of the 21-day period, and until disposition of a motion to withdraw if one is timely 3led. If no motion to withdraw is filed, the Clerk shall unseal Docket Entry No. 6-2.

Appellant's motion for voluntary dismissal of this appeal (Docket Entry No. 10) is granted in part. This appeal is dismissed. See Fed. R. App. P. 42(b). Appellant's request that we vacate or remand with instruction to vacate the underlying judgments is denied. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 25 (1994) (*Munsingwear* rule is inapplicable when mootness results from circumstances attributable in part to appellant's actions).

This order served on the district court shall act as and for the mandate of this court.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

JOHN C. EASTMAN, Plaintiff, vs. BENNIE G. THOMPSON, SELECT COMMITTEE TO INVESTIGATE THE JANUARY 6 ATTACK ON THE UNITED STATES CAPITOL, AND CHAPMAN UNIVERSITY, Defendants.	Case No. 8:22-cv-00099-DOC-DFM ORDER RE PRIVILEGE OF REMAINING DOCUMENTS (Filed Oct. 19, 2022)

Table of Contents

[3] Plaintiff Dr. John Eastman ("Dr. Eastman"), a former law school dean at Chapman University ("Chapman"), is a "political conservative who supported former President [Donald] Trump" and a

self-described "activist law professor."[1] While he was a professor at Chapman, Dr. Eastman worked with President Trump and his campaign on legal and political strategy regarding the November 3, 2020 election.

This case concerns the House of Representatives Select Committee to Investigate the January 6 Attack on the US Capitol's ("Select Committee") attempt to obtain Dr. Eastman's emails from his Chapman email account between November 3, 2020 and January 20, 2021.

The parties disagree on whether those documents are privileged and thus protected from disclosure.

I. BACKGROUND

The Court previously conducted two reviews to determine whether Dr. Eastman's privilege assertions apply to the records subpoenaed by the Select Committee. In its First Order, the Court extensively detailed the events of January 6, 2021, and Dr. Eastman and President Trump's actions leading up to and on that day.[2] The Court also held that President Trump and Dr. Eastman more likely than not committed obstruction of an official proceeding, in violation of 18 U.S.C. § 1512(c)(2), and conspiracy to defraud the United States, in violation of 18 U.S.C. § 371.

The Court has now conducted an in camera review of every document disputed by the parties, weighed

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[1] Complaint (Dkt. 1) ¶¶ 5–6.

[2] Order Re: Privilege of Documents Dated January 4-7, 2021 ("First Order") (Dkt. 260).

and considered all evidence presented by the parties, and applied the appropriate standard of proof.

The Court proceeds by discussing the case's procedural history, before determining whether Dr. Eastman's assertions of work product privilege and attorney-client privilege apply. Finding that most documents fall within work product privilege or attorney-client privilege, the Court then analyzes whether disclosure is still warranted under the crime-fraud [4] exception. The Court concludes that the crime-fraud exception applies to a number of emails related to President Trump and Dr. Eastman's (1) court efforts to delay or disrupt the January 6 vote; and (2) their knowing misrepresentation of voter fraud numbers in Georgia when seeking to overturn the election results in federal court.

Dr. Eastman filed this action on January 20, 2021, to prevent Chapman University from complying with the Select Committee's subpoena. After briefing from the parties and a hearing, the Court denied Dr. Eastman's application for a preliminary injunction (Dkt. 41). The Court ordered Dr. Eastman to begin reviewing the documents and producing a privilege log to the Court and the Select Committee (Dkt. 43).

During a hearing on January 31, the Court granted the Select Committee's request that Dr. Eastman begin his production with documents dated January 4-7, 2021 (Dkt. 63). On March 28, 2022, after briefing and a hearing, the Court ordered Dr. Eastman to disclose 101 of those 111 documents to the Select Committee. First Order at 44. Pursuant to the Court's order, Dr. Eastman produced the 101 documents in the first week of April 2022 (Dkt. 286).

Dr. Eastman completed his privilege review of the remaining documents on April 19, 2022, and the parties then cooperated to reduce their privilege claims and objections. On May 2, 2022, Dr. Eastman produced a consolidated privilege log identifying over 2000 documents over which he claimed privilege (Dkt. 336). The Select Committee dropped many objections but reserved the right to renew objections to 576 documents on a later date. *Id*. After the parties' cooperation, the Select Committee maintained its objections to 599 documents. On June 7, 2022, the Court ordered Dr. Eastman to disclose 159 of the 599 documents in review ("Second Order") (Dkt. 356).

On September 14, 2022, the Select Committee renewed its objections to the 576 documents and asked the Court to review them (Dkt. 366). The Select Committee proposed an expedited briefing schedule that this Court promptly adopted. The parties again cooperated to reduce their privilege claims and objections, and the Select Committee ultimately maintained its objections to 562 documents. After receiving the final list of disputed [5] documents, the Court immediately began reviewing the documents while the parties submitted briefing on their claims. Dr. Eastman filed his brief on September 26, 2022 (Dkt. 369). The Select Committee responded on October 3, 2022 (Dkt. 370), and Dr. Eastman replied on October 5, 2022 (Dkt. 371).

II. LEGAL STANDARD

Federal common law governs the attorney-client privilege when courts adjudicate issues of federal

law.[3] "As with all evidentiary privileges, the burden of proving that the attorney-client privilege applies rests not with the party contesting the privilege, but with the party asserting it."[4] The "party asserting the attorney-client privilege has the burden of establishing the relationship and the privileged nature of the communication."[5] The party must assert the privilege "as to each record sought to allow the court to rule with specificity."[6] "Because it impedes full and free discovery of the truth, the attorney-client privilege is strictly construed."[7] The same burden applies to the party asserting work product protection.[8]

III. DISCUSSION

The Court will first consider work product protection, then attorney-client privilege. For documents where Dr. Eastman claims both work product and attorney client privilege, the Court will only address attorney-client privilege if it finds that work product protection does not apply. The Court draws substantially on its reasoning from its prior

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

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

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

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

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

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

orders which addressed many of the same legal and factual issues.[9]

Dr. Eastman claims that 561 of the 562 documents are protected work product. Dr. Eastman also claims that 54 of the documents that are allegedly protected work product are [6] also protected under the attorney-client privilege. Finally, Dr. Eastman claims attorney-client privilege for only one document over which he does not also assert work product privilege.

A. Work Product

The Court first turns to the 561 documents that Dr. Eastman claims are protected work product. Documents are protected work product if they are (1) "'prepared in anticipation of litigation or for trial,'" and (2) "prepared 'by or for another party or by or for that other party's representative.'"[10] The Court considers each requirement in turn.

1. Anticipation of litigation

Documents qualify for work product protection if they were "prepared in anticipation of litigation or for trial."[11] Where some litigation documents are also prepared for a second, non-litigation purpose, they are protected if they were "created *because of* anticipated litigation and would not have been created in

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[9] *See* First Order; Second Order.

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

[11] Fed. R. Civ. P. 26(b)(3).

substantially similar form *but for* the prospect of that litigation."[12]

The Court groups its anticipation of litigation analysis of the remaining documents into five categories: ongoing suits, the Electoral Act plan, state elections, connecting third parties, and news articles.

a. Draft filings related to ongoing suits

486 of the 561 documents relate to ongoing litigation in state or federal court.[13] These documents, in

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[12] *In re Grand Jury Subpoena (Mark Torf/Torf Envtl. Mgmt.)* ("*Torf*"), 357 F.3d 900, 908 (9th Cir. 2003) (internal quotation omitted) (emphasis added).

[13] 6777; 6876; 6962; 6963; 7032; 7098; 7182; 7252; 7745; 7768; 8085; 8247; 10067; 16033; 18474; 18501; 21761; 21932; 22453; 23053; 23742; 24935; 24952; 25122; 25224; 28556; 29234; 29239; 29249; 29353; 29358; 29368; 29398; 29403; 29413; 31731; 31735; 31737; 31742; 31746; 31869; 31872; 31878; 31882; 31885; 31888; 31890; 31907; 31925; 31928; 31932; 31941; 31948; 31952; 31958; 31961; 31971; 31975; 31979; 32000; 32007; 32017; 32022; 32028; 32038; 32043; 32047; 32050; 32056; 32073; 32101; 32117; 32158; 32166; 32231; 32237; 32242; 32327; 32347; 32354; 32368; 32428; 32759; 32799; 32838; 32846; 32895; 32904; 32931; 32940; 32958; 33376; 33383; 33389; 33400; 33407; 33435; 33456; 33543; 33551; 33584; 33593; 33611; 33619; 33667; 33678; 33693; 33780; 33788; 33796; 33832; 33840; 33875; 33885; 33894; 33920; 33942; 33984; 34080; 34089; 34107; 34116; 34445; 34454; 34471; 34489; 34499; 34506; 34516; 34535; 34554; 34565; 34961; 34971; 35153; 35163; 35172; 35241; 35251; 35283; 35335; 35346; 35378; 35385; 35391; 35467; 35539; 35561; 35567; 35619; 35624; 35629; 35636; 35639; 35650; 35651; 38211; 38217; 38227; 38232; 47447; 47449; 48040; 48464; 48472; 48473; 48503; 48509; 48525; 49061; 49519; 49522; 49531; 49593; 49594; 49615; 49666; 49667; 49672; 49678; 49688; 49693; 49712; 49718; 49721; 50002; 50117; 50224; 50330; 50332; (continued…)

part: seek or send legal research for case filings; make recommendations or [7] edits to court filings; or discuss litigation strategy for ongoing cases. All of

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50446; 50449; 51079; 51173; 51293; 51296; 51307; 51325; 51328; 51394; 51397; 51412; 51419; 51425; 51441; 51764; 52486; 52759; 52951; 52953; 52978; 53489; 53495; 53539; 53541; 53562; 53823; 53829; 54423; 54437; 54444; 54452; 54816; 54962; 54976; 54977; 54979; 54981; 54983; 54986; 55015; 55017; 55026; 55034; 55038; 55042; 55044; 55046; 55107; 55117; 55123; 55133; 55138; 55157; 55158; 55159; 55390; 55394; 55400; 55426; 55490; 55494; 55531; 55537; 55550; 55555; 55559; 55566; 55594; 55601; 55659; 55662; 55663; 55669; 55681; 55693; 55699; 56068; 56073; 56079; 56082; 56085; 56088; 56091; 56095; 56098; 56101; 56104; 56111; 56438; 56440; 56442; 56445; 56451; 56542; 56625; 56692; 56702; 56730; 56731; 56732; 56733; 56735; 56736; 56737; 56738; 56742; 56747; 56748; 56943; 56944; 56981; 56983; 56984; 56992; 56998; 57001; 57003; 57004; 57006; 57203; 57409; 57416; 57419; 57435; 57440; 57443; 57868; 57877; 57911; 57915; 57921; 57925; 57929; 57933; 57937; 57942; 57946; 57950; 57954; 57957; 58452; 58708; 58717; 58727; 58751; 58755; 58777; 59043; 59064; 59073; 59087; 59101; 59125; 59132; 59163; 59171; 59178; 59216; 59229; 59237; 59246; 59260; 59266; 59279; 59297; 59306; 59355; 59390; 59430; 59436; 59444; 59447; 59482; 59508; 59512; 59603; 59637; 59639; 59640; 59643; 59649; 59653; 59655; 59656; 59682; 59689; 59694; 59697; 59702; 59705; 59709; 59716; 59732; 59751; 59757; 59761; 59764; 59767; 59768; 59770; 59792; 59793; 59806; 59809; 59812; 59817; 59821; 59829; 59839; 59849; 59861; 59881; 59888; 59938; 59954; 59996; 60004; 60023; 60042; 60051; 60052; 60057; 60077; 60081; 60089; 60105; 60133; 60171; 60209; 60217; 60225; 60235; 60243; 60251; 60260; 60276; 60287; 60315; 60317; 60365; 60569; 60590; 60599; 60635; 60647; 60658; 60669; 60678; 60721; 60732; 60742; 60743; 60745; 60797; 60831; 60839; 60848; 60851; 60861; 60872; 60877; 60903; 60914; 60925; 60939; 60950; 60961; 60975; 60986; 60998; 61010; 61022; 61037; 61052; 61108; 61124; 61216; 61229; 61237; 61248; 61272; 61284; 61297; 61321; 61332; 61344; 61385; 61493; 61505; 61532; 61544; 61568; 61684; 61762; 62729.

these 492 documents were clearly prepared in anticipation of litigation.

Two of the 561 documents are duplicate files of documents the Court previously ordered to be disclosed.[14] Accordingly, the Court ORDERS these two documents to be disclosed.

b. Electoral Count Act plan

Five of the 561 documents relate to Dr. Eastman's proposal for vice President Pence to reject or delay counting electoral votes on January 6, 2021.[15] As discussed in the Court's prior Order, to the extent the plan was intended "to proceed without judicial involvement," emails pertaining to the plan were not made in anticipation of litigation.[16]

All five of these emails discuss in part actions to support the plan to disrupt the Joint Session. Some portions of these emails do discuss litigation strategy, and to that extent, they are created in anticipation of litigation. However, for other portions, "[t]he true animating force behind these emails was advancing a political strategy: to persuade Vice President Pence to take unilateral action on January 6."[17] These portions of the documents were not [8] created in anticipation of litigation, so they are not protected work product. Because Dr. Eastman also claims attorney-client privilege for one of these documents, however, the Court will address it in the attorney-client privilege

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[14] 59765; 59766.

[15] 55146; 55949; 59680; 61774; 61778.

[16] First Order at 23.

[17] *Id.* at 24.

analysis below.[18] The Court ORDERS portions of the other four documents to be disclosed.[19]

c. State election-related documents

Dr. Eastman claims work product protection over 52 documents relating to alleged fraud in state elections.[20] The Court discusses them in turn.

Thirty-five are emails between various attorneys discussing statistical data in the context of state election litigation.[21] These emails would not have been made in the same form if not for litigation and are thus prepared in anticipation of litigation.

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[18] 55146.

[19] For document 55950, the email dated December 22, 2020 at 7:42 PM is not work product. For document 59680, the first email dated December 30, 2020 at 5:54 PM MST is not work product. For document 61774, the first sentence of the email dated January 1, 2021 at 2:14 PM MST is work product, but the rest of the email is not work product; the email dated January 1 at 3:29 PM is not work product. Document 61778 contains the same emails as 61744, which are not work product; additionally, the email dated January 1, 2021 at 2:22 PM MST is not work product. The email headers associated with these emails are also not work product. Dr. Eastman is responsible for redacting the remaining portions of these documents.

[20] 6731; 6733; 6744; 6745; 6746; 6748; 6751; 6752; 6753; 6755; 6759; 6764; 6780; 7779; 7786; 7936; 7945; 8101; 8393; 8568; 8704; 8706; 8717; 8730; 8731; 8732; 8733; 8735; 15004; 15243; 15366; 16635; 17644; 19886; 20140; 22680; 28123; 28127; 28144; 28155; 28161; 28166; 28301; 28336; 28355; 28359; 30685; 30688; 32062; 32068; 57412; 57422.

[21] 6731; 6733; 6744; 6745; 6746; 6748; 6751; 6752; 6753; 6755; 6759; 6764; 6780; 7779; 7786; 7936; 7945; 8101; 8393; 8568; 8704; 8706; 8731; 8732; 8733; 8735; 15004; 15243; 15366; 16635; 17644; 19886; 20140; 30685; 30688.

Similarly, two of these 52 documents relate to potential press releases.[22] These emails reference litigation and would not have been made in the same form if not for litigation and are thus prepared in anticipation of litigation.

Twelve are documents discussing reactions to various state filings.[23] These are not prepared in anticipation of litigation and are thus not protected work product. Because Dr. Eastman also claims attorney-client privilege for these documents, however, the Court will address them in the attorney-client privilege analysis below.

Three documents are not created in anticipation of litigation, and Dr. Eastman does not [9] claim attorney-client privilege over them.[24] Two of these documents are emails between Eastman and non-attorney consultants and discuss statistical data with no mention of state election litigation.[25] The remaining document is a report on alleged election irregularities, which the Court finds would "have been created in substantially similar form" without the prospect of litigation.[26]

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[22] 57412; 57422.

[23] 28123; 28127; 28144; 28155; 28161; 28166; 28301; 28336; 28355; 28359; 32062; 32068.

[24] 8717; 8730; 22680.

[25] 8717; 8730. Further, Dr. Eastman does not meaningfully respond to the Select Committee's objections to a number ofdocuments, including 8717 and 8730. *See* Privilege Log, 8717, 8730.

[26] 22680.

Accordingly, the Court ORDERS the above three documents to be disclosed.[27]

d. Connecting third parties

Four documents connect third parties to Dr. Eastman.[28] Similar documents were discussed in the First Order, none of which were found to relate to or implicate litigation. Accordingly, these four documents are not protected and the Court ORDERS them to be disclosed.

e. Public documents

Eleven documents share news articles or other public documents.[29] These public articles and posts were not created for litigation, and the minimal commentary contained in the emails is unrelated to litigation. As such, these eleven documents are not work product.

Accordingly, the Court ORDERS these eleven documents to be disclosed.

2. Preparation by or for a client's representative

Having found that 524 of the 561 documents were created in anticipation of litigation, the Court turns to the next prong of the work product doctrine and examines whether these documents were created by or for a party or "party's representative (including the

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[27] 8717; 8730; 22680.

[28] 6757; 16628; 16634; 20973.

[29] 15667; 32172; 32181; 32183; 32189; 32200; 32208; 32215; 32806; 32821; 33701.

other party's attorney, consultant, . . . or agent)."[30] Documents are protected if they were prepared by or for President Trump or another client, or by or for Dr. Eastman or another [10] representative of those clients.[31]

Of the 524 documents, 503 relate to representing President Trump or his campaign. All 503 documents were prepared or sent by or for members of the White House and campaign staff, attorneys of record in court cases (including Dr. Eastman), and those attorneys' staff. Because these documents were created by or for agents of President Trump or his campaign, they are work product.

The remaining 21 documents are legal memoranda prepared by third parties unrelated to the Trump campaign.[32] Dr. Eastman argues that these documents are substantive attachments to emails previously held to be protected work product.[33] Although these legal memoranda appear to be unsolicited, they were created for Dr. Eastman and Trump's legal team, who may have considered these

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

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

[32] 29234; 29239; 29249; 29353; 29358; 29368; 29398; 29403; 29413; 32022; 32028; 32038; 32043; 38211; 38217; 38227; 38232; 49672; 49678; 49688; 49693.

[33] Privilege Log (Dkt. 36).

legal memoranda in litigation filings. As such, these 21 documents are also work product.

3. Waiver of protection

The Court now considers whether Dr. Eastman waived his privilege over any of the 524 documents that the Court concluded constitute protected work product. Unlike attorneyclient privilege, which is waived if not kept completely confidential, work product protection is only waived when attorneys disclose their work to "an adversary or a conduit to an adversary in litigation."[34]

As the Court previously ruled, Dr. Eastman's use of his Chapman University email address did not destroy Dr. Eastman's privilege over his communications.[35]

Dr. Eastman did not disclose any of the 524 documents to a conduit to an adversary in litigation. The documents were all exchanged between members of President Trump's [11] campaign and its litigation teams; President Trump's staff; and likeminded experts, consultants, and volunteers. Moreover, many of the documents were labeled confidential or "attorney work product," reinforcing Dr. Eastman's assertion that his team did not intend for these documents to be disclosed to adversaries.

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[34] *United States v. Sanmina Corp.*, 968 F.3d 1107, 1121 (9th Cir. 2020); *Nobles*, 422 U.S. at 239.

[35] First Order at 17-20, 29-30.

4. Substantial or compelling need exception

The Court finds that all 524 protected documents are 'opinion' work product because they include attorneys' thoughts and legal theories. Opinion work product "is virtually undiscoverable."[36] A court may compel disclosure of opinion work product only in the rare situation "when mental impressions are *the pivotal issue* in the current litigation and the need for the material is compelling."[37]

As the Court previously found, review of the 524 protected documents shows that none are "pivotal" to the Select Committee's investigation. The majority of the documents include opinions and discussions about trial strategy in ongoing or anticipated lawsuits. As discussed above, this litigation was a "legitimate form of recourse, and is not tied to the investigation's core purpose, which is to 'investigate and report upon the facts, circumstances, and causes relating to the January 6, 2021, domestic terrorist attack upon the United States Capitol.'"[38] Accordingly, none of these 524 shall be disclosed based on compelling need.

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

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

[38] First Order at 43 (quoting H.R. Res. 503 § 3).

Having evaluated each element of work product protection, the Court finds that 524 documents are protected work product and 37 documents are not protected work product. Dr. Eastman also claims attorney client privilege over 13 of the 37 documents that are not protected work product,[39] so the Court will determine disclosure for these documents under attorney-client privilege below. Thus, the Court ORDERS the other 24 documents to be [12] disclosed.[40]

B. Attorney-Client Privilege

The Court now moves from work product protection to Dr. Eastman's claims of attorney-client privilege. The attorney-client privilege protects confidential communications between attorneys and clients for the purpose of legal advice.[41] However, "advice on political, strategic, or policy issues" is not protected.[42] The privilege extends to communications with agents of the clients and third parties assisting the attorney.[43]

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[39] 28123; 28127; 28144; 28155; 28161; 28166; 28301; 28336; 28355; 28359; 32062; 32068; 55146.

[40] 6757; 8717; 8730; 15667; 16628; 16634; 20973; 22680; 32172; 32181; 32183; 32189; 32200; 32208; 32215; 32806; 32821; 33701; 55949; 59680; 59765; 59766; 61774; 61778.

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

[42] *In re Lindsey*, 148 F.3d 1100, 1106 (D.C. Cir. 1998).

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

Dr. Eastman claims attorney-client privilege over 55 documents. The Court found above that most of these documents are protected work product. The Court here considers the remaining 14 documents.[44]

1. Clients seeking legal advice from attorneys

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

The Court previously found that Dr. Eastman had an attorney-client relationship with President Trump throughout the subpoena's time period.[45] One of the 14 documents involves discussions between a Trump representative and Dr. Eastman.[46] These discussions primarily seek legal advice, but some portions only discuss political advice. Accordingly, the Court ORDERS this document to be disclosed with redactions.[47]

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[44] These 14 documents include the 13 discussed in the work product section, as well as 26919, which was only claimed to be attorney-client privileged: 26919; 28123; 28127; 28144; 28155; 28161; 28166; 28301; 28336; 28355; 28359; 32062; 32068; 55146.

[45] Second Order at 14.

[46] 55146.

[47] 55146: the first two paragraphs of the email dated December 24, 2020, at 11:16 AM and its associated email header shall be disclosed. Dr. Eastman is responsible for redacting the remaining portions of this document.

[13] For 12 of the 14 documents, Dr. Eastman is the potential client.[48] In these emails, Dr. Eastman discusses with another attorney the possible grounds of a lawsuit. These documents explicitly seek legal advice and representation.

One of the 14 documents involves potential representation of a state legislator.[49] The email is solely between the potential client and Dr. Eastman and also explicitly seeks legal advice.

2. Confidentiality

In order for the above 13 communications to be privileged,[50] they must also have been kept confidential.[51] The presence of a third party does not necessarily destroy confidentiality if that third party is an agent of the client or attorney.[52] But the third party's "shared desire to see the same outcome in a legal matter is insufficient" to maintain confidentiality.[53]

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[48] 28123; 28127; 28144; 28155; 28161; 28166; 28301; 28336; 28355; 28359; 32062; 32068.

[49] 26919.

[50] 26919; 28123; 28127; 28144; 28155; 28161; 28166; 28301; 28336; 28355; 28359; 32062; 32068.

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

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

[53] *In re Pac. Pictures Corp.*, 679 F.3d at 1129.

All 13 of these documents are solely between the client or potential client, and confirmed counsel.[54] Accordingly, these 13 documents are protected.

* * *

Having evaluated each element of attorney-client privilege, the Court finds that 13 of the 14 documents are privileged.[55] The remaining document is ORDERED to be disclosed with redactions.[56]

C. Crime-fraud exception

Having determined that 26 documents are unprotected, the Court has found that 536 documents are protected either by work product or attorney-client privilege. The Court now considers whether any of the remaining 536 documents should be disclosed under the crime- [14] fraud exception.

The crime-fraud exception applies when (1) a "client consults an attorney for advice that will serve [them] in the commission of a fraud or crime,"[57] and (2) the communications are "sufficiently related to" and were made "in furtherance of" the crime.[58] It is irrelevant whether the scheme was ultimately

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[54] 23582; 23584; 23631; 24730; 25035; 62776; 64305; 64331; 64715.

[55] 26919; 28123; 28127; 28144; 28155; 28161; 28166; 28301; 28336; 28355; 28359; 32062; 32068.

[56] *See supra* note 47.

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

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

successful.[59] An attorney's wrongdoing alone may pierce the privilege, regardless of the client's awareness or innocence.[60] The exception, which extinguishes both the attorney-client privilege and the work product doctrine,[61] applies "only to documents and communications that were themselves in furtherance of illegal or fraudulent conduct."[62]

As to the first prong of the crime fraud exception, the Court has previously determined that President Trump was more likely than not engaged in or planning an obstruction of an official proceeding, in violation of 18 U.S.C. § 1512(c)(2), and a conspiracy to defraud the United States, in violation of 18 U.S.C. §

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[59] *Id.* at 382.

[60] *See In re Sealed Case*, 107 F.3d 46, 49 n.2 (D.C. Cir. 1997) (recognizing a "the attorney's fraudulent or criminal intent defeats a claim of privilege even if the client is innocent"); *In re Impounded Case (Law Firm)*, 879 F.2d 1211, 1213 (3d Cir. 1989) ("We cannot agree" that "the crime-fraud exception does not apply to defeat the client's privilege where the pertinent alleged criminality is solely that of the law firm").

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

[62] *In re Grand Jury Investigation*, 231 Fed. Appx. 692 (9th Cir. 2007).

371, when he sought the advice of Dr. Eastman.[63] The Court now turns to the second prong of the exception to determine whether any of the 536 emails were "sufficiently related to" and made "in furtherance of" the obstruction and conspiracy crimes.[64] In this last batch of documents, the Court finds that the crime-fraud exception applies to eight communications.

[15]**1. Emails related to and in furtherance of delaying or disrupting the January 6 congressional proceedings**

The Court's prior orders addressed several email threads related to ongoing or prospective litigation in key battleground states. In the current review, the Court finds 18 similar documents that present a close call.[65] Some emails discuss legitimate litigation strategy: how the electoral votes affect the Campaign's "legal options"; how the litigation (if successful) might overturn the election results; and how to frame cases for the Supreme Court. Others discuss how the litigation served other goals, like providing support to state electors trying to decertify electoral votes or persuading the public to question the integrity of the election. Although these emails are "sufficiently related" to disrupting the January 6 vote, on balance, the Court cannot conclusively determine that these emails furthered the obstruction of the

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[63] *See* First Order at 31–40; Second Order at 20.

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

[65] 48464, 48503, 48509, 49594, 55046, 55123, 55133, 55146, 59680, 57957, 55949, 55426, 55490, 61762, 60081, 55494, 55537, 55550.

January 6 proceedings. Accordingly, the crime-fraud exception does not apply.

There are four documents,[66] however, in which Dr. Eastman and other attorneys suggest that—irrespective of the merits—the primary goal of filing is to delay or otherwise disrupt the January 6 vote. In one email,[67] for example, President Trump's attorneys state that "[m]erely having this case pending in the Supreme Court, not ruled on, might be enough to delay consideration of Georgia." This email, read in context with other documents in this review, make clear that President Trump filed certain lawsuits not to obtain legal relief, but to disrupt or delay the January 6 congressional proceedings through the courts. The Court finds that these four documents are sufficiently related to *and* in furtherance of the obstruction [16] crime. Accordingly, the crime-fraud exception applies, and the Court ORDERS Dr. Eastman to disclose the four documents.[68]

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[66] 55697, 59954, 55146, 60023.

[67] The Court previously determined in a "close call" that this email, along with one other, did not fall within the crime-fraud exception. In so doing, the Court preserved the sanctity of attorney-client privilege, noting that "pursuing legal recourse itself did not advance any crimes." Second Order at 21. The additional context now before the Court, particularly with respect to Georgia, confirms that those emails fall within the ambit of the crime-fraud exception.

[68] 55697, 59954, 55146, 60023. For document 55697, only the email sent Saturday, December 26, 2020 4:57 PM MST requires disclosure. For document 59954, only the email sent on Thursday, December 31, 2020 7:35 AM and email sent on Thursday,

(continued…)

2. Emails related to and in furtherance of the conspiracy to defraud

Four emails demonstrate an effort by President Trump and his attorneys to press false claims in federal court for the purpose of delaying the January 6 vote. The evidence confirms that this effort was undertaken in at least one lawsuit filed in Georgia.

On December 4, 2020, President Trump and his attorneys alleged in a Georgia state court action that Fulton County improperly counted a number of votes including 10,315 deceased people, 2,560 felons, and 2,423 unregistered voters.[69] President Trump and his attorneys then decided to contest the state court

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December 31, 2020 9:45 AM require disclosure. For document 55146, only the email sent on Thursday, December 24, 2020 7:41 AM requires disclosure. For document 60023, only the email sent on Thursday, December 31, 2020 9:55 AM requires disclosure.

[69] As discussed in the previous orders, President Trump's own U.S. Attorney General said that his investigators found no evidence of fraud on a scale that would have changed the outcome of the election, but President Trump and his attorneys continued to file dozens of lawsuits in states he lost, seeking to overturn the results. First Order at 5. By early January, more than sixty court cases alleging fraud had been dismissed for lack of evidence or lack of standing. *Id.* at 6. *See also* J. M. Luttig et al., *Lost, Not Stolen: The Conservative Case that Trump Lost and Biden Won the 2020 Presidential Election* (July 2022) (examining every count of every case of election irregularities brought by President Trump's team in six battleground states and concluding that "Donald Trump and his supporters had their day in court and failed to produce substantive evidence to make their case"), https://perma.cc/MKC4-BV3Q.

proceeding in federal court,[70] and discussed incorporating by reference the voter fraud numbers alleged in the state petition. On December 30, 2020, Dr. Eastman relayed "concerns" from President Trump's team "about including specific numbers in the paragraph dealing with felons, deceased, moved, etc."[71] The attorneys continued to discuss the President's resistance to signing "when specific numbers were included."[72] As Dr. Eastman explained the next day:

> Although the President signed a verification for [the state court filing] back on Dec. 1, he has since been made aware that some of the allegations (and evidence [17] proffered by the experts) has been inaccurate. For him to sign a new verification with that knowledge (and incorporation by reference) would not be accurate.[73]

President Trump and his attorneys ultimately filed the complaint with the same inaccurate numbers without rectifying, clarifying, or otherwise changing

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[70] *See Trump v. Kemp*, 511 F. Supp. 3d 1325, 1330 (N.D. Ga. 2021) ("Plaintiff's motion for expedited declaratory and injunctive relief asks this Court to take the unprecedented action of decertifying the results of the presidential election in Georgia and directing the Georgia General Assembly to appoint presidential electors.")

[71] 59643.

[72] 59390.

[73] 60742.

them.[74] President Trump, moreover, signed a verification swearing under oath that the incorporated, inaccurate numbers "are true and correct" or "believed to be true and correct" to the best of his knowledge and belief.[75]

The emails show that President Trump knew that the specific numbers of voter fraud were wrong but continued to tout those numbers, both in court and to the public. The Court finds that these emails are sufficiently related to and in furtherance of a conspiracy to defraud the United States.

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[74] *See generally* Model Rules of Pro. Conduct r. 3.3 cmt. 5 (Am. Bar Ass'n 1983) (noting that the duty requiring "that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes" is "premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence"), https://perma.cc/3PB5-CGRM; s*ee also Christensen*, 828 F.3d at 805 ("[C]onduct by an attorney that is merely unethical, as opposed to illegal, may be enough to vitiate the work product doctrine.").

[75] In an attempt to disclaim his responsibility over the misleading allegations, President Trump's attorneys remove the numbers from the body of complaint (but nonetheless incorporate them by reference) and add a footnote that states President Trump is only relying on information that was provided to him. *See* 61108. But, by his attorneys' own admissions, the information provided to him was that the alleged voter fraud numbers were inaccurate. *See* 60742.

Accordingly, the Court ORDERS Dr. Eastman to disclose these four communications to the Select Committee.[76]

[18] **IV. DISPOSITION**

For the reasons explained above, the Court **ORDERS** Dr. Eastman to disclose the 33 documents[77] to the House Select Committee by 2:00 pm Pacific on October 28, 2022.[78]

DATED: October 19, 2022

DAVID O. CARTER
UNITED STATES
DISTRICT JUDGE

[76] 59643; 59390; 60742; 61108. For document 59643, only the first page (Chapman059643) requires disclosure. For document 60742, Dr. Eastman may redact emails sent before Thursday, December 31, 2020 12:00 PM MST. For document 61108, Dr. Eastman may redact emails sent before Thursday, December 31, 2020 7:43 AM.

[77] *See supra* notes 40, 47, 68, 76.

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

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

JOHN C. EASTMAN, Plaintiff, vs. BENNIE G. THOMPSON, SELECT COMMITTEE TO INVESTIGATE THE JANUARY 6 ATTACK ON THE UNITED STATES CAPITOL, AND CHAPMAN UNIVERSITY, Defendants.	Case No. 8:22-cv-00099-DOC-DFM ORDER RE PRIVILEGE OF 599 DOCUMENTS DATED NOVEMBER 3, 2020 – JANUARY 20, 2021 (Filed June 7, 2022)

Table of Contents

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

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[1] Complaint (Dkt. 1) ¶¶ 5-6.

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

I. BACKGROUND

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

Dr. Eastman filed his Complaint in this Court on January 20, 2022. On January 31, the Court ordered Dr. Eastman to begin his production with documents dated January 4-7, 2021.[3] On March 28, 2022, after briefing and a hearing, the Court ordered Dr. Eastman to disclose 101 of those 111 documents to the Select Committee.[4] Dr. Eastman produced the 101 documents in the first week of April 2022.[5]

Dr. Eastman completed his privilege review of the remaining documents on April 19, and the parties then cooperated to reduce their privilege claims and objections. On May 2, Dr. Eastman produced to the

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[2] Order Re: Privilege of Documents Dated January 4-7, 2021 ("Order") (Dkt. 260) at 3-12.

[3] Dkt. 63.

[4] Order at 44.

[5] Dkt. 286.

Select Committee 933 documents and a consolidated privilege log identifying 2,018 documents over which he claims privilege.[6] The Select Committee withdrew its objections to 721 documents and reserved the right to raise objections to 576 documents at a [4] later date. After receiving the final list of disputed documents, the Court immediately began reviewing the documents while the parties submitted briefing on their claims.

On May 19, 2022, Dr. Eastman filed his Brief supporting his privilege assertions over the remaining 599 documents.[7] The Select Committee filed its Opposition ("Opp'n") on March 2, 2022.[8] Dr. Eastman filed his Reply on May 31, 2022.[9]

II. LEGAL STANDARD

Federal common law governs the attorney-client privilege when courts adjudicate issues of federal law.[10] "As with all evidentiary privileges, the burden of proving that the attorney-client privilege applies rests not with the party contesting the privilege, but with the party asserting it."[11] The "party asserting the attorney-client privilege has the burden of establishing the relationship *and* the privileged

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[6] Dkt. 336.

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

[8] Dkt. 350.

[9] Dkt. 353.

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

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

nature of the communication."[12] The party must assert the privilege "as to each record sought to allow the court to rule with specificity."[13] "Because it impedes full and free discovery of the truth, the attorney-client privilege is strictly construed."[14] The same burden applies to the party asserting work product protection.[15]

III. DISCUSSION

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

[5] A. Work Product

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

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

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

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

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

protected work product, the Court will then determine whether attorney-client privilege prevents disclosure.

Documents are protected work product if they are (1) "'prepared in anticipation of litigation or for trial,'" and (2) "prepared 'by or for another party or by or for that other party's representative.'"[16] The Court considers each requirement in turn.

1. Anticipation of litigation

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

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

a. Draft filings related to ongoing suits

360 of the 555 documents relate to ongoing litigation in state or federal court. Eleven of those documents seek or send legal research for case

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

[17] Fed. R. Civ. P. 26(b)(3).

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

filings,[19] and another fifty-seven documents make recommendations or edits to court filings or forward draft filings.[20] 292 [6] documents discuss litigation strategy for ongoing cases.[21] All of these 360

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[19] 7101; 8110; 23285; 23674; 23839; 31640; 55569; 60106; 60155; 60163; 60210.

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

[21] 3268; 3269; 3270; 3271; 7100; 7106; 7177; 7254; 7320; 7402; 7403; 7414; 7416; 7419; 15960; 15965; 15966; 15968; 15980; 15982; 16022; 16194; 16285; 16334; 16350; 17197; 17257; 18270; 19889; 20826; 21094; 21760; 21854; 23042; 23047; 23048; 23049; 23052; 23056; 23060; 23061; 23101; 23107; 23110; 23113; 23156; 23233; 23240; 23242; 23244; 23248; 23324; 23349; 23383; 23408; 23421; 23426; 23431; 23434; 23554; 23555; 23556; 23673; 23740; 23774; 23777; 23819; 23826; 23833; 23845; 23852; 23858; 23862; 23866; 23870; 23875; 23880; 23885; 23894; 23898; 23899; 23906; 23910; 23918; 24133; 24212; 24218; 24310; 24697; 24698; 24703; 24714; 24725; 24727; 24732; 24739; 24746; 24752; 24776; 24777; 24797; 24800; 24803; 24866; 24895; 24899; 24931; 24947; 25031; 25033; 25108; 25111; 25220; 25900; 25908; 26385; 26757; 26789; 26836; 26869; 26874; 26884; 26885; 28064; 28074; 28075; 28078; 28148; 28154; 28168; 28399; 28530; 28853; 28952; 29007; 29233; 29273; 29322; 29352; 29397; 29417; 29420; 29444; 29457; 29560; 29783; 29791; 30012; 30013; 30015; 30039; 30040; 30052; 30111; 30175; 30176; 30666; 31213; 32015; 32021; 32079; 32106; 33360; 38210; 43503; 45886; 46183; 46474; 47297; 47433; 48793; 49452; 49668; 50327; 51290; 51291; 51303; 51311; 51316; 51759; 53537; 53565; 53826; 55012; 55029; 55039; 55050; 55127; 55141; 55152; 55271; 55453; 55457; 55486; 55518; 55522; 56070; 56115; 57889;
(continued…)

documents were 2 clearly prepared in anticipation of litigation.

b. Electoral Count Act plan

Eleven of the 555 documents relate to Dr. Eastman's proposal for Vice President Pence to reject or delay counting electoral votes on January 6, 2021.[22] As discussed in the Court's prior Order, the plan was intended "to proceed without judicial involvement" and thus emails pertaining to the plan were not made in anticipation of litigation.[23]

Five of those eleven emails discuss actions to support the plan to disrupt the Joint Session.[24] One forwards a now-public November memo about the plan,[25] and one discusses actions that Vice President Pence could take on January 6.[26] Three documents discuss actions for alternate state electors to take in

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57908; 57961; 58684; 59210; 59222; 59253; 59448; 59452; 59485; 59498; 59500; 59504; 59506; 59510; 59651; 59685; 59691; 59729; 59799; 59802; 59813; 59825; 59834; 59844; 59855; 59867; 59874; 59895; 59902; 59924; 59931; 59946; 59962; 59970; 59978; 59987; 60033; 60070; 60097; 60113; 60114; 60117; 60118; 60120; 60123; 60126; 60131; 60142; 60145; 60149; 60153; 60183; 60185; 60188; 60193; 60201; 60230; 60353; 60362; 60453; 60456; 60465; 60475; 60578; 60587; 60748; 60812; 60889; 61035; 61068; 61134; 61176; 61259; 61296; 61309; 61359; 61373; 61397; 61424; 61437; 61449; 61452; 61517; 61543; 61555; 61560; 61561; 61562; 61563; 61565; 61580; 61763; 64995.

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

[23] Order at 23.

[24] 23998; 24716; 24905; 24906; 51059.

[25] 23998.

[26] 51059.

the days leading up to January 6.[27] Because these documents only relate to the political plan for January 6, they were not made in anticipation of litigation and thus are not protected.

Three of the eleven documents discuss suits brought by third parties about the legality of [7] the Electoral Count Act.[28] These emails do not discuss how this litigation might affect the participants' existing lawsuits; they only consider how these suits could disrupt their plan for January 6. As the Court previously described, "[t]he true animating force behind these emails was advancing a political strategy: to persuade Vice President Pence to take unilateral action on January 6."[29] Because these documents were not created in anticipation of litigation, they are not protected.

In contrast, three of the eleven documents place the January 6 plan in the context of litigation strategy.[30] Two of those documents are separate email chains discussing strategy for a filing in an election-related case and its potential effects on the January 6 plan.[31] Similarly, one document is an email chain discussing the viability of election-related lawsuits after January 6.[32] While these emails relate to the January 6 plan, the team's ongoing and future

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[27] 24716; 24905; 24906.

[28] 56980; 57425; 57790.

[29] Order at 24.

[30] 55112; 59916; 60565.

[31] 59916; 60565.

[32] 55112.

litigation "animate[d] every document,"[33] such that they were created in anticipation of litigation.

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

c. State election-related documents

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

Fifty-four of those emails are Dr. Eastman advising state legislators or circulating his theories on their authority.[34] Thirty-seven of those coordinate meetings with state legislators or other third parties to discuss alleged election fraud and certifying electors.[35] Another fifteen [8] documents send or discuss information for state legislators about their legislative authority.[36] Two documents include Dr.

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[33] *Torf,* 357 F.3d at 908.

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

[35] 16181; 16301; 16349; 16379; 16381; 6458; 20142; 21105; 21106; 21111; 21112; 21113; 21116; 21117; 21122; 21124; 21126; 23582; 23638; 24730; 24760; 24762; 24778; 24795; 24802; 24893; 24897; 25035; 31598; 32071; 32072; 62706; 62844; 62858; 62859; 62861; 62863.

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

Eastman's request for updates on state legislative subpoenas.[37] All fifty-four documents do not relate to or mention anticipated litigation and are thus not protected.

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

Forty-two of the 170 documents are reports or analyses of alleged state election irregularities.[41] Review of the emails shows that these documents served several purposes: they were distributed to state and federal legislators, discussed in public hearings, and also used to support election-related litigation. The reports are largely statistical analyses; they make no reference to litigation and have no indication of being tailored for potential suits. Because these forty-two documents would "have been

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[37] 61724; 61764.

[38] 25905; 30038; 30118; 30119.

[39] 25905.

[40] 30038; 30118; 30119.

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

created in substantially similar form" without the prospect of litigation, they are not protected work product.[42]

Seventy of the 170 documents are emails discussing the election data reports discussed above.[43] Forty-six of these are emails between various attorneys discussing statistical data in the context of state election litigation.[44] These emails would not have been made in the same [9] form if not for litigation and are thus protected. Eighteen other emails are predominantly Dr. Eastman and statisticians discussing election analyses that they used for both litigation and political purposes.[45] Like the contents of the reports themselves, these discussions would have

4 had the same form without the prospect of litigation and thus are not protected. Dr. Eastman

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[42] *Torf,* 357 F.3d at 908.

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

[44] 7650; 7652;7799;8739;8742; 11779; 15393; 15584; 15636; 15944; 16182; 16184; 16354; 16561; 16892; 16893; 16894; 16895; 16901; 17124; 17247; 17416; 18406; 18550; 18552; 18554; 18684; 18793; 18796; 18797; 18858; 18863; 18865; 18875; 18887; 18901; 18902; 18919; 19169; 23290; 23292; 23306; 23308; 23310; 28104; 30669.

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

admits that an additional six emails discussing election reports[46] were created for "adjudicatory proceedings in Congress and/or the state legislatures," not litigation.[47] Although he argues that adjudication of electors is analogous to litigation, his only support for this novel claim is a district court case that did not address the issue.[48] Accordingly, these twenty-four documents are not protected.

Of these 170 state election-related documents, 124 were not made in anticipation of litigation and thus are not protected work product. Because Dr. Eastman also claims attomey-client privilege over thirty-seven of those 124 documents,[49] the Court discusses those attomey-client claims below. The remaining eighty-seven documents[50] were not created in anticipation of

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[46] 31602; 31628; 31634; 31635; 61695; 61701.

[47] Brief at 26-27.

[48] *Id.* at 25.

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

[50] 16181; 16301; 16349; 16379; 16381; 16458; 18813; 18814; 18821; 18822; 18920; 18956; 19686; 19888; 20142; 20163; 21105; 21106; 21111; 21112; 21113; 21116; 21117; 21122; 21124; 21126; 22679; 23905; 24802; 26075; 28479; 30119; 31598; 31602; 31628; 31634; 31635; 32071; 32072; 61724; 61764; 62940; 62944; 62948;62951; 62955; 62958; 62984; 62987; 62996; 63000; 63054; 63058; 63081; 63084; 63091; 63095; 63103; 63114; 63119; 63125; 63131; 63139; 63146; 63154; 63194; 63407; 63416; 63425; 63438; 63448; 63449; 63450; 63451; 63479; 63503; 63512; 63515; 63518; 63519; 63520; 63717; 63919; 63920; 63973; 63974; 63977.

litigation and have no attorney-client privilege claim, so the Court ORDERS them to be disclosed.

d. Documents for Congress

Three documents are email chains gathering information for members of Congress.[51] Two of those documents do not mention litigation and solely collect materials for Congress.[52] [10] The third email chain discusses litigation plans, but also includes a paragraph recommending talking points for members of Congress on their alleged authority to delay the electoral count.[53] This paragraph is not in anticipation of litigation and must be disclosed, with the remainder of the document redacted.

Dr. Eastman also claims attorney-client privilege over one of the three documents discussed in this section,[54] so the Court discusses that document below. Accordingly, the Court ORDERS that the other two documents[55] must be disclosed.

e. **Connecting third parties**

Four documents connect third parties to Dr. Eastman.[56] Two of those connect Dr. Eastman to state legislators and their attorneys.[57] The other two emails are people reaching out to Dr. Eastman to offer

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[51] 52958; 61666; 62657.

[52] 52958; 62657.

[53] List item 4 in 61666.

[54] 52958.

[55] 61666; 62657.

[56] 23893; 31209; 61862; 61868.

[57] 61862; 61868.

suggestions or praise.[58] As was the case for similar documents discussed in the prior Order, none of these documents relate to or implicate litigation. Accordingly, these four documents are not protected and the Court ORDERS them to be disclosed.

f. **News articles**

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

Dr. Eastman also claims attorney-client privilege over two of the seven documents,[60] so the Court discusses those below. Accordingly, the Court ORDERS the other five documents[61] to be disclosed.

2. Preparation by or for a client's representative

The Court now examines whether the 409 documents that were created in anticipation of [11] litigation were created by or for a party or "party's representative (including the other party's attorney, consultant, ... or agent)," which is the second requirement for work product protection.[62] Accordingly, documents are protected if they were

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[58] 23893; 31209.

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

[60] 25167; 25170.

[61] 6854; 6855; 18592; 18593; 18897.

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

prepared by or for President Trump or another client, or by or for Dr. Eastman or another representative of those clients.[63]

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

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

3. **Waiver of protection**

The Court now considers whether Dr. Eastman waived his privilege over any of the 409 documents that the Court concluded above were protected work product. Unlike attorney-client privilege, which is waived if not kept completely confidential, work product protection is only waived when attorneys

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

[64] 24727; 24797; 59448; 60185; 60188.

disclose their work to "an adversary or a conduit to an adversary in litigation."[65]

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

Dr. Eastman did not disclose any of the 409 documents to a conduit to an adversary in litigation. The documents were all exchanged between members of President Trump and his campaign's litigation teams; President Trump's staff; and likeminded experts, consultants, and volunteers. Moreover, many of the documents were labeled confidential or "attorney work [12] product," reinforcing Dr. Eastman's assertion that his team did not intend for these documents to be disclosed to adversaries.

4. Substantial or compelling need exception

As was the case in the Court's prior decision, all of the 409 protected documents are 'opinion' work product because they include attorneys' thoughts and legal theories. Opinion work product "is virtually undiscoverable."[67] A court may compel disclosure of opinion work product only in the rare situation "when mental impressions are *the pivotal issue* in the current

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

[66] Order at 17-20, 29-30.

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

litigation and the need for the material is compelling."[68]

As the Court previously found, review of the 409 protected documents shows that none are "pivotal" to the Select Committee's investigation. The majority of the documents include opinions and discussions about trial strategy in ongoing or anticipated lawsuits. As discussed above, this litigation was a "legitimate form of recourse, and is not tied to the investigation's core purpose, which is to 'investigate and report upon the facts, circumstances, and causes relating to the January 6, 2021, domestic terrorist attack upon the United States Capitol.'"[69]

Accordingly, none of these 409 non-"pivotal" litigation-related documents shall be disclosed based on compelling need.

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Having evaluated each element of work product protection, the Court finds that 409 documents are protected work product and 146 documents are not protected work product. Dr. Eastman also claims attorney client privilege over 40 of the 146 documents that are not protected work product,[70] so the Court

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

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

[70] 23291; 23582; 23584; 23591; 23631; 23638; 24730; 24760; 24762; 24778; 24795; 24893; 24897; 25035; 25167; 25170; 25905; (continued…)

will determine disclosure for these 40 documents under attorney-client privilege below. Thus, the Court ORDERS the other 106 documents to be [13] disclosed.[71]

B. Attorney-Client Privilege

The Court now moves from work product protection to Dr. Eastman's claims of attorney-client privilege. The attorney-client privilege protects confidential communications between attorneys and clients for the purpose of legal advice.[72] However, "advice on political, strategic, or policy issues" is not protected.[73] The privilege extends to communications

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30038; 30118; 51402; 51403; 51407; 51408; 52958; 61695; 61697; 61701; 61767; 61768; 61904; 61905; 62674; 62675; 62698; 62706; 62844; 62858; 62859; 62861; 62863.

[71] 6854; 6855; 16181; 16301; 16349; 16379; 16381; 16458; 18592; 18593; 18813; 18814; 18821; 18822; 18897; 18920; 18956; 19686; 19888; 20142; 20163; 21105; 21106; 21111; 21112; 21113; 21116; 21117; 21122; 21124; 21126; 22679; 23893; 23905; 23998; 24716; 24802; 24905; 24906; 26075; 28479; 30119; 31209; 31598; 31602; 31628; 31634; 31635; 32071; 32072; 51059; 56980; 57425; 57790; 61666; 61724; 61764; 61862; 61868; 62657; 62940; 62944; 62948; 62951; 62955; 62958; 62984; 62987; 62996; 63000; 63054; 63058; 63081; 63084; 63091; 63095; 63103; 63114; 63119; 63125; 63131; 63139; 63146; 63154; 63194; 63407; 63416; 63425; 63438; 63448; 63449; 63450; 63451; 63479; 63503; 63512; 63515; 63518; 63519; 63520; 63717; 63919; 63920; 63973; 63974; 63977.

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

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

with agents of the clients and third parties assisting the attorney.[74]

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

1. Clients seeking legal advice from attorneys

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

a. **President Trump as client**

The Court previously found that Dr. Eastman had an attorney-client relationship with President Trump between January 4-7, 2021.[76] Dr. Eastman was counsel of record on several cases representing President Trump and his campaign in post-election

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

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

[76] Order at 14-15.

litigation beginning in [14] November 2020.[77] In that capacity he communicated with members of the campaign and White House staff, and their emails confirm that they viewed him as President Trump's attorney. An attorney-client relationship between Dr. Eastman and President Trump thus existed throughout the subpoena's time period.

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

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

[78] 25167; 25170; 25905; 30038; 30118.

[79] 25167; 25170; 25905.

[80] Privilege log, 25905; 25905.

[81] 30038; 30118.

b. Legislators as potential clients

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

Fifteen of the forty documents are email communications between Dr. Eastman, two [15] Pennsylvania state legislators, and an agent of those legislators.[85] The first email is the legislators' agent asking Dr. Eastman for legal advice, which Dr. Eastman describes as "regarding the constitutional authority of state legislatures to deal with election illegality and fraud."[86] Two documents are an email chain containing this inquiry and Dr. Eastman's initial response, which are protected; the remainder of the chain is not for [16] legal advice, so Dr. Eastman must disclose redacted versions of the two

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

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

[84] Eastman Decl. ¶¶ 15-20.

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

[86] Brief at 16.

documents.[87] Two more documents are Dr. Eastman's attachments to his response, which are protected attorney-client communications.[88] The eleven documents constituting the remainder of the chain schedule Zoom meetings or discuss state politics.[89] Those emails were not for the purpose of legal advice and so must be disclosed.

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

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

[88] 23584; 23631.

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

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

[91] 24730; 24778; 24795; 62674; 62675; 62698.

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

[93] 61767; 61768.

Nine of the forty documents involve Arizona state legislators.[94] Four of those include a state legislator asking for Dr. Eastman's advice on a draft resolution and are therefore for the purpose of legal advice.[95] One document includes an email asking about the intersection of state and federal election law and thus seeks legal advice; the rest of the document is not for legal advice, so Dr. Eastman must disclose the unprotected portions.[96] Four documents coordinate scheduling calls and are therefore not for the purpose of legal advice,[97] so they must be disclosed.

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

Two of the forty documents seek and provide information to encourage Members of Congress to

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

[95] 51402; 51403; 51407; 51408.

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

[97] 62841; 62842; 62865; 62868.

[98] 62844; 62858; 62859; 62861; 62863.

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

[100] 62844; 62858; 62859; 62861.

object to certain electoral slates.[101] While these emails refer to alleged violations of state law, the purpose of the exchange is to encourage Members to object, not to seek legal advice. Accordingly, these two documents are not protected.

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

c. Dr. Eastman as client

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

d. No client relationship

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

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

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[101] 52958; 53452.

[102] 64305; 64331; 64715.

[103] Brief at 17.

[104] Eastman Decl. ¶ 21.

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

[106] 23291.

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

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

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

2. **Confidentiality**

The Court found above that nineteen full or partial documents were communications between an attorney and client for the purpose of seeking legal advice.[109] In order for these communications to be privileged, they must also have been kept confidential.[110] The

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[107] 61904; 61905.

[108] 61695; 61697; 61701.

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

[110] *In re Pac. Pictures Corp.,* 679 F.3d 1121, 1126-27 (9th Cir. 2012); *see also Reiserer v. United States,* 479 F.3 1160, 1165 (9th

(continued…)

presence of a third party does not necessarily destroy confidentiality if that third party is an agent of the client or attorney.[111] But the third party's "shared desire to see the same outcome in a legal matter is insufficient" to maintain confidentiality.[112]

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

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

Two of the nineteen documents involve a potential representation of two Georgia state senators.[115] Those emails are between the two potential clients, their counsel, Dr. Eastman, and a third party. The attorney for the legislators submitted a sworn declaration that the third party was an attorney working as his agent

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Cir. 2007) ("there is no confidentiality where a third party ... either receives or generates the documents").

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

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

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

[114] 51402; 51403; 51407; 51408.

[115] 24778; 24795.

in this matter.[116] Accordingly, those emails are confidential and therefore privileged.

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

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

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

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

[117] 62674; 62675; 62698.

[118] Privilege log, 62674.

[119] 62863.

[120] 62674; 62675; 62698; 62863.

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Having evaluated each element of attorney-client privilege, the Court finds that 12 [19] documents are privileged and 42 documents are not privileged. Thus, the Court ORDERS the 42 documents to be disclosed.[121]

C. Crime-fraud exception

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

The crime-fraud exception applies when (1) a "client consults an attorney for advice that will serve [them] in the commission of a fraud or crime,"[122] and (2) the communications are "sufficiently related to" and were made "in furtherance of" the crime.[123] It is irrelevant whether the scheme was ultimately successful.[124] An attorney's wrongdoing alone may pierce the privilege, regardless of the client's

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

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

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

[124] *Id.* at 382.

awareness or innocence.[125] The exception extinguishes both the attorney-client privilege and the work product doctrine.[126]

The majority of the remaining protected documents are clearly legitimate legal or litigation communications. However, five documents reference the plan to delay or stop the electoral count on January 6, 2021, and therefore present a close call as to whether they fall [20] within the crime-fraud exception.[127]

1. Timeframe

The Court previously held that from January 4-7, 2021, President Trump and Dr. Eastman likely committed obstruction of an official proceeding, in violation of 18 U.S.C. § 1512(c)(2), and conspiracy to

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

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

[127] 51291 ; 51759; 55112; 59916; 60565.

defraud the United States, in violation of 18 U.S.C. § 371, when they attempted to disrupt the Joint Session of Congress on January 6, 2021.[128] Because the remaining protected documents pre-date that time period, the Court now determines whether those attempted crimes began earlier.

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

The current set of documents also confirm that the plan was established well before January 6, 2021. In an email on December 22, 2020, an attorney with the Trump legal team referred to the "the January 6 strategy" as a known plan to eight other people.[131] Two days later, Dr. Eastman explained that the worst case for the plan was receiving a court decision that constrained Vice President Pence's authority to reject

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[128] Order at 36, 45.

[129] Opp'n Ex. B (Dkt. 350-3).

[130] Opp'n Ex. A (0kt. 350-2); Order at 41.

[131] 51291; *see also* 51759.

electors.[132] Dr. Eastman and President Trump's plan to stop the count was not only established by early December, it was the ultimate goal that the legal team was working to protect from that point forward.

[21] **2. Emails related to and in furtherance of the crimes**

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

In the fifth email, dated December 22, 2020, an attorney goes beyond strategizing litigation outcomes. This email considers whether to bring a case that would decide the interpretation of the Electoral Count Act and potentially risk a court finding that the Act binds Vice President Pence.[136] Because the attorney concluded that a negative court ruling would "tank the January 6 strategy," he encouraged the legal team

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[132] 55112, 55114.

[133] 51759; 55112; 59916; 60565.

[134] 51759.

[135] Order at 41.

[136] 51291.

to avoid the courts.[137] This email cemented the direction of the January 6 plan. The Trump legal team chose not to seek recourse in court—instead, they forged ahead with a political campaign to disrupt the electoral count. Lawyers are free not to bring cases; they are not free to evade judicial review to overturn a democratic election. Accordingly, this portion of the email[138] is subject to the crime-fraud exception and must be disclosed.

D. First Amendment

Dr. Eastman claims that the First Amendment protects thirty documents involving a group of "civic minded citizens of a conservative viewpoint who meet semi-regularly to [22] socialize and discuss issues of public concern."[139] Dr. Eastman contends that disclosure would deter people from participating in potentially controversial groups.

Disclosing information related to political associations can "have a profound chilling effect on the exercise of political rights."[140] The Supreme Court has therefore held that disclosure is only appropriate when there is "a sufficiently important governmental

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

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

[139] Brief at 31.

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

interest."[141] Courts must then balance the government's interest and the group members' privacy interests.[142] Ultimately, disclosure requirements must be "narrowly tailored to the government's asserted interest."[143]

The thirty documents at issue here are emails that include invitations for Dr. Eastman to speak about election litigation, meeting agendas, or Zoom information.[144] Dr. Eastman argues that the Select Committee does not have a strong interest in these documents because they "consist[] mostly of scheduling, agenda setting, and communicating login information."[145] The Court's *in camera* review shows that twenty of the thirty documents match Dr. Eastman's description: they are entirely logistical or plan updates on state post-election litigation, which the Court has already found to be a legitimate form of

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

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

[143] *Bonta,* 141 S. Ct. at 2383 (majority opinion). While the Select Committee proposes using only *Barenblatt's* balancing test, Opp'n at 24, the Court finds that *Barenblatt* and *Banta* articulate effectively the same test. *See Republican Nat'l Comm. v. Pelosi,* No. 22-cv-00659-TJK, _ F. Supp. 3d _, 2022 WL 1294509, at *20 (D.D.C.

May 1, 2022) (finding minimal or no differences between the tests).

[144] 21115; 21119; 21120; 21242; 21243; 21245; 21253; 21429; 21430; 22779; 22780; 23038; 23956; 24948; 24950; 25165; 25438; 25558; 25877; 26072; 26091; 26790; 26791; 26793; 26903; 26910; 28376; 30032; 31471; 31537.

[145] Brief at 32.

recourse.[146] The potential chilling effect on the participants outweighs the Select Committee's interest because the documents are at most minimally relevant to its investigation. Accordingly, those twenty documents are protected from disclosure.

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

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

Five documents include the agenda for a meeting on December 9, 2020.[151] The agenda included a section

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

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

[148] 22779; 22780; 25558; 26091.

[149] 25558.

[150] *Id.*

[151] 23038; 24948; 24950; 26072; 26791.

entitled "GROUND GAME following Nov 4 Election Results," during which a sitting Member of Congress discussed a "[p]lan to challenge the electors in the House of Representatives."[152]

One document contains the agenda for a meeting on December 16, 2020.[153] This meeting similarly had a section on the "GROUND GAME following Nov 4 Election Results." In this segment, an elector for President Trump analyzed "The Constitutional implications of the Electoral College Meeting and What Comes Next."[154]

The Select Committee has a substantial interest in these three meetings because the presentations furthered a critical objective of the January 6 plan: to have contested states certify alternate slates of electors for President Trump.[155] The week before these meetings, Dr. Eastman sent memos to high-level White House staff explaining that the January 6 plan required legislators "to determine the manner of choosing electors, even to the point of [24] adopting a slate of electors themselves."[156] In the same two week period, Dr. Eastman reached out to sympathetic state legislators in Pennsylvania, Georgia, and Arizona, urging them to decertify Biden electors and certify alternate Trump electors. Just three days after the third meeting, Dr. Eastman admitted that his January 6 plan hinged on "electors get[ting] a

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[152] 26791.

[153] 30032.

[154] *Id.*

[155] *See* Order at 4-5, 41.

[156] Opp'n Ex. J (Dkt. 350-11) at 6.

certification from their State Legislators"—without it, the dueling slates would be "dead on arrival in Congress."[157] Dr. Eastman's actions in these few weeks indicate that his and President Trump's pressure campaign to stop the electoral count did not end with Vice President Pence—it targeted every tier of federal and state elected officials. Convincing state legislatures to certify competing electors was essential to stop the count and ensure President Trump's reelection.

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

The Court now considers whether the Select Committee's interests outweigh the associational interests of the participants. Several courts have suggested that the First Amendment bars disclosure when it results in "extensive interference with political groups' internal operations and with their

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[157] Opp'n Ex. D (Dkt. 350-5).

[158] Brief at 32.

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

effectiveness."[160] For example, the Supreme Court found that NAACP members facing "economic reprisal, loss of employment, [and] threat of physical coercion" outweighed the government's need for disclosure of membership lists.[161] On the other hand, another district court recently found that the Select Committee's interest [25] outweighed "the subpoena's interference with the [Republican National Committee's] ability to pursue political goals such as winning elections and advocating for its policies."[162]

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

While Dr. Eastman has legitimate concerns, they are not as weighty as either the RNC's fears or those of NAACP members. First, the risk of third parties receiving future subpoenas cannot be sufficient to

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

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

[162] *RNC,* _ F. Supp. 3d _, 2022 WL 1294509, at *23 (internal quotation marks omitted).

[163] Brief at 32-33.

[164] *Id.*

justify noncompliance with an existing subpoena. Second, disclosing the documents would not reveal a full membership list of the group; the emails blind copied all recipients, so their information is not accessible. Eight of the ten documents are meeting agendas, so group members' names only appear if they were scheduled to speak. To mitigate any chilling effect, the Court can order redaction of the names of presenters on topics unrelated to the January 6 plan. Third, although the Court "must presume that the committees of Congress will exercise their powers responsibly and with due regard for the rights of affected parties,"[165] there have been leaks and public disclosures from the Select Committee in this case already.[166] But as the *RNC* court found, the balancing still tips in the Select Committee's favor, even when the Court considers the likelihood of disclosure to the public.[167]

Having considered the parties' arguments, the Court finds that disclosure of these ten key documents is "narrowly tailored to the government's asserted interest."[168] Accordingly, the [26] Court ORDERS Dr. Eastman to disclose those ten documents.[169] Dr. Eastman should redact the names of all participants

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

[166] Brief at 33.

[167] *RNC,* _ F. Supp. 3d _, 2022 WL 1294509, at *20.

[168] *Bonta,* 141 S. Ct. at 2383.

[169] 22779; 22780; 23038; 24948; 24950; 25558; 26072; 26091; 26791; 30032.

listed as speakers besides those mentioned by the Court.[170]

IV. DISPOSITION

For the reasons explained above, the Court finds that 440 documents are privileged. The Court **ORDERS** Dr. Eastman to disclose the other 159 documents to the House Select Committee by 2:00 p.m. Pacific Time on Wednesday, June 8, 2022.[171]

DATED: June 7, 2022

David O. Carter

DAVID O. CARTER
UNITED STATES
DISTRICT JUDGE

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[170] The Court here refers to unmentioned participants listed on the agendas in 23038, 24948, 24950, 25558,

26072, 26091, 26791, and 30032.

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

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

JOHN C. EASTMAN, Plaintiff, vs. BENNIE G. THOMPSON, SELECT COMMITTEE TO INVESTIGATE THE JANUARY 6 ATTACK ON THE UNITED STATES CAPITOL, AND CHAPMAN UNIVERSITY, Defendants.	Case No. 8:22-cv-00099-DOC-DFM ORDER RE PRIVILEGE OF DOCUMENTS DATED JANUARY 4-7, 2021 (Filed March 28, 2022

Table of Contents

[3] Plaintiff Dr. John Eastman ("Dr. Eastman"), a former law school dean at Chapman University, is a "political conservative who supported former President [Donald] Trump" and a self-described "activist law professor."[1] While he was a professor at Chapman, Dr. Eastman worked with President Trump and his campaign on legal and political

[1] Complaint ("Compl.") (Dkt. 1) ¶¶ 5–6.

strategy regarding the results of the November 3, 2020 election.

This case concerns the House of Representatives Select Committee to Investigate the January 6 Attack on the US Capitol's ("Select Committee") attempt to obtain emails sent or received by Dr. Eastman on his Chapman email account between November 3, 2020 and January 20, 2021. The parties disagree on whether the documents are privileged or if they should be disclosed.

The Court previously ordered the parties to begin with documents from January 4-7, 2021. Dr. Eastman reviewed each document and claimed privilege over some, and the Select Committee objected to a number of his claims. At this point, the parties disagree on whether 111 documents from those dates are privileged. The parties submitted briefing, and the Court held a hearing on the privilege claims on March 8, 2022. The Court then personally reviewed the 111 challenged documents, which were provided by Dr. Eastman.

I. BACKGROUND

A. Facts[2]

1. Election fraud claims

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[2] In this discussion, the Court relies solely on facts provided by Dr. Eastman and the Select Committee in their briefing and attached exhibits. To the extent either party references publicly-available and authenticated memoranda, government reports, and recordings, the Court takes judicial notice of those materials. See Fed. R. Evid. 201(b).

Dr. Eastman claims that the 2020 presidential election was "one of the most controversial in American history."[3] Despite the lack of evidence of election tampering, "a significant portion of the population came to believe the election was tainted by fraud, disregard of state election law, misconduct by election officials and other factors."[4]

In the months after the election, President Trump and Dr. Eastman helped foster those [4] public beliefs and encouraged state legislators to question the election results. Dr. Eastman testified before and met with "state legislators[ ] to advise them of their constitutional authority ... to direct the 'manner' of choosing presidential electors."[5] Relying on public interviews with attendees, the Select Committee states that on January 2, 2021, President Trump and Dr. Eastman hosted a briefing urging several hundred state legislators from states won by President Biden to "decertify" electors.[6]

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[3] Compl. ¶ 1.

[4] *Id.*

[5] Declaration of John Eastman ("Eastman Decl.") (Dkt. 132-1) ¶ 30.

[6] Select Committee's Privilege Opposition ("Opp'n") (Dkt. 164) at 7 (citing Michael Leahy, President Trump Joins Call Urging State Legislators to Review Evidence and Consider Decertifying 'Unlawful' Election Results, Breitbart (Jan. 3, 2021), perma.cc/GZ8R-68EY, and Jacqueline Alemany et al., Ahead of Jan. 6, Willard Hotel in Downtown DC was a Trump Team 'Command Center' for Effort to Deny Biden the Presidency, Wash. Post (Oct. 23, 2021), perma.cc/2PRC-NXKV (quoting Michigan State Senator Ed McBroom)).

President Trump also made personal appeals to state officials. On January 2, he called Georgia Secretary of State Brad Raffensperger to discuss allegations of election fraud.[7] During the call, President Trump repeatedly claimed it was impossible for him to have lost the popular vote in Georgia,[8] and repeatedly mentioned his "current margin [of] only 11,779" votes.[9] He explained to Secretary Raffensperger that he did not care about specific fraud numbers as long as he won, "[b]ecause what's the difference between winning the election by two votes and winning it by half a million votes[?]"[10] When Secretary Raffensperger pushed back against these requests, the President warned of public anger

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[7] *Id.* at 8 (citing Amy Gardner & Paulina Firozi, Here's the full transcript and audio of the call between Trump and Raffensperger, Wash. Post (Jan. 5, 2021), perma.cc/5SMX-4FPX ("Trump-Raffensperger Call Transcript")).

[8] Trump-Raffensperger Call Transcript ("It's just not possible to have lost Georgia. It's not possible." / "There's no way I lost Georgia. There's no way. We won by hundreds of thousands of votes.").

[9] *Id.* ("You don't need much of a number because the number that in theory I lost by, the margin would be 11,779" / "the bottom line is, many, many times the 11,779 margin that they said we lost by" / "Brad, if you took the minimum numbers where many, many times above the 11,779, and many of those numbers are certified, or they will be certified, but they are certified." / "And those are numbers that are there, that exist. That beat the margin of loss, they beat it, I mean, by a lot" / "You know when you add them up, it's many more times, it's many times the 11,779 number.").

[10] *Id.*

and threatened criminal consequences.[11] The President interspersed the conversation with specific fraud claims—dead people voting, absentee ballot forgeries, trucks ferrying illegal ballots, and machines stuffed with "unvoted" [5] ballots.[12] Mr. Raffensperger debunked the allegations "point by point" and explained that "the data you have is wrong;" however, President Trump still told him, "I just want to find 11,780 votes."[13]

The next day, President Trump attempted to elevate Jeffrey Clark to Acting Attorney General, based on Mr. Clark's statements that he would write a letter to contested states saying that the election may have been stolen and urging them to decertify electors.[14] The White House Counsel described Mr. Clark's proposed letter as a "murder-suicide pact" that would "damage everyone who touches it" and commented "we should have nothing to do with that letter."[15] President Trump eventually did not promote Mr. Clark after multiple high-ranking members of the

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[11] *Id.* ("the people of Georgia are angry, the people of the country are angry. And there's nothing wrong with saying that, you know, that you've recalculated." / "But the ballots are corrupt. And you are going to find that they are – which is totally illegal – it is more illegal for you than it is for them because, you know what they did and you're not reporting it. That's a criminal, that's a criminal offense.").

[12] *Id.*

[13] *Id.*

[14] Opp'n Ex. B, Richard Donoghue Deposition Transcript ("Donoghue Tr.") (Dkt. 160-5) 124.

[15] *Id.* at 126.

Department of Justice threatened mass resignations that would leave the Department a "graveyard."[16]

In the months following the election, numerous credible sources–from the President's inner circle to agency leadership to statisticians–informed President Trump and Dr. Eastman that there was no evidence of election fraud. One week after the election, the Cybersecurity and Infrastructure Security Agency declared "[t]he November 3rd election [ ] the most secure in American history" and found "no evidence that any voting system deleted or lost votes, changed votes, or was in any way compromised."[17] An internal Trump Campaign memo concluded in November that fraud claims related to Dominion voting machines were baseless.[18] In early December, Attorney General Barr publicly stated there was no evidence of fraud, and on December 27, Deputy Attorney General Donoghue privately told President Trump that after "dozens of investigations, hundreds of interviews," the Department of Justice had concluded that "the major allegations [of election fraud] are not supported by the evidence developed."[19] [6] Still, President Trump repeatedly urged that "the Department [of Justice]

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[16] *Id.* at 123–26; Opp'n Ex. C, Jeffrey Rosen Deposition Transcript ("Rosen Tr.") (Dkt. 160-6) 105–06, 118.

[17] Opp'n at 5 (citing Cybersecurity and Infrastructure Security Agency, Joint Statement from Elections Infrastructure Government Coordinating Council & The Election Infrastructure Sector Coordinating Executive Committees (Nov. 12, 2020), perma.cc/NQQ9-Z7GZ).

[18] *Id.* at 45 (citing *Read the Trump campaign's internal memo*, N.Y. TIMES (Sept. 21, 2021), perma.cc/HE7A-3D27).

[19] Donoghue Tr. 59–60, 80.

should publicly say that the election is corrupt or suspect or not reliable."[20]

By early January, more than sixty court cases alleging fraud had been dismissed for lack of evidence or lack of standing.[21]

2. Plan to disrupt electoral count

In response to alleged fraud, Dr. Eastman researched and planned a strategy for President Trump to win the election. Just after Christmas, Dr. Eastman wrote a now-public two-page memo proposing that Vice President Pence refuse to count certified electoral votes from states contested by the Trump campaign: Arizona, Georgia, Michigan, Nevada, New Mexico, Pennsylvania, and Wisconsin.[22] The memo outlines the two ways in which Dr. Eastman's plan ensures "President Trump is re-elected."[23] If Vice President Pence refused to count electoral votes from all seven contested states, President Trump would win 232 votes to 222.[24] Alternatively, if Congress claimed that a candidate could not win without reaching 270 votes, Vice President Pence could send the election to the

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[20] *Id*. at 59.

[21] Opp'n at 45 (citing William Cummings, Joey Garrison & Jim Sergent, By the numbers: President Donald Trump's failed efforts to overturn the election, USA Today (Jan. 6, 2021), perma.cc/683S-HSRC).

[22] Opp'n at 9 (citing READ Trump lawyer's memo on six-step plan for Pence to overturn the election, CNN (Sept. 21, 2021), perma.cc/LP48-JRAF ("Eastman Short Memo")).

[23] Eastman Short Memo at 2.

[24] *Id.*

Republican-majority House of Representatives, which would then elect President Trump.[25] The memo emphasizes that "[t]he main thing here is that Pence should do this without asking for permission – either from a vote of the joint session or from the Court."[26]

On January 3, 2021, Dr. Eastman drafted a six-page memo expanding on his plan and analysis,[27] which he later disclosed to the media.[28] This memo "war gam[ed]" four potential scenarios for January 6, only some of which would lead to President Trump winning re-election.[29] Claiming that "[t]he stakes could not be higher," Dr. Eastman concludes his memo [7] stating that his plan is "BOLD, Certainly. But this Election was Stolen by a strategic Democrat plan to systematically flout existing election laws for partisan advantage; we're no longer playing by Queensbury Rules."[30]

On January 4, President Trump and Dr. Eastman invited Vice President Pence, the Vice President's counsel Greg Jacob, and the Vice President's Chief of Staff Marc Short to the Oval Office to discuss Dr.

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[25] *Id.*

[26] *Id.*

[27] Opp'n at 9 (citing Jan. 3 Memo on Jan. 6 Scenario, CNN, perma.cc/B8XQ-4T3Z ("Eastman Long Memo")).

[28] *Id.* at 9 n.27 (citing Jeremy Herb (@jeremyherb), Twitter (Sept. 21, 2021, 5:46 PM), perma.cc/GX4R-MK9B (explaining that Dr. Eastman gave the six-page memo to a CNN reporter)).

[29] *See generally* Eastman Long Memo.

[30] *Id.* at 5.

Eastman's memo.[31] Dr. Eastman presented only two courses of action for the Vice President on January 6: to reject electors or delay the count.[32] During that meeting, Vice President Pence consistently held that he did not possess the authority to carry out Dr. Eastman's proposal.[33]

The Vice President's counsel and chief of staff were then directed to meet separately with Dr. Eastman the next day to review materials in support of his plan. Dr. Eastman opened the meeting on January 5 bluntly: "I'm here asking you to reject the electors."[34] Vice President's counsel Greg Jacob and Dr. Eastman spent the majority of the meeting in a Socratic debate on the merits of the memo's legal arguments.[35] Over the course of their discussion, Dr. Eastman's focus pivoted from requesting Vice President Pence reject the electors to asking him to delay the count, which he presented as more "palatable."[36] Ultimately, Dr. Eastman conceded that his argument was contrary to consistent historical practice,[37] would likely be

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[31] Opp'n Ex. F, Greg Jacob Deposition Transcript ("Jacob Tr.") (Dkt. 160-8) 82.

[32] *Id.* at 89.

[33] *Id.* at 95 ("from my very first conversation with the Vice President on the subject, his immediate instinct was that there is no way that one person could be entrusted by the Framers to exercise that authority. And never once did I see him budge from that view ... So everything that he said or did during that meeting was consistent with his first instincts on this question.").

[34] *Id.* at 92.

[35] *Id.* at 96.

[36] *Id.*

[37] *Id.* at 109.

unanimously rejected by the Supreme Court,[38] and violated the Electoral Count Act on four separate grounds.[39]

Despite receiving pushback, President Trump and Dr. Eastman continued to urge Vice President Pence to carry out the plan. At 1:00 am on January 6, President Trump tweeted, "If [8] Vice President @Mike_Pence comes through for us, we will win the Presidency ... Mike can send it back!"[40] At 8:17 a.m., the President tweeted again, "States want to correct their votes ... All Mike Pence has to do is send them back to the States, AND WE WIN. Do it Mike, this is a time for extreme courage!"[41]

Following his tweets, President Trump placed two calls to Vice President Pence directly. After not being able to connect with the Vice President around 9:00 am, they spoke at approximately 11:20 am.[42] Vice President Pence's National Security Advisor, General Keith Kellogg, Jr., was present and described President Trump as berating the Vice President for

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[38] *Id.* at 110.

[39] *Id.* at 128.

[40] Opp'n at 10 (quoting Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 6, 2021, 1:00 AM), perma.cc/9EV8-XJ7K).

[41] *Id.* at 11 (quoting Donald J. Trump (@realDonaldTrump), Twitter (Jan. 6, 2021, 8:17 AM), perma.cc/2J3P-VDBV).

[42] Opp'n Ex. H ("POTUS Private Schedule") (Dkt. 160-10) (notes on President's private schedule show call with VPOTUS at 11:20 AM) (cited in Opp'n at 11 n.36); see also Opp'n Ex. I, Marc Short Deposition Transcript ("Short Tr.") (Dkt. 160-11) 16; Jacob Tr. 168.

"not [being] tough enough to make the call" to delay or reject electoral votes.[43]

3. Attack on the Capitol

On January 6, 2021, tens of thousands of people gathered outside the White House to protest the lawful transition of power from President Trump to President Joseph Biden. Both Dr. Eastman and President Trump gave speeches to relay the plan not just to the thousands gathered at the Ellipse but also to those watching at home.

President Trump's personal attorney, Rudy Giuliani, introduced Dr. Eastman before he spoke as the "professor" who would "explain ... what happened last night, how they cheated, and how it was exactly the same as what they did on November 3."[44] Dr. Eastman declared to the crowd:

> And all we are demanding of Vice President Pence is this afternoon at 1:00 he let the legislators of the state look into this so we get to the bottom of it, and the American people know whether we have control of the direction of our government, or not. We no longer live in a self-governing republic if we can't get the answer to this question. This is bigger than President Trump. It is a very essence of our republican form of government, and it has to be done. And anybody that is not willing to stand

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[43] Opp'n Ex. G, Keith Kellogg, Jr. Deposition Transcript ("Kellogg Tr.") (Dkt. 160-9) 87, 90–92.

[44] *See* Opp'n at 12 (citing Rudy Giuliani, Speech to the "Save America March" and Rally (Jan. 6, 2021), perma.cc/4NKM-24AZ ("Giuliani Speech")).

> up to do it, does not deserve to be in the office. It is that simple.[45]

[9] President Trump then took the podium. He began with praise for Dr. Eastman and his plan to have Vice President Pence disrupt the count:

> Thank you very much, John.... John is one of the most brilliant lawyers in the country, and he looked at this and he said, "What an absolute disgrace that this can be happening to our Constitution." Because if Mike Pence does the right thing, we win the election. All he has to do, all this is, this is from the number one, or certainly one of the top, Constitutional lawyers in our country. He has the absolute right to do it.[46]

Before the Joint Session of Congress began, Vice President Pence publicly rejected President Trump and Dr. Eastman's plan: "It is my considered judgment that my oath to support and defend the Constitution constrains me from claiming unilateral authority to determine which electoral votes should be counted and which should not."[47]

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[45] *See* Opp'n at 12 (quoting John Eastman, Speech to the "Save America March" and Rally, C-SPAN (Jan. 6, 2021), perma.cc/3C8Y-GRK3 ("Eastman Speech")).

[46] *Id.* at 11 (citing Donald J. Trump, President, Speech to the "Save America March" and Rally (Jan. 6, 2021), perma.cc/2YNN-9JR3 ("Trump Speech Transcript")).

[47] *Id.* at 40 (citing Public Letter from Michael R. Pence to Congress (Jan. 6, 2021), perma.cc/Y9BG-JFMJ ("Pence Letter")).

At 1:00 pm, members of Congress began the Joint Session as required by the Twelfth Amendment and the Electoral Count Act.

Soon after, President Trump finished his speech by urging his supporters to walk with him to the Capitol:

> Now, it is up to Congress to confront this egregious assault on our democracy. And after this, we're going to walk down, and I'll be there with you, we're going to walk down, we're going to walk down.... [W]e're going to try and give our Republicans, the weak ones because the strong ones don't need any of our help. We're going to try and give them the kind of pride and boldness that they need to take back our country. So let's walk down Pennsylvania Avenue.[48]

After President Trump's speech, several hundred protesters left the rally and stormed the Capitol building. As the D.C. Circuit described it:

> Shortly after the speech, a large crowd of President Trump's supporters—including some armed with weapons and wearing full tactical gear—marched to the Capitol and violently broke into the building to try and prevent Congress's certification of the election results. The mob quickly overwhelmed law enforcement and scaled walls, smashed through barricades, and shattered windows to gain access to the interior of the Capitol. Police officers were attacked with chemical agents, beaten with flag

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[48] Trump Speech Transcript.

poles and frozen water bottles, and crushed between doors and throngs of rioters.[49]

[10] President Trump returned to the White House after his speech. At 2:02 pm, Mark Meadows, the White House Chief of Staff, was informed about the violence unfolding at the Capitol.[50] Mr. Meadows immediately went to relay that message to President Trump.[51] Even as the rioters continued to break into the Capitol, President Trump tweeted at 2:24 pm: "Mike Pence didn't have the courage to do what should have been done to protect our Country and our Constitution, giving States a chance to certify a corrected set of facts, not the fraudulent or inaccurate ones which they were asked to previously certify. USA demands the truth!"[52]

During the riot, Vice President Pence, Members of Congress, and workers across the Capitol were forced

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[49] *Trump v. Thompson*, 20 F.4th 10, 15–16 (D.C. Cir. 2021), *cert. denied*, No. 21-932, —— U.S. ——, 142 S.Ct. 1350, 212 L.Ed.2d 55 (U.S. Feb. 22, 2022) (citing Staff Rep. of S. Comm. on Homeland Security & Governmental Affs. & S. Comm. on Rules & Admin., 117th Cong., Examining the U.S. Capitol Attack: a Review of the Security, Planning, and Response Failures on January 6, at 23–29 (June 8, 2021) ("Capitol Attack Senate Report"), and *Hearing on the Law Enforcement Experience on January 6th Before the H. Select Comm. to Investigate the January 6th Attack on the U.S. Capitol*, 117th Cong., at 2 (July 27, 2021)).

[50] Opp'n Ex. J, Benjamin Williamson Deposition Transcript ("Williamson Tr.") (Dkt. 160-12) 62.

[51] *Id.* at 65.

[52] Opp'n at 12 (quoting Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 6, 2021, 2:24 pm), perma.cc/Z9Q5-EANU).

to flee for safety.[53] Seeking shelter during the attack, Vice President Pence's counsel Greg Jacob emailed Dr. Eastman that the rioters "believed with all their hearts the theory they were sold about the powers that could legitimately be exercised at the Capitol on this day."[54] Mr. Jacob continued, "[a]nd thanks to your bullshit, we are now under siege."[55]

President Trump later published a video expressing support for the rioters but urging them to leave the Capitol: "We love you, you're very special. You've seen what happens, you see the way others are treated that are so bad and so evil. I know how you feel."[56] At 6:00 pm, President Trump reiterated: "These are the things and events that happen when a sacred landslide election victory is so unceremoniously & viciously stripped away from great patriots who have been badly & unfairly treated for so long. Go home with love & in peace. Remember this day forever!"[57]

As the attack progressed, Dr. Eastman continued to urge Vice President Pence to reconsider his decision not to delay the count. In an email to Vice President

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[53] *Thompson*, 20 F.4th at 15–16.

[54] Opp'n Ex. N (Dkt. 160-16), Email from Greg Jacob to John Eastman (Jan. 6, 2021, 1:05 pm).

[55] *Id.*, Email from Greg Jacob to John Eastman (Jan. 6, 2021, 2:14 pm).

[56] Opp'n at 15 (quoting Donald J. Trump, President, Video Statement on Capitol Protesters (Jan. 6, 2021), perma.cc/7WF3-QSV8).

[57] *Id.* at 15 (quoting Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 6, 2021, 6:01 pm), perma.cc/J5WJ-X2V4).

Pence's counsel Greg Jacob at 2:25 pm on January 6, Dr. Eastman wrote: "The 'siege' is because YOU and [11] your boss did not do what was necessary to allow this to be aired in a public way so the American people can see for themselves what happened."[58] At 6:09 pm, Dr. Eastman "remain[ed] of the view" that "adjourn[ing] to allow the state legislatures to continue their work" was the "most prudent course."[59] At 11:44 pm, Dr. Eastman sent one final email to persuade Jacob to change his mind: "I implore you to consider one more relatively minor violation and adjourn for 10 days ...."[60]

After the riot had subsided, the Joint Session of Congress reconvened. "It was not until 3:42 a.m. on January 7 that Congress officially certified Joseph Biden as the winner of the 2020 presidential election."[61]

The rampage on January 6 "left multiple people dead, injured more than 140 people, and inflicted millions of dollars in damage to the Capitol."[62] As the House of Representatives later wrote, January 6, 2021 was "one of the darkest days of our democracy."[63]

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[58] Opp'n Ex. N (Dkt. 160-16), Email from John Eastman to Greg Jacob (Jan. 6, 2021, 2:25 pm EST) (capitalization in original).

[59] *Id.*, Email from John Eastman to Greg Jacob (Jan. 6, 2021, 6:09 pm EST).

[60] *Id.*, Email from John Eastman to Greg Jacob (Jan. 6, 2021, 11:44 pm EST (converting from MST)).

[61] *Thompson*, 20 F.4th at 18 (citing Capitol Attack Senate Report at 26).

[62] *Id*. at 15–16.

[63] H.R. Res. 503, 117th Cong. (2021), Preamble.

4. Investigation into the attack

In response to the attack, the House of Representatives created the Select Committee to "investigate and report upon the facts, circumstances, and causes relating to the January 6, 2021, domestic terrorist attack upon the United States Capitol Complex ... and relating to the interference with the peaceful transfer of power."[64]

On November 8, 2021, the Select Committee issued a subpoena to Dr. Eastman.[65] In the accompanying cover letter, Chairman Thompson stated that Dr. Eastman was "instrumental in advising President Trump that Vice President Pence could determine which electors were recognized on January 6, a view that many of those who attacked the Capitol apparently also [12] shared."[66]

Dr. Eastman declined to produce any documents or communications to the Select Committee and asserted his Fifth Amendment privilege against production.[67] During his deposition, Dr. Eastman asserted his Fifth Amendment privilege 146 times.[68]

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[64] *Id.* § 3(2).

[65] Opposition to App. for Temporary Restraining Order ("TRO Opp'n") (Dkt. 23) (citing Nov. 8, 2021 Select Committee Cover Letter to John Eastman ("Subpoena Cover Letter"), January6th.house.gov/sites/democrats.january6th.house.gov/files/20211108%20Eastman.pdf).

[66] Subpoena Cover Letter at 3.

[67] Opp'n at 17.

[68] *See generally* Opp'n Ex. A, John Eastman Deposition Transcript ("Eastman Tr.") (Dkt. 160-4).

The Select Committee subsequently issued a subpoena to obtain Dr. Eastman's communications from his former employer, Chapman University on January 18, 2022. The subpoena ordered Chapman to produce Dr. Eastman's documents stored on Chapman's servers "that are related in any way to the 2020 election or the January 6, 2021 Joint Session of Congress, ... during the time period November 3, 2020 to January 20, 2021."[69] Chapman initially collected over 30,000 responsive documents. The Select Committee then worked with Chapman to tailor search terms, resulting in just under 19,000 responsive documents.

B. Procedural History

Dr. Eastman filed his Complaint in this Court on January 20, 2022, and immediately filed an Application for a Temporary Restraining Order to prevent Chapman University from complying with the Select Committee's subpoena. On the same day, the Court granted a temporary restraining order (Dkt. 12). After briefing from the parties and a hearing, the Court denied Dr. Eastman's application for a preliminary injunction (Dkt. 41). The Court ordered Dr. Eastman to begin reviewing the documents and producing a privilege log to the Court and the Select Committee (Dkt. 43).

On January 31, 2022, given the urgency of the investigation and the lack of prejudice to Dr. Eastman, the Court granted the Select Committee's request and ordered Dr. Eastman to begin his production with documents dated between January 4

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[69] *Id.*

and January 7, 2021 (Dkt. 63). On February 14, 2022, the Court set a briefing and hearing schedule as to the January 4-7 documents (Dkt. 104).

On February 22, 2022, Dr. Eastman filed his brief supporting his privilege assertions [13] ("Brief") (Dkt. 144). The Select Committee filed its opposition ("Opp'n") (Dkt. 164) on March 2, 2022. Dr. Eastman filed his Reply on March 7, 2022 (Dkt. 185). The Court heard oral arguments on March 8, 2022.

II. LEGAL STANDARD

Federal common law governs the attorney-client privilege when courts adjudicate issues of federal law.[70] "As with all evidentiary privileges, the burden of proving that the attorney-client privilege applies rests not with the party contesting the privilege, but with the party asserting it."[71] The "party asserting the attorney-client privilege has the burden of establishing the relationship *and* the privileged nature of the communication."[72] The party must assert the privilege "as to each record sought to allow the court to rule with specificity."[73] It is "extremely disfavored" when a "subpoena [i]s met by blanket assertions of privilege."[74] "Because it impedes full and free discovery of the truth, the attorney-client

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[70] *United States v. Ruehle*, 583 F.3d 600, 608 (9th Cir. 2009).

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

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

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

[74] *In re Grand Jury Witness*, 695 F.2d 359, 362 (9th Cir. 1982).

privilege is strictly construed."[75] The same burden applies to the party asserting work product protection.[76]

III. DISCUSSION

The Court will first consider Dr. Eastman's assertions of attorney-client privilege, then his assertions of work product protection. For each category, the Court will examine whether the privilege attached in the first place, whether it was waived, and whether an exception applies.

A. Attorney-Client Privilege

The attorney-client privilege protects confidential communications between attorneys and clients for the purpose of legal advice.[77] The privilege "is intended 'to encourage clients to make full disclosure to their attorneys,' " recognizing that sound advice depends on transparency.[78]

[14] Whether a communication or document is covered by the attorney-client privilege is determined by an eight-part test:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the

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

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

[77] *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981).

[78] *Hernandez*, 604 F.3d at 1100 (quoting *Upjohn*, 449 U.S. at 389, 101 S.Ct. 677).

> client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection be waived.[79]

"The party asserting the privilege bears the burden of proving each essential element."[80]

Dr. Eastman claims attorney-client privilege over nine out of the total 111 documents.[81] The Court now examines whether an attorney-client relationship existed between President Trump and Dr. Eastman; whether Dr. Eastman's use of Chapman University email destroyed or waived confidentiality; and whether the emails were between an attorney, client, or their agents.

1. Existence of attorney-client relationship

The Select Committee argues that Dr. Eastman has not met his burden of proving that an attorney-client relationship existed between him and President Trump.[82] An attorney-client relationship is formed when an attorney advises a client who has consulted him seeking legal assistance.[83] Attorney-client

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[79] *United States v. Graf*, 610 F.3d 1148, 1156 (9th Cir. 2010) (citation omitted).

[80] *Id.*

[81] 4708; 4713; 4722; 4723; 4744 (duplicate); 4745 (duplicate); 4766 (duplicate); 4767 (duplicate); 4788.

[82] Opp'n at 20–21.

[83] *Waggoner v. Snow, Becker, Kroll, Klaris & Krauss*, 991 F.2d 1501, 1505 (9th Cir. 1993) (citations omitted).

relationships may be express or implied.[84] Among other factors, courts consider "the intent and conduct of the parties"[85] and "whether the client believed an attorney-client relationship existed."[86]

In response to the Court's request for evidence of an attorney-client relationship, Dr. Eastman provided only an unsigned, undated retainer agreement between him, President Trump as candidate, and President Trump's campaign committee.[87] However, strong evidence establishes that Dr. Eastman had an attorney-client relationship with President Trump and his campaign between January 4 and 6, 2021. Dr. Eastman appeared on behalf of President Trump[15] in a Georgia lawsuit on January 5, 2021.[88] In the days leading up to January 6, Dr. Eastman also attended closed-door meetings with and on behalf of President Trump to present his legal theories on the Electoral Count Act. The Vice President's counsel, who attended those meetings, "assumed it to be true for the purposes of [his] interactions with him" that Dr. Eastman was representing President Trump.[89] President Trump's speech explicitly acknowledged Dr.

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[84] *In re Johore Inv. Co. (U.S.A.), Inc.*, 157 B.R. 671, 676 (D. Haw. 1985).

[85] *Waggoner*, 991 F.2d at 1505.

[86] *Boskoff v. Yano*, 57 F. Supp. 2d 994, 998 (D. Haw. 1998) (quoting *Waggoner*, 991 F.2d at 1505, and *Research Corp. Tech., Inc. v. Hewlett-Packard Co.*, 936 F. Supp. 697, 700 (D. Ariz. 1996)).

[87] Eastman Decl., Ex. A ("Retainer Agreement") (Dkt. 132-2).

[88] Reply at 8 (citing *Application for Admission of Jonathan Eastman Pro Hac Vice, Trump v. Kemp*, No. 1:20-cv-05310, 2020 WL 8225382 (N.D. Ga. Dec. 31, 2020)), ECF No. 17).

[89] Jacob Tr. 106–07.

Eastman's legal role in developing the plan to delay or stop the count: "John is one of the most brilliant lawyers in the country, and he looked at this and he said, 'What an absolute disgrace that this can be happening to our Constitution.' "[90] And on May 5, 2021, Dr. Eastman stated on a talk show that President Trump was his client in the aftermath of the election.[91] The evidence clearly supports an attorney-client relationship between President Trump, his campaign, and Dr. Eastman during January 4-7, 2021.

2. Chapman University email use

Communications between an attorney and a client are only privileged if they are intended to be kept confidential and are not disclosed.[92] Dr. Eastman used his Chapman University email to communicate with legal clients that he represented outside of his university activities. The Select Committee argues that Dr. Eastman's use of his Chapman email prevents all of his communications from being privileged given the university's monitoring policies.[93] Although the Select Committee argued at the hearing that use of Chapman email destroys privilege for all 111 documents, their confidentiality argument is only

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[90] Trump Speech Transcript.

[91] Opp'n at 29 (quoting Peter Boyles Show, 710KNUS NEWS/TALK (May 5, 2021, 8:00 AM), perma.cc/Q6YE-KD5F) ("I have express authorization from my client, the President of the United States at the time, to describe what occurred—to truthfully describe what occurred in that conversation.").

[92] *Graf*, 610 F.3d at 1156.

[93] Opp'n at 24.

relevant to attorney-client privilege and therefore applies only to nine documents.[94] The Court examines how using Chapman email affects the other documents when it reaches work product protection below.[95]

[16] The Court notes that this is not a question of whether an employee can use a work computer for purely personal use. The questions here are whether to penalize clients of law professors for not understanding university email policies, and how professors should navigate mixed signals about what legal work is allowed as part of their academic jobs.

Accordingly, the Court analyzes below whether Dr. Eastman's clients expected their emails to be confidential, discusses Chapman's email rules, and considers public policy concerns. The Court finds that using Chapman email did not destroy attorney-client privilege.

a. Client expectations of confidentiality

The Select Committee's argument rests on Dr. Eastman lacking a reasonable expectation of confidentiality in his emails. Dr. Eastman argues that he and his clients reasonably expected privacy,

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[94] Unlike in the attorney-client privilege context, "the overriding concern in the work-product context is not the confidentiality of a communication, but the protection of the adversary process." *United States v. Sanmina Corp.*, 968 F.3d 1107, 1124 (9th Cir. 2020).

[95] *See supra* Section III.B.2, *Waiver of protection.*

particularly since representing clients was part of his duties as a professor.[96]

Although the Ninth Circuit has not explicitly ruled on the issue, the majority of other circuits consider "whether the *client* reasonably understood the [conversation] to be confidential" in determining whether communications are privileged.[97] Determining the client's intent hinges on the circumstances of the communication, such as whether disclosure to third parties was intended or considered.[98]

Here, Dr. Eastman represented clients while employed as a law professor at Chapman University, and he used his official university email to communicate with those clients. When President Trump and members of his campaign referenced Dr. Eastman in public, they frequently highlighted his position as a law professor.[99] Since Dr. Eastman's

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[96] Brief at 26, 29.

[97] *Kevlik v. Goldstein*, 724 F.2d 844, 849 (1st Cir. 1984) (quoting MCCORMICK ON EVIDENCE, § 91 at 189 (1972) (emphasis added)); *United States v. Schaltenbrand*, 930 F.2d 1554, 1562 (11th Cir. 1991) (same). *See also United States v. BDO Seidman*, 337 F.3d 802, 812 (7th Cir. 2003); *United States v. Moscony*, 927 F.2d 742, 751–52 (3d Cir. 1991); *United States v. Schwimmer*, 892 F.2d 237, 244 (2d Cir. 1989); *United States v. (Under Seal)*, 748 F.2d 871, 875 (4th Cir. 1984); *United States v. Pipkins*, 528 F.2d 559, 563 (5th Cir. 1976).

[98] *In re LTV Sec. Litig.*, 89 F.R.D. 595, 603–04 (N.D. Tex. 1981) (citing *Pipkins*, 528 F.2d at 563).

[99] *E.g.*, Giuliani Speech ("I have Professor Eastman here with me to say a few words about that. He's one of the preeminent

(continued…)

work for President Trump was tied to his position as a "preeminent constitutional scholar[ ]," it would be logical [17] for his clients to communicate with him through his university email.[100] Moreover, it is clear from reviewing the emails that Dr. Eastman's correspondents believed they were using an appropriate email address to discuss confidential legal matters.[101] In these circumstances, clients and their agents who communicated with Dr. Eastman on his Chapman University email address had a reasonable expectation of privacy in their communications.

b. Potentially unauthorized use of Chapman email

Chapman University argues that Dr. Eastman's representation of President Trump was unauthorized based on Chapman's policies and IRS rules,[102] which the Select Committee argues waives any privilege.[103]

Although there are no Ninth Circuit cases addressing this kind of attorney waiver, courts in other jurisdictions have analyzed a *client's* use of

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constitutional scholars in the United States."); Trump Speech Transcript ("John is one of the most brilliant lawyers in the country ... this is from the number one, or certainly one of the top, Constitutional lawyers in our country ...").

[100] Giuliani Speech.

[101] *See, e.g.*, 4708 (including "PRIVILEGED AND CONFIDENTIAL" in email text).

[102] Chapman University's Response to Plaintiff's Application for Temporary Restraining Order (Dkt. 17) at 4.

[103] Opp'n at 27–28.

monitored employer email. The Court will follow those other district courts in considering four factors:

> (1) does the corporation maintain a policy banning personal or other objectionable use,
>
> (2) does the company monitor the use of the employee's computer or e-mail,
>
> (3) do third parties have a right of access to the computer or e-mails, and
>
> (4) did the corporation notify the employee, or was the employee aware, of the use and monitoring policies?[104]

First, Chapman University maintains a policy banning some objectionable uses of university email. Its policy states in pertinent part:

> Except as authorized, in writing or by e-mail, by the University, users are not to use Chapman Information Resources for compensated outside work, the benefit of organizations not related to the University (except in connection with scholarly, creative or community service activities), or commercial or personal advertising.[105]

The policy does not clearly apply to Dr. Eastman's work for President Trump, as it was

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[104] *Doe 1 v. George Washington Univ.*, 480 F. Supp. 3d 224, 226 (D.D.C. 2020) (quoting *In re Asia Glob. Crossing, Ltd.*, 322 B.R. 247, 257 (Bankr. S.D.N.Y. 2005)).

[105] Decl. of Janine DuMontelle ("DuMontelle Decl.") (Dkt. 17-1) ¶ 5 (quoting *Computer and Network Acceptable Use Policy*, Chapman Univ., www.chapman.edu/campus-services/information-systems/policies-and-procedures/acceptable-use-policy.aspx).

uncompensated[106] and Dr. Eastman contends that it was "in connection with scholarly [18] [activities]" given his election law focus. In fact, Dr. Eastman's prior work on the 2000 election was considered "scholarly" by Chapman's Rank and Tenure Committee, which noted Dr. Eastman's "status as one of a very few law professors viewed as expert in the area of election law."[107] The Tenure Committee further stated that "[i]t was in the Law School's interest that Professor Eastman pursue this opportunity to the fullest."[108]

Moreover, Chapman blurred the lines between authorized and unauthorized work in practice. Dr. Eastman describes a 2020 meeting with the then-Dean of Chapman's law school about a proposed post-election filing on behalf of President Trump.[109] According to Dr. Eastman, the Dean requested that he remove the "c/o Chapman University" line from his signature block on the brief, but did not ask him to remove Chapman's address or Dr. Eastman's university email or phone number.[110] Critically, the Dean did not express any concerns about Dr. Eastman filing the brief on behalf of President Trump or using Chapman email for his representation, and did not raise any of the claims of unauthorized use that Chapman now asserts in this case.

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[106] Retainer Agreement at 2.

[107] Eastman Decl. ¶ 5.

[108] *Id.*

[109] Eastman Decl. ¶ 17.

[110] *Id.*

IRS rules prohibit faculty from using university resources to support political candidates,[111] which Chapman's President publicly reiterated in the context of Dr. Eastman's work on December 10, 2020.[112] But as Dr. Eastman notes, the IRS prohibits "[c]ontributions to political campaign funds or public statements ... in favor of or in opposition to any candidate for public office," but does not mention post-election litigation for campaigns.[113] Chapman's endorsement of Dr. Eastman's 2000 post-election litigation and the lack of IRS enforcement against other law professors representing candidates in post-election litigation[114] suggest that [19] Dr. Eastman's work on behalf of President Trump was not in violation of IRS rules.

With respect to the second factor, Chapman's Computer and Network Acceptable Use Policy allows the university to monitor emails:

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[111] DuMontelle Decl. ¶ 3.

[112] Opp'n at 26 (citing Dawn Bonker, President Struppa's *Message on Supreme Court Case*, Chapman Univ. (Dec. 10, 2020), https://perma.cc/3CTG-4DBN).

[113] Brief at 29 n.6 (quoting *The Restriction of Political Campaign Intervention by Section 501(c)(3) Tax-Exempt Organizations*, Internal Revenue Serv., www.irs.gov/charities-non-profits/charitable-organizations/the-restriction-of-political-campaign-intervention-by-section-501c3-tax-exempt-organizations).

[114] For example, Professor Laurence Tribe was counsel of record for candidate Al Gore in the same 2000 post-election litigation. *Id*. (citing Brief of Respondent Albert Gore, Jr., *Bush v. Gore*, No. 00-949 (S. Ct. 2000) (listing his official Harvard University office address)).

> Although Chapman University does not make a practice of monitoring e-mail, the University reserves the right to retrieve the contents of University-owned computers or e-mail messages for legitimate reasons, such as to find lost messages, to comply with investigations of wrongful acts, to respond to subpoenas, or to recover from system failure.[115]

The policy is explicit that monitoring is not "a practice" of the university, though some courts have found that policies allowing monitoring, even if not used, reduce any expectation of privacy.[116] Despite the policy, Dr. Eastman's subjective expectation of confidentiality was enhanced by his private password, which Chapman administrators could not access.[117]

The third factor favors an expectation of privacy, as third parties do not have a right to access Chapman emails. The policy states that the university will comply with lawful orders, but is otherwise silent about third party access.

In terms of the fourth factor, Chapman notes that when users log into the system, they are presented with a message that states in relevant part:

> Use of this computer system constitutes your consent that your activities on, or information you store in, any part of the system is subject to monitoring and recording by Chapman

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[115] DuMontelle Decl. ¶ 5 (quoting *Computer and Network Acceptable Use Policy*).

[116] *George Washington Univ.*, 480 F. Supp. 3d at 227.

[117] Brief at 28; *United States v. Long*, 64 M.J. 57, 60 (C.A.A.F. 2006).

> University or its agents, consistent with the Computer and Network Acceptable Use Policy without further notice. You are responsible for being familiar with the University policies related to the use of this computer system.[118]

However, Dr. Eastman states that he accessed his email through his laptop and that he has no recollection of ever seeing that message appear.[119] And although the Select Committee argues that Dr. Eastman was aware of Chapman's policies due to his decades as a law professor and dean of the law school, it does not specify when the current policy was enacted.[120]

The above factors are not conclusive here and reveal substantial ambiguity in the [20] boundaries of Dr. Eastman's legal work at Chapman.

c. Public policy considerations

The Court notes the public policy implications of a finding that Dr. Eastman waived all attorney-client privilege through his use of Chapman email. Chapman states in its summary of its computer use policy that "[u]sers should not expect privacy in the contents of University-owned computers or e-mail

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[118] DuMontelle Decl. ¶ 6.

[119] Brief at 27 n.5.

[120] Opp'n at 26. *See George Washington Univ.*, 480 F. Supp. 3d at 227–28 (users were on notice of policies when they had to accept terms and conditions to create email accounts); *In re Royce Homes*, LP, 449 B.R. 709, 741 (Bankr. S.D. Tex. 2011) ("[A]ctual or direct notification to employees is unnecessary if the corporation has a communications policy that is memorialized.").

messages.[121] But at the hearing, Chapman confirmed that its clinical professors continue to use university email for client communications, and that Chapman has taken no steps to clarify its policies after raising concerns in this case. Although Chapman appears to be in the minority of American colleges and universities with a policy this unprotective of privacy,[122] the Court is concerned about the broader ramifications for professors and their clients. Law professors across the country use their university email accounts to communicate with clients, and reasonably expect privacy for those emails as part of their jobs. More importantly, clients of law school clinics should not be expected to research that particular university's email policies before feeling secure in emailing their attorneys.

Given that confidentiality and waiver analysis are ordinarily focused on the client, and considering the unique circumstances of clinical legal work, the Court finds that Dr. Eastman's use of Chapman's email account did not destroy attorney-client privilege.

3. Communications between attorney and client

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[121] *Computer and Network Acceptable Use Policy: Summary*, Chapman Univ., www.chapman.edu/campus-services/information-systems/policies-and-procedures/acceptable-use-policy.aspx.

[122] Opp'n at 25 (citing Gregory C. Sisk & Nicholas Halbur, *A Ticking Time Bomb? University Data Privacy Policies and Attorney-Client Confidentiality in Law School Settings*, 2010 Utah L. Rev. 1277 (2010)).

The purpose of the attorney-client privilege is to empower clients to speak freely and candidly to their attorneys.[123] As such, the privilege protects communications made between an attorney and their client. Given the realities of modern legal practice, the privilege also extends to communications with third parties "who have been engaged to assist the attorney in providing legal advice" and those "acting as agent[s]" of the client.[124]

[21] Dr. Eastman claims attorney-client privilege over only nine documents: five emails[125] and four attachments.[126] None of these documents includes Dr. Eastman's client, President Trump, as a sender or recipient of the email. Instead, all emails are sent from a third party to Dr. Eastman, and two of the emails blind copy (bcc) a close advisor to President Trump.[127]

Despite having filed nearly a hundred pages of briefing, Dr. Eastman does not mention this third-party email sender anywhere in his briefs; the person is named only in his privilege log entries. Dr. Eastman's description in the privilege log is conclusory, describing the sender merely as his "co-

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[123] *See In re Pac. Pictures Corp.*, 679 F.3d 1121, 1126 (9th Cir. 2012) (citing *Upjohn*, 449 U.S. at 389, 101 S.Ct. 677).

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

[125] 4708; 4722; 4744 (duplicate); 4766 (duplicate); 4788.

[126] 4713; 4723; 4745 (duplicate); 4767 (duplicate).

[127] 4766; 4788.

counsel."[128] Dr. Eastman failed to provide retainer agreements or a sworn declaration that would prove this third party was an attorney or agent for President Trump. The Court also cannot infer the third party's affiliation with President Trump from his email, which is a generic, non-@donaldtrump.com email address. Dr. Eastman has not met his burden to show that these communications were with an agent of President Trump or the Trump campaign, and as such, these documents do not warrant the protection of the attorney-client privilege. However, Dr. Eastman also claims work product protection over these nine documents, so the Court analyzes them in the next section.

B. Work Product

Dr. Eastman claims that all 111 documents, including the nine documents over which he claims attorney-client privilege, are protected work product. The work-product doctrine "protect[s] from discovery documents and tangible things prepared by a party or his representative in anticipation of litigation."[129]

To begin, the Court excludes ten of the 111 documents because they are entirely non-substantive.[130] Seven of these documents are only images of logos attached to email signatures, including Facebook, LinkedIn, and Twitter.[131] One

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[128] *See, e.g.*, Privilege log, 4766 ("Comm with co-counsel re legal advice").

[129] *Admiral Ins. Co. v. U.S. Dist. Ct. for Dist. of Arizona*, 881 F.2d 1486, 1494 (9th Cir. 1989) (citing Fed. R. Civ. P. 26(b)(3)).

[130] 4827; 5066; 5067; 5154; 5155; 5156; 5157; 5158; 5159; 5160.

[131] 5066; 5067; 5155; 5156; 5157; 5158; 5159.

document is a blank page[132] and two are [22] blank emails.[133] These ten documents do not contain any information protected by the work product doctrine and the Court ORDERS that they must be disclosed.[134]

The Court now considers whether the remaining 101 documents constituted protected work product to begin with; whether the privilege was waived; and whether an exception applies.

1. Whether the remaining documents qualify for protection

After removing ten non-substantive documents, the Court is left with 101 documents to analyze under the work product doctrine. For documents to be protected work product, they must (1) "be 'prepared in anticipation of litigation or for trial,'" and (2) "be prepared 'by or for another party or by or for that other party's representative.'"[135] The Court considers each requirement in turn.

a. Anticipation of litigation

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[132] 5160.

[133] 4827; 5154.

[134] *See Tower 570 Co. LP v. Affiliated FM Ins. Co.*, No. 20-CV-00799-JMF, 2021 WL 1222438, at *4 (S.D.N.Y. Apr. 1, 2021) ("logos or similar images [ ] contain no substantive content. The notion that they are protected by the attorney-client privilege or work product doctrine is so preposterous that one must wonder whether the documents were perhaps mislabeled.").

[135] *In re California Pub. Utils. Comm'n*, 892 F.2d 778, 780–81 (9th Cir. 1989) (quoting Fed. R. Civ. P. 26(b)(3)).

In this section, the Court analyzes eighty-seven of the remaining 101 documents, all of which present a question about whether they were prepared in anticipation of litigation. The other fourteen documents[136] were obviously prepared for litigation, so the Court leaves those for later discussion.[137]

Documents qualify for work product protection if they were "prepared in anticipation of litigation or for trial."[138] However, some litigation documents are also prepared for a second, non-litigation purpose. Courts protect such "dual purpose" documents when they pass the "because of" test: whether "it can fairly be said that the 'document was created *because of* anticipated litigation, and would not have been created in substantially similar form *but for* the prospect of that litigation.'"[139] It does not matter "whether litigation was a primary or [23] secondary motive behind the creation of a document;"[140] instead, courts consider the totality of the circumstances surrounding the document's creation.[141]

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[136] 4553; 4708; 4713; 4793; 4794; 4828; 5096; 5097; 5101; 5113; 5412; 5424; 5719; 5720; 5722.

[137] *See supra* Section III.B.1.b, *Preparation by or for the client's representative*.

[138] Fed. R. Civ. P. 26(b)(3).

[139] *In re Grand Jury Subpoena (Mark Torf/Torf Environmental Management) ("Torf")*, 357 F.3d 900, 908 (9th Cir. 2003) (quoting *United States v. Adlman*, 134 F.3d 1194, 1195 (2d Cir. 1998)) (emphasis added).

[140] *Id*. at 908.

[141] *Id.*

The Court groups its analysis of the eighty-seven documents as relating to the Electoral Count Act plan; state elections; documents prepared for Congress; connecting third parties; and news sources.

i. Electoral Count Act Plan

This section deals with twenty-two of the eighty-seven documents, which relate to Dr. Eastman's proposal for Vice President Pence to reject or delay counting electoral votes.[142] The Court's determination of whether these twenty-two documents were created in anticipation of litigation is contextualized by Dr. Eastman's memo, which outlined the plan to disrupt the Joint Session of Congress.

The plan proposed by Dr. Eastman's memo involve actions by the Vice President without recourse to the courts. The memo states explicitly: "[t]he main thing here is that Pence should do this without asking for permission—either from a vote of the joint session *or from the Court*."[143] Dr. Eastman only acknowledged the potential for litigation dismissively, mocking the idea of opponents challenging him in court.[144]

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[142] 4707; 4708; 4720; 4722; 4723; 4744; 4745; 4766; 4767; 4788; 4789; 4790; 4791; 4792; 4833; 4834; 4835; 5114; 5283; 5329; 5484; 5488.

[143] Eastman Long Memo at 5 (emphasis added).

[144] *Id*. at 5–6 ("Let the other side challenge his actions in court, where Tribe (who in 2001 conceded the President of the Senate might be in charge of counting the votes) and others who would press a lawsuit would have their past position – that these are non-justiciable political questions – thrown back at them, to get the lawsuit dismissed."). *Cf. Riverkeeper v. U.S. Army Corps of*

(continued…)

Litigation was never Dr. Eastman's motivation for planning the events of January 6, perhaps because, as he conceded, his legal theories would be rejected "9-0" by the Supreme Court.[145] The Court's review of the twenty-two documents shows they are consistent with the memo's plan to proceed without judicial involvement.

Sixteen of the twenty-two documents discuss, forward, or request academic articles [24] interpreting the Electoral Count Act or the Twelfth Amendment.[146] The articles themselves were clearly not created for litigation: they were written and published by independent authors more than a decade ago. The email chains discussing the articles do not reveal litigation strategy or consider how the articles' analyses would affect litigation. Instead, the emails at most discuss how they could be read to support Dr. Eastman's interpretation of the Electoral Count Act or the Twelfth Amendment. On these facts, these sixteen documents are not protected work product.

In addition, five of the twenty-two documents discuss actions to advance the Electoral Count Act plan.[147] In one of those, Dr. Eastman explains arguments for his plan that he had previously sent to

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Engineers, 38 F. Supp. 3d 1207, 1222 (D. Or. 2014) (holding that mere "awareness that litigation may have been a likely prospect" is insufficient for work product protection).

[145] Jacob Tr. 110.

[146] 4707; 4720; 4722; 4723; 4744 (duplicate); 4745 (duplicate); 4766 (duplicate); 4767 (duplicate); 4788; 4789; 4790; 4791; 4792; 4833; 4834; 4835.

[147] 5114; 5283; 5329; 5484; 5488.

Vice President Pence's counsel, and does not reference litigation.[148] In another email thread, Dr. Eastman's colleagues discuss whether to publish a piece supporting his plan, and they touch on state lawsuits only to criticize how they are being handled by the Trump campaign.[149] In a different email thread, Dr. Eastman and a colleague consider how to use a state court ruling to justify Vice President Pence enacting the plan.[150] In another email, a colleague focuses on the "plan of action" after the January 6 attacks, not mentioning future litigation.[151] Even if the authors of these five documents anticipated litigation, its prospect certainly did not "animate every document [they] prepared."[152] The true animating force behind these emails was advancing a political strategy: to persuade Vice President Pence to take unilateral action on January 6. Moreover, nothing about the form of these documents is tailored to the prospect of litigation. Because these five documents were not created in anticipation of litigation, Dr. Eastman must disclose them to the Select Committee.

One of the twenty-two documents relating to the Electoral Count Act plan presents a much closer question on anticipation of litigation. In this email, a colleague forwards to Dr. [25] Eastman a memo they

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[148] 5484.

[149] 5283; 5329.

[150] 5114. With respect to this document, the Court's finding applies only to the first email at the top of the page. The remainder of the document comprises document 5113 and is discussed below.

[151] 5488.

[152] *Torf*, 357 F.3d at 908.

wrote for one of President Trump's attorneys.[153] The memo sketches a series of events for the days leading up to and following January 6, if Vice President Pence were to delay counting or reject electoral votes. The memo clearly contemplates and plans for litigation: it maps out potential Supreme Court suits and the impact of different judicial outcomes. While this memo was created for both political and litigation purposes, it substantively engages with potential litigation and its consequences for President Trump. The memo likely would have been written substantially differently had the author not expected litigation. The Court therefore finds that this document was created in anticipation of litigation.

Accordingly, the Court finds that twenty-one of the twenty-two documents were not made in anticipation of litigation and thus ORDERS them to be disclosed to the Select Committee.

ii. State election-related documents

This section pertains to nineteen of the eighty-seven documents, all of which discuss or analyze alleged election fraud at the state level.[154]

First, eight of the nineteen documents forward or discuss communications from state legislators about alleged fraud in the 2020 election.[155] Two of those are resolutions by state legislatures regarding election

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[153] 4708.

[154] 4990; 5011; 5012; 5014; 5018; 5130; 5131; 5134; 5135; 5161; 5251; 5252; 5261; 5268; 5433; 5490; 5491; 5492; 5498.

[155] 4990; 5011; 5012; 5014; 5251; 5252; 5261; 5268.

fraud;[156] one is a letter from the Republican members of the Arizona Legislature to Vice President Pence;[157] and two are letters from a Georgia state senator to President Trump.[158] These documents do not reference litigation and are explicitly intended to express the opinions of the legislature or seek assistance from federal officials. Similarly, the four emails discussing these documents offer no litigation analysis. As such, these eight documents are not protected work product and must be disclosed to the Select Committee.

In addition, eleven of the nineteen documents relate to concerns about election fraud.[159] [26] Eight of those contain or discuss technical analyses of alleged fraud, including five noting voting machine weaknesses that could lead to fraudulent results.[160] Although Dr. Eastman's privilege log describes some of these documents as "comm with counsel and expert re fact evidence," he does not specify any particular litigation.[161] Moreover, the technical analyses make no mention of any potential action based on their findings, and the email discussions do not engage with the findings of the reports or specify any litigation uses for them. Three of those eleven documents

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[156] 5012 (Wisconsin); 5252 (Arizona).

[157] 5261.

[158] 4990; 5268 (duplicate).

[159] 5018; 5130; 5131; 5134; 5135; 5161; 5433; 5490; 5491; 5492; 5498.

[160] 5018; 5130; 5131; 5134 (duplicate); 5135 (duplicate); 5161 (duplicate); 5492; 5498.

[161] Privilege log, 5130; Privilege log, 5134.

discuss general concerns about election fraud, such as fears about voting machines[162] and publicizing potential new evidence.[163] In general, Dr. Eastman used evidence of alleged election fraud for two purposes: to support state litigation and to persuade legislators and Vice President Pence to act. Despite those possible dual purposes, these emails do not suggest that Dr. Eastman used them for litigation, make no mention of litigation, and would have had the same form without the prospect of litigation.

On this record, Dr. Eastman has not met his burden of demonstrating that these nineteen documents were created in anticipation of litigation, and therefore the Court ORDERS them to be disclosed.

iii. Documents for Congress

This section discusses seventeen of the eighty-seven documents, each of which specify that it was created for distribution to Congress.[164] Two of those state, "[p]lease pass this onto ... federal legislators;"[165] or note "[t]his ... has been circulated to Members."[166] Eight documents are an email chain between Dr. Eastman and colleagues creating a memo of Article II

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[162] 5433.

[163] 5490; 5491.

[164] 4494; 4496; 4547; 4721; 4839; 4841; 4976; 4977; 4979; 4992; 5017; 5045; 5046; 5064; 5068; 5091; 5094.

[165] 4547.

[166] 4976; 4977; 4979; 4992.

violations "for [C]ongress."[167] And seven emails name specific senators as the intended recipients of the attached documents.[168] These communications were prepared for members of [27] Congress and do not reference litigation strategy or concerns. The Court finds that those documents were not prepared in anticipation of litigation, but rather were created to persuade federal legislators to take action.[169]

Accordingly, these seventeen documents are not protected work product, and the Court ORDERS them to be disclosed to the Select Committee.

iv. Connecting third parties

This section discusses twenty of the eighty-seven documents, all of which connect third parties.[170] Seven of those documents provide or request contact

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[167] 4721; 5017; 5045; 5046; 5064; 5068; 5091; 5094 (discussing a recent litigation development in the context of creating a list for Congress).

[168] 4494; 4496; 4839; 4841.

[169] *See Phillips v. Immig. and Customs Enforcement*, 385 F. Supp. 2d 296, 309 (S.D.N.Y. 2005) ("one of the memoranda suggests that they were actually prepared for a presentation to a member of Congress. The Court notes that the date of the memoranda, October 4, 2000, happens to be the day before the INS meeting with Senator Feingold ..., further indicating that these memoranda were prepared in anticipation of that meeting."). *Cf. P and B Marina, Ltd. Partnership v. Logrande*, 136 F.R.D. 50, 58 (E.D.N.Y. 1991) (holding that when a lobbyist was used to "apply[ ] political pressure," correspondence "was not directed towards anticipated litigation but rather toward nonlitigation means that could achieve the same results in lieu of litigation").

[170] 5299; 5300; 5423; 5547; 5551; 5668; 5672; 5676; 5677; 5678; 5680; 5874; 5876; 6023; 6024; 6028; 6032; 6035; 6039; 6041.

information for President Trump, Dr. Eastman, and third parties.[171] Thirteen documents are communications with third parties volunteering to help Dr. Eastman, sending resumes, or offering suggestions for President Trump.[172] None of these documents relate to or implicate litigation. Although Dr. Eastman claims that some of the emails are regarding "fact development,"[173] they are predominantly administrative. The emails do not discuss how these third parties could contribute to any potential litigation; in fact, some are unsolicited introductions or requests[174] rather than coordinated discussions between experts or advisors.

Accordingly, these twenty documents are not protected by the work product doctrine, and the Court ORDERS them to be disclosed.

v. News articles and press releases

This section considers nine of the eighty-seven documents, each of which relates to or includes news or press releases.[175] Five of those forward news reports and press releases about [28] the events of January 6 with no or virtually no text in the bodies of the emails.[176] Two email chains comment on news reports about violent rioters on January 6, but do not

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[171] 5668; 5676; 5677; 5678; 5680; 5874; 5876.

[172] 5299; 5300 (resume); 5423; 5547; 5551; 5672; 6023; 6024; 6028 (resume); 6032; 6035; 6039; 6041.

[173] Privilege log, 5680.

[174] 5668; 5874.

[175] 5023; 5024; 5061; 5338; 5489; 5510; 5515; 5519; 5578.

[176] 5023; 5024; 5061; 5510 (email body is "FYI"); 5578 (commending press release).

relate to litigation.[177] One email congratulates Dr. Eastman for his speech on the Ellipse and links to a Twitter video of the speech.[178] These public articles, press releases, and videos were not created for litigation, and the minimal commentary contained in the emails was unrelated to litigation.

As such, these nine documents are not protected work product and the Court ORDERS that they must be disclosed.

b. Preparation by or for the client's representative

The Court next considers the fourteen of the 101 documents that it has not yet discussed because they were clearly prepared in anticipation of litigation, as well as the one document it concluded above was prepared in anticipation of litigation.[179] The Court now examines those fifteen documents to confirm whether they were created by or for a protected party.

The work product doctrine protects materials prepared "by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)."[180] Accordingly, documents are protected if they were prepared by or for President

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[177] 5489; 5515; 5519.

[178] 5338.

[179] 4553; 4708; 4713; 4793; 4794; 4828; 5096; 5097; 5101; 5113; 5412; 5424; 5719; 5720; 5722. The Court notes that document 5114 includes the entirety of document 5113, so all discussions of 5113 apply to the corresponding sections of 5114. See note 150.

[180] Fed. R. Civ. P. 26(b)(3); *see United States v. Nobles*, 422 U.S. 225, 238, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975).

Trump or his campaign, or by or for Dr. Eastman or another representative of President Trump.

The Court finds that thirteen of these fifteen documents qualify as protected.[181] Eight of those were sent by Dr. Eastman, sent directly to Dr. Eastman, or had Dr. Eastman copied on the email.[182] Five documents were created by or for agents of President Trump or his campaign, including attorneys of record in state cases and President Trump's personal attorney.[183] These documents were later forwarded to Dr. Eastman. Because these thirteen documents were [29] created by or for agents of President Trump or his campaign, they are protected work product.

However, two of the fifteen documents are orders issued by a court in a state proceeding.[184] As such, these two documents were not created by or for an agent of President Trump or his campaign, and the Court ORDERS them to be disclosed.

2. Waiver of protection

The Court now considers whether Dr. Eastman waived his privilege over any of the thirteen remaining documents that the Court concluded above were protected work product.[185]

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[181] 4553; 4708; 4713; 4793; 4794; 4828; 5097; 5101; 5113; 5412; 5424; 5719; 5720.

[182] 4553; 4793; 5097; 5101; 5113; 5412; 5424; 5719.

[183] 4708; 4713; 4794; 4828 (duplicate); 5720.

[184] 5096; 5722.

[185] 4553; 4708; 4713; 4793; 4794; 4828; 5097; 5101; 5113; 5412; 5424; 5719; 5720.

Unlike attorney-client privilege, which is waived if not kept completely confidential, work product protection is only waived when attorneys disclose their work to "an adversary or a conduit to an adversary in litigation."[186] The Ninth Circuit makes two inquiries to assess whether disclosure to "a conduit to an adversary" constitutes waiver: whether the party selectively disclosed materials, and whether the party reasonably believed that the recipient would keep the disclosed documents confidential.[187]

The Select Committee previously argued that Dr. Eastman's use of Chapman email constituted waiver because he knew that his documents could be accessed by Chapman University, which it claims was a conduit to an adversary by virtue of its "policy to disclose emails in response to subpoenas."[188] However, courts consider whether the party reasonably believed that the recipient would keep the disclosed documents confidential,[189] and as discussed above Dr. Eastman had a reasonable expectation of confidentiality in his emails.[190] Holding otherwise would result in the sweeping proposition that using any email provider

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[186] *Sanmina*, 968 F.3d at 1121; *Nobles*, 422 U.S. at 239, 95 S.Ct. 2160.

[187] *Sanmina*, 968 F.3d at 1121.

[188] TRO Opp'n at 22–23.

[189] *Sanmina*, 968 F.3d at 1121.

[190] *See supra* Section III.A.2, *Chapman University email use*.

that complies with subpoenas waives work product protection.[191]

[30] However, the Court finds work product protection was waived for two documents that are now public: a court filing[192] and a memo disclosed to the news media.[193] Making work product public is the epitome of sharing with an adversary, thus waiving protection.[194] Because these two documents are public, Dr. Eastman may not assert the privilege, and the Court ORDERS them to be disclosed.

3. Crime-fraud exception

Based on the Court's previous analysis, there are eleven remaining protected documents.[195] The Court now considers whether any of those documents should

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[191] *See*, *e.g.*, *Government Data Requests*, Yahoo!, www.yahoo-inc.com/transparency/reports/government-data-requests.html ("When we disclose data, consistent with our Global Principles for Responding to Government Requests, we narrowly interpret the request and disclose only as much data as is necessary to comply with the request."); *How Google handles government requests for user information*, Google, policies.google.com/terms/information-requests.

[192] 5720.

[193] 4713 (November 18, 2020 memo from Kenneth Chesebro); *Read the Nov. 18 Memo on Alternate Trump Electors*, N.Y. TIMES (Feb. 2, 2022), www.nytimes.com/interactive/2022/02/02/us/trump-electors-memo-november.html.

[194] *Bittaker v. Woodford*, 331 F.3d 715, 719–20 (9th Cir. 2003).

[195] 4553; 4708; 4793; 4794; 4828 (duplicate); 5097; 5101; 5113; 5412; 5424; 5719.

be disclosed based on the crime-fraud exception, as the Select Committee argues.[196]

The crime-fraud exception applies when (1) a "client consults an attorney for advice that will serve [them] in the commission of a fraud or crime,"[197] and (2) the communications are "sufficiently related to" and were made "in furtherance of" the crime.[198] It is irrelevant whether the attorney was aware of the illegal purpose[199] or whether the scheme was ultimately successful.[200] The exception extinguishes both the attorney-client privilege and the work product doctrine.[201] The party seeking disclosure must prove the crime-fraud exception applies by a

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[196] Opp'n at 37.

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

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

[199] *United States v. Laurins*, 857 F.2d 529, 540 (9th Cir. 1988).

[200] *In re Grand Jury Proc. (Corp.)*, 87 F.3d at 382.

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

preponderance of the evidence,[202] meaning "the relevant facts must be shown to be more [31] likely true than not."[203]

The Court first analyzes whether President Trump and Dr. Eastman likely committed any of the crimes alleged by the Select Committee, and then whether the eleven remaining documents relate to and further those crimes.

a. Potential crimes or fraud

The Select Committee alleges that the crime-fraud exception applies based on three offenses:

> (1) President Trump attempted to obstruct "Congress's proceeding to count the electoral votes on January 6," in violation of 18 U.S.C. § 1512(c)(2);[204]
>
> (2) "President Trump, Plaintiff [Dr. Eastman], and several others entered into an agreement to defraud the United States by interfering with the election certification process," in violation of 18 U.S.C. § 371;[205] and
>
> (3) "President [Trump] and members of his Campaign engaged in common law fraud in

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[202] *In re Napster, Inc. Copyright Litig.*, 479 F.3d 1078, 1094–95 (9th Cir. 2007), *abrogated on other grounds by Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 130 S.Ct. 599, 175 L.Ed.2d 458 (2009); *see* Fed. R. Evid. 104(a).

[203] *United States v. Lawrence*, 189 F.3d 838, 844 (9th Cir.1999).

[204] Opp'n at 38.

[205] *Id*. at 43.

connection with their efforts to overturn the 2020 election results."[206]

The Court will now determine whether President Trump and Dr. Eastman likely committed these offenses.

i. Obstruction of an official proceeding

The Select Committee alleges that President Trump violated 18 U.S.C. § 1512(c)(2), which criminalizes obstruction or attempted obstruction of an official proceeding.[207] It requires three elements: (1) the person obstructed, influenced or impeded, or attempted to obstruct, influence or impede (2) an official proceeding of the United States, and (3) did so corruptly.

Attempts to obstruct

Section 1512(c)(2) requires that the obstructive conduct have a "nexus ... to a specific official proceeding" that was "either pending or was reasonably foreseeable to [the person] [32] when he engaged in the conduct."[208] President Trump attempted to obstruct an official proceeding by launching a pressure campaign to convince Vice President Pence to disrupt the Joint Session on January 6.

President Trump facilitated two meetings in the days before January 6 that were explicitly tied to persuading Vice President Pence to disrupt the Joint

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[206] *Id.* at 46.

[207] *Id.* at 38.

[208] *United States v. Lonich*, 23 F.4th 881, 905 (9th Cir. 2022) (citing *United States v. Young*, 916 F.3d 368, 385 (4th Cir. 2019)).

Session of Congress. On January 4, President Trump and Dr. Eastman hosted a meeting in the Oval Office with Vice President Pence, the Vice President's counsel Greg Jacob, and the Vice President's Chief of Staff Marc Short.[209] At that meeting, Dr. Eastman presented his plan to Vice President Pence, focusing on either rejecting electors or delaying the count.[210] When Vice President Pence was unpersuaded, President Trump sent Dr. Eastman to review the plan in depth with the Vice President's counsel on January 5.[211] Vice President Pence's counsel interpreted Dr. Eastman's presentation as being on behalf of the President.[212]

On the morning of January 6, President Trump made several last-minute "revised appeal[s] to the Vice President" to pressure him into carrying out the plan.[213] At 1:00 am, President Trump tweeted: "If Vice President @Mike_Pence comes through for us, we will win the Presidency ... Mike can send it back!"[214] At 8:17 am, President Trump tweeted: "All Mike Pence has to do is send them back to the States, AND WE WIN. Do it Mike, this is a time for extreme courage!"[215] Shortly after, President Trump rang Vice

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[209] Jacob Tr. 82.

[210] *Id.*

[211] *Id.* at 105–07.

[212] *Id.* at 107.

[213] Short Tr. 26.

[214] Opp'n at 10 (quoting Donald J. Trump (@realDonaldTrump), Twitter (Jan. 6, 2021, 1:00 AM), perma.cc/9EV8-XJ7K).

[215] *Id.* at 11 (quoting Donald J. Trump (@realDonaldTrump), Twitter (Jan. 6, 2021, 8:17 AM), perma.cc/2J3P-VDBV).

President Pence and once again urged him "to make the call" and enact the plan.[216] Just before the Joint Session of Congress [33] began, President Trump gave a speech to a large crowd on the Ellipse in which he warned, "[a]nd Mike Pence, I hope you're going to stand up for the good of our Constitution and for the good of our country. And if you're not, I'm going to be very disappointed in you. I will tell you right now."[217] President Trump ended his speech by galvanizing the crowd to join him in enacting the plan: "[L]et's walk down Pennsylvania Avenue" to give Vice President Pence and Congress "the kind of pride and boldness that they need to take back our country."[218]

Together, these actions more likely than not constitute attempts to obstruct an official proceeding.

Official proceeding

The Court next analyzes whether the Joint Session of Congress to count electoral votes on January 6, 2021, constituted an "official proceeding" under the obstruction statute. The United States Code defines

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[216] POTUS Private Schedule (handwritten note on President's schedule showing call with VPOTUS at 11:20 AM); Kellogg Tr. 87, 90–92 (describing President Trump criticizing the Vice President as "not tough enough to make the call" to delay or reject electoral votes). *See also* Short Tr. 16 ("Q [from Select Committee]: ... I understand that you weren't on the call, but I just want to read you something that was quoted in Bob Woodward's book "Peril," that he indicated in "Peril" that the President said: If you don't do it, I picked the wrong man 4 years ago. The President said: You're going to wimp out. He reportedly said to the Vice President: You can be a hero, or you can be a pussy.").

[217] Trump Speech Transcript.

[218] *Id.*

"official proceeding" to include "a proceeding before the Congress."[219] The Twelfth Amendment outlines the steps to elect the President, culminating in the President of the Senate opening state votes "in the presence of the Senate and House of Representatives."[220] Dr. Eastman does not dispute that the Joint Session is an "official proceeding." While there is no binding authority interpreting "proceeding before the Congress," ten colleagues from the District of Columbia have concluded that the 2021 electoral count was an "official proceeding" within the meaning of section 1512(c)(2),[221] and the Court joins those well-reasoned opinions.

[34] *Corrupt intent*

A person violates § 1512(c) when they obstruct an official proceeding with a corrupt mindset. The Ninth Circuit has not defined "corruptly" for purposes of this

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[219] 18 U.S.C. § 1515(a)(1)(B).

[220] U.S. CONST. amend. XII.

[221] *United States v. Sandlin*, 575 F.Supp.3d 16, No. 21-CR-00088-DLF (D.D.C. Dec. 10, 2021); *United States v. Caldwell*, 581 F.Supp.3d 1, No. 21-CR-00028-APM (D.D.C. Dec. 20, 2021); *United States v. Mostofsky*, 579 F.Supp.3d 9, No. 21-CR-00138-JEB (D.D.C. Dec. 21, 2021); *United States v. Nordean*, 579 F.Supp.3d 28, No. 21-CR-00175-TJK (D.D.C. Dec. 28, 2021); *United States v. Montgomery*, No. 21-CR-00046-RDM, 2021 WL 6134591 (D.D.C. Dec. 28, 2021); *United States v. McHugh*, 583 F.Supp.3d 1, No. 21-CR-00453-JDB (D.D.C. Feb. 1, 2022); *United States v. Grider*, No. 21-CR-00022-CKK, 2022 WL 392307 (D.D.C. Feb. 9, 2022); *United States v. Miller*, No. 21-CR-00119-CJN, 2022 WL 823070 (D.D.C. Mar. 7, 2022); *United States v. Andries*, No. 21-CR-00093-RC, 2022 WL 768684 (D.D.C. Mar. 14, 2022); *United States v. Puma*, No. 21-CR-00454-PLF, 2022 WL 823079 (D.D.C. Mar. 19, 2022).

statute.[222] However, the court has made clear that the threshold for acting "corruptly" is lower than "consciousness of wrongdoing,"[223] meaning a person does not need to know their actions are wrong to break the law. Because President Trump likely knew that the plan to disrupt the electoral count was wrongful, his mindset exceeds the threshold for acting "corruptly" under § 1512(c).

President Trump and Dr. Eastman justified the plan with allegations of election fraud—but President Trump likely knew the justification was baseless, and therefore that the entire plan was unlawful. Although Dr. Eastman argues that President Trump was advised several state elections were fraudulent,[224] the Select Committee points to numerous executive

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[222] *Lonich*, 23 F.4th at 906.

[223] *See United States v. Watters*, 717 F.3d 733, 735 (9th Cir. 2013) (affirming a jury instruction stating that " 'corruptly' meant acting with 'consciousness of wrongdoing' " because "if anything, ... [it] placed a higher burden of proof on the government than section 1512(c) demands" (emphasis added)).

[224] Reply at 21 (former Attorney General Barr remarking recently, "one of the things is the President was surrounded by these people who would very convincingly make the case for fraud"); Donoghue Tr. 124 (Assistant Attorney General Jeff Clark repeatedly told President Trump that there was likely substantial election fraud and that the Department of Justice was not doing "real investigations that would ... uncover widespread fraud."); Eastman Long Memo at 1 ("Quite apart from outright fraud (both traditional ballot stuffing, and electronic manipulation of voting tabulation machines), important state election laws were altered or dispensed with altogether in key swing states and/or cities and counties.").

branch officials who publicly stated[225] and privately stressed to President Trump[226] that there was no evidence of fraud. By early January, more than sixty courts dismissed cases alleging fraud due to lack of standing or lack of evidence,[227] noting that they made "strained legal arguments [35] without merit and

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[225] On November 12, 2020, the Cybersecurity and Infrastructure Security Agency published a statement that "[t]he November 3rd election was the most secure in American history" and that "[t]here is no evidence that any voting system deleted or lost votes, changed votes, or was in any way compromised." Opp'n at 5 (citing CISA, Joint Statement from Elections Infrastructure Government Coordinating Council & The Election Infrastructure Sector Coordinating Executive Committees (Nov. 12, 2020), perma.cc/NQQ9-Z7GZ). Similarly, Attorney General Barr publicly disagreed with President Trump's claims of election improprieties. *Id*. at 6 (citing Michael Balsamo, *Disputing Trump, Barr says no widespread election fraud*, ASSOC. PRESS (Dec. 1, 2020), perma.cc/4U8N-SMB5).

[226] In a December 15, 2020 meeting, high-ranking advisors emphasized to President Trump that with respect to allegations of fraud, "people are telling you things that are not right." Opp'n at 6 (citing Interview of Jeffrey Rosen Before the S. Comm. on the Judiciary, 117th Cong. 30 (Aug. 7, 2021), perma.cc/UF5R-PW7Y). On December 27, 2020, Deputy Attorney General Donoghue told President Trump "in very clear terms" that the Department of Justice had done "dozens of investigations, hundreds of interviews" and concluded that "the major allegations [of election fraud] are not supported by the evidence developed." Donoghue Tr. 59–60.

[227] Opp'n at 45 (citing William Cummings, Joey Garrison & Jim Sergent, *By the numbers: President Donald Trump's failed efforts to overturn the election*, USA TODAY (Jan. 6, 2021), perma.cc/683S-HSRC).

speculative accusations"[228] and that "there is no evidence to support accusations of voter fraud."[229] President Trump's repeated pleas[230] for Georgia Secretary of State Raffensperger clearly demonstrate that his justification was not to investigate fraud, but to win the election: "So what are we going to do here, folks? I only need 11,000 votes. Fellas, I need 11,000

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[228] *Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899, 906 (M.D. Pa.), *aff'd sub nom. Donald J. Trump for President, Inc. v. Sec'y of Pennsylvania*, 830 F. App'x 377 (3d Cir. 2020), *and appeal dismissed*, No. 20-3384, 2021 WL 807531 (3d Cir. Jan. 7, 2021) ("[T]his Court has been presented with strained legal arguments without merit and speculative accusations, unpled in the operative complaint and unsupported by evidence. In the United States of America, this cannot justify the disenfranchisement of a single voter, let alone all the voters of its sixth most populated state. Our people, laws, and institutions demand more.").

[229] *Stoddard v. City Election Comm'n*, No. 20-014604-CZ, slip op. at 4 (Mich. Cir. Ct. Nov. 6, 2020) ("A delay in counting and finalizing the votes from the City of Detroit without any evidentiary basis for doing so, engenders a lack of confidence in the City of Detroit to conduct full and fair elections. The City of Detroit should not be harmed when there is no evidence to support accusations of voter fraud."). *See also Ward v. Jackson*, No. CV-20-0343-AP/EL, 2020 WL 8617817, at *2 (Ariz. Dec. 8, 2020), *cert. denied*, —— U.S. ——, 141 S. Ct. 1381, 209 L.Ed.2d 125 (2021) ("[Plaintiff] fails to present any evidence of 'misconduct[ ]' [or] 'illegal votes.'").

[230] First, President Trump requested, "All I want to do is this, I just want to find 11,780 votes, which is one more than we have because we won the state." Trump-Raffensperger Call Transcript. Minutes later he grasped again: "I don't know, look, Brad. I got to get ... I have to find 12,000 votes." *Id.*

votes. Give me a break."[231] Taken together, this evidence demonstrates that President Trump likely knew the electoral count plan had no factual justification.

The plan not only lacked factual basis but also legal justification. Dr. Eastman's memo noted that the plan was "BOLD, Certainly."[232] The memo declared Dr. Eastman's intent to step outside the bounds of normal legal practice: "we're no longer playing by Queensbury Rules."[233] In addition, Vice President Pence "very consistent[ly]" made clear to President Trump that the plan was unlawful, refusing "many times" to unilaterally reject electors or return them to the states.[234] In the meeting in the Oval Office two days before January 6, Vice President Pence stressed his "immediate instinct [ ] that there is no way that one person could be entrusted by the Framers to exercise that authority."[235]

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[231] *Id*.

[232] Eastman Long Memo at 5 (capitalization in original).

[233] *Id*. The Queensberry Rules were accepted norms for boxing fights and commonly refers to general rules of fair play. *Marquis of Queensberry Rules*, Merriam-webster, perma.cc/UHF2-T3FY. *Cf. R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 392, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992) ("St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules."); *Miranda v. Arizona*, 384 U.S. 436, 442, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) (quoting Police Commissioner arguing that "What the Court is doing is akin to requiring one boxer to fight by Marquis of Queensbury rules while permitting the other to butt, gouge and bite").

[234] Short Tr. 26–27.

[235] Jacob Tr. 95.

[36] Dr. Eastman argues that the plan was legally justified as it "was grounded on a good faith interpretation of the Constitution."[236] But "ignorance of the law is no excuse,"[237] and believing the Electoral Count Act was unconstitutional did not give President Trump license to violate it. Disagreeing with the law entitled President Trump to seek a remedy in court, not to disrupt a constitutionally-mandated process.[238] And President Trump knew how to pursue election claims in court—after filing and losing more than sixty suits, this plan was a last-ditch attempt to secure the Presidency by any means.

The illegality of the plan was obvious. Our nation was founded on the peaceful transition of power, epitomized by George Washington laying down his sword to make way for democratic elections.[239] Ignoring this history, President Trump vigorously campaigned for the Vice President to single-handedly determine the results of the 2020 election. As Vice President Pence stated, "no Vice President in American history has ever asserted such

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[236] Reply at 20.

[237] *United States v. Int'l Mins. & Chem. Corp.*, 402 U.S. 558, 562, 91 S.Ct. 1697, 29 L.Ed.2d 178 (1971).

[238] *See*, *e.g.*, *Bush v. Gore*, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000).

[239] Members of Congress are daily reminded of his commitment when they pass John Trumbull's iconic painting, *General George Washington Resigning His Commission*, which hangs in the Capitol Rotunda. Architect of the Capitol, www.aoc.gov/explore-capitol-campus/art/general-george-washington-resigning-his-commission.

authority."[240] Every American—and certainly the President of the United States—knows that in a democracy, leaders are elected, not installed. With a plan this "BOLD,"[241] President Trump knowingly tried to subvert this fundamental principle.

Based on the evidence, the Court finds it more likely than not that President Trump corruptly attempted to obstruct the Joint Session of Congress on January 6, 2021.

ii. Conspiracy to defraud the United States

The Select Committee also alleges that President Trump, Dr. Eastman, and others conspired to defraud the United States by disrupting the electoral count, in violation of 18 U.S.C. § 371.[242] That crime requires that (1) at least two people entered into an agreement to obstruct a lawful function of the government (2) by deceitful or dishonest means, and (3) that a [37] member of the conspiracy engaged in at least one overt act in furtherance of the agreement.[243]

Agreement to obstruct a lawful government function

As the Court discussed at length above,[244] the evidence demonstrates that President Trump likely attempted to obstruct the Joint Session of Congress on January 6, 2021. While the Court earlier analyzed those actions as attempts to obstruct an "official proceeding," Congress convening to count electoral

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[240] Pence Letter at 2.

[241] Eastman Long Memo at 5 (capitalization in original).

[242] Opp'n at 43.

[243] *United States v. Meredith*, 685 F.3d 814, 822 (9th Cir. 2012).

[244] *See supra* Section III.B.3.a.i.(a), *Attempts to obstruct.*

votes is also a "lawful function of government" within the meaning of 18 U.S.C. § 371, which Dr. Eastman does not dispute.

An "agreement" between co-conspirators need not be express and can be inferred from the conspirators' conduct.[245] There is strong circumstantial evidence to show that there was likely an agreement between President Trump and Dr. Eastman to enact the plan articulated in Dr. Eastman's memo. In the days leading up to January 6, Dr. Eastman and President Trump had two meetings with high-ranking officials to advance the plan. On January 4, President Trump and Dr. Eastman hosted a meeting in the Oval Office to persuade Vice President Pence to carry out the plan. The next day, President Trump sent Dr. Eastman to continue discussions with the Vice President's staff, in which Vice President Pence's counsel perceived Dr. Eastman as the President's representative.[246] Leading small meetings in the heart of the White House implies an agreement between the President and Dr. Eastman and a shared goal of advancing the electoral count plan. The strength of this agreement was evident from President Trump's praise for Dr. Eastman and his plan in his January 6 speech on the Ellipse: "John is one of the most brilliant lawyers in the country, and he looked at this and he said, 'What an absolute

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[245] *United States v. Paramount Pictures*, 334 U.S. 131, 142, 68 S.Ct. 915, 92 L.Ed. 1260 (1948).

[246] Jacob Tr. 107.

disgrace that this can be happening to our Constitution.'"[247]

Based on these repeated meetings and statements, the evidence shows that an agreement to enact the electoral count plan likely existed between President Trump and Dr. Eastman.

Deceitful or dishonest means

Obstruction of a lawful government function violates § 371 when it is carried out "by [38] deceit, craft or trickery, or at least by means that are dishonest."[248] While acting on a "good faith misunderstanding" of the law is not dishonest, "merely disagreeing with the law does not constitute a good faith misunderstanding ... because all persons have a duty to obey the law whether or not they agree with it."[249]

The Court discussed above how the evidence shows that President Trump likely knew that the electoral count plan was illegal.[250] President Trump continuing to push that plan despite being aware of its illegality constituted obstruction by "dishonest" means under § 371.

The evidence also demonstrates that Dr. Eastman likely knew that the plan was unlawful. Dr. Eastman

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[247] Trump Speech Transcript.

[248] *Hammerschmidt v. United States*, 265 U.S. 182, 188, 44 S.Ct. 511, 68 L.Ed. 968 (1924).

[249] Cmt., 9th Cir. Model Crim. Jury Instr. 11.2 (revised Sept. 2020) (analogizing to "good faith" defenses for violations of tax code).

[250] *See supra* Section III.B.3.a.i.(c), *Corrupt intent*.

heard from numerous mentors and like-minded colleagues that his plan had no basis in history or precedent. Fourth Circuit Judge Luttig, for whom Dr. Eastman clerked, publicly stated that the plan's analysis was "incorrect at every turn."[251] Vice President Pence's legal counsel spent hours refuting each part of the plan to Dr. Eastman, including noting there had never been a departure from the Electoral Count Act[252] and that not "a single one of [the] Framers would agree with [his] position."[253]

Dr. Eastman himself repeatedly recognized that his plan had no legal support. In his discussion with the Vice President's counsel, Dr. Eastman "acknowledged" the "100 percent consistent historical practice since the time of the Founding" that the Vice President did not have the authority to act as the memo proposed.[254] More importantly, Dr. Eastman admitted more than once that "his proposal violate[d] several provisions of statutory law,"[255] including explicitly characterizing the plan as "one more relatively minor violation" of the Electoral Count Act.[256] In addition, on January 5, Dr. Eastman

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[251] Opp'n at 13 (quoting J. Michael Luttig (@judgeluttig), TWITTER (Sept. 21, 2021, 11:50 PM), perma.cc/ULW5-NRRT).

[252] Jacob Tr. 108.

[253] Opp'n Ex. N (Dkt. 160-16), Email from Greg Jacob to John Eastman at 3 (Jan 6, 2021, 2:14 pm EST).

[254] Jacob Tr. 109.

[255] *Id.* at 127 (discussing memo written by Vice President's counsel referencing January 4 meeting).

[256] Opp'n Ex. N (Dkt. 160-16), Email from John Eastman to Greg Jacob (Jan. 6, 2021, 9:44 pm MST) at 2. *See also* Jacob Tr. 128

(continued…)

conceded that the Supreme Court would [39] unanimously reject his plan for the Vice President to reject electoral votes.[257] Later that day, Dr. Eastman admitted that his "more palatable" idea to have the Vice President delay, rather than reject counting electors, rested on "the same basic legal theory" that he knew would not survive judicial scrutiny.[258]

Dr. Eastman's views on the Electoral Count Act are not, as he argues, a "good faith interpretation" of the law;[259] they are a partisan distortion of the democratic process. His plan was driven not by preserving the Constitution, but by winning the 2020 election:

> [Dr. Eastman] acknowledged that he didn't think Kamala Harris should have that authority in 2024; he didn't think Al Gore should have had it in 2000; and he acknowledged that no small government conservative should think that that was the case.[260]

("So the memo lays out the four ways in which the proposal would violate provisions of the Electoral Count Act, and he acknowledged as much in our conversations [on January 5]").

[257] Jacob Tr. 110 (recounting conversation between Dr. Eastman and Vice President's counsel).

[258] *Id.* at 117 (recounting call between Dr. Eastman and Vice President's counsel).

[259] Reply at 20.

[260] Jacob Tr. 110 (recounting conversation between Dr. Eastman and Vice President's counsel on January 5). *See also* Opp'n Ex. N (Dkt. 160-16), Email from Greg Jacob to John Eastman (Jan. 6,

(continued…)

Dr. Eastman also understood the gravity of his plan for democracy—he acknowledged "[y]ou would just have the same party win continuously if [the] Vice President had the authority to just declare the winner of every State."[261]

The evidence shows that Dr. Eastman was aware that his plan violated the Electoral Count Act. Dr. Eastman likely acted deceitfully and dishonestly each time he pushed an outcome-driven plan that he knew was unsupported by the law.

Overt acts in furtherance of the conspiracy

President Trump and Dr. Eastman participated in numerous overt acts in furtherance of their shared plan. As detailed at length above, President Trump's acts to strong-arm Vice President Pence into following the plan included meeting with and calling the Vice President and berating him in a speech to thousands outside the Capitol.[262] Dr. Eastman joined for one of those meetings, spent hours attempting to convince the Vice President's counsel to support the plan, and gave his own speech at the Ellipse "demanding" the Vice President "stand up" and [40] enact his plan.[263]

Based on the evidence, the Court finds that it is more likely than not that President Trump and Dr.

2021, 2:14 pm EST) at 3 ("I have run down every legal trail placed before me to its conclusion, and I respectfully conclude that as a legal framework, it is a results oriented position that you would never support if attempted by the opposition, and essentially entirely made up.").

[261] Jacob Tr. 110.

[262] *See supra* Section III.B.3.a.i.(a), *Attempts to obstruct.*

[263] Opp'n at 12 (quoting Eastman Speech).

Eastman dishonestly conspired to obstruct the Joint Session of Congress on January 6, 2021.

iii. Common law fraud

As the Court discusses below,[264] review of the eleven remaining documents reveals that none further efforts to spread false claims of election fraud. Accordingly, the Court does not reach whether President Trump likely engaged in common law fraud.

b. Actions in furtherance of crime or fraud

The Court now determines whether any of the remaining eleven documents were in furtherance of the two crimes the Court found evidence of above, obstruction of an official proceeding and conspiracy to defraud the United States by attempting to persuade Vice President Pence to reject or delay electoral votes on January 6, 2021.

The crime-fraud exception applies when the "communications for which production is sought are 'sufficiently related to' and were made 'in furtherance of [the] intended, or present, continuing illegality.'"[265] In a civil case, the burden of proof for the party seeking disclosure under the crime-fraud exception is preponderance of the evidence, meaning more likely than not.[266]

"[T]he crime-fraud exception does not require a *completed* crime or fraud but only that the client have

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[264] *See infra* Section III.B.3.b, *Actions in furtherance of crime or fraud.*

[265] *Napster*, 479 F.3d at 1090 (quoting *In re Grand Jury Proc. (Corp.)*, 87 F.3d at 381–83).

[266] *Id.* at 1094–95.

consulted the attorney in an *effort* to complete one."[267] The exception applies even if the attorney does not participate in the criminal activity, and "and even [if] the communication turns out not to help (and perhaps even to hinder) the client's completion of a crime."[268] An attorney's wrongdoing alone may pierce the privilege, regardless of the client's [41] awareness or innocence.[269]

Nine of the eleven documents were emails or attachments discussing active lawsuits in state and federal courts.[270] They include drafting filings, conferring about oral arguments, or planning future litigation strategy. While these suits might have dealt with claims of election fraud, pursuing legal recourse itself did not advance any crimes, and the contents of the emails are cabined to those narrow litigation purposes. As such, these nine emails were not in furtherance of any of the offenses alleged by the Select Committee, so the crime-fraud exception does not apply.

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[267] *In re Grand Jury Proc. (Corp.)*, 87 F.3d at 381 (emphasis in original).

[268] *Id*. at 382.

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

[270] 4553; 4793; 4794; 4828 (duplicate); 5097; 5101; 5113; 5412; 5719.

The tenth document is an email sent at 4:03 pm MST on January 6, 2021, during the resumption of the Joint Session of Congress after the attack on the Capitol.[271] The email responded to a request to participate in Dr. Eastman's work on behalf of President Trump.[272] While the email discusses Vice President Pence's refusal to reject or delay the electoral count, the email was not "*itself* in furtherance" of the plan and thus does not fall within the crime-fraud exception.[273]

The eleventh document is a chain forwarding to Dr. Eastman a draft memo written for President Trump's attorney Rudy Giuliani.[274] The memo recommended that Vice President Pence reject electors from contested states on January 6. This may have been the first time members of President Trump's team transformed a legal interpretation of the Electoral Count Act into a day-by-day plan of action. The draft memo pushed a strategy that knowingly violated the Electoral Count Act, and Dr. Eastman's later memos closely track its analysis and proposal. The memo is both intimately related to and clearly advanced the plan to obstruct the Joint [42] Session of Congress on January 6, 2021. Because the

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[271] 5424.

[272] The Court previously concluded that this earlier email, 5423, was not prepared in anticipation of litigation. *See* text accompanying note 172.

[273] *In re Richard Roe, Inc.*, 68 F.3d 38, 40 (2d Cir. 1995) ("[T]he exception applies only when the court determines that the client communication or attorney work product in question was itself in furtherance of the crime or fraud." (emphasis in original)).

[274] 4708.

memo likely furthered the crimes of obstruction of an official proceeding and conspiracy to defraud the United States, it is subject to the crime-fraud exception and the Court ORDERS it to be disclosed.

4. Substantial or compelling need exception

After concluding that one document falls within the crime-fraud exception, the Court reviews the ten remaining protected documents,[275] which the Select Committee argues should be disclosed based on its compelling need and inability to obtain the materials elsewhere.[276]

All ten documents are 'opinion' work product because they include attorneys' thoughts and legal theories. Unlike fact-based work product, which may be disclosed,[277] opinion work product "is virtually undiscoverable."[278] A court may compel disclosure of opinion work product only in the rare situation "when mental impressions are *the pivotal issue* in the current

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[275] 4553; 4793; 4794; 4828 (duplicate); 5097; 5101; 5113; 5412; 5424; 5719.

[276] Opp'n at 35.

[277] *Torf*, 357 F.3d at 906 (quoting Fed. R. Civ. P. 26(b)(3)(A)(ii)) (noting non-opinion work product may be disclosed upon a showing of "substantial need" for the documents and "undue hardship [in obtaining] the substantial equivalent of the materials by other means").

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

litigation and the need for the material is compelling."[279]

Dr. Eastman argues that discovery of opinion work product is limited to when the opposing party needs materials "to prepare its *case*," so the exception cannot extend to legislative needs.[280] The Court agrees that decisions applying this exception only involve litigation.[281] However, it would be inconsistent to recognize the work product doctrine in the legislative subpoena context without also recognizing the privilege's exceptions. Given the limited caselaw involving legislative subpoenas, the Court assumes that a legislative body could have the requisite compelling need for disclosure of opinion work product.

The Select Committee claims that Dr. Eastman's opinions "are directly at issue" because he "was a central figure in the effort to encourage the former Vice President to reject the [43] electors from several states."[282]

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[279] *Holmgren v. State Farm Mutual Auto. Ins. Co.*, 976 F.2d 573, 577 (9th Cir. 1992) (emphasis added); see also *Upjohn*, 449 U.S. at 401–02, 101 S.Ct. 677 (noting that opinion work product is discoverable only upon "a far stronger showing of necessity and unavailability by other means").

[280] Reply at 17 (quoting Fed. R. Civ. Proc. 26(b)(3)(A)(ii) (emphasis added)).

[281] *See*, *e.g.*, *Holmgren*, 976 F.2d at 577 ("opinion work product may be discovered and admitted when mental impressions are at issue in a case and the need for the material is compelling.").

[282] Opp'n at 36.

However, review of the ten remaining documents shows that none are "pivotal" to the Select Committee's investigation. Nine of these include opinions and discussions about trial strategy in ongoing lawsuits.[283] As discussed above, this litigation was a legitimate form of recourse, and is not tied to the investigation's core purpose, which is to "investigate and report upon the facts, circumstances, and causes relating to the January 6, 2021, domestic terrorist attack upon the United States Capitol."[284]

The tenth email includes Dr. Eastman's thoughts on the evening of January 6 about potential future actions given Vice President Pence's refusal to reject or delay the electoral count.[285] Cases that have found a "compelling need" involved situations where an attorney's bad faith was central to a claim or defense, making the attorney's opinions critical evidence.[286]

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[283] 4553; 4793; 4794; 4828 (duplicate); 5097; 5101; 5113; 5412; 5719.

[284] H.R. Res. 503 § 3.

[285] 5424.

[286] *Holmgren*, 976 F.2d at 577 ("In a bad faith insurance claim settlement case, the " 'strategy, mental impressions and opinion of [the insurer's] agents concerning the handling of the claim are directly at issue.' ") (quoting *Reavis v. Metro. Prop. & Liab. Ins. Co.*, 117 F.R.D. 160, 164 (S.D. Cal. 1987)); *Handgards, Inc. v. Johnson & Johnson*, 413 F. Supp. 926, 931 (N.D. Cal. 1976) ("The principal issue in the case at bar is the good faith of the defendants in instituting and maintaining the prior patent litigation against plaintiff."); *United States v. McGraw-Hill Companies, Inc.*, No. 13-CV-00779, 2014 WL 8662657, at *6 (C.D. Cal. Sept. 25, 2014) ("[Defendant's] most salient defense is that the Government improperly selected it for prosecution in an effort to retaliate[.]").

Although Dr. Eastman's thoughts in this email pertain to the January 6 electoral count, these thoughts are not analogously "pivotal" to the Select Committee's investigation.The Court reiterates its earlier statement that the Select Committee's investigation is "weighty and urgent."[287] But the Court does not want to enable well-intentioned committees to circumvent work product protection by using broad and urgent mandates, as has occurred in our not-so-distant past.[288]

Accordingly, none of these ten documents shall be disclosed based on compelling need.

[44] **IV. DISPOSITION**

Dr. Eastman and President Trump launched a campaign to overturn a democratic election, an action unprecedented in American history. Their campaign was not confined to the ivory tower—it was a coup in search of a legal theory. The plan spurred violent attacks on the seat of our nation's government, led to the deaths of several law enforcement officers, and deepened public distrust in our political process.

More than a year after the attack on our Capitol, the public is still searching for accountability. This case cannot provide it. The Court is tasked only with

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[287] Order Denying Preliminary Injunction (Dkt. 43) at 12.

[288] *See Watkins v. United States*, 354 U.S. 178, 205–06, 77 S.Ct. 1173, 1 L.Ed.2d 1273 (1957) ("An excessively broad charter, like that of the House Un-American Activities Committee, places the courts in an untenable position if they are to strike a balance between the public need for a particular interrogation [sic] and the right of citizens to carry on their affairs free from unnecessary governmental interference.").

deciding a dispute over a handful of emails. This is not a criminal prosecution; this is not even a civil liability suit. At most, this case is a warning about the dangers of "legal theories" gone wrong, the powerful abusing public platforms, and desperation to win at all costs. If Dr. Eastman and President Trump's plan had worked, it would have permanently ended the peaceful transition of power, undermining American democracy and the Constitution. If the country does not commit to investigating and pursuing accountability for those responsible, the Court fears January 6 will repeat itself.

With this limited mandate, the Court finds the following ten documents privileged: 4553; 4793; 4794; 4828; 5097; 5101; 5113; 5412; 5424; 5719.[289] The Court **ORDERS** Dr. Eastman to disclose the other one hundred and one documents to the House Select Committee.

DATED: March 28, 2022

David O. Carter

DAVID O. CARTER
UNITED STATES
DISTRICT JUDGE

[289] Document 5113 is entirely included in document 5114. Dr. Eastman shall redact the portions of 5114 that comprise document 5113 when disclosing the unprivileged portion of that document to the Select Committee.

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SA CV 22-00099-DOC-DFM Date: October 28, 2022

Title: JOHN EASTMAN V. BENNIE THOMPSON ET AL.

PRESENT:

THE HONORABLE DAVID O. CARTER, JUDGE

Karlen Dubon	Not Present
Courtroom Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF:	ATTORNEYS PRESENT FOR DEFENDANT:
None Present	None Present

PROCEEDINGS (IN CHAMBERS): ORDER DENYING MOTION TO RECONSIDER OR, IN THE ALTERNATIVE, FOR A STAY [373]

On October 19, 2022, the Court ordered Dr. Eastman to produce to the Select Committee certain

emails, including eight pursuant to the crime fraud exception ("Order") (Dkt. 372). The Court ordered Dr. Eastman to produce these documents by 2:00 p.m. PST on October 28, 2022. *Id*. On October 27, 2022, Dr. Eastman filed a motion asking the Court to reconsider its ruling pertaining to crime-fraud or, in the alternative, to stay enforcement of the Order pending Dr. Eastman's appeal of the Order to the Ninth Circuit. Motion for Reconsideration or Stay ("Motion" or "Mot.") (Dkt. 373). In support of his motion, Dr. Eastman filed a sworn affidavit under seal, ("Affidavit") (Dkt. 374-1), in which he contends provides "the relevant context" that "shows that this ruling was clearly erroneous." *See* Motion at 2.[539]

Dr. Eastman's motion fails to meet the standards governing motions for reconsideration or a stay. A stay is an equitable remedy not available as a matter of right, and the Court must balance the remedy sought against Congress's "uniquely vital interest in studying the January 6th attack on itself to formulate remedial legislation and to safeguard its constitutional and legislative operations" without

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[539] Specifically, the Affidavit "identifies specific documents previously submitted for the court's *in camera review* that explain the true import of the email record surrounding the Presidential certification" and "the purpose for the filing of the complaint in that case." Motion at 2. Dr. Eastman files this affidavit under seal because it "includes the content of communications that this Court has held to be privileged." Motion at 2 n. 1. This case arises out of privileges asserted *by* Dr. Eastman. To the extent that Dr. Eastman wishes to disclose more communications to clarify his role vis a vis President Trump, his campaign, or other attorneys, nothing prohibits Dr. Eastman from seeking the necessary approvals to waive the privileges where appropriate.

undue interference from federal courts. *See Trump v. Thompson*, 20 F.4th 10, 17 (D.C. Cir. 2021), *cert. denied*, 142 S. Ct. 1350 (2022); *Hill v. McDonough*, 547 U.S. 573, 574–75 (2006).

Because Dr. Eastman does not meet the standards under Local Rule 7-18 or Federal Rule of Civil Procedure 62(c), the Court DENIES the motion.

I. DISCUSSION

A. Motion For Reconsideration

Dr. Eastman requests reconsideration under Central District of California Local Rule 7-18 (c), which permits reconsideration upon "a manifest showing of a failure to consider material facts presented to the Court before the Order was entered." C.D. Cal. R. 7-18. In his affidavit, Dr. Eastman identifies certain emails that he notes were "previously submitted for the court's *in camera* review that explain the true import of the email record surrounding the Presidential certification." *Id.* at 2. This "full email record," according to Dr. Eastman, "clearly shows that the President's lawyers took great care to ensure all court filings were accurate," and "that the legal filings were all designed to obtain a ruling from the court on the contested election challenges." *Id.*

In ruling that the crime-fraud exception applies, the Court has considered every document that the parties identified in the over 30 privilege logs they submitted in this action. *See* Privilege Logs, Dkts. 67, 68, 74, 84, 95, 100, 107, 119, 122, 127, 124, 138, 142, 143, 148, 151, 163, 179, 204, 216, 221, 226, 236, 241, 245, 249, 254, 263, 267, 272, 276, 279, 284, 298, 302, 206, 310, 312, 342.

Out of the 1272 documents the parties specifically requested rulings on, the Court found that the crime-fraud exception applies to 10 documents. Dr. Eastman's affidavit, which provides his version of events in the last few days of December 2020, points to emails already considered by the Court in reaching its decision. Mot. Ex. 1 (Dkt. 374-1). The Court "strictly confined" the "scope of the privilege . . . within the narrowest possible limits." *United States v. Christensen*, 828 F.3d 763, 803 (9th Cir. 2015). Dr. Eastman's affidavit presents no evidence that the Court "manifestly failed" to consider when ruling that the crime-fraud exception applies.

Because Dr. Eastman fails to carry his burden under Rule 7-18(c), the Court DENIES his motion for reconsideration.

A. Motion for a Stay

In the alternative, Dr. Eastman requests a stay under Federal Rule of Civil Procedure 62(c), which provides in relevant part that "[u]nless the Court orders otherwise," "an interlocutory or final judgment in an action for an injunction" is "not stayed after being entered, even if an appeal is taken." Fed. R. Civ. P. 62(c)(1).

The Court's standard for granting a stay is familiar. Supreme Court precedent has "distilled" the legal principles for issuing stays pending appeal into consideration of four factors: (1) whether the stay applicant has made a strong showing of likelihood of success on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the

public interest lies. *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776, (1987)). "The first two factors of the traditional standard are the most critical." *Id*. In applying these factors, the Ninth Circuit employs a "sliding scale" approach. The factors are balanced such that a stronger showing of one element may offset a weaker showing of another. *Leiva-Perez v. Holder*, 640 F.3d 962, 964-66 (9th Cir. 2011). In other words, "the required degree of irreparable harm increases as the probability of success decreases." *Nat. Res. Def. Council, Inc. v. Winter*, 502 F.3d 859, 862 (9th Cir. 2007); *see Al Otro Lado v. Wolf*, 952 F.3d 999, 1007 (9th Cir. 2020) ("We first consider the government's showing on irreparable harm, then discuss the likelihood of success on the merits under the sliding scale approach").

1. Likelihood of Success on the Merits

Dr. Eastman does not carry his burden of showing a likelihood of success on the merits, because the contents of the affidavit do not alter the Court's conclusion.

In issuing the Order, the Court followed the Ninth Circuit's test for applying the crime-fraud exception and determined that the Select Committee had (1) made a *prima facie* showing that Dr. Eastman and President Trump engaged in criminal or fraudulent conduct when seeking the advice of counsel and creating attorney work product; and (2) identified categories of communications and attorney work product that may not be protected from discovery because they were sufficiently related to and in furtherance of a crime or fraud. *See* Order Re Privilege

of Remaining Documents ("Order") (Dkt. 372 at 14) (citing *In re Grand Jury Investigation*, 810 F.3d 1110, 1113 (9th Cir. 2016)).

Dr. Eastman does not challenge the Court's finding of "a prima facie case of crime-fraud," which can be made "either by examining privileged material in cam- era or by examining independent, non-privileged evi- dence." *See In re Grand Jury Investigation*, 810 F.3d at 1113. Nor does Dr. Eastman challenge the preponder- ance of the evidence standard, which the Court applied in finding that eight emails were sufficiently related to and in furtherance of a crime or fraud.

Accordingly, this factor weighs against granting a stay.

2. Irreparable Harm

Dr. Eastman argues that "[d]isclosure of privileged information is itself and (sic) irreparable injury." Mot. at 5.

Speculative injury, however, cannot be the basis for a finding of irreparable harm. *In re Excel Innovations*, Inc., 502 F.3d 1086, 1098 (9th Cir. 2007) (citing *Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 472 (9th Cir.1984)). "Nor is such a 'generalized interest in confidentiality' . . . sufficient for a court to cast aside the January 6th Committee's exercise of core legislative functions." *Trump v. Thompson*, 20 F.4th at 38 (quoting *United States v. Nixon*, 418 U.S. 683, 711 (1974)).

Accordingly, this factor weighs against granting a stay.

3. Harm to the Committee and Public Interest

In his Motion, Dr. Eastman suggests that the only harm to the Select Committee "would be merely a delay in its receipt of documents," and that the public interest lies in granting a stay. Mot. at 6-7. Not so.

The Select Committee here had requested expedited briefing "in light of the limited time remaining for the Select Committee to complete its work before January 3, 2023, the date on which the 117th Congress ends." Motion for In Camera Review of Documents Held in Abeyance (Dkt. 366). Courts accordingly "must take care not to unnecessarily 'halt the functions of a coordinate branch.'" *Id.* (quoting *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 511 n.17 (1975)).

The importance of the Committee's work led the D.C. Circuit to reject arguments similar to Dr. Eastman's in the context of executive privilege, noting that "[e]ven under ordinary circumstances," there is "a strong public interest in Congress carrying out its lawful investigations." *Trump v Thompson*, 20 F.4th at 48 (citing *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927)). The public interest is "heightened," moreover, when "the legislature is proceeding with urgency to prevent violent attacks on the federal government and disruptions to the peaceful transfer of power." *Id.* Citing Supreme Court precedent, the D.C. Circuit made clear that "Congress's desire to restore public confidence in our political processes by facilitating a full airing of the events leading to such political crises constitutes a substantial public interest." *Id.* (internal

quotation marks omitted) (citing *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. at 453 (1977)).

Having weighed the factors above, the Court finds that Dr. Eastman has failed to establish a likelihood of success on the merits and irreparable harm, and that the balance of interests weighs against granting a stay. Accordingly, the Court DENIES the motion for a stay pending appeal.

II. DISPOSITION

Because Dr. Eastman presents no evidence warranting reconsideration under Local Rule 7-18(c) or a stay under Federal Rule of Civil Procedure 62(c), the Court **DENIES** the Motion. (Dkt. 373).

The Clerk shall serve this minute order on the parties.

MINUTES FORM 11 Initials of Deputy Clerk: kdu

CIVIL-GEN

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN C. EASTMAN, Plaintiff-Appellant, v. BENNIE G. THOMPSON, in his official capacity as Chairman of the House Select Committee to Investigate the January 6 Attack on the United States Capitol; et al., Defendants-Appellees.	No. 22-56013 D.C. No. 8:22-cv-00099-DOC-DFM Central District of California, Santa Ana ORDER (Filed Jan. 30, 2023)

Before: McKEOWN, WARDLAW, and W. FLETCHER, Circuit Judges.

The full court has been advised of the motion for reconsideration en banc and no judge has requested a vote on whether to reconsider the matter en banc. *See* Fed. R. App. P. 35; *see also* 9th Cir. R. 27-10.

The motion for reconsideration en banc (Docket Entry No. 15) is denied.

The unopposed motion to withdraw the exhibits at Docket Entry No. 6-2 (Docket Entry No. 16) is granted. The Clerk shall strike Docket Entry Nos. 6-1 and 6-2 and shall return the documents to appellant.

This case remains closed.

APPENDIX G

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November 2, 2022

By CM / ECF

Molly C. Dwyer, Clerk of Court
U.S. Court of Appeals for the Ninth Circuit The James R. Browning Courthouse
95 7th Street
San Francisco, CA 94103

Re: *Eastman v. Thompson, et al.*, No. 22-56013

Dear Ms. Dwyer:

It has come to our attention this morning that some media outlets have been able to access the Dropbox link that counsel for Dr. Eastman created to share documents with the Select Committee and that was

included in the attachments to the brief we filed with the Court last night in response to Dr. Eastman's emer- gency motion. We were not aware that the links in Dr. Eastman's email remained active, and had no intention to provide this type of public access to the materials at this stage. Providing public access to this material at this point was purely inadvertent on our part. We have communicated this information to counsel for Dr. Eastman so that they can deactivate the links going forward.

Respectfully submitted,

/s/ *Douglas N. Letter*
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General Counsel

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Counsel for Defendants-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of November 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF sys- tem. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ *Douglas N. Letter*
Douglas N. Letter

APPENDIX H

No. 22-56013

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN C. EASTMAN,

Plaintiff-Appellant,

v.

BENNIE G. THOMPSON, *et al.*,

Defendants-Appellees,

On Appeal from a Final Order of the U.S. District Court for the Central District of California (No. 8:22-cv-00099) (Hon. David O. Carter, U.S. District Judge)

PLAINTIFF-APPELLANT'S MOTION TO DISMISS APPEAL AS MOOT AND VACATE UNDERLYING DECISION

(Filed Nov. 2, 2022)

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TABLE OF CONTENTS

[iii] **TABLE OF AUTHORITIES**

Cases

Rules

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[1] INTRODUCTION AND SUMMARY OF RELIEF REQUESTED[1]

Plaintiff-Appellant John C. Eastman respectfully moves this Court to dismiss this appeal as moot and vacate the underlying district court opinion ordering disclosure of materials for which Appellant had claimed privilege. Where, as here, a civil case becomes moot before an appeal can be fully heard, well-established authority dictates that the court should vacate the judgment below to ensure fairness to the party that is unable, through no fault of its own, to secure appel- late review of an adverse decision. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); *City & Cnty. of San Francisco v. Garland*, 42 F.4th 1078, 1088 (9th Cir. 2022). That is precisely the situation here.

This appeal concerns the district court's order directing Plaintiff to produce, pursuant to the court's finding of a crime-fraud exception, eight documents

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[1] Before filing this, counsel for Plaintiff-Appellant inquired of opposing counsel whether he would oppose motion. Opposing counsel stated he would discuss the request with his clients. In the event the Court disagrees that the district court decision should be vacated as moot, Plaintiff-Appellant wishes to reserve his right to brief the merits of the appeal.

that the court determined were otherwise privileged. *Eastman v. Thompson, et al.*, No. 8:22cv99 (C.D. Cal.) at ECF 372.

Plaintiff filed a motion for reconsideration in the district court, a motion for stay pending appeal, and a motion for extension of time to comply with the production deadline set by the district court pending appeal. *Id*. at ECF 373-75. He also [2] moved for stay pending appeal with a single Ninth Circuit Judge pursuant to F.R.A.P. 8(a)(2)(D).

Shortly before the 2 pm Pacific time deadline for production that had been set by the district court, the district court denied Plaintiff's motions for reconsideration, for stay pending appeal, and for extension of time. *Eastman v. Thompson*, *supra*, at ECF 377-78.

In order to comply with the district court's order, Plaintiff provided to counsel for the Government Defendants (The House Select Committee to Investigate the January 6 Attack on the United States Capitol and its Chairman, Representative Bennie G. Thompson) a link to a dropbox folder containing the disputed documents with a request that the Select Committee not review the documents until the motion to stay pending appeal, which was still pending before a judge of this Court, had been ruled upon.

Instead of honoring that request, the Select Committee downloaded and reviewed the contested documents, later falsely asserting that it did so because no motion to stay was pending at the time. It then, in an unredacted public filing to this Court, provided the link to the documents, which have now been obtained by members of the media and publicly disseminated further. Dkt. 7-1.

[3] **ARGUMENT**

I. THE COURT SHOULD DISMISS THE APPEAL AND VACATE THE UNDERLYING DECISION BECAUSE THE APPEAL HAS BECOME MOOT BY THE UNILATERAL ACTIONS OF DEFENDANTS-APPELLEES

"[A]n appeal should . . . be dismissed as moot when, by virtue of an intervening event, a court of ap- peals cannot grant 'any effectual relief whatever' in fa- vor of the appellant." *Calderon v. Moore*, 518 U.S. 149, 150 (1996) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). Public disclosure of privileged documents moots any appeal of a court order requiring the production of the documents, as there is no longer any effective relief that can be provided by the court of appeals.

The question then becomes whether the lower court decision ordering the production of privileged documents should be vacated in light of the case having become moot. When a civil case becomes moot on appeal, "the established practice . . . in the federal system . . . is to reverse or vacate the judgment below and remand with a direction to dismiss." *Munsingwear*, 340 U.S. at 39; *San Francisco*, 42 F.4th at 1088. The Supreme Court has described reversal or vacatur as 'the duty of the appellate court' because such action "eliminates a judgment, review of which was prevented through happenstance." *Munsingwear*, 340 U.S. at 39-40 (quoting *Duke Power Co. v. Greenwood Cty.*, 299 U.S. 259, 267 (1936)). "In the decades since *Munsingwear*, [this Court has] treated *automatic* vacatur as the 'established practice,' applying whenever mootness prevents appellate

review." *Dilley v.* [4] *Gunn*, 64 F.3d 1365, 1369-70 (9th Cir. 1995) (emphasis added, citing *In re Davenport*, 40 F.3d 298, 299 (9th Cir.1994); *Funbus Systems, Inc. v. California Pub. Utils. Comm'n*, 801 F.2d 1120, 1131 (9th Cir.1986); *DHL Corp. v. Civil Aeronautics Bd.*, 659 F.2d 941, 944 (9th Cir.1981); *Boggess v. Berry Corp.*, 233 F.2d 389, 393 (9th Cir.1956)); *see also NASD Disp. Resol., Inc. v. Jud. Council of State of Cal.*, 488 F.3d 1065, 1068 (9th Cir. 2007) ("Under the '*Munsingwear* rule,' vacatur is gen- erally 'automatic' in the Ninth Circuit when a case be- comes moot on appeal." (quoting *Pub'l Util. Comm'n v. FERC*, 100 F.3d 1451, 1461 (9th Cir.1996))).

The Supreme Court has clarified that vacatur is not required when the case became moot through the voluntary action of the party seeking an appeal. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 25 (1994) (holding that *Munsingwear* is "inapplicable" when mootness results from the parties' settlement because, in these cases, "[t]he judgment is not unreviewable, but simply unreviewed by [the appellant's] own choice."). But where, as here, a case becomes moot through the "unilateral action of the party who prevailed in the lower court," "[v]acatur is in order." *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 71–72 (1997) (quoting *U.S. Bancorp*, 513 U.S., at 23).

This Court focusses on "fairness" principles in deciding whether the decision that has become moot should be vacated. *In re Burrell*, 415 F.3d 994, 999 (9th Cir. 2005); *Dilley*, 64 F.3d at 1370. "The relevant inquiry 'is whether the party [5] seeking relief from the judgment below caused the mootness by voluntary action.'" *Id.* at 1371 (quoting *U.S. Bancorp*, 513 U.S.

at 24). If the party seeking relief did not cause the appeal to become moot, vacatur should be granted. *Id.* "[T]he key question is whether the live case was resolved by the strategic decision of the appealing party rather than mere happenstance" or, as here, the unilateral action of the opposing party. *Marshack v. Helvetica Cap- ital Funding LLC*, 495 F. App'x 808, 810 (9th Cir. 2012) (internal quotations omitted).

This appeal was mooted solely by the decision of appellees to download and view the disputed documents while a motion for stay was pending before this Court, and then subsequently to provide the link to those documents in an unredacted public filing. Therefore, the mootness of this appeal occurred by the "unilateral action of the party who prevailed in the lower court," and vacatur should be required, *Arizonans*, 520 U.S. at 1068, and automatic, *NASD*, 488 F.3d at 71-72.

There can be no better illustration of the importance of the *Munsingwear* doctrine than a district court decision ordering the production of privileged materials pursuant to the "crime-fraud" privilege exception. A "crime-fraud" privilege finding carries much of the stigma of a criminal conviction with none of the constitutional protections. Moreover, any appeal of district court privilege rulings will almost by definition be susceptible to mootness challenges. Finally, applying the *Munsingwear* doctrine to a district court's ruling on attorney client privilege [6] will not harm the prevailing party below because it will not deprive them of access to the privileged materials themselves.

In this particular case, Judge Carter's order compelling production of privileged documents under a crime-fraud exception threatens significant harm both to Appellant and to his former client. *Cf. In re Burrell*, 415 F.3d at 999 (noting "that collateral estoppel engenders legal consequences from which a party may continue to suffer harm after a claim has been rendered moot."). As is noted in the Declaration Plaintiff-Appellant submitted *in camera* to this Court in support of the Motion to Stay, the "crime-fraud" determination is clearly erroneous in light of the context in which the supposed "crime-fraud" communications occurred. Leaving that decision in place without Plaintiff-Appellant having the opportunity to challenge it on appeal is precisely the reason the Supreme Court has directed vacatur in circumstances such as this, *Munsingwear*, and why this Court has treated vacatur in such circumstances as "generally automatic," *NASD*, 488 F.3d at 1068. As the authorities cited above indicate, principles of fairness dictate that the parties opposing appeal ought not to be allowed unilaterally to moot and insulate the district court's order from review. Because Plaintiff-Appellant has been prevented from appealing the district court's "crime-fraud" determination for reasons outside of his control, vacatur should be granted. *See U.S. Bancorp.*, 513 U.S. at 25.

[7] CONCLUSION

This appeal was mooted by the unilateral action of the congressional defendants-Appellees who oppose this appeal. Because their decision to download and re- view privileged documents while a motion for stay was pending in this Court, and their subsequent publica- tion of the link to those documents, were

beyond Plain- tiff-Appellant's control, this Court should dismiss the appeal and vacate the underlying decisions finding that certain privileged documents had to be disclosed pursuant to a crime-fraud exception.

November 2, 2022 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: November 2, 2022

Respectfully submitted,

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