

**In the
Supreme Court of the United States**

John C. Eastman,

Petitioner,

v.

State Bar of California,

Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of California

**BRIEF OF AMICUS CURIAE
LIFE LEGAL DEFENSE FOUNDATION
IN SUPPORT OF PETITIONER**

CATHERINE SHORT

Counsel of Record

SHEILA A. GREEN

LIFE LEGAL DEFENSE FOUNDATION

PO Box 2105

Napa, CA 94558

(707) 224-6675

kshort@lifelegal.org

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. The State Bar erred by not applying strict scrutiny analysis to Eastman’s out- of-court statements.	3
A. Eastman’s out-of-court statements regarding fraud in the 2020 election are fully protected by the First Amendment.	3
1. Eastman’s statements to the public.	4
2. Eastman’s statements to Pence and his attorney.	9
B. Eastman’s advice regarding the Vice President’s power to reject ballots or postpone certifying the election was within the scope of legitimate advocacy on behalf of his client.	11
II. The State Bar’s decision to disbar Eastman for alleged misstatements to the courts creates a dangerous precedent in politically charged cases.....	13
III. The State Bar’s actions damage, rather than strengthen, the legal profession.	15

A. The State Bar’s disbarment of John Eastman will likely further undermine public confidence in the legal profession.....	15
B. The State Bar’s actions will produce a chilling effect on attorneys’ advocacy for disfavored clients and viewpoints... 18	
1. An attorney’s duty is to his client, not abstract values of “democracy” or “the orderly transfer of power.”	18
2. Attorneys for unpopular causes have in the past lost—and then regained—their right to practice law due to their advocacy.....	19
3. The State Bar’s decision to use the “objectively reasonable” standard in this highly partisan matter put Eastman at the mercy of the subjective beliefs and preferences of the tribunal.	23
CONCLUSION	25

TABLE OF AUTHORITIES

Cases

<i>Ass’n of Bar of N.Y. v. Isserman</i> , 271 F.2d 784 (2d Cir. 1959).....	23
<i>Brown v. Board of Education</i> , 347 U.S. 483 (1954).....	24
<i>Dennis v. U.S.</i> , 341 U.S. 494 (1951).....	22
<i>Edwards v. Aguillard</i> , 482 U.S. 578 (1987).....	8
<i>Frazer v. U.S.</i> , 18 F.3d 778 (9th Cir. 1994)	20
<i>Garrison v. State of Louisiana</i> , 379 U.S. 64 (1964).....	5
<i>Gentile v. State Bar of Nevada</i> , 501 U.S. 1030 (1991).....	6, 10, 13
<i>Gladstein v. McLaughlin</i> , 230 F.2d 762 (1955)	23
<i>Harrington v. Richter</i> , 562 U.S. 86 (2011).....	7
<i>In re Disbarment of Isserman</i> , 348 U.S. 1 (1954).....	23
<i>In re Isserman</i> , 345 U.S. 286 (1953)	23
<i>In re Isserman</i> , 9 N.J. 269 (1952).....	23
<i>In the Matter of Anderson</i> , 3 Cal. State Bar. Ct. Rptr. 775 (Rev. Dept. 1997)	7
<i>N.Y. Times v. Sullivan</i> , 376 U.S. 254 (1964)	5
<i>NAACP v. Button</i> , 371 U.S. 415 (1963).....	25

<i>National Institutes of Family & Life Advocates v. Becerra</i> , 585 U.S. 755 (2018)	5, 6
<i>Ohralik v. Ohio State Bar Ass’n</i> , 436 U.S. 447 (1978).....	20
<i>Polk County v. Dodson</i> , 454 U.S. 312 (1981)	21
<i>Sacher v. Ass’n of Bar</i> , 347 U.S. 388 (1954).....	23
<i>Standing Comm. on Discipline of the U.S. Dist. Court v. Yagman</i> , 55 F.3d 1430 (9th Cir. 1995).....	6
<i>Sup. Ct. of N.H. v. Piper</i> , 470 U.S. 274 (1985).....	20
<i>Texas v. Pennsylvania</i> , 592 U.S. 1144 (2020)	15
<i>Trump v. Kemp</i> , 511 F. Supp. 3d 1325 (N.D. Ga. 2021)	15
<i>U.S. Dist. Ct. for the E. Dist. of Wash. v. Sandlin</i> , 12 F.3d 861 (9th Cir. 1993)	7
<i>U.S. v. Alvarez</i> , 567 U.S. 709 (2012)	4, 5
<i>U.S. v. Lumumba</i> , 741 F.2d 12 (2d Cir. 1984).....	22
<i>U.S. v. Sacher</i> , 182 F.2d 416 (2d Cir. 1950), <i>aff’d.</i> , 343 U.S. 1 (1952)	22
<i>U.S. v. Skrmetti</i> , 605 U.S. 495 (2025)	7
<i>Zell v. Am. Seating Co.</i> , 138 F.2d 641 (2d Cir. 1943)	27
Statutes	
3 U.S.C. § 15(b)	13
3 U.S.C. § 5(a)	13
3 U.S.C. § 5(c)	13

42 U.S.C. § 1983	18
Cal. Bus. & Prof. Code § 6106	4
U.S.C. § 5	13

Other Authorities

Alan M. Dershowitz, <i>Why Donald Trump Cannot Get a Top-Tier Lawyer</i> , Gatestone Institute (June 15, 2023, 5:00 AM)	25, 28
Andy Craig, <i>Trump’s Fake Electors and the Electoral Count Act</i> , Cato Institute (Feb. 3, 2022, 1:09 PM)	14
Annaleise Azevedo Lohr, <i>Politico Magazine Ipsos Trump Hush Money Verdict</i> , Ipsos (June 17, 2024)	19
Commission on Federal Election Reform, <i>Building Confidence in U.S. Elections</i> 46 (Jimmy Carter & James Baker, 2005)	9
<i>Donald Trump Indictments, 2023-2025</i> , Ballotpedia	19
Jacob Fabina & Zachary Scherer, <i>Voting and Registration in the Election of November 2020</i> 14 (Jan. 2022)	9
James E. Moliterno, <i>Politically Motivated Bar Discipline</i> , 83 Wash. U. L. Q. 740-41 (2005.) 24, 25	
Jessica McDonald, <i>COVID-19 Face Mask Advice, Explained</i> , FactCheck.org (last updated Aug. 6, 2021)	8
Mark D. Alicke & Stephanie H. Weigel, <i>The Reasonable Person Standard: Psychological</i>	

<i>and Legal Perspectives</i> , 17 Ann. Rev. L. & Soc. Sci. (2021)	26
Michael R. Belknap, <i>Cold War Political Justice – The Smith Act, the Communist Party, and American Civil Liberties</i> 219 (1977).....	22, 24
Rebecca Roiphe, <i>Why Courts Should Not Discipline Trump’s Lawyers</i> , 46 Cardozo L. Rev. 1817, 1849-51 (2025).....	3, 11, 16, 17, 21
Russell Viner, et al., <i>School Closures During Social Lockdown and Mental Health, Health Behaviors, and Well-being Among Children and Adolescents During the First COVID-19 Wave</i> , 176 JAMA Pediatrics (Jan. 18, 2022)	8
<i>The American Presidency Project</i> (last updated Dec. 31, 2024)	19
The State Bar of Cal. Standing Comm. on Pro. Resp. and Conduct Formal Opinion No. 2015-194	11
<i>Voter’s Reflections on the 2020 Election Process</i> , Pew Research Center (Jan. 15, 2021)	18
Rules	
Cal. R. of Prof. Conduct 1	15
Cal. R. Prof. Conduct 3.1(2).....	12, 14
Cal. R. Prof. Conduct 4.1, cmt.2.....	10
Fed. R. Crim. P. 42(a)	19
Model R. Prof. Conduct 3.1, cmt. 2	14

INTEREST OF AMICUS CURIAE¹

Amicus Life Legal Defense Foundation (“Life Legal”) is a California non-profit 501(c)(3) public interest legal and educational organization that was founded in 1989. Its mission is to give innocent and helpless human beings of any age, particularly unborn children, a trained and committed defense against the threat of death, and to support their advocates in the nation’s courtrooms. Life Legal litigates cases to protect innocent human life, from preborn babies targeted by a billion-dollar abortion industry to the elderly, disabled, and medically vulnerable denied life-sustaining care. Since its inception, Life Legal has been at odds with the prevailing philosophy of the State of California on this vital issue of the protection of all human life from conception to natural death.

Life Legal opposes the use of state bar disciplinary proceedings to censor speech with which

¹ No counsel for any party authored this brief in whole or in part; no party counsel or party made a monetary contribution intended to fund its preparation or submission; and no person other than *amici* or its counsel funded it. Petitioner John Eastman is listed as a member of Life Legal's “Board of Advisors” in some Life Legal publications. The “Board of Advisors” has no role in the governance of Life Legal. Advisors do not meet as a board, nor do they deliberate on or vote on anything related to Life Legal’s actions. Life Legal drafted this amicus brief in response to a general solicitation for amicus briefs supporting Petitioner in this matter; Petitioner did not seek out Life Legal’s participation as amicus, nor did his inclusion in the “Board of Advisors” play any part in Life Legal’s decision to file this brief.

Notice of intent to file this brief was emailed to counsel of record on October 1, 2026.

the state disagrees. It is vitally important to the health of our nation's legal system and the confidence of the public that constitutional standards be upheld, especially when the decisionmaker, whether a court or a state bar, disagrees with the core philosophy of the attorney or litigant.

SUMMARY OF ARGUMENT

Acting as judge, jury, and executioner, the State Bar has put Dr. John Eastman to professional death for statements made during his representation of President Donald Trump during the 2020 election controversy. In the eyes of the State Bar, his advocacy involved a political “sin” – advocating for Donald Trump in his claims that the 2020 presidential election was stolen from him. The State Bar's judgment is based on its belief that Eastman was dishonest in the legal arguments he made as attorney for President Trump regarding Vice President Mike Pence's constitutional authority to reject some states' slates of electors and/or delay the electoral count during the Joint Session of Congress on January 6. The State Bar also determined that Eastman was dishonest in statements to the public and to the courts regarding fraud in the election. Pet. App. (“App.”) 122a.

The State Bar ruling is problematic for several reasons. First, it did not employ strict scrutiny under the First Amendment in its analysis of Eastman's political statements but instead applied an “objective reasonableness standard.” App. 103a. Second, in the context of a presidential

election that continues to divide the electorate, the ruling inevitably will contribute to the erosion of trust in the legal system. *See* Sec. III.A. Third, because the decision involves the defense of a highly controversial figure, Donald Trump, furthering highly controversial claims, it will deter attorneys from representing clients whose actions or beliefs are currently outside the mainstream of acceptable discourse.

In such heated situations, the State Bar should have exercised restraint and awaited a referral from a court before pursuing disciplinary action, rather than making its own unilateral assessment of the very complex legal and factual issues presented by Eastman's defense of President Trump. *See* Rebecca Roiphe, *Why Courts Should Not Discipline Trump's Lawyers*, 46 Cardozo L. Rev. 1817, 1849-51 (2025).

ARGUMENT

I. The State Bar erred by not applying strict scrutiny analysis to Eastman's out-of-court statements.

A. Eastman's out-of-court statements regarding fraud in the 2020 election are fully protected by the First Amendment.

The State Bar of California disbarred Eastman for various statements he made to the public, to the Trump campaign and its attorney, and to then-Vice President Pence and his attorney. App.

4a-5a. The Supreme Court of California denied Eastman's petitions for review of the State Bar's decision finding Eastman culpable on ten of eleven counts he was charged with. App. 1a-2a.

1. Eastman's statements to the public.

The Review Department found Eastman guilty of "moral turpitude" in violation of Cal. Bus. & Prof. Code § 6106, App. 78a, 91a, 93a, for statements made to the public at the "Stop the Steal Rally" on January 6, App. 74a-75a, on a podcast with Steve Bannon, 87a-88a, and in an article in "The American Mind" on January 18, 2021. App. 91a-95a. Whether these statements were made in his capacity as an attorney or not, they are protected by the First Amendment.

If Eastman was speaking as a private citizen when addressing the public, these statements, even if false, are protected by the First Amendment because they were political speech and do not fall into any of the exceptions (i.e., incitement, obscenity, defamation, true threats) to the general prohibition against content-based restrictions. *U.S. v. Alvarez*, 567 U.S. 709, 717-18 (2012). "[S]ome false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee." *Id.* at 718. "The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions." *N.Y. Times v. Sullivan*, 376 U.S. 254, 269 (1964).

The case *Garrison v. State of Louisiana*, 379 U.S. 64 (1964), cited by the Bar to support its ruling, involved a speech category that can be restricted—defamation by an attorney against judges—and therefore does not support the Bar’s broad assertion that “false statements made knowingly or with reckless disregard of the truth are not protected speech.” App. 102a, n. 93, 234a-35a, n. 89. The Bar erroneously cast aside *Sullivan*, asserting that defamation cases use a “subjective standard” while disciplinary proceedings like Eastman’s use an “objective standard” App. 103a, n. 96. The holding of *Sullivan* cannot be so constrained.

Sullivan’s broad affirmation of the First Amendment protection of political speech clearly applies to Eastman’s speech as a private citizen. *Sullivan*, 376 U.S. at 269-71. Indeed, the Bar makes no effort to justify imposing a stricter standard on Eastman than the First Amendment, as explained by *Sullivan*, permits.

The Bar is on no better grounds if Eastman’s statements to the public constituted professional speech. Pet. 13-17. In *National Institutes of Family & Life Advocates v. Becerra*, 585 U.S. 755 (2018) this Court noted that restrictions on “professional speech” must satisfy strict scrutiny unless “a law requires professionals to disclose factual, noncontroversial information in their *commercial speech*” or “where States regulate professional *conduct* that incidentally involves speech . . .” *Id.* at 756 (emphases added). Neither of these exceptions applies to any of Eastman’s statements to the public.

The Review Department correctly cited *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991)

to support its assertion that strict scrutiny was applicable but then proceeded to ignore that standard, instead applying an “objective, reasonableness standard.” App. 102a-03a. The *Gentile* court acknowledged that attorney speech even about “ongoing proceedings” receives “traditional First Amendment protections,” *id.* at 1055, unless the statements present a “substantial likelihood of material prejudice” to a pending case. *Id.* at 1075. Ignoring *Gentile*’s actual holding, to support the “objective, reasonableness” standard, the Review Department cited two Ninth Circuit cases that involved defamation, speech that does not receive strict scrutiny analysis. *Standing Comm. on Discipline of the U.S. Dist. Court v. Yagman*, 55 F.3d 1430, 1442 (9th Cir. 1995) (defamation against federal district court judge presiding over attorney’s case analyzed under standard of whether it “obstructs or prejudices the administration of justice” in “pending cases”); *U.S. Dist. Ct. for the E. Dist. of Wash. v. Sandlin*, 12 F.3d 861, 867 (9th Cir. 1993) (attorney’s statements were defamatory and involved a pending case, thus attorney’s conduct was reviewed under reasonableness standard).

The Review Department also cited *In the Matter of Anderson*, 3 Cal. State Bar. Ct. Rptr. 775 (Rev. Dept. 1997) but that case involved false statements critical of judges— a materially different scenario than the instant case.

Finally, even under the objective reasonableness standard, the State Bar’s critique of Eastman is not reasonable. The Bar asserted that Eastman’s rejection of the opinions of “true experts,” App. 78a, 92a, and statements by election officials,

87a-88a, 92a-95a, was objectively unreasonable. But one member of this Court has questioned the wisdom of “deferring to the authority of the expert class” and noted that “the American people . . . are entitled to disagree with those who hold themselves out as experts.” *U.S. v. Skrmetti*, 605 U.S. 495, 530 (2025) (Thomas, J., concurring). Experts are not infallible, which is why many court cases involve the conflicting claims of “true experts.” *Harrington v. Richter*, 562 U.S. 86, 108-09 (2011); *Edwards v. Aguillard*, 482 U.S. 578, 596 (1987)². Experienced attorneys know this. Yet, the State Bar treated the experts that held contrary opinions to Eastman’s experts as conclusively correct. App. 58a-60a.

To take one example relevant to the issues here, experts disagree as to the security of voting by mail. While the Cybersecurity and Infrastructure

² The changing advice given by the Centers for Disease Control regarding the need for wearing face masks during the COVID-19 pandemic serves as another example of the fallibility of experts. Jessica McDonald, *COVID-19 Face Mask Advice, Explained*, FactCheck.org (last updated Aug. 6, 2021), <https://www.factcheck.org/2020/04/covid-19-face-mask-advice-explained/>. Similarly, there was strong, and evolving, disagreement among experts as to the wisdom of school closures. One review of studies showed that the school closures caused negative mental health symptoms and behaviors among children and adolescents and recommended that in future the adverse mental health effects should be balanced against “epidemiological benefits.” Russell Viner, et al., *School Closures During Social Lockdown and Mental Health, Health Behaviors, and Well-being Among Children and Adolescents During the First COVID-19 Wave*, 176 JAMA Pediatrics (Jan. 18, 2022), <https://jamanetwork.com/journals/jamapediatrics/fullarticle/2788069>.

Security Agency (“CISA”) stated on November 12, merely nine days after the election, that the 2020 election was “the most secure in American history,” App. 218a, Eastman could reasonably have put stock in other authorities, such as the Report of the Commission on Federal Election Reform from September 2005, *Building Confidence in U.S. Elections*, which concluded that “Absentee ballots remain the largest source of potential voter fraud.”³ The 2020 election saw a more than one hundred percent increase in the percentage of votes cast by absentee ballot as compared to the 2016 election.⁴

Eastman could reasonably have believed that state officials’ statements defending the election were inherently unreliable, as they were self-serving defenses of the security of the election they oversaw. The same could be said for CISA’s statements.⁵

Finally, people who intentionally lie or are “willful[ly] blind” to the truth of their statements, App. 39a n. 38, have no incentive to push for investigations into their allegations because the result would be to reveal their statements as false. Eastman’s email to Pence’s attorney “implored” him to adjourn the Joint Session “to allow the legislatures to finish their investigations, as well as

³ Commission on Federal Election Reform, *Building Confidence in U.S. Elections* 46 (Jimmy Carter & James Baker, 2005).

⁴ Twenty-one percent of voters voted by mail in 2016 as compared to over forty-three percent in 2020. Jacob Fabina & Zachary Scherer, *Voting and Registration in the Election of November 2020* 14 (Jan. 2022), <https://www.census.gov/content/dam/Census/library/publications/2022/demo/p20-585.pdf>.

⁵ “CISA is part of the United States Department of Homeland Security and is one of the entities tasked with protecting election infrastructure.” App. 31a, n. 24.

to allow a full forensic audit of the massive amount of illegal activity that has occurred here.” App. 69a. Eastman was also concerned that “a good portion of the 75 million people who supported President Trump will have seen a process that allowed the illegality to be aired,” even if the result of the elections did not change. *Id.* Eastman’s advocacy of postponing the counting of the electoral ballots until the states had the opportunity to investigate fraud allegations undercuts the State Bar’s assertion that he “knowingly” lied. App. 104a.

2. Eastman’s statements to Pence and his attorney.

A similar analysis applies to Eastman’s statements to Vice President Pence and his attorney regarding alleged fraud. App. 62a-69a. No legal proceeding was pending that might have been materially prejudiced by Eastman’s statements, so the *Gentile* balancing rule is irrelevant. Instead, the rules regarding negotiations come into play here.

Attorneys in negotiations often repeat the allegations of their clients, some of which may later be determined to be false. While the California Rules of Professional conduct prohibit the making of a false statement of material fact or law to a third party, one comment on the rule indicates that whether a statement involves facts depends on the context. “For example, *in negotiation*, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim

are ordinarily in this category.” Cal. R. Prof. Conduct 4.1, cmt.2 (emphasis added). Eastman’s statements to the Vice President’s attorney that there was “compelling evidence that the election was stolen,” App. 67a, could reasonably be understood as a negotiation strategy. *See also* Roiphe, *supra*, at 1844 (overstatement during negotiations “is simply a part of the way the system operates”).

Similarly, where the other party would not be likely to rely on the assertion, a statement may be considered mere puffery and thus not actionable.⁶ Eastman’s assertions alone were unlikely to have had any effect on the Vice President or his attorney because the fraud debate was widely reported in the news, and both Pence and his attorney were certainly aware of the opposing evidence. Furthermore, statements that are general or subjective are not actionable.⁷ Since Eastman’s allegations of election fraud were sweeping and general, they should be considered as puffery and not proper subjects for discipline.

Most significantly, by the time Eastman e-mailed the statement in Count Eight about “compelling evidence” of fraud to Vice-President Pence’s attorney, Pence had already issued his “Dear Colleague” letter stating that he did not believe he

⁶ “A statement of opinion is not actionable, nor is a statement of ‘puffery.’ A statement of puffery is one that is ‘extremely unlikely’ to induce reliance. . . . A statement that is general or subjective will not [be actionable].” The State Bar of Cal. Standing Comm. on Pro. Resp. and Conduct Formal Opinion No. 2015-194 at 5, [https://www.calbar.ca.gov/sites/default/files/portals/0/documents/ethics/Opinions/2015-194-\(12-0007\)-Puffing-in-Negotiations-FINAL-12-29-15.pdf](https://www.calbar.ca.gov/sites/default/files/portals/0/documents/ethics/Opinions/2015-194-(12-0007)-Puffing-in-Negotiations-FINAL-12-29-15.pdf)

⁷ *Id.*

had the authority “to determine which electoral votes should be counted and which should not.” App. 66a at n.66. Eastman’s statement about the “overwhelming” evidence that the election was stolen were in the nature of recriminations about what Vice-President Pence should have done (“YOU and your boss did not do what was necessary,” App. 67a), rather than efforts to influence any future action by Pence at that point.

B. Eastman’s advice regarding the Vice President’s power to reject ballots or postpone certifying the election was within the scope of legitimate advocacy on behalf of his client.

Eastman wrote two internal memos and communicated to Vice President Pence, his attorney, and President Trump that, in Eastman’s opinion, Pence had the authority under the Twelfth Amendment to reject or postpone the counting of the electoral ballots. App. 62a-69a, 82a-86a. The Review Department found Dr. Eastman culpable under Count Ten for “intentionally push[ing]” his theories regarding the Vice President’s powers “knowing those theories were not supported by the facts, the relevant historical record, or the law.” App. 83a. The opinion asserted that he showed a “lack of rigor and discernment” “to the issue of vice-presidential authority and the analysis of the historical record.” App. 84a.

The statements and memos were not made in court, nor did they relate to a court proceeding, so the *Gentile* exception permitting regulation of

attorney's statements when there is "the substantial likelihood of material prejudice" in pending cases does not apply. *Gentile*, 501 U.S. at 1075. In litigation, attorneys are permitted to argue for "an extension, modification, or reversal of the existing law."⁸ *A fortiori*, constraints on statements outside the context of litigation would be even less restrictive. The State Bar's application of a lowered standard of review to Eastman's out-of-court legal advice has the potential to deter lawyers from taking controversial cases and to chill their speech in non-public discussions with other attorneys and sophisticated clients. Lawyers for controversial clients will legitimately fear that state disciplinary authorities would apply the State Bar's lower standard of "objective reasonableness" against them rather than applying strict scrutiny. See Sec. III.B below.

While the State Bar rejected Eastman's view that the scope of a vice-president's authority was an "open question," App. 98a, the fact is that, after the 2020 election, Congress explicitly rewrote portions of the Electoral Count Act in order to clarify this matter—an action which would have been unnecessary if it was not an open question. The revised Act now makes explicit that the vice-president's role in counting ballots is "limited to performing solely ministerial duties" and that the vice-president "shall have no power to solely

⁸ "A lawyer shall not: . . . (2) present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of the existing law." Cal. R. Prof. Conduct 3.1(2).

determine, accept, reject, or otherwise adjudicate or resolve disputes over the proper certificate of ascertainment of appointment of electors, the validity of electors, or the votes of electors.” 3 U.S.C. § 15(b). In addition, to address the issue of dual slates of electors, Congress amended 3 U.S.C. § 5 to require that the governor of each state “shall issue a certificate of ascertainment of appointment of electors” no later than “six days before the time fixed for the meeting of the electors.” § 5(a). This certification “shall be treated as conclusive in Congress with respect to the determination of electors appointed by the State.” § 5(c).

The fact that Congress moved expeditiously to amend the Electoral Count Act to specifically close the course Eastman advised was open is strong evidence that his argument was not wholly lacking a “basis in law or fact.” App. 82a.⁹

II. The State Bar’s decision to disbar Eastman for alleged misstatements to the courts creates a dangerous precedent in politically charged cases.

The Review Department found Eastman culpable for making allegedly false statements to courts in his intervention motion in *Texas v.*

⁹ See also Andy Craig, *Trump’s Fake Electors and the Electoral Count Act*, Cato Institute (Feb. 3, 2022, 1:09 PM), <https://www.cato.org/blog/trumps-fake-electors-electoral-count-act> (emphasis added) (despite opposing Eastman’s argument, calling it “not entirely frivolous” and noting “the fact that Trump’s team was able to identify *plausible legal arguments* for such a gambit is also a shocking indictment of the current law.”) (emphasis added).

Pennsylvania, 592 U.S. 1144 (2020) and in *Trump v. Kemp*, 511 F. Supp. 3d 1325 (N.D. Ga. 2021). App. 30a-43a. Of course, false statements made to courts can be sanctioned by the State Bar and would not receive strict scrutiny analysis. Cal. R. Prof. Conduct 3.1. However, in these cases, neither this Court (in *Texas v. Pennsylvania*) nor the federal district court in Georgia (in *Trump v. Kemp*) saw fit to sanction any of the attorneys involved, much less refer them to the State Bar for discipline. The State Bar’s investigation against Eastman was instigated by complaints filed by politically partisan groups – States United Democracy Center and Lawyers Defending American Democracy. Pet. 7-8. A State Bar investigation founded on such politically motivated complaints conveys the impression that the State Bar itself is also acting with partisan motives.

Furthermore, the Court used statements by Eastman regarding his need for or his optimism about finding compelling evidence of fraud as proof that he knew his claims were false. App. 31a, 243a. In the Model Rules comments to Rule. 3.1, it states, that an action “is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. . . Such action is not frivolous even though the lawyer believes that the client’s position ultimately will not prevail.” Model R. Prof. Conduct 3.1, cmt. 2. Indeed, Eastman’s optimism, which was based on statistical analysis and not mere conjecture, indicated he had a good faith belief that discovery would provide direct evidence of fraud.

It sets a dangerous precedent to disbar an attorney for not having a level of certainty about his client's claims that can exist only after discovery and trial. Such a standard would deter many lawyers from bringing lawsuits in which access to evidence before discovery is minimal.¹⁰ Eastman himself noted the difficulty of establishing conclusive evidence of election fraud, because, as he stated, "serious forensic investigations have been blocked at almost every turn." App. 51a. Lack of certainty about a client's claims should not be equated with lying. For this reason, "bar disciplinary agencies rarely sanction lawyers for this sort of conduct and when they do it is usually because they have received a referral from a judge." Roiphe, *supra*, at 1849.

III. The State Bar's actions damage, rather than strengthen, the legal profession.

A. The State Bar's disbarment of John Eastman will likely further undermine public confidence in the legal profession.

The purpose of the Rules of Professional Conduct of the State Bar of California is "to protect the public, the courts, and the legal profession; protect the integrity of the legal system; and promote the administration of justice *and confidence*

¹⁰ If this were the rule, "[C]ertain types of lawyers would be at a distinct disadvantage, particularly those who represented clients with minimal access to evidence before discovery, like plaintiffs suing large corporations." Roiphe, *supra*, at 1846.

in the legal profession.” Cal. R. of Prof. Conduct 1 (emphasis added). Both the Review Department and the Hearing Department justified the decision to disbar Eastman by invoking the need to protect the public and preserve public confidence in the legal system. App. 117a, 292a-93a. But those same interests caution restraint in disciplinary actions toward attorneys when the subject matter involves tremendous public disagreement, because of the danger that the public will perceive the action as politically motivated, with a resulting loss of confidence in the legal system as an unbiased, even-handed institution.

The statements made by Eastman concerned one of the most hotly debated elections in United States history, with public opinion fiercely divided on partisan lines. A Pew Research poll from January 2021 revealed that seventy-five percent of Trump voters thought Trump had won the election, while only one percent of Biden voters said the same.¹¹ As recently as April 2026, a Reuters/Ipsos poll showed that sixty-three percent of Republicans still believed that Trump won the 2020 election, while twenty-one percent of independents but only nine percent of Democrats (an *increase* over 2021) held the same opinion.

These statistics illustrate that partisanship heavily affected, and continues to affect, the views of individuals towards what happened in the 2020 election. It is a logical inference that those same

¹¹ *Voter’s Reflections on the 2020 Election Process*, Pew Research Center (Jan. 15, 2021), <https://www.pewresearch.org/politics/2020/11/20/voters-evaluations-of-the-2020-election-process/>.

partisan divides will affect the public's perception of the State Bar's actions towards Eastman. For example, a poll conducted of Republicans just after the May 2024 "hush money" verdict against Trump found that only thirty-nine percent said they trusted state court judges, as compared to a July 2023 survey in which forty-nine percent said the same. Republicans' trust in district attorneys, state attorneys, and prosecuting attorneys fell by nine points from July 2023 (forty-one percent) to June 2024 (thirty-two percent).¹²

The very fact that Trump was indicted in four criminal cases, including eighty-eight criminal counts, and was convicted of thirty-four counts of falsifying business records¹³ before winning the 2024 presidential election by a greater popular vote than either of the two previous elections¹⁴ strongly indicates that the public already doesn't trust the legal establishment when it comes to these issues. Disbarring Eastman will merely appear to the public to be yet another political maneuver to discredit Trump, rather than evidence of the legal system seeking to preserve the rule of law.

¹² Annaleise Azevedo Lohr, *Politico Magazine Ipsos Trump Hush Money Verdict*, Ipsos (June 17, 2024), <https://www.ipsos.com/en-us/politico-magazine-ipsos-trump-hush-money-verdict>.

¹³ *Donald Trump Indictments, 2023-2025*, Ballotpedia, https://ballotpedia.org/Donald_Trump_indictments,_2023-2025.

¹⁴ *The American Presidency Project* (last updated Dec. 31, 2024), <https://www.presidency.ucsb.edu/statistics/elections>.

B. The State Bar's actions will produce a chilling effect on attorneys' advocacy for disfavored clients and viewpoints.

1. An attorney's duty is to his client, not abstract values of "democracy" or "the orderly transfer of power."

A lawyer's first responsibility is to zealously represent his client within the bounds of the law, regardless of whether the client or his views are popular. "The lawyer who champions unpopular causes surely is as important to the maintenance or well-being of the Union . . . as was the shrimp fisherman in *Toomer* or the pipeline worker in *Hicklin*." *Sup. Ct. of N.H. v. Piper*, 470 U.S. 274, 281 (1985) (internal quotes omitted); *Frazer v. U.S.*, 18 F.3d 778, 784 (9th Cir. 1994) ("Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. . . And nowhere is this service deemed more honorable than in case of appointment to represent . . . a member of an unpopular or hated group.") It is by fulfilling their obligation to their clients that attorneys participate in the administration of justice. "As trusted agents of their clients, and as assistants to the court in search of a just solution to disputes" they "are essential to the primary governmental function of administering justice." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978).

Furthermore, "a lawyer is not an officer of the State in any political sense." *Piper*, 470 U.S. at 283. This means that in many cases, an attorney will oppose the state—for example when private

attorneys or public defenders defend a criminal defendant against the state's charges or when attorneys bring cases under 42 U.S.C. § 1983, allowing their clients to sue the state and its officials. "It is the constitutional obligation of the State to respect the professional independence of the public defenders whom it engages. . . [C]ounsel will be free of state control." *Polk County v. Dodson*, 454 U.S. 312, 322 (1981). An attorney's primary obligation is to his client, not to other democratic values, not even to the "orderly transfer of power," if the client believes the transfer of power is contrary to law and he believes he will be able to uncover evidence of this. App. 3a; Sec. II.¹⁵

Therefore, Eastman had the constitutional right and professional obligation as attorney to President Trump to voice opposition to the counting of the electoral ballots and to petition Vice President Pence regarding the latter's role. Pet. Cert. 31-33; App. 99a-106a.

2. Attorneys for unpopular causes have in the past lost—and then regained—their right to practice law due to their advocacy.

This is not the first time in U.S. history that "lawfare" and "barfare" have been used against attorneys who represented unpopular clients. At the entry of the verdict against the Communist

¹⁵ "Lawyers do not have a general obligation to democracy. . . . Lawyers' duty to democracy can be defined modestly as an obligation to represent clients diligently within the bounds of the law." Roiphe, *supra*, at 1819.

defendants in *Dennis v. U.S.*, 341 U.S. 494 (1951), the district court immediately turned on the six attorneys who represented the defendants, filed a certificate under Fed. R. Crim. P. 42(a) for criminal contempt, and sentenced them to prison. The district court judge acted summarily without giving notice to the attorneys or affording them an opportunity to make a formal answer to the charges. The Second Circuit upheld most of the district court's specifications. *U.S. v. Sacher*, 182 F.2d 416, 419-20 (2d Cir. 1950), *aff'd.*, 343 U.S. 1 (1952). Only decades later did the Second Circuit, citing various Supreme Court precedents, conclude that *Sacher's* "summary punishment power . . . is not the present rule and that *Sacher* has limited vitality as precedent." *U.S. v. Lumumba*, 741 F.2d 12, 16 (2d Cir. 1984).

Imprisonment was not the end of the trials and tribulations of the attorneys in the *Dennis* case. Emmanuel Celler, chair of the House Judiciary Committee, called for disciplinary action against the attorneys.¹⁶ *Sacher* was permanently disbarred by the Second Circuit, but the Supreme Court reversed the decision as "unnecessarily severe," stating that the "contumacious conduct" of the attorney was due to "an excess of zeal for his clients that obscured his recognition of responsibility as an officer of the court." *Sacher v. Ass'n of Bar*, 347 U.S. 388, 388 (1954). The Court also noted the lack of allegations or proof of prior misconduct for the prior twenty-four years of his law practice as another mitigating circumstance. *Id.* at 388-89.

¹⁶ Michael R. Belknap, *Cold War Political Justice – The Smith Act, the Communist Party, and American Civil Liberties* 219 (1977).

Another attorney, Isserman, was disbarred by the New Jersey Supreme Court. *In re Isserman*, 9 N.J. 269 (1952). This Court disbarred him as well, *In re Isserman*, 345 U.S. 286 (1953), but later reinstated him. *In re Disbarment of Isserman*, 348 U.S. 1 (1954). Isserman's initial disbarment from the federal bench was reversed by the Second Circuit. *Ass'n of Bar of N.Y. v. Isserman*, 271 F.2d 784 (2d Cir. 1959).

Attorney Gladstein was subject to proceedings in Hawaii to suspend him. *Gladstein v. McLaughlin*, 230 F.2d 762 (1955). And three judges of a state circuit court in Michigan publicly reprimanded attorney George Crockett upon the recommendation of the Michigan State Bar.¹⁷

In 1951, an American Bar Association committee recommended that all Communists and Marxist-Leninists be "expelled from legal practice."¹⁸ Two years later, it called for investigations into lawyers who pled the Fifth Amendment when asked about possible affiliation with the Communist Party.¹⁹ As a consequence of the crackdown against attorneys who represented Communists, it became almost impossible for them to find representation.²⁰

Attorneys involved in the fight for civil rights faced similar opposition. Terrence Hallinan, a civil rights worker who had engaged in civil disobedience

¹⁷ *Id.* at 220.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 221-23.

was initially denied admission to the California State Bar. The denial was later reversed.²¹

James Gilliland advocated for the desegregation of public schools pursuant to *Brown v. Board of Education*, 347 U.S. 483 (1954). Subsequently, for the first time ever, he became the subject of bar complaints. The North Carolina Bar ordered his disbarment but reversed its decision once the state Supreme Court remanded his case for failure to honor Gilliland's right to trial by jury.²²

As with the Communists, few white southern lawyers would represent civil rights defendants. One lawyer was disbarred after doing so.²³ When northern lawyers attempted to represent southern defendants, the state of Virginia brought legal action against the NAACP to prevent the organization from connecting plaintiffs with affiliated attorneys who were willing to represent them, claiming it violated a ban on "improper solicitation of any legal business . . . and the Canons of Professional Ethics." *NAACP v. Button*, 371 U.S. 415, 429 (1963).²⁴ This Court struck down the ban for being in violation of the First Amendment. *Id.*

²¹ James E. Moliterno, *Politically Motivated Bar Discipline*, 83 Wash. U. L. Q. 740-41 (2005.)

²² *Id.* at 741-42.

²³ *Id.* at 742-43.

²⁴ *Id.* at 743.

The furor against attorneys who represented Communists and civil rights defendants eventually died down, but history tends to repeat itself.²⁵

3. The State Bar's decision to use the "objectively reasonable" standard in this highly partisan matter put Eastman at the mercy of the subjective beliefs and preferences of the tribunal.

The Bar's unusually harsh assessments of Eastman's *mens rea* and motives under its "objective, reasonableness" standard are sure to send a literal chill down the spines of attorneys who represent clients out of favor with the powers that be. The "objective reasonableness" standard is problematic for the same reasons legal scholars and psychologists have questioned the "reasonable person" standard as necessarily including the subjective view of the decisionmaker. As one review of studies on the influence of "self-standards," i.e., "personal beliefs, preferences, abilities, and expectations" on judgments observed:

Legal scholars have speculated that people cannot remove themselves from the judgment process, and we have conducted several studies that confirm

²⁵ President Trump also has had similar problems in obtaining counsel for his many indictments. Alan M. Dershowitz, *Why Donald Trump Cannot Get a Top-Tier Lawyer*, Gatestone Institute (June 15, 2023, 5:00 AM), <https://www.gatestoneinstitute.org/19725/donald-trump-lawyer>.

their suspicions. . . . [S]elf-standards accounted for more than six times as much of the variance in participants' judgments as did the RPP [reasonably prudent person], indicating that it is a far more powerful judgment standard."²⁶

At least one court has similarly observed, "But where do we find that 'objective' third person? We ask judges or juries to discover that 'objective viewpoint' - *through their own subjective processes*." *Zell v. Am. Seating Co.*, 138 F.2d 641, 647 (2d Cir. 1943) (emphasis added). The use of the "objectively, reasonable" standard is especially problematic in cases where, as here, the decisionmaker serves as judge, jury, and executioner.

What might have been viewed as legitimate points of disagreement in other contexts were found to be "knowingly" making false statements, App. 104a, and "willful blindness." App. 39a, n. 38. Memory lapses regarding details of events that occurred several years prior were signs of "intellectual disingenuous[ness]." App. 56a, n. 53. Maintaining his innocence of the charges against him and refusal to recant his statements was a sign of "lack of remorse and accountability," App. 294a, rather than a sincere belief in the rightness of his actions and disagreement with the court's opinions.

²⁶ Mark D. Alicke & Stephanie H. Weigel, *The Reasonable Person Standard: Psychological and Legal Perspectives*, 17 Ann. Rev. L. & Soc. Sci. (2021), <https://www.annualreviews.org/content/journals/10.1146/annurev-lawsocsci-111620-020400>

Rather than applying the "objective, reasonableness standard" to Eastman's statements, the Review Department should have asked whether there was a compelling state interest in suppressing lawyers' out-of-court statements regarding not yet conclusively proven assertions or novel legal arguments not yet adjudicated by any court. Asserting such an interest as compelling would silence much valid legal advocacy. A general state interest in regulating the legal profession is insufficient to preserve attorney freedom of speech and the free exchange of ideas that is central to our democracy and the administration of justice.

CONCLUSION

"Hard cases may make bad law, but partisan cases endanger constitutional rights."²⁷ When a state bar adopts one view of a hotly contested matter and then punishes an attorney for taking the opposite view, this will necessarily affect the public perception of the action and the willingness of attorneys to represent positions that are unpopular with the powers that be. The very nature of our adversarial system requires attorneys on both sides of an issue. Involvement of state bar disciplinary systems in divisive political issues risks undermining the adversarial system itself as attorneys avoid zealously advocating for unpopular ideas or representing unpopular clients.

²⁷ Dershowitz, *supra*, n. 25.

The Court should grant the Petition and reinstate the proper constitutional standard for disciplinary proceedings based on attorney statements.

Respectfully submitted,

CATHERINE SHORT
Counsel of Record
SHEILA A. GREEN
LIFE LEGAL DEFENSE FOUNDATION
PO Box 2105
Napa, CA 94558
(707) 224-6675
kshort@lifelegal.org

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Counsel for Amici Curiae